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Breach of Contract and Remedies under the New German Law of Obligations

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I. THE REFORM OF THE GERMAN LAW OF OBLIGATIONS

1. History of the reform

On 1 January 2000 the German Civil Code (BGB) turned one hundred years old. It had been remarkably resilient throughout the various periods of 20th century German history.[1] Yet, only two years later, on 1 January 2002, the most sweeping reform that has ever affected the code entered into force.[2] It has remoulded large parts of the German law of obligations. At the same time, it has led to a deep division among legal scholars in Germany.[3] For, on the one hand, the reform was hailed as having been overdue and as bringing some of the most outdated parts of the BGB into line with modern international developments. On the other hand, there has been fierce criticism focusing, in particular, on the extraordinarily tight schedule for forcing through such fundamental changes. It might have been better, so it was maintained, to have an old code rather than a bad and ill-prepared one.[4] It is not easy to provide a fair assessment of these different views. There is some truth on both sides. For it has to be acknowledged that the history of the project to effect a comprehensive reform of the German law of obligations reaches back to the late 1970s.[5] The Ministry of Justice

[1]See Reinhard Zimmermann, 'Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts', in: Mathias Schmoeckel, Joachim Rückert, Reinhard Zimmermann (eds.), *Historischer Kommentar zum Bürgerlichen Gesetzbuch*, vol. I, in preparation for 2003, with further references; and see the contributions to Uwe Diederichsen, Wolfgang Sellert (eds.), *Das BGB im Wandel der Epochen* (2002).

[2]Gesetz zur Modernisierung des Schuldrechts of 26 November 2001, BGBl I, 3138 ff.

[3]For references, see Reinhard Zimmermann, 'Das neue deutsche Verjährungsrecht – ein Vorbild für Europa?', in: Ingo Koller, Herbert Roth, Reinhard Zimmermann, *Schuldrechtsmodernisierungsgesetz 2002* (2002), 15.

[4]See the balanced summary of the discussions in Regensburg on 17 and 18 November 2000 by Dieter Medicus, 'Schlussbetrachtung', in: Wolfgang Ernst, Reinhard Zimmermann (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform: Zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (2001), 610.

requested a number of academic opinions which were published in three big volumes in 1981 and 1983,[6] and in 1984 a commission was appointed which presented its final report in 1992.[7] After that, however, the élan to enact a far-reaching reform of the law of obligations appeared to peter out, and the final report of the reform commission was not very broadly discussed.[8]

It therefore caused considerable surprise when the German Ministry of Justice, in September 2000, published a 630-page 'discussion draft' of a statute modernizing the law of obligations.[9] This draft was triggered by the enactment of Directive 1999/44/EC of the European Parliament and Council on certain aspects of the sale of consumer goods and associated guarantees and the need for that directive's implementation by 1 January 2002.[10] It cannot seriously be disputed that the directive could have been implemented by a number of relatively marginal changes to the existing provisions on the law of sale.[11] But the Minister of Justice had decided to use the tail wind from Brussels to carry out a more ambitious and comprehensive reform project.[12] This decision, as well as the content of the discussion draft, gave rise to very widespread criticism which was articulated particularly strongly at a symposium in Regensburg in

[5]For an account, see Reinhard Zimmermann, 'Modernizing the German Law of Obligations?', in: *Essays in Comparative Law for Bernard Rudden* (2002), in preparation; Barbara Dauner-Lieb, 'Die geplante Schuldrechtsmodernisierung – Durchbruch oder Schnellschuss?', (2001) *Juristenzeitung* 8 ff.

[6]Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (1981/1983), 3 vols.

[7]Bundesminister der Justiz (ed.), *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[8]For a bibliography, see Ernst/Zimmermann (n. 4), Appendix II B. (729 ff.).

[9]The text of the provisions has been printed in Ernst/Zimmermann (n. 4), Appendix I (613 ff.). See now Claus-Wilhelm Canaris (ed.), *Schuldrechtsmodernisierung 2002* (2002), 3 ff. (text of the provisions and motivation).

[10]On which see the contributions in Stefan Grundmann, Dieter Medicus, Walter Rolland (eds.), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (2001); for a bibliography, see Ernst/Zimmermann (n. 4), Appendix II C. (735 ff.).

[11]See Wolfgang Ernst, Beate Gsell, 'Kaufrechtsrichtlinie und BGB: Gesetzentwurf für eine 'kleine' Lösung bei der Umsetzung der EU-Kaufrechtsrichtlinie', (2000) *Zeitschrift für Wirtschaftsrecht*, 1410 ff. (with a draft proposal on pp. 1410 ff.); cf. also Wolfgang Ernst, Beate Gsell, 'Nochmals für die 'kleine' Lösung', (2000) *Zeitschrift für Wirtschaftsrecht* 1812 ff.

[12]Herta Däubler-Gmelin, 'Die Entscheidung für die so genannte Grosse Lösung bei der Schuldrechtsreform', (2001) *Neue Juristische Wochenschrift* 2281 ff.

November 2001.[13] The Minister of Justice reacted by establishing two working groups charged with the task of improving the discussion draft. Representatives of the various legal professions, including a number of law professors, were asked to serve on these groups.[14] In the course of 2001, therefore, the discussion draft was revised, in some areas very substantially. A government draft was published in early May.[15] Though it was pushed through Parliament by way of an accelerated procedure, it was again repeatedly changed. Thus, for example, the Council of State Governments (*Bundesrat*) submitted proposals for 150 amendments, of which the Government accepted about 100.[16] The statute modernizing the German law of obligations was finally approved by the Federal Parliament in October and by the Council of State Governments in early November 2001 and it was promulgated on 26 November 2001. A little more than five weeks later it entered into force. The period left to German courts and legal practice to adjust to the new civil code can hardly be regarded as generous. After the BGB in its original version was promulgated, a period

[13]The contributions to this symposium are published in the volume edited by Ernst and Zimmermann, quoted above n. 4. Another symposium was held in January 2001: Reiner Schulze, Hans Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (2001), on the basis of the discussion draft. On 30/31 March 2001 the Association of German Teachers of Private Law held a special meeting in Berlin to discuss what had by then become the revised version of the discussion draft. The lectures given in Berlin have been printed in a special issue of the *Juristenzeitung*: (2001) *Juristenzeitung* 473 ff.; the revised version of the discussion draft (known as Konsolidierte Fassung des Diskussionsentwurfs eines Schuldrechtsmodernisierungsgesetzes) can be found in Canaris (n. 9), 349 ff.

[14]One of these groups was charged with a revision of the discussion draft, as far as it dealt with non-performance and remedies for non-performance (Kommission Leistungsstörungen). It consisted predominantly of professors of private law (the members are listed by Claus-Wilhelm Canaris, 'Die Reform des Rechts der Leistungsstörungen', (2001) *Juristenzeitung* 499 ff.). The other group (dealing with all the other areas of the law covered by the discussion draft) was designed, primarily, to liase with the departments of justice of the various German Länder and involved representatives of the Federal Supreme Court and of various professional organizations in the reform process; one or two representatives from the ranks of German law professors were invited for each topic under consideration.

[15]Gesetzentwurf der Bundesregierung, *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*, Drucksache 338/01 (11th May 2001); easily accessible now in Canaris (n. 9), 429 ff., 569 ff.

[16]See *Stellungnahme des Bundesrates*, Deutscher Bundestag, Drucksache 14/6857 (31st August 2001); *Gegenäußerung der Bundesregierung zur Stellungnahme des Bundesrats zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*, Deutscher Bundestag, Drucksache 14/6857 (31 August 2001), 42 ff.; both now easily accessible in Canaris (n. 9), 935 ff., 995 ff.

of more than three years was regarded as adequate before the new code took effect.

2. Scope of the reform

When the idea of a reform of the law of obligations was first mooted the reform was to have been comprehensive. Thus, it was intended to cover areas like unjustified enrichment, delict and strict liability, suretyship and partnership. By the time, however, when the commission charged with the revision of the law of obligations was appointed in 1984, the project had become somewhat less ambitious. It was decided to confine the commission's brief to the law of breach of contract, liability for defects in contracts of sale and contracts for work, and extinctive prescription (limitation of claims). The discussion draft, however, once again extended the scope of the reform. In the end, the following areas of the law of obligations have been affected: extinctive prescription,[17] breach of contract, contracts of sale,[18] contracts for work,[19] credit transactions,[20] and restitution after termination for breach of contract. The Standard Contract Terms Act and a number of special statutes aiming at the protection of the consumer have been integrated into the BGB.[21]

[17] See Heinz-Peter Mansel, 'Die Neuregelung des Verjährungsrechts', (2002) *Neue Juristische Wochenschrift* 89 ff.; Zimmermann (n. 3), 9 ff.

[18] See Harm Peter Westermann, 'Das neue Kaufrecht', (2002) *Neue Juristische Wochenschrift* 241 ff.; Herbert Roth, 'Das neue Kauf- und Werkvertragsrecht', in: Koller/Roth/Zimmermann (n. 3), 67 ff.; Ulrich Büdenbender, 'Der Kaufvertrag', in: Barbara Dauner-Lieb, Thomas Heidel, Manfred Lepa, Gerhard Ring (eds.), *Das Neue Schuldrecht* (2002), 222 ff.; Stephan Lorenz, Thomas Riehm, *Lehrbuch zum neuen Schuldrecht* (2002), 242 ff.; Peter Huber, in: Peter Huber, Florian Faust, *Schuldrechtsmodernisierung: Einführung in das neue Recht* (2002), 289 ff.

[19] Jörg Schudnagies, 'Das Werkvertragsrecht nach der Schuldrechtsreform', (2002) *Neue Juristische Wochenschrift* 396 ff.; Roth (n. 3), 67 ff.; Thomas Raab, in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 261 ff.; Lorenz/Riehm (n. 18), 353 ff.; P. Huber (n. 18), 425 ff.

[20] See Judith Wittig, Arne Wittig, 'Das neue Darlehensrecht im Überblick', (2002) *Zeitschrift für Wirtschafts- und Bankrecht* 145 ff.; Peter Reiff, in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 285 ff.; Lorenz/Riehm (n. 18), 335 ff.

[21] See the contributions by Thomas Pfeiffer, in: Ernst/Zimmermann (n. 4), 481 ff. and by Jürgen Schmidt-Räntsch, Heinrich Dörner, Hans-W. Micklitz and Peter Ulmer, in: Schulze/Schulte/Nölke (n. 13), 169 ff.; Joachim Hennrichs, 'Die Kontrolle von Allgemeinen Geschäftsbedingungen', und Gerhard Ring, 'Der Verbraucherschutz', both in: Dauner-Lieb/Heidel/Lepa Ring (n. 18), 188 ff., 343 ff.; Lorenz/Riehm (n. 18), 47 ff., 63 ff.; P. Huber (n. 18), 453 ff.

Some legal doctrines which have been developed over the past hundred years and have come to be generally recognized have now found their home in the text of the BGB.[22] All of this has to be seen against the background of further amendments of the BGB effected either shortly before 1 January 2002 or waiting to be implemented in the course of this year. There has been a comprehensive reform of the law concerning contracts of lease,[23] the rules on contracts concerning package tours have been changed,[24] bank transfers have been regulated,[25] two new types of form requirements have been introduced into the BGB,[26] the terms 'consumer' and 'entrepreneur' have been given a statutory definition[27] and a reform of the law relating to damages is impending.[28] Some of these changes have been necessitated by EC-Directives,[29] while others are based on a domestic desire to modernize German private law, to bring it into line with international developments and to make it more comprehensible. Further reforms are likely to follow. The BGB, once acclaimed for its resilience and its technical perfection, has been turned into a permanent building site.[30] Of all the reforms just mentioned the one concerning the law of extinctive

[22] See Barbara Dauner-Lieb, 'Kodifikation von Richterrecht', in: Ernst/Zimmermann (n. 4), 305 ff.; Peter Krebs, Manfred Lieb, Arnd Arnold, 'Kodifizierung von Richterrecht', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 121 ff.

[23] On which, see Birgit Grundmann, 'Die Mietrechtsreform – Wesentliche Inhalte und Änderungen gegenüber der bisherigen Rechtslage', (2001) *Neue Juristische Wochenschrift* 2497 ff.; Friedrich Klein-Blenkers, 'Das Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts (Mietrechtsreformgesetz)', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 506 ff.

[24] See Mark Niehuus, 'Der Reisevertrag', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 322 ff.

[25] See Dorothee Einsele, 'Das neue Recht der Banküberweisung', (2000) *Juristenzeitung* 9 ff.; Horst Heinrich Jakobs, 'Gesetzgebung im Banküberweisungsrecht', (2000) *Juristenzeitung* 641 ff.

[26] See Walter Boente, Thomas Riehm, 'Das BGB im Zeitalter digitaler Kommunikation – Neue Formvorschriften', (2001) *Jura* 793 ff.; Ulrich Noack, 'Elektronische Form und Textform', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 441 ff.; Lorenz/Riehm (n. 18), 7 ff.

[27] §§ 13 and 14 BGB; for comment, see Herbert Roth, 'Das Fernabsatzgesetz', (2000) *Juristenzeitung* 1013 ff.; Stephan Lorenz, 'Im BGB viel Neues: Die Umsetzung der Fernabsatzrichtlinie', (2000) *Juristische Schulung* 833 ff.

[28] Christian Huber, 'Das neue Schadensersatzrecht', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 462 ff.

[29] On the impact of which on the BGB, see Thomas M. J. Möllers, 'Europäische Richtlinien zum Bürgerlichen Recht', (2002) *Juristenzeitung* 121 ff.

[30] This view has also been expressed by Wulf-Henning Roth, 'Europäischer Verbraucherschutz und BGB', (2001) *Juristenzeitung* 488.

prescription is practically by far the most important. Of particular interest, doctrinally, are the new rules relating to breach of contract. The present paper will focus exclusively on the latter topic.[31]

II. REMEDIES FOR NON-PERFORMANCE: THE PATH TO THE NEW RULES

1. The old law, Abschlussbericht *and 'discussion draft'*

Before the revision of the German law of obligations it had been, for a long time, a standard complaint that the German rules concerning breach of contract were far too complex.[32] Moreover, they were taken to be deficient in several important respects. They were based on a classification of various types of breach, i.e. impossibility of performance, delay of performance and defective performance, rather than structured according to the various remedies available. Central to the understanding of the system, so it was said, was a highly artificial concept of impossibility of pandectist vintage. Moreover, the BGB was thought to be characterized by an axiomatic adherence to the outdated fault-principle. One of its core provisions, § 275 BGB (old version), was widely held to be misconceived in so far as the release of the debtor from his obligation to perform was confined to the situation where he had not been responsible for his inability to perform. The BGB's insistence on the strict mutual exclusivity of termination of the contract and a claim for damages was regarded as untenable; it was based on outdated conceptual logic. § 306 BGB, in terms of which a contract the performance of which is impossible was held to be void, was generally criticized as being both conceptually and practically unsound. And, above all, the

[31] For a general discussion, see Daniel Zimmer, 'Das neue Recht der Leistungsstörungen', (2002) *Neue Juristische Wochenschrift* 1 ff.; Hansjörg Otto, 'Die Grundstrukturen des neuen Leistungsstörungsrechts', (2002) *Jura* 1 ff.; Roland Schwarze, 'Unmöglichkeit, Unvermögen und ähnliche Leistungshindernisse im neuen Leistungsstörungsrecht', (2002) *Jura* 73 ff.; Sonja Meier, 'Neues Leistungsstörungsrecht', (2002) *Jura* 118 ff., 187 ff.; Claus-Wilhelm Canaris, Einführung, in: Canaris (n. 9), IX ff.; Barbara Dauner-Lieb, 'Das Leistungsstörungsrecht im Überblick', in: Dauner-Lieb/Heidel/Lepa/Ring (n. 18), 64 ff.; Lorenz/Riehm (n. 18), 83 ff.; Huber/Faust (n. 18), 7 ff. The first commentary, rule by rule, is Barbara Dauner-Lieb, Thomas Heidel, Manfred Lepa, Gerhard Ring (eds.), *Anwaltkommentar Schuldrecht* (2002), hereinafter *Anwaltkommentar.*

[32] See, e.g., Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (3rd ed., 1998), 486 ff.; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edition, 1996), 783, 806 ff.

usually so well designed BGB was very widely considered to have contained two gaps which were as central as they were surprising: the code did not deal with the situation where performance was not generally, or objectively, impossible but where it was impossible specifically for the debtor; and it did not contain rules for what came to be termed – already two years after the enactment of the BGB – 'positive breach of contract' (*positive Vertragsverletzung*):[33] for situations, *inter alia*, where the creditor had suffered consequential loss as a result of the debtor's deficient performance.

That much of this criticism was fallacious, and that the provisions of the BGB had in fact been based on a well thought-out and logical masterplan – albeit one that had been misunderstood for nearly a century – only became dramatically apparent with the publication of Ulrich Huber's monograph on the German law of breach of contract:[34] a historico-doctrinal study that would probably have had an enormous impact had not the reform process been well under way by that time. Ironically, the mastermind behind the reform draft, as it had originally been conceived, had also been Ulrich Huber.[35] The study of pandectist literature and of the *travaux préparatoires* of the BGB had, in the meantime, completely reformed his views. As a result, Huber now became one of the fiercest critics of the new system.[36]

This system had been largely inspired by the rules contained in the Convention on the International Sale of Goods (CISG) and its predecessor, the Convention relating to a Uniform Law on the International Sale of Goods of 17 July 1973. Characteristic elements, therefore, of the draft produced by the commission charged with the revision of the law of obligations, were a system of rules structured primarily under the auspices of the legal remedies available (i.e., in particular, specific performance, damages, termination), a uniform concept of breach of duty (*Pflichtverletzung*) and a shift away from the fault-requirement concerning

[33] See the discussion and the references in Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (2001), 92 ff.

[34] Ulrich Huber, *Leistungsstörungen* (1999), 2 vols.

[35] Ulrich Huber, 'Empfiehlt sich die Einführung eines Leistungsstörungsrechts nach dem Vorbild des Einheitlichen Kaufgesetzes? Welche Änderungen im Gesetzestext und welche praktischen Auswirkungen im Schuldrecht würden sich dabei ergeben?', in: *Gutachten und Vorschläge I* (n. 6), 647 ff.

[36] Ulrich Huber, 'Das geplante Recht der Leistungsstörungen', in: Ernst/Zimmermann (n. 4), 31 ff.

termination of contract.[37] The concept of impossibility that had caused so much doctrinal headache was ostracized. On the other hand, the commission decided to stick to the fault-principle concerning claims for damages while, in terms of CISG, the debtor's liability is excluded only when the breach is based on an impediment which lies outside the sphere of influence of the debtor and which is not foreseeable by him;[38] moreover, the draft of the commission required the granting of a grace period (*Nachfrist*) before termination of a contract (though exceptions to this requirement were accepted in certain cases of serious breach) whereas, in terms of CISG, termination may be declared immediately in cases of fundamental breach (although a breach of contract can also be made fundamental by the fixing of a *Nachfrist*).[39] In his comparative analysis of both sets of rules, Peter Schlechtriem has, however, come to the conclusion that in both respects the practical differences would not have been very considerable.[40]

2. From the 'discussion draft' to the new law

The discussion draft of autumn 2001 very largely adopted the commission's proposals of 1992, as far as the law of breach of contract was concerned. The explanations appended to the draft were also taken over, often verbatim, from the 1992 proposals. It thus became immediately apparent that the discussion draft had missed out on more than ten years of debate. Neither did it take account of the Dutch *Burgerlijk Wetboek* which had entered into force in 1992, nor of the *Principles of European Contract Law* by the 'Lando'-Commission and Unidroit's *Principles of International Commercial Contracts* which had been published in 1995 and 1994 respectively.[41] This was particularly deplorable in view of the fact that with the reform envisaged by her, the Minister of Justice intended to advance the Europeanisation of private law; the proposed draft, she declared more than once, was to be 'a great step

[37] Cf., e.g., Rolf Stürner, 'Einige Bemerkungen zum Stand der Schuldrechtsreform', in: *Festschrift für Hans Erich Brandner* (1996), 635 ff.

[38] Art. 79 CISG.

[39] Art. 49 CISG.

[40] Peter Schlechtriem, 'Rechtsvereinheitlichung in Europa und Schuldrechtsreform in Deutschland', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 217 ff., 228 ff., 234 ff.

[41] For a bibliography on the literature produced on both sets of *Principles*, see Ernst/Zimmermann (n. 4), Appendix II D. (739 ff.).

on the path towards a European Civil Code'.[42]

Both sets of international *Principles* started to be referred to in the ensuing debates about the discussion draft.[43] None the less these debates now veered towards a retention of rules and thinking patterns established under the old law, as far as they appeared to have stood the test of time. The rules and concepts used in the discussion draft (and in the international *Principles*) were criticized as being too abstract and too general; a code, it was now argued, should aspire to a significantly higher level of specificity, in order to be workable and to provide the necessary degree of legal certainty. Thus, in particular, the specific types of breach of contract re-entered the scene – albeit under the general umbrella concept of breach of duty. Ulrich Huber and Claus-Wilhelm Canaris emerged as the most prominent critics of the discussion draft: the former hammering it with uncompromising severity,[44] the latter adopting an approach more moderate in tone and substance.[45]

The Minister of Justice then decided to appoint the special commission on the law relating to breach of contract mentioned above.[46] The recommendations made by that commission were subsequently accepted, apparently without exception, and thus decisively shaped the Government draft of 9 May as well as the statute modernising the law of obligations based on it. Professor Canaris, the most influential member of the commission, had presented these recommendations to a special meeting of the German Association of Teachers of Private Law at the end of March 2001 in Berlin;[47] his analysis can largely be taken to constitute the *interpretatio authentica* of the new German law of breach of contract.[48] The discussion that follows will have to confine itself to the structural foundations of the new rules.

[42] See, e.g., *Süddeutsche Zeitung* of 20 September 2000, 1 and the references in Zimmermann (n. 3), 19 (n. 49).

[43] See, concerning breach of contract, particularly the contributions by U. Huber, in: Ernst/Zimmermann (n. 4), 31 ff. and Claus-Wilhelm Canaris, 'Die Reform des Rechts der Leistungsstörungen', (2001) *Juristenzeitung* 499 ff.

[44] U. Huber, in: Ernst/Zimmermann (n. 4), 31 ff.

[45] Claus-Wilhelm Canaris, 'Zur Bedeutung der Kategorie der 'Unmöglichkeit' für das Recht der Leistungsstörungen', in: Schulze/Schulte-Nölke (n. 13), 43 ff.

[46] *Supra*, note 14.

[47] Canaris, (2001) *Juristenzeitung* 499 ff.

[48] cf. also Claus-Wilhelm Canaris, 'Das allgemeine Leistungsstörungsrecht im Schuldrechtsmodernisierungsgesetz', (2001) *Zeitschrift für Rechtspolitik* 329 ff.; *idem*, 'Einführung', in: *idem* (n. 9), IX ff.

Many details will have to be passed over. On the other hand, however, an attempt will be made to look at the development of German law from the vantage point of the broader European debate that has led to the formulation of the *Principles of European Contract Law*.[49]

III. SPECIFIC PERFORMANCE AND EXCLUSION OF THE RIGHT TO SPECIFIC PERFORMANCE

1. Impossibility of performance

The general starting point in German law remains what it has been throughout the 20th century: the parties to a contract, as a matter of course, are entitled to demand performance of their respective obligations *in specie*. 'The effect of an obligation', says § 241 I at the outset of book II of the BGB, 'is that the creditor is entitled to claim performance from the debtor.'[50] The implication is specific performance. Art. 9:102 PECL proceeds from the same principle.[51]

The most important exception is laid down in § 275 I BGB: a claim for specific performance is excluded, as far as such performance is impossible. This rule has a very long tradition; it ultimately derives from the Roman principle of impossibilium nulla est obligatio and corresponds to the basic principle of moral philosophy, that 'ought implies can'.

§ 275 I BGB, as its wording makes clear, applies to all types of impossibility:

[49] The rules on non-performance and remedies for non-performance, published first in 1995, are now part of Ole Lando, Hugh Beale (eds.), *Principles of European Contract Law* (2000). Translations into several other languages have appeared or are about to appear. The Unidroit *Principles of International Commercial Contracts*, 1994, are in broad agreement; discrepancies between both sets of *Principles* will be noted in the footnotes. Whenever the term 'Principles' is used in the following text, it refers to the *Principles of European Contract Law* (PECL). The Unidroit *Principles* will be abbreviated as PICC. For a most useful and perceptive comparison between both sets of *Principles* and the old German rules on non-performance, see U. Huber, in: Ernst/Zimmermann (n. 4), 116 ff. That comparison also includes CISG.

[50] For historical background, see *Law of Obligations* (n. 32), 770 ff.; Karin Nehlsen-von Stryk, 'Grenzen des Rechtszwangs: Zur Geschichte der Naturalvollstreckung', (1993) 193 *Archiv für die civilistische Praxis* 529 ff.; Wolfgang Rütten, 'Die Entstehung des Erfüllungszwangs im Schuldverhältnis', in: *Festschrift für Joachim Gernhuber* (1993), 939 ff.; Tilman Repgen, *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft* (1994).

[51] Cf. also Art. 7.2.2 PICC.

objective impossibility (nobody can perform), subjective impossibility (a specific debtor cannot perform),[52] initial impossibility (performance was already impossible when the contract had been concluded), subsequent impossibility (performance has become impossible after conclusion of the contract), partial impossibility and total impossibility. Exclusion of the right to specific performance does not depend on whether the debtor was responsible for the impossibility or not. The new provision significantly differs from its predecessor in that it places initial and subsequent impossibility on a par; and in that it drops the fault-requirement (which had been contained in § 275 I (old version) but which, according to the prevailing opinion under the old law, had to be treated as *pro non scripto*, as far as the right to demand performance was concerned).[53] The *Principles* also do not, of course, attempt to force a debtor to perform what he is unable to perform. This follows, as far as 'impediments' arising after the conclusion of the contract are concerned,[54] from Art. 8:101 III read in conjunction with Art. 8:108 PECL:[55] where a party's non-performance is excused because it was due to an impediment that was beyond his control and that he could not reasonably have been expected to take into account, or to have avoided or overcome, the creditor may not claim performance. For all other cases, i.e. where the remedy of specific performance is not excluded *a limine*, Art. 9:102 PECL contains the rider that specific performance cannot be obtained

[52] Details as to what constitutes 'subjective impossibility' (is performance subjectively impossible wherever the debtor cannot dispose over the object, e.g., because he is not its owner, or only if he cannot reasonably be expected to overcome the impediment, e.g. by acquiring the object from its owner?) have been disputed under the old law (U. Huber II (n. 34), § 60; for a very clear summary of the discussion, see Meier, (2002) *Jura* 128 ff.) and are likely to be disputed also under the new law; cf. infra III. 3.

[53] Cf., e.g., Helmut Heinrichs, in: *Palandt, Bürgerliches Gesetzbuch* (61st ed., 2002), § 275, n. 24; Manfred Löwisch, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (revised edition, 2001), § 275, n. 58. But see the discussion in Huber II (n. 34), § 58; Christian Knütel, (2001) *Juristische Rundschau* 353 ff.; Hans Stoll, 'Überlegungen zu Grundfragen des Rechts der Leistungsstörungen aus der Sicht des Schuldrechtsmodernisierungsgesetzes', in: *Festschrift für Werner Lorenz* (2001), 288 ff.

[54] On the genesis of the notion of an 'impediment' (first used in Art. 79 CISG) and on its interpretation, see U. Huber, in: Ernst/Zimmermann (n. 4), 119 ff.; Nicole N. Fisher, *Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht* (2001), 55 ff. That Art. 8:108 PECL only deals with impediments arising after conclusion of the contract is stated in the comments: cf. Lando/Beale (n. 49), 379.

[55] Cf. also Art. 7.1.7 PICC.

where performance would be impossible.[56]

2. 'Practical impossibility' and 'economic impossibility'

After the revision, therefore, the BGB provides a clearer and much more streamlined regime, as far as the exclusion of the right to specific performance is concerned. On the other hand, however, it now draws a distinction between cases of impossibility *stricto sensu* and situations where it would be unreasonable to expect the debtor to render performance. According to § 275 II BGB the debtor may refuse to perform insofar as such performance would require an effort which would be grossly disproportionate to the interest of the creditor in receiving performance, taking into account the content of the obligation and the requirements of good faith. In determining what can reasonably be required of the debtor, regard must be had as to whether he was responsible for the impediment or not.

This provision is designed to take account of what was termed, under the old law, 'practical impossibility' (*faktische Unmöglichkeit*) as opposed to 'economic impossibility' (*wirtschaftliche Unmöglichkeit*);[57] this is why the effort required to perform is measured against the interest of the creditor in the performance.[58] The paradigmatic example is the ring (worth 100) that has been dropped into a lake after it has been sold but before it has been transferred to the purchaser. The cost of draining the lake and recovering the ring would amount to 100,000. It would obviously be unreasonable to expect the debtor to incur such vast expenses in view of the fact that the creditor's interest in the ring is still only 100, i.e. the value of the ring.[59] Matters are different in cases of economic impossibility. If the price of 1,000 barrels of oil that have been sold increases dramatically, the debtor cannot invoke § 275 I, for while it may also be unreasonable in this case to expect the debtor to

[56] Cf. also Art. 7.2.2 (a) PICC.

[57] See, for the old law, *Staudinger*/Löwisch (n. 53), § 275, n. 9 as opposed to n. 10; *Palandt*/Heinrichs (n. 53), § 275, n. 8 as opposed to n. 12; Huber I (n. 34), § 4 III 4.

[58] Canaris, (2001) *Juristenzeitung* 501 f.

[59] For details of the application of § 275 II BGB, see Canaris, (2001) *Juristenzeitung* 501 ff.; Meier, (2002) *Jura* 120 f.; Faust, in: Huber/Faust (n. 18), 31 ff.; Lorenz/Riehm (n. 18), 151 ff.; for a critical evaluation, see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, nn. 7 f.; Ingo Koller, 'Recht der Leistungsstörungen', in: Koller/Roth/Zimmermann (n. 3), 50 ff.; Hans Stoll, 'Notizen zur Neuordnung des Rechts der Leistungsstörungen', (2001) *Juristenzeitung* 591 f.; Jan Wilhelm, Schuldrechtsreform 2001, (2001) *Juristenzeitung* 866 f. (a 'monstrosity'); Zimmer, (2002) *Neue Juristische Wochenschrift* 3 f.; Otto, (2002) *Jura* 3; Schwarze, (2002) *Jura* 76 f.

perform under the changed circumstances, we do not have a gross disproportion between the debtor's effort and the creditor's interest in receiving performance: the latter has not, as in the previous example, remained at the earlier lower level, but has risen to the same extent as the debtor's effort; the object of the sale has become more valuable and the purchaser would, of course, fully benefit from that higher value. The law may still grant some relief to the debtor in this situation. But whether it does so depends on the applicability of the rules on change of circumstances (*Störung der Geschäftsgrundlage*) which is regarded as a conceptually different problem.[60] The rules on change of circumstances have, under the old law, been worked out and generally recognized under the auspices of the general good faith rule of § 242 BGB[61] and they have thus constituted one of the most famous examples of a judge-made legal doctrine; they have now found their statutory home in § 313 BGB.[62]

§ 275 II is based on considerations which also find their expression in the *Principles*; according to Art. 9:102 (2)(b) PECL specific performance cannot be obtained where performance would cause the debtor unreasonable effort or expense;[63] and illustration 3 in the comments to Art. 9:102 PECL demonstrates that the rule is designed to cover the same type of case.[64] As in German law, the problem

[60] Canaris, (2001) *Juristenzeitung* 501; Faust, in: Faust/Huber (n. 18), 55; Lorenz/Riehm (n. 18), 152. The distinction between these two situations, and whether it is sufficiently clearly indicated in the provision of §275 II BGB, is questioned by *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, n. 14; Jan Wilhelm, Schuldrechtsreform 2001, (2001) *Juristenzeitung* 866 f.; Otto, (2002) *Jura* 3; Schwarze, (2002) *Jura* 76 f.

[61] See Reinhard Zimmermann, Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), 25 f., 557 f. with further references; on the origin of this doctrine, see *Roman Law, Contemporary Law, European Law* (n. 33), 80 ff. Most recently, see Bernd Nauen, *Leistungserschwerung und Zweckvereitelung im Schuldverhältnis* (2001) and Christian Reiter, *Vertrag und Geschäftsgrundlage im deutschen und italienischen Recht* (2002).

[62] As under the old law, the basis of the contract consists of those circumstances (i) which the parties have presupposed at the time of conclusion of their contract, (ii) which are so important to one of them that he would not have concluded the contract, or would have concluded it differently, and (iii) the importance of which is such that that party cannot reasonably be expected to comply with the contract. For further discussion, see *Abschlußbericht* (n. 7), 146 ff.; P. Huber, in: Huber/Faust (n. 18), 231 ff.; Lorenz/Riehm (n. 18), 197 ff.; *Anwaltkommentar*/Krebs (n. 31), § 313, nn. 1 ff.

[63] Cf. also Art. 7.2.2 (b) PICC.

[64] Lando/Beale (n. 49), 396. Canaris, however, draws attention to the fact that the rule contained in the *Principles* is much less specific than § 275 II BGB, (2001) *Juristenzeitung* 505;

of change of circumstances is dealt with at a different place and in another systematic context.[65]

3. The problem of 'subjective impossibility'

Under the old law, the rules relating to impossibility were applied to cases of 'practical' impossibility; no distinction, in other words, was drawn between situations where performance was factually impossible and where it was merely practically impossible. The new § 275 II does, however, necessitate such distinction – not simply in view of the fact that it contains a special rule concerning practical impossibility, but because that rule provides for a different legal consequence from the one concerning factual impossibility: the debtor's obligation does not automatically fall away but the debtor is merely granted a right to refuse performance. The law thus wants to leave it open to the debtor to render performance in spite of the unreasonable effort which this may involve.[66]

None the less, this is not a happy solution.[67] For, on the one hand, it places the creditor in an awkward position in cases where the debtor does not perform but does not raise the defence either.[68] On the other hand, the line between the different types of situations may be difficult to draw.[69] This is apparent, particularly, in cases of a

while the existence of Art. 9:102 (2) demonstrates the need for a rule of this type, it constitutes, in every other respect, 'a negative example'.

[65] Art. 6:111 PECL; cf. also Artt. 6.2.1 ff. PICC. For an evaluation, from the point of view of German law, see Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 243 ff.; Reinhard Zimmermann, 'Konturen eines Europäischen Vertragsrechts', (1995) *Juristenzeitung* 486 f.; Wolfgang Ernst, 'Die Verpflichtung zur Leistung in den Principles of European Contract Law und in den Principles of International Commercial Contracts', in: Jürgen Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000), 147 ff.; Gundula Maria Peer, 'Die Rechtsfolgen von Störungen der Geschäftsgrundlage', in: *Jahrbuch Junger Zivilrechtswissenschaftler 2001*, 61 ff.; Fischer (n. 54), 215 ff.; cf. also U. Huber, in: Ernst/Zimmermann (n. 4), 123 ff. (who draws attention to an important point of difference between Art. 6:111 PECL and Art. 6.2.2 PICC).

[66] Canaris, (2001) *Juristenzeitung* 504; cf. also the example provided by Meier, (2002) *Jura* 121.

[67] This is also criticized by Canaris, (2001) *Juristenzeitung* 504. For an account of the legislative history, see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, nn. 3 ff.

[68] Faust, in: Huber/Faust (n. 18), 24.

[69] Koller (n. 3), 50 ff.

merely subjective impossibility. Though they are covered by the wording of § 275 I BGB ('… as far as performance is impossible *for the debtor*'), they do not usually constitute cases of a factual impossibility. If a person (A) first sells a painting to X and subsequently sells and transfers it to Y, he may well be able to acquire the painting back from Y and will then be in a position to honour his contractual obligation towards X. Whether this may be expected of him is to be determined by applying the requirements of § 275 II BGB. Thus, A may refuse to perform if the painting is worth € 10,000 and Y is only prepared to return it at a price of € 100,000. 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.[70] The draftsmen of the new law thus intended § 275 I to apply only where Y is not at all prepared to return the painting or where it has been stolen and where neither the thief nor the painting can be found.[71]

Even here, however, it is arguable that performance is not factually impossible and that through an enormous investment of money A might still be able to recover the painting.[72] If, on the other hand, one *does* apply the parameters fixed by § 275 II BGB to cases of subjective impossibility, this may sometimes lead to unsatisfactory results.[73] A dies after he has sold his painting to X for € 50,000. A's heir (B) being unaware of the transaction, sells and transfers the painting to Y for € 70,000. Y is prepared to return the painting to B for a price of € 75,000. If we assume that X, in the meantime, has been able to re-sell the painting for € 80,000, B would not have a right to refuse performance under § 275 II, as his expenses (€ 75,000) could not be said to be grossly disproportionate to the interest of the creditor in receiving performance (€ 80,000). As a result, B loses € 5,000 on account of an impediment for which he was not responsible and which he can, therefore, hardly be expected to overcome. This demonstrates the dangers inherent in any attempt to draw up general rules for exceptional situations.

4. 'Moral impossibility'

[70] See the discussion by Meier, (2002) *Jura* 128 ff.; Zimmer, (2002) *Neue Juristische Wochenschrift* 2 f.; Faust, in: Huber/Faust (n. 18), 25 ff.; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, nn. 12, 17.

[71] See Begründung der Bundesregierung zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts, in: Canaris (n. 9), 658.

[72] This is pointed out by Meier, (2002) *Jura* 130.

[73] The following example is taken from Meier, (2002) *Jura* 128, 130.

There is another situation where German law grants the debtor a right to refuse performance: he has to perform in person but it would be unreasonable to expect him to perform considering, on the one hand, the impediment that has arisen and, on the other, the creditor's interest in receiving performance: § 275 III BGB. This is the case of the soprano who refuses to sing after she has learnt that her son has contracted a disease which threatens his life.[74] Under the old law, this was regarded as a case of 'moral' impossibility to which the rules concerning change of circumstances were applied.[75] The *Principles* exclude altogether a right to specific performance where the performance consists in the provision of services or work of a personal character;[76] the problem, therefore, does not arise.

The relationship between the new § 275 II and III BGB is not quite clear.[77] Contrary to § 275 II BGB, it does not appear to be a relevant factor, in determining what can reasonably be expected of the debtor, whether he has been responsible for the impediment or not: the soprano may refuse to perform even if she herself has negligently caused her child's disease.[78] Moreover, the creditor's interest in her performance is only one consideration in determining the issue of unreasonableness on the basis of a general balancing of interests and not, as under § 275 II BGB, the decisive criterion for establishing whether, what the debtor would have to do in order to render performance is excessive and thus unreasonable. § 275 III, in other words, remains a specific manifestation of the general rules concerning change of circumstances, and the inclusion of this rule in § 275 III, in a way, undermines the subtle line the law has drawn in § 275 II between impossibility and change of

[74] Begründung, in: Canaris (n. 9), 662; Canaris, (2001) *Zeitschrift für Rechtspolitik* 330; Meier, (2002) *Jura* 121; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, n. 19.

[75] For a discussion of these cases under the old law, see Volker Emmerich, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (4th ed., vol. II, 2001), § 275, n. 32; Jürgen Schmidt, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (13th ed., 1995), § 242, nn. 1196 ff.; cf. also Huber, in: Ernst/Zimmermann (n. 4), 73.

[76] Art. 9:102 (2) (c) PECL; cf. also Art. 7.2.2 PICC.

[77] See, in particular, Faust, in: Huber/Faust (n. 18), 56 ff.

[78] Contra: *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, n. 20, who argues that the fault-requirement was inadvertently dropped when § 275 III BGB became a separate subsection; previously the rule had been included as a second sentence in § 275 II and what is now the second sentence had then been the third sentence; see *Zusammenstellung des Entwurfs eines Gesetzes zur Modernisierung des Schuldrechts mit den Beschlüssen des Rechtsausschusses*, in: Canaris (n. 9), 441.

circumstances.[79]

IV. DAMAGES

1. Conceptual Foundations

§ 275 BGB only concerns the right to receive specific performance. If the debtor becomes free under § 275 I or is granted a right to refuse to perform under § 275 II, III, this does not mean that he may not be exposed to a 'secondary' obligation.[80] The most important secondary obligation is a claim for damages. The BGB now has a core provision concerning damages for non-performance, and that is § 280 I: if the debtor fails to comply with a duty arising under the contract, the creditor is entitled to claim compensation for the loss caused by such breach of his duty. This does not apply if the debtor is not responsible for the breach of duty. Two differences from the *Principles* are immediately apparent:

(i) The claim for damages, under the BGB, is still based on the notion of fault. The *Principles*, on the other hand, exclude a claim for damages only in cases where the debtor's non-performance is due to an impediment that is beyond his control and that he could not reasonably have been expected to take into account at the time of the conclusion of the contract, or to have avoided or overcome.[81] The differences between these two regimes may be more apparent than real in practice.[82] For fault is

[79] Cf. also the criticism offered by *Anwaltkommentar*/Dauner-Lieb (n. 31), § 275, nn. 8, 19. It also, incidentally, remains unclear what the position is if the debtor does not have to perform in person and the other requirements of § 275 III BGB are met. Presumably, this may be a case of change of circumstances (§ 313 BGB).

[80] For a specific statement to this effect, see § 275 IV BGB.

[81] Artt. 9:501 (1), 8:108 PECL; cf. also Artt. 7.4.1, 7.1.7 PICC. The question whether a claim for specific performance is excluded and whether or not damages may be claimed thus has to be answered according to the same criteria; cf. *supra* III. 1. This is also, as Ulrich Huber has demonstrated, what the draftsmen of the BGB (in its original form) intended to lay down and provides the explanation for the way in which § 275 BGB old version was drafted: see Huber II (n. 34), § 58.

[82] See Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 228 ff. The German, fault-based, approach is defended by Dieter Medicus, 'Voraussetzungen einer Haftung für Vertragsverletzung', in: Jürgen Basedow (Hg.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000), 185 ff. Medicus, *inter alia*, discusses the case of a debtor who is prevented from performing his contractual obligation because he has fallen ill; under the *Principles*, according to Medicus, the debtor would be liable for damages in terms of Art. 9:501 PECL.

not, strictly speaking, a requirement for the claim; it is the debtor who has to prove that he was not responsible for the breach of duty. This reversal of the burden of proof follows from the negative formulation of § 280 I 2 BGB ('This does not apply, if …').[83] Moreover, even under German law, the debtor is not only responsible for fault. This comes out more clearly under the new § 276 than under its predecessor. For while § 276 I 1 BGB (old version) merely stated that the debtor is responsible for fault either in the form of intention or negligence, unless something else is specifically provided, the new rule explicitly provides that a stricter type of liability may be inferred from the content of an obligation, particularly from the assumption of a guarantee (this is supposed to cover, for example, the promise of a quality in the object sold)[84] or from the assumption of the risk to be able to procure the object in question (this is the case, particularly but not exclusively, if the debtor owes an object described by class).[85] The reform of § 276 BGB was intended primarily to clarify the law.[86] None the less, the way in which the new rule is drafted leaves much leeway for a flexible adjustment of the standard of liability.[87]

(ii) The conceptual cornerstone for a claim for damages is termed 'breach of duty' (*Pflichtverletzung*) in German law, 'non-performance' under the *Principles*.[88] The main reason for rejecting the term 'non-performance' was that cases of a deficient performance or the infringement of auxiliary duties in the course of performing can only awkwardly be accommodated under it.[89] On the other hand, however, the

Contrary to Medicus, however, I think that the illness has to be regarded as an 'impediment beyond [the debtor's] control' and that, therefore, Art. 8:108 (1) would apply; cf. also illustration 6 in the comment (Lando/Beale (n. 49), 382).

[83] But see, for employment relationships, § 619 a BGB (a last-minute-amendment to the proposed reform; cf. *Anwaltkommentar*/Dauner-Lieb (n. 31), § 619 a, n. 1).

[84] Faust, in: Huber/Faust (n. 18), 75 f.; Lorenz/Riehm (n. 18), 92 f.; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 276, n. 18.

[85] Canaris, (2001) *Juristenzeitung* 518 f.; Faust, in: Huber/Faust (n. 18), 76 ff.; Lorenz/Riehm (n. 18), 93; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 276, nn. 22 ff.

[86] *Anwaltkommentar*/Dauner-Lieb (n. 31), § 276, n. 3.

[87] The point is also emphasized by Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 229; cf. also Faust, in: Huber/Faust (n. 18), 74.

[88] This applies to chapters 8 and 9 of PECL as much as to chapter 7 of PICC. The term 'non-performance' is defined in Art. 1:301 (4) PECL as 'any failure to perform an obligation under the contract … and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract'. Cf. also Art. 7.1.1 PICC.

[89] *Abschlußbericht* (n. 7), 130; Begründung, in: Canaris (n. 9), 668 ff.

German term *Pflichtverletzung* has a distinctive flavour associating it with the notion of fault – which is inappropriate in view of the fact that fault is a separate additional element of liability which may or may not have to be present. An employee who is suffering from pneumonia does not have to go to work. He does not perform his contractual obligation *vis-à-vis* his employer but he can hardly, without some awkwardness, be said to be in breach of a duty in terms of the law of breach of contract.[90]

Another much more crucial difference between the new BGB and the *Principles* lies in the different level of complexity of the respective liability regime. Article 9:501 (1) PECL ('The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108') provides a general and comprehensive claim for damages covering all forms of failure of performance.[91] § 280 I BGB, on the other hand, only covers cases where the failure to comply with a duty arising under the contract results from conduct which has occurred after conclusion of the contract (subsequent impossibility of performance, delay of performance, defective performance etc.). This follows from the fact that the BGB provides a special rule for situations in which there is an initial impediment to performance (i.e. cases of initial impossibility): § 311a II BGB.[92] Moreover, even within this limited sphere of application, § 280 I primarily serves as a doctrinal peg for a number of more specific rules establishing further requirements for a claim for damages and is directly applicable only to a residual group of cases. The key to understanding this new liability regime lies in the different types of damages which a creditor may seek to recover, for § 280 BGB distinguishes between 'damages in lieu of performance', damages for delay, and (simple) damages. The most far-reaching of these alternatives, as far as the contractual relationship between the parties is concerned, is the first one: the duty to perform is substituted by a duty to pay damages.

2. Damages in lieu of performance

[90] For criticism of the term *Pflichtverletzung*, see U. Huber I (n. 34), 2 ff.; *idem*, in: Ernst/Zimmermann (n. 4), 98 ff.; Canaris, in: Schulze/Schulte-Nölke (n. 13), 59 ff.; Stoll, *Festschrift Lorenz*, 293 ff.; *idem*, (2001) *Juristenzeitung* 593. For a defence, see Peter Schlechtriem, 'Entwicklung des deutschen Schuldrechts und europäische Rechtsangleichung', in: *Das neue Schuldrecht, Jahrbuch Junger Zivilrechtswissenschaftler 2001*, 16 ff. It is generally agreed, however, that *Pflichtverletzung* and non-performance are supposed to be synonymous; see, e.g. *Anwaltkommentar*/Dauner-Lieb (n. 31), § 280, n. 15.

[91] Cf. also Art. 7.4.1 PICC.

[92] On which see infra VII. 2.

a) Impossibility of performance

'Damages in lieu of performance' (*Schadensersatz statt der Leistung*) is a neologism replacing the familiar term 'damages for non-performance' (*Schadensersatz wegen Nichterfüllung*).[93] It can be claimed only if the additional requirements of § 281, § 282 or § 283 BGB are met (§ 280 III BGB). Here we find, also under the new law, the different types of breach of contract so familiar to the German lawyer. In the first place, we have the cases of impossibility of performance, i.e. those situations where the debtor's obligation to perform falls away according to § 275 I BGB, or where the debtor has refused to perform according to § 275 II, III BGB. They are covered by § 283 BGB which, however, merely refers back to the requirements of § 280 I BGB: a doctrinal roundabout which is intended to clarify the law.[94] The upshot is that the creditor may claim his positive interest in all cases of subsequent impossibility unless the debtor proves that he was not responsible for his impossibility to perform. This, at any rate, is the rule the draftsmen of the new law intended to lay down,[95] though it is not easily reconcilable with the way the law is drafted. For since a debtor who does not comply with a duty of which § 275 BGB has specifically relieved him can hardly be said to be acting in breach of the very same duty, the fact that performance has not been made cannot be regarded as the breach of duty required for a claim for damages. Strictly speaking, therefore, it would have to be asked whether the debtor has infringed a duty by causing the event which has led to the impossibility of performance. This alternative perspective would, however, have detrimental consequences for the creditor who would not merely have to prove the impossibility of performance as such but also the reason for the impossibility.[96] This would constitute a deviation from what was recognized under the old law that was clearly not intended.[97] The entire problem could have been avoided if 'non-performance' rather than 'breach of duty' had been used as the conceptual pillar for

[93] For the reasons, see *Abschlußbericht* (n. 7), 131; Begründung, in: Canaris (n. 9), 674; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 280, n. 36.

[94] Cf. also *Anwaltkommentar*/Dauner-Lieb (n. 31), § 283, n. 4.

[95] See Begründung, in: Canaris (n. 9), 672: the breach of duty 'quite simply' lies in the fact that performance has not been rendered.

[96] This point has been made by Faust, in: Huber/Faust (n.18), 113 f. The reversal of the onus of proof mentioned above *sub* IV.1 merely relates to the issue of fault. Cf. also Canaris, (2001) *Juristenzeitung* 512; Stoll, *Festschrift Lorenz*, 295 ff.

[97] Faust, in: Huber/Faust (n. 18), 114.

the claim for damages.[98]

b) Delay of performance and deficient performance

Secondly, the cases of a delay of performance and of deficient performance. If the debtor does not perform, or does not perform properly, at the time when he has to effect performance (due date), the creditor may claim damages in lieu of performance provided the requirements of § 280 I are met and he has fixed, without success, a reasonable period for effecting performance (or remedying the defective performance): § 281 I BGB. At first blush, therefore, German law appears to be more lenient towards a debtor who does not perform, or does not perform properly, than the *Principles*, for in terms of Art. 9:501 ff. PECL[99] there is no requirement for the creditor to fix a period, by notice to his debtor, before he can recover damages: a debtor who does not perform in time is liable for breach of contract and is moreover immediately exposed to a claim for damages. It must be kept in mind, however, that the type of damages to which § 283 BGB applies are damages in lieu of performance. The creditor loses his right to performance (this is specifically stated in § 281 IV BGB) and may claim damages on the basis of not having received performance at all. This includes, in particular, his expenses for procuring a substitute performance.[100] In a way, therefore, the contract is terminated, and the effect of claiming damages in lieu of performance does indeed correspond in many respects to what is termed 'termination' under the *Principles*.[101]

Consequently, Art. 9:506 PECL, i.e. the provision dealing with recovery of the costs for substitute transactions,[102] presupposes that the aggrieved party has terminated the contract. A right to termination, however, is only granted if the

[98] See the proposal submitted by Canaris, (2001) *Juristenzeitung* 523.

[99] Cf. also Artt. 7.4.1 ff. PICC.

[100] See, e.g., *Palandt*/Heinrichs (n. 53), § 325, n. 20; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 280, nn. 49 ff.; Faust, in: Huber/Faust (n. 18), 137 ff.

[101] See the note to Art. 8:102 PECL in Lando/Beale (n. 49), 363 f.

[102] Cf. also Art. 9:507 PECL (for situations where the creditor has not made a substitute performance but where there is a current price for the performance contracted for). These rules correspond to Artt. 7.4.5 and 7.4.6 PICC and they have been inspired by Artt. 75 and 76 CISG. For a comparative assessment of the notion of 'damages for non-performance', in this context, see Hans Stoll, in: Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht* (3rd ed., 2000), Art. 74, nn. 3, 14; Schlechtriem, *Entwicklung* (n. 90), 22.

debtor's non-performance is fundamental, or, in the case of a delay in performance which is not fundamental, if the creditor has given a notice fixing an additional period of time of reasonable length.[103] Since the BGB also does not insist on the fixing of an additional period for performance in certain cases of a serious breach of contract[104] the differences between both sets of rules are somewhat reduced. They do exist, however, insofar as the recovery of damages other than the difference between the contract price and that of a substitute transaction is concerned,[105] and also, with regard to the costs for a substitute performance, in cases where the debtor has made a defective performance which does not constitute a serious breach.[106]

c) Infringement of ancillary duties which do not affect the performance as such

The third situation where the BGB is prepared to grant a claim for damages in lieu of performance is dealt with in §§ 280 III, 282 BGB. A contractual relationship, according to German law, does not only give rise to duties for performance but may also oblige both parties to be considerate with regard to each other's rights and legal interests (§ 241 II BGB).[107] A wide variety of ancillary duties find their basis in this general principle.[108] Infringement of one of these duties leads to a claim for damages in lieu of performance if the creditor can no longer reasonably be expected to receive performance. This applies, for instance, if a painter immaculately carries out the painting job that he has undertaken but repeatedly damages the door, the chandelier and other pieces of furniture in his creditor's flat with his ladder.[109] Or: a babysitter

[103] Artt. 9:301 (1), 8:106 (3) PECL; cf. also Artt. 7.3.1 (1), 7.1.5 (3) PICC.

[104] § 281 II BGB.

[105] Cf. the items listed in the comment to Art. 9:502 PECL (Lando/Beale (n. 49), 438 f.) as compared to what are regarded as damages for non-performance in German law (see the references above, note 100).

[106] Under the *Principles*, the creditor does not have the possibility, by way of fixing a grace period, the elevate this type of breach to the level of a fundamental one (with the result of being able to terminate the contract).

[107] The same applies even at the pre-contractual stage; see §§ 241 II, 311 II BGB. Problems relating to *culpa in contrahendo* will not, however, be discussed in the present article.

[108] See, e.g., *Palandt*/Heinrichs (n. 53), § 276, nn. 117 f.; Günther H. Roth, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (4th ed., vol. II, 2001), § 242, nn. 234 ff.

[109] This is the case mentioned in Begründung, in: Canaris (n. 9), 682; cf. also *Anwaltkommentar*/Dauner-Lieb (n. 31), § 282, n. 1; Faust, in: Huber/Faust (n. 18), 132.

tenderly looks after the children entrusted to him but repeatedly attempts to debit too many hours to his employer's account. Under the old law, the doctrine of positive malperformance was applied to these cases. As the examples demonstrate, §§ 280 III, 281 BGB only apply to auxiliary duties which do not affect the performance as such (*nicht leistungsbezogene Nebenpflichten*): the main performance owed under the contract is not deficient but it has been rendered under circumstances which the creditor does not have to tolerate. Infringement of ancillary duties directly affecting the performance (*leistungsbezogene Nebenpflichten*) – a doctor fails to provide a step-by-step documentation of the treatment administered by him; the seller does not properly wrap the object sold so that it gets damaged – are covered by §§ 280 III, 281 rather than §§ 280 III, 281 BGB: we are dealing with a case of deficient performance.[110]

The *Principles* do not have any special rules concerning auxiliary duties; presumably, termination is available, provided the painter's or the babysitter's action can be regarded as fundamental non-performance.[111] Apart from that, a claim for damages under Art. 9:501 PECL (Art. 7.4.1 CISG) may be available. Article 1:301 (4) and the comments to Art. 8:101 PECL specifically state that the violation of an accessory duty or failure to fulfil the duty to co-operate in order to give full effect to the contract is covered by the term 'non-performance'.[112] None the less it is doubtful whether the claim for damages would not, by many lawyers outside Germany, be regarded as belonging to the province of the law of delict.

3. Damages for delay of performance

a) Mora debitoris

Contrary to damages in lieu of performance, damages for delay leave the debtor's duty to render performance unaffected. They cover the loss that has arisen because the debtor has not performed in time, and this includes gains lost or expenses incurred as a result of the delay as well as decline in value of the subject-matter during the period of delay.[113] They can be recovered if the debtor has defaulted in the

[110] For the differentiation between *leistungsbezogene* and *nicht leistungsbezogene Nebenpflichten* see, e.g., Koller (n. 3), 61 f.; Zimmer, (2002) *Neue Juristische Wochenschrift* 6.

[111] Art. 9:301 (1) PECL; Art. 7.3.1 (1) PICC.

[112] Lando/Beale (n. 49), 123, 359.

[113] Staudinger/Löwisch (n. 53), § 286, nn. 11 ff.; *Palandt*/Heinrichs (n. 53), § 286, nn. 5 ff.; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 280, nn. 47, 62; Faust, in: Huber/Faust, (n. 18) 100 ff.;

technical sense of the word, i.e. if he is in *mora debitoris* (§§ 280 II, 283 BGB). The requirements have been taken over, largely unchanged, from the old law. Due date must have arrived, the creditor must have served a special warning (*Mahnung*) on the debtor, and the latter must still not have performed.[114] In a number of situations, the warning is dispensable, particularly if a time for performance has been fixed with reference to the calendar (*dies interpellat pro homine*).[115] An important change that has been implemented relates to payments which have to be rendered under a bilateral contract. Here the German Government has passed, in March 2000, an act on the acceleration of payments[116] which was apparently intended to constitute an anticipated implementation of the EU directive on combating late payments in commercial transactions.[117] This act had brought about an amendment of the rules on *mora debitoris*[118] which was rightly described as 'infinitely ill-conceived and inappropriate':[119] it had had exactly the opposite effect to the one intended. Hence the need for reforming the reform. The new § 286 III BGB now specifies the lapse of 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment as the latest date when a payment debtor has to be considered

G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988), n. 108. As a general guideline it may be said that damages for delay are those damages which would also have arisen if the debtor had still performed at the end of the delay for which damages are sought.

[114] On the requirements for *mora debitoris*, see Staudinger/Löwisch (n. 53), § 284, nn. 4 ff.; *Palandt*/Heinrichs (n. 53), § 284, nn. 11 ff.; Faust, in: Huber/Faust (n. 18), 81 ff.

[115] On *dies interpellat pro homine*, see Law of Obligations (n. 32), 798. For a discussion of all cases in which a warning is dispensable, see Staudinger/Löwisch (n. 53), § 284, nn. 63 ff. On the new law (which has effected certain changes in order to implement the Directive on combating late payment in commercial transactions 2000/35/EC) see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 286, nn. 39 ff.; Faust, in: Huber/Faust (n. 18), 86 ff.; Lorenz/Riehm (n. 18), 133 ff.

[116] *Bundesgesetzblatt*, Teil I, 330 ff.

[117] See the remarks by Jürgen Schmidt-Räntsch, 'Gedanken zur Umsetzung der kommenden Kaufrechtsrichtlinie', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 302.

[118] See, in particular, the third section of what was then § 284 BGB.

[119] Wolfgang Ernst, Deutsche Gesetzgebung in Europa – am Beispiel des Verzugsrechts, (2000) 8 *Zeitschrift für Europäisches Privatrecht* 769. For a detailed criticism, see Ulrich Huber, 'Das neue Recht des Zahlungsverzugs und das Prinzip der Privatautonomie', (2000) *Juristenzeitung*, 743 ff.; *idem*, 'Das Gesetz zur Beschleunigung fälliger Zahlungen und die europäische Richtlinie zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr', (2000) *Juristenzeitung* 957 ff.

to be in default.[120]

b) Excursus: other consequences of mora debitoris

It may be mentioned, in this context, that a claim for the delay interest is not the only legal consequence based on the somewhat complex requirements of *mora debitoris*. Thus, if the delay relates to payment of a sum of money, the creditor is entitled to interest on that sum, which is specified as eight percent above the base rate of interest for legal transactions not involving a consumer, and five percent in all other cases (§ 288 I, II BGB). Moreover, while he is in *mora debitoris*, a debtor is responsible for every degree of negligence (this is relevant in situations where he is normally subject to a more lenient standard of liability)[121] and he is also responsible if performance now becomes impossible, even if such impossibility is not due to his fault, unless the damage would have arisen even if he had performed timeously: § 287 BGB.[122] Contrary to the old law, the specific requirements for *mora debitoris* laid down in § 286 BGB are no longer necessary for the claim for damages in lieu of performance or for the right to terminate the contract;[123] the situation, in this respect, is similar to that under the *Principles*.[124] Like the BGB, the *Principles* grant a claim for interest if payment of a sum of money is delayed (Art. 9:508 (1) PECL);[125] they give a right to damages (Art. 9:501 PECL);[126] and they specify that a creditor who recovers the interest is not precluded from recovering further damages that may have arisen (Art. 9:508 PECL).[127] Unlike the BGB, however, the *Principles* do not have the

[120] For details, see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 286, nn. 57 ff.; Faust, in: Huber/Faust (n. 18), 90 ff.; Lorenz/Riehm (n. 18), 135 ff.

[121] Such as the situations listed in *Palandt*/Heinrichs (n. 53), § 277, nn. 4 and 6.

[122] For the historical background to this rule, see *Law of Obligations* (n. 32), 799 f.

[123] See §§ 280, 281 and 323 BGB.

[124] Cf. also Medicus, in: Basedow (n. 82), 184.

[125] However, Art. 9:508 (1) PECL is confined to primary contractual obligations to pay; the provision does not cover interest on secondary monetary obligations, such as damages or interest: Lando/Beale (n. 49), 451. Cf. also Art. 7.4.9 PICC. On the interpretation of Art. 9:508 (1) PECL see Helmut Koziol, 'Europäische Vertragsrechtsvereinheitlichung und deutsches Schadensrecht', in: Jürgen Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000), 209 ff.

[126] Cf. also Art. 7.4.1 PICC.

[127] Cf. also Art. 7.4.9 (3) PICC.

requirement of a special warning for delay of performance.[128] Nor do they contain a rule like § 287 BGB. Yet, the substance of § 287, 2 BGB is probably inherent in Art. 8:108 PECL, in that it may be said of a debtor whose performance has become impossible while he was defaulting that he could have avoided even an impediment that was both unforeseeable and beyond his control. His non-performance would then not be excused.

4. 'Simple' damages

What, then, remains for the claim for damages in § 280 I BGB ('simple' damages)? The draftsmen of the new law intended it to cover consequential loss, i.e. damage suffered by the creditor as a result of the breach of contract, with respect to other objects of legal protection:[129] A has sold cattle to B; the cattle, however, are infected with a disease that now spreads to other cattle owned by B; the radiator that has been sold explodes and injures the purchaser; etc. This was a core area of application of what was called positive malperformance (*positive Forderungsverletzung*) under the old law. The old law, insofar, was based on a very subtle distinction between the creditor's interest in receiving the kind of performance that he had bargained for (*Mangelschaden* - this interest was protected by special claims available under the law of sale and contract for work) and his interest in not having his other objects of legal protection impaired as a result of the defective performance (*Mangelfolgeschaden*).[130]

Whether, and how far, this distinction will be translated into the new law is doubtful. For, on the one hand, it may be argued that consequential loss is covered by damages in lieu of performance (§ 281 BGB).[131] For if the creditor has to be placed in the position in which he would have been had the debtor properly performed, it appears that not only would he now have had a healthy cow and a good radiator, but

[128] For criticism, see Eugen Bucher, 'Mora früher und heute, oder auch: die Verdienste der Römer um ein menschengemässes, und der Redaktoren des Obligationenrechts um ein neuzeitliches Vertragsrecht', in: *Pacte – Convention – Contrat: Mélanges en l'honneur du Professeur Bruno Schmidlin* (1998), 412 ff., 426 ff. Cf. also Medicus, in: Basedow (n. 82), 183 ff.

[129] Begründung, in: Canaris (n. 9), 671 f., 834.

[130] See, e.g., Dieter Medicus, *Bürgerliches Recht* (18th ed., 1999), nn. 351 ff.; Heinrich Honsell, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (13th ed., 1995), Vorbem. zu §§ 459 ff., nn. 78 ff.; Frank Peters, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (revised edition, 2000), § 635, nn. 55 ff.

[131] See, e.g., Faust, in: Huber/Faust (n. 18), 137.

that he would not have suffered any consequential loss either. On the basis of this argument, the range of application of § 280 I BGB could be very considerably reduced; it would still, however, cover cases where the injury to the creditor's health, property or other interests has not been the result of a defect in the main performance (the painter damaging his employer's chandelier while carrying out his painting job; the purchaser slipping on a banana skin that is lying around in the seller's shop; the doctor causing loss to his patient by disclosing confidential information about him) and where the creditor does not intend to claim damages for non-performance. On the other hand, § 281 BGB requires the creditor to grant his debtor a grace period for performance, and this requirement is obviously meaningless in cases of consequential loss. This may induce the courts to apply the 'simple' damages provision of § 280 I BGB to consequential loss.[132] Unclear is also whether everything that has hitherto been classified by the courts as *Mangelschaden* is recoverable under §§ 280 I, III, 281 BGB. If a defective machine has been delivered and cannot be used until it has been repaired, the purchaser may have suffered damages for loss of use. In these cases, too, the granting of a grace period would be meaningless and thus it has been argued that this loss is recoverable in terms of §§ 280 II, 286 BGB (damages for delay): the loss, in other words, 'has not arisen because the vendor has delivered a defective machine but because he has failed to deliver a machine which was not defective'. [133]

V. CLAIM FOR THE SUBSTITUTE IN CASES OF IMPOSSIBILITY

If performance has become impossible, due to no fault of the debtor, the creditor cannot, of course, claim damages. Still, however, the debtor may have acquired something in the place of the object he was supposed to deliver: compensation from, or a claim against, an insurance company or a third party. German law regards it as obviously equitable for the debtor to have to make over to the creditor whatever benefit he has acquired:[134] since the debtor was under a duty to deliver the object which was destroyed, or lost, or stolen, he should not now retain that object's substitute. This was recognized under the old law (§ 281 BGB old version) as much

[132] For a discussion of the problem, see P. Huber, in: Faust/Huber (n. 18), 349 ff.

[133] Faust, in: Huber/Faust (n. 18), 155. Cf. also *Anwaltkommentar*/Dauner-Lieb (n. 31), § 280, nn. 39 ff., 48 with a detailed discussion of the problem. Contra: P. Huber, in: Huber/Faust (n. 18), 351 ff.

[134] *Abschlußbericht* (n. 7), 132 ('offenbarer Gerechtigkeitsgehalt').

as it is under the new (§ 285 BGB). Obviously, the creditor may also claim that substitute if the debtor has been responsible for the impediment. His claim for damages in lieu of performance is then reduced by the value of the substitute.[135] Oddly, the *Principles* do not provide this kind of remedy. Nor does the Convention on the International Sale of Goods. Some German commentators of the Convention attempt to remedy this deficiency either by way of interpretation of the contract or by resorting to an analogy to Art. 84 II CISG.[136]

VI. EXPENSES INCURRED IN THE EXPECTATION OF RECEIVING PERFORMANCE

It sometimes happens that a creditor finds it difficult to quantify his loss or to establish any loss at all. None the less, he may have made considerable expenses in reliance on his debtor's promise. B has bought a piece of property from A only to find out that, contrary to the assurances made by the vendor, he is not allowed to run a disco on the property.[137] Any estimate of his loss of profits is based on mere speculation. A much safer peg on which to hang a claim for damages are the expenses incurred by B in the expectation of being able to run the disco. Yet, these expenses have not been caused by A's non-performance; they would also have been incurred had the vendor not failed to honour his promise. The purpose of these expenses has merely been frustrated. Under the old law, the courts used to help B with a presumption that the transaction would have been profitable and would thus have allowed him to earn the amount of what he had invested. This, so it was argued, justified using the expenses as a yardstick for measuring the positive interest.[138] An insurmountable problem, however, arose in cases where the creditor had never intended to make money but where the transaction (and the expenses incurred in

[135] § 285 II BGB. For a detailed discussion of the problems arising, see Meier, (2002) *Jura* 122 ff.

[136] Schlechtriem/Stoll (n. 102), Art. 79, n. 53; Ulrich Magnus, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (revised edition, 1999), Art. 79, n. 54. For criticism of the *Principles* as well as CISG for failing to deal with the matter, see Raimund Bollenberger, *Das stellvertretende Commodum: Die Ersatzherausgabe im österreichischen und deutschen Schuldrecht unter Berücksichtigung weiterer Rechtsordnungen* (1999), 153 ff.

[137] See the case of BGHZ 114, 193 ff.

[138] See, e.g., the references in Hansjörg Otto, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (revised edition, 2001), § 325, nn. 84 ff.; *Palandt*/Heinrichs (n. 53), § 325, n. 15.

reliance thereon) served to satisfy some immaterial interest. The obstacle in the way towards a claim for damages was § 253 BGB, i.e. the rule preventing the recovery of immaterial interest in contract law. This was widely regarded as inequitable.[139] The new law, therefore, now has a general provision according to which the creditor, instead of claiming damages in lieu of performance, may recover any expenses that he has incurred in the expectation of receiving performance and that he was reasonably entitled to incur, unless the purpose of these expenses would have been frustrated even without the debtor's breach of duty.[140] The *Principles* do not contain a rule of this kind; it may, however, conceivably be read into Art. 9:502 PECL, as was done under the old German law.[141] Significantly, damages under the *Principles* include non-pecuniary loss (Art. 9:501 (2)(a) PECL).[142]

VII. INITIAL IMPEDIMENTS TO PERFORMANCE

1. Validity of the contract

We now have to turn our attention to initial impediments to performance.[143] According to § 306 BGB (old version) the initial objective impossibility of performance was not regarded as a specific type of breach of contract but as an impediment to the validity of the contract: 'A contract, the performance of which is impossible, is void.' This rule was widely said to have found its origin in Roman law. But this is wrong. For while the Roman lawyers did indeed coin the phrase *impossibilium nulla obligatio est*,[144] for them it merely encapsulated the idea that

[139] Canaris, (2001) *Juristenzeitung* 516.

[140] For further background information on the reasoning behind this provision and the controversy preceding its introduction into the code, and for details of its application, see Begründung, in: Canaris (n. 9), 684 ff.; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 284, nn. 1 ff.; Faust, in: Huber/Faust (n. 18), 157 ff.

[141] For a comparative discussion, also dealing with CISG, PECL and PICC, see Torsten Schackel, *Der Anspruch auf Ersatz des negativen Interesses bei Nichterfüllung von Verträgen*, (2001) 9 *Zeitschrift für Europäisches Privatrecht* 248 ff., 268 ff. As far as CISG is concerned, the position is controversial; see Schlechtriem/Stoll (n. 102), Art. 74, n. 4; Peter Schlechtriem, *Internationales UN-Kaufrecht* (1996), n. 308.

[142] Cf. also Art. 7.4.2 PICC.

[143] See, in particular, Sonja Meier, 'Neues Leistungsstörungsrecht: Anfängliche Leistungshindernisse, Gattungsschuld und Nichtleistung trotz Möglichkeit', (2002) *Jura* 187 ff.

[144] Celsus D. 50, 17, 185.

nobody could be obliged to perform what he cannot perform. This is not identical to the assertion that a contract aimed at an impossible performance is bound to be void and, in fact, the Roman lawyers were quite prepared to grant to the disappointed purchaser the *actio empti* where this appeared appropriate.[145] Following a proposition first submitted by the Natural lawyers, and later taken up by Rudolf von Jhering,[146] the draftsmen of the BGB at least allowed the purchaser to recover his negative interest if the vendor knew or should have known about the impossibility (§ 307 BGB, old version). Such claim, however, is often insufficient. A contract of sale induces in the purchaser a reasonable reliance that he will in due course receive the promised object; if performance turns out to have been impossible from the outset, he may therefore expect to be placed in the position he would have been in had the contract been properly carried out (as opposed to the position he would have been in had he not relied upon the validity of the contract).

That the rules contained in §§ 306 f. BGB were unsound and unfortunate was pointed out, influentially, by Ernst Rabel[147] and soon became the established view:[148] textbooks and commentaries were full of exhortations to apply § 306 BGB restrictively and to try to avoid the harshness inherent in the unequivocal verdict of invalidity wherever possible. Occasionally, for instance, the undertaking of a specific guarantee was read into the contract, with the effect that the risk of initial impossibility of performance was shifted to the person who had promised such performance. The reform of the BGB has now put an end to this. § 311a I BGB specifically states that a contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible.[149] This is in line with Art. 4:102 PECL.[150]

[145] For details, see *Law of Obligations* (n. 32), 686 ff.; cf. also, most recently, Jan Dirk Harke, 'Unmöglichkeit und Pflichtverletzung: Römisches Recht, BGB und Schuldrechtsmodernisierung', in: *Das neue Schuldrecht, Jahrbuch Junger Zivilrechtswissenschaftler 2001*, 31 ff.

[146] See Law of Obligations (n. 32), 694 f.

[147] Ernst Rabel, 'Unmöglichkeit der Leistung' (1907) and 'Über Unmöglichkeit der Leistung und heutige Praxis' (1911), both today in Ernst Rabel, *Gesammelte Aufsätze* (vol. I, 1965), 1 ff., 56 ff.

[148] Zweigert/Kötz (n. 32), 488 ff.; Reinhold Thode, in: *Münchener Kommentar zum BGB* (4th ed., vol. II, 2001), § 306, n. 3.

[149] None the less, of course, the creditor does not have a claim for specific performance if performance is impossible: § 275 BGB applies. For details, see Faust, in: Huber/Faust (n. 18), 208 f. The debtor's liability is governed by § 311a II BGB, on which see infra *sub* 2.

[150] Cf. also Art. 3.3 PICC.

2. Essential elements of the liability regime

Less clear but equally problematic under the old law was the legal position in cases of what used to be termed initial inability (or initial subjective impossibility) of performance: a painting is sold which has been stolen before the contract was concluded, or which turns out to belong to a third person, or to a museum. Predominantly, the vendor was held to be liable strictly, i.e. irrespective of whether he knew or could have known about the impediment.[151] Methodically, this was based on §§ 275, 306 BGB (*argumentum e contrario*), policy-wise the rule was justified as being inherent in the contractual promise. A person who sells a painting implicitly promises to be able to transfer ownership in the painting: 'I will perform' implies 'I will be able to perform'.

§ 311a II BGB now provides for a different liability regime. It is based on the following considerations: (i) Initial objective and subjective impossibility are to be treated alike. (ii) The same liability regime should apply for initial and supervening impossibility. For it would be both awkward and arbitrary to make the standard of liability dependant on whether the painting was stolen just before or just after conclusion of the contract.[152] (iii) It follows that the fault principle should also prevail in cases of initial impediments. (iv) The point of reference, however, for the attribution of fault is different in cases of initial and supervening impediments. If the painting is stolen or destroyed after the conclusion of the contract, the vendor can be blamed for not properly looking after it. Before the contract has come into existence, on the other hand, the vendor can hardly be made responsible for lack of diligence vis-à-vis the purchaser. What he can be blamed for is merely the fact that at the time the contract was concluded he knew, or should have known, that the painting had been stolen or destroyed.[153] (v) The debtor is not liable for a breach of duty. He cannot be under a duty to perform in these cases (see § 275 BGB). An infringement of a duty not to promise to perform even though he knew, or should have known, that he was unable to do so would only support a claim for the negative, not for the positive interest. Thus, while the debtor's fault relates to an informational deficiency (the debtor did not know that he was unable to perform) his liability for the positive interest is based on the non-performance. The creditor's

[151] Staudinger/Löwisch (n. 53), § 306, nn. 45 ff.; *Palandt*/Heinrichs (n. 53), § 306, nn. 9 f.; U. Huber I (n. 34), § 22. For an excellent overview of the way in which the discussion developed under the old law, see Meier, (2002) *Jura* 189 f.

[152] Canaris, (2001) *Juristenzeitung* 506.

[153] See Canaris, (2001) *Juristenzeitung* 507.

claim cannot therefore simply be based on §§ 280 I, III, 283 BGB, or, alternatively, §§ 280 I (*culpa in contrahendo*).[154]

3. Initial impossibility and the rules on mistake

These are the reasons why § 311a II BGB now contains a separate liability rule concerning initial impediments which entitles the creditor to claim damages in lieu of performance, unless the debtor did not know of the impediment when the contract was concluded, and was not responsible for not having known about it.[155] The latter clause, which refers to § 276 BGB, opens up the possibility of perpetuating the legal regime prevailing under the old law even after the reform of the law of obligations:[156] it would merely have to be argued that a standard of liability stricter than fault follows 'from the content of the obligation', particularly from the assumption of a guarantee.[157] While such argument would certainly be *contra intentionem legislatoris*, it would hardly be *contra legem.* In case, however, the law is going to be applied in the way in which its draftsmen intended it to be applied, the result will be that while a debtor who knew or could have known about the impediment is liable for the positive interest, there is no liability at all, if the debtor could not have had any knowledge.

Should the law countenance such a stark contrast? Under the old law, after all, the debtor was even in the latter situation often held liable for the positive interest. The suggestion has therefore been advanced that a debtor who is not responsible for not knowing about the impediment should at least be liable for the negative interest under the new law.[158] This suggestion is based on an analogy to § 122 BGB, according to which a person who avoids a contract for mistake is bound to compensate the other party for the damage which that other party has sustained in

[154] Canaris, (2001) *Juristenzeitung* 507; *idem*, (2001) *Zeitschrift für Rechtspolitik* 331 f.; *idem*, 'Schadensersatz wegen Pflichtverletzung, anfängliche Unmöglichkeit und Aufwendungsersatz im Entwurf des Schuldrechtsmodernisierungsgesetzes', (2001) *Der Betrieb* 1817 ff.; Faust, in: Huber/Faust (n. 18), 210 f.; Beate Gsell, 'Der Schadensersatz statt der Leistung nach dem neuen Schuldrecht', in: *Jahrbuch Junger Zivilrechtswissenschaftler 2001*, 118 ff.

[155] For criticism, both from the point of view of doctrinal consistency and practicability, see Meier, (2002) *Jura* 188 f., 191 f.; cf. also, e.g., Schwarze, (2002) *Jura* 80 f.; Harke (n. 145), 56 ff.

[156] This has been pointed out, correctly, by Zimmer, (2002) *Neue Juristische Wochenschrift* 3, and Faust, in: Huber/Faust (n. 18), 215.

[157] On the requirements of § 276 BGB, see above *sub* IV. 1. (i).

[158] Canaris, in: Schulze/Schulte-Nölke (n. 13), 64 f.; *idem*, (2001) *Juristenzeitung* 507 f.

relying upon the validity of the contract. The analogy, in turn, is justified with reference to the fact that cases of an initial impediment essentially deal with a problem of mistake: the seller does not know that his painting has been stolen or destroyed. Yet, as § 122 BGB demonstrates, the BGB normally only allows a party to rid himself of his contractual obligation for the price of having to pay the negative interest. It would therefore be inconsistent not to apply the same regime in the present situation.[159]

Whether this argument will ultimately prevail – it has not prevailed in the council chamber of the commission revising the discussion draft – remains to be seen.[160] Structurally, it would bring the law into line with the approach adopted in the *Principles*. For they do indeed treat cases of initial impossibility in the same way as other mistakes.[161] The debtor, therefore, may avoid the contract only if he could not have known about the fact that performance was impossible, either for him or objectively, at the moment when the contract was concluded.[162] Unlike the BGB, however, the *Principles* do not give the creditor a claim for the negative interest in this situation. The position is thus the same as it would be under the BGB if § 122 BGB were *not* to be applied analogously. Where, on the other hand, the debtor could have known about the initial impediment, he cannot escape his liability for the positive interest by invoking his error. His liability is based on non-performance and follows the general rules.[163] A special provision on damages like § 311a II BGB is therefore unnecessary. Alternatively, the creditor can also claim his negative interest;[164] since he, too, has been labouring under a mistake, he merely has to avoid the contract[165] and may then avail himself of the special damage provision of

[159] Canaris, loc. cit.

[160] Canaris' view is rejected by *Anwaltkommentar*/Dauner-Lieb (n. 31), § 311 a, n. 18 and Faust, in: Huber/Faust (n. 18), 220 f.

[161] Lando/Beale (n. 49), 234.

[162] Art. 4:103 (2) (b) PECL. The parallel rule of Art. 3.5 (2) (a) PICC is different in this respect. For the legal position under the Unidroit Principles, see Huber I (n. 34), § 22 III.

[163] Artt. 8:101, 9:501 PECL.

[164] He may want to do this, for instance, in cases where he finds it difficult to quantify his positive interest; cf. U. Huber, in: Ernst/Zimmermann (n. 4), 129.

[165] This he can do if the requirements of Art. 4:103 (1) PECL are met (i.e., in particular: the other party has made the same mistake) and if his mistake was excusable. That the creditor does not loose his right to claim the positive interest in view of the fact that he is entitled to rescind the contract is specifically stated in Art. 4:119. Cf. also Artt. 3.7 and 3.18 PICC.

VIII. TERMINATION

1. Doctrinal and historical background to the new law

Following CISG, the *Principles* grant a claim for loss caused by the other party's non-performance, as long as such non-performance is not excused as a result of an impediment beyond the other party's control. This claim for damages leaves the contract unaffected. In many cases, however, the creditor may rather wish to terminate the contract; or he may wish to terminate the contract in addition to claiming damages. Such right to termination is granted only in cases of fundamental non-performance; on the other hand, however, it does not depend on whether or not the non-performance is excused. This is the remedial model which has been gaining ground internationally and which has now found its most recent manifestation in the *Principles*.[167]

The notion that the remedy of termination is available only if the non-performance attains a certain minimum level of seriousness is also reflected, in some or other form, in most of the more traditional national legal systems; it is based on the consideration that termination, in a way, jeopardizes the fundamental principle of *pacta sunt servanda* and has the effect of throwing back on the defaulting party a risk which, according to the contract, was to have been borne by the aggrieved party.[168] Roman law was even stricter in this regard and never recognized a general right of termination in case of breach of contract.[169] This approach has, for a long time,

[166] U. Huber (who is generally sympathetic to the approach adopted by the *Principles* in cases of initial impossibility) argues that the rules contained in the *old* BGB were less complex while leading, by and large, to the same results: U. Huber, in: Ernst/Zimmermann (n. 4), 128 ff.

[167] See, as far as termination is concerned, Artt. 8:101, 9:301 PECL; cf. also Artt. 7.1.7 (4), 7.3.1 PICC; Art. 49 CISG. On the international development, see Peter Schlechtriem, 'Abstandnahme vom Vertrag', in: Jürgen Basedow (Hg.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000), 161 ff. For criticism, see Bucher, *Mélanges Schmidlin* (n. 128), 430 f.

[168] Treitel (n. 113), nn. 239 ff., 259 ff.; Axel Flessner, 'Befreiung vom Vertrag wegen Nichterfüllung', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 266 ff.

[169] Law of Obligations (n. 32), 578 f., 800 ff.

dominated the *ius commune*, and it has even shaped the BGB.[170] For the code too did not contain a general statutory right of termination but used to provide a highly fragmented regime which was conceptually based, in important respects, on a *lex commissoria* that has been tacitly agreed upon:[171] extinction of the duty to perform, if performance becomes impossible as a result of the debtor's fault[172] but also if he has not been responsible for the impossibility of performance;[173] automatic extinction also of the other party's duty to pay the price where the impossibility was not attributable to the debtor;[174] a right of termination, on the part of the creditor, if the impossibility was attributable to the debtor;[175] in cases of *mora debitoris*,[176] and in those of positive malperformance, provided such malperformance seriously affects the contractual relationship;[177] a right to redhibition which is not dependent on fault in cases of a latent defect in the object sold or in the work performed;[178] restitution partly according to the law of unjustified enrichment,[179] partly according to a special set of rules devised for a situation where one party may avail himself of a contractual right to terminate the contract;[180] an obvious lack of coordination between the two restitution regimes;[181] a strict mutual exclusivity prevailing between the remedies of damages and termination:[182] the rules contained in the BGB were not generally admired for their clarity and ease of operation. On the contrary, it was extremely difficult to comprehend their doctrinal intricacies and to arrive at solutions which

[170] Reinhard Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter …": Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die civilistische Praxis* 160 ff.

[171] See Hans G. Leser, *Der Rücktritt vom Vertrag* (1975), 16 ff.

[172] § 275 BGB old version.

[173] Prevailing opinion under the old law; see, e.g., *Palandt*/Heinrichs (n. 53), § 275, n. 24.

[174] § 323 BGB old version.

[175] § 325 BGB old version.

[176] § 326 BGB old version.

[177] Generally recognized under the old law; see, e.g., *Palandt*/Heinrichs (n. 53), § 276, n. 124.

[178] §§ 459, 462 and 633, 634 BGB old version.

[179] §§ 323 III, 327, 2 BGB old version.

[180] §§ 346 ff. BGB old version.

[181] See, e.g., *Palandt*/Heinrichs (n. 53), § 350, n. 3.

[182] See, e.g., *Abschlußbericht* (n. 7), 19.

were both practicable and logically consistent.

2.Automatic release of the creditor in cases of impossibility of performance on the part of the debtor

The new set of rules after the reform is considerably simpler than the old law though it is not exactly simple either. It ties in with the rules contained in §§ 275, 280 ff. BGB. This is particularly obvious with regard to § 326 BGB. This provision refers to the situation where the debtor becomes free under § 275, either because his duty to perform falls away as a result of the fact that performance is impossible (§ 275 I BGB), or because he avails himself of his right to refuse performance under § 275 II, III BGB. The legal consequence, as far as the debtor's own claim against the creditor is concerned, is that it falls away (§ 326 I 1 BGB). The creditor, in other words, does not have to avail himself of a right to terminate the contract but is automatically released from his obligation. This rule which was not contained in the discussion draft (nor in the *Abschlußbericht*) has been introduced for two reasons: (i) A right of termination is pointless in cases where the creditor does not have any alternative: in view of the impossibility of performance he would not be able to hold on to the contract anyway.[183] This argument, however, is not convincing, for it is not logically impossible for the creditor to claim damages in lieu of performance and ask for these damages to be assessed according to what used to be called, under the old law, 'exchange theory' (*Surrogationstheorie*):[184] he would then be entitled to the full value of the performance promised to him but only on condition of performing his own promise.[185] (ii) More persuasive is the second reason. The remedies for non-

[183] Canaris, (2001) *Juristenzeitung* 508; cf. also *Anwaltkommentar*/Dauner-Lieb (n. 31), § 326, n. 4.

[184] On the 'difference'- and 'exchange'-theories of assessing damages for non-performance in German law (*Differenztheorie* and *Surrogationstheorie*), see Treitel (n. 113), n. 106; *Palandt*/Heinrichs (n. 53) § 325, nn. 9 ff.; *Staudinger*/Otto (n. 138), § 325, nn. 38 ff. The position under the new law is analysed by Faust, in: Huber/Faust (n. 18), 142 ff.; Lorenz/Riehm (n. 18), 106 ff.; Meier, (2002) *Jura* 124 ff. Whether in cases where performance has become impossible and where the debtor is responsible for the impossibility (i.e. where both parties are automatically released from their respective obligations under §§ 275 I and 326 I BGB) the creditor may claim damages only according to the 'difference theory' or also according to the 'exchange theory' has already become a matter of dispute; cf., e.g., Faust, in: Huber/Faust (n. 18), 148 f. as opposed to Schwarze, (2002) *Jura* 82.

[185] According to § 326 V BGB the creditor, incidentally, does not have to rely on being automatically released from his obligation to perform but is also granted the option of terminating

performance do not only apply to contracts of sale and contracts for work, but also, for example, to employment contracts. If an employee is prevented from appearing at work – no matter whether he is responsible for the impediment or not – it would be unreasonable to grant his employer the right to terminate the contract, and artificial to regard his right of termination as being confined to the period for which the employee has not performed his duties.[186] The most appropriate solution appears to be that the creditor is released from his obligation insofar as the debtor is released from his.

For cases of impossibility exclusion *ipso iure* also of the other party's duty to perform is the functional equivalent to a right of termination. This applies both in cases where the debtor has, and where he has not, been responsible for the impossibility. If the impossibility was attributable to the creditor, or if it has occurred at a time when the creditor had defaulted in accepting performance, the debtor retains his claim. He must, however, deduct what he saves as a result of being released from his own duty to perform, or what he acquires or wilfully omits to acquire by using his capacity to work elsewhere (§ 326 II BGB). This is what used to be laid down in § 324 BGB (old version); in respect of the second alternative ('…or if it has occurred …') the rule refers to the requirements for *mora creditoris* as laid down in §§ 293 ff. BGB. Other details concerning the fate of the creditor's duty to perform have also been taken over from the old law: if the creditor claims what the debtor has received as a substitute for the object owed under the contract, the debtor retains his claim against the creditor; it is, however, diminished insofar as the value of the substitute is lower than the value of the performance due.[187] In cases where the creditor has already performed an obligation from which he was released under § 326 BGB he may ask for restitution.[188]

3. The requirements for termination

Where we have a type of breach of contract other than impossibility, a right of termination is available to the creditor, provided the requirements laid down in §§ 323 or 324 BGB are met. These requirements largely mirror those contained in §§ 281 and

the contract. On the rationale of this rule, see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 326, nn. 15 ff.; P. Huber, in: Huber/Faust (n. 18), 199 ff.

[186] U. Huber, in: Ernst/Zimmermann (n. 4), 102; Canaris, in: Schulze/Schulte-Nölke (n. 13), 54 f.; *idem*, (2001) *Juristenzeitung* 508.

[187] § 326 III BGB; cf. § 323 II BGB old version.

[188] § 326 IV BGB; cf. § 323 III BGB old version. However, while the BGB used to refer to the law of unjustified enrichment, the reference is now to the specific restitution regime of §§ 346 ff.

282 BGB (concerning damages in lieu of performance). This assimilation reflects a desire, on the part of the draftsmen of the new law, to prevent any danger of the requirements for termination of contract effectively being subverted by the possibility of resorting to the remedy of damages in lieu of performance.[189] The structure of §§ 323, 324 BGB thus also largely corresponds to the provisions of §§ 281 f. BGB. The law distinguishes between the situation (i) where the debtor does not perform, or does not perform properly, at the time when he has to effect performance (including those cases in which he infringes ancillary duties directly affecting the performance) and (ii) where the debtor infringes ancillary duties which do not affect the performance as such (i.e. duties of care with regard to the creditor's general rights and interests as mentioned in § 241 II BGB). For the latter situation § 324 BGB grants the creditor a right to terminate the contract if he can no longer reasonably be expected to accept performance. In all cases covered by the former alternative the creditor may terminate if he has fixed a reasonable period for effecting performance, or for remedying the defective performance, and such period has lapsed without success (§ 323 I BGB). § 323 II BGB specifies a number of situations where the fixing of a period is dispensable;[190] according to § 323 III BGB a warning (*Abmahnung*) takes the place of the fixing of a period for effecting performance where the latter step is impracticable.[191] § 323 VI BGB mirrors § 326 II BGB in that the creditor is prevented from terminating the contract if he was responsible for the

[189] Begründung, in: Canaris (n. 9), 757 ff. For a discussion how far the draftsmen of the new law have succeeded in synchronizing the remedies of damages and termination, see Gsell (n. 154), 122 ff.; for a detailed comparison between the new § 323 BGB and § 326 BGB old version, see Meier, (2002) *Jura* 194.

[190] These are: (i) the debtor seriously and definitively refuses to perform; (ii) the debtor does not perform at a date fixed in the contract, or within a certain period, and the creditor has tied the continuation of his interest in receiving performance to performance being rendered in time; (iii) there are special circumstances which justify immediate termination of the contract, taking account of the interests of both parties. All these exceptions are taken, with some slight modifications, from what was recognized under the old law: see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 323, nn. 15 ff.; P. Huber, in: Huber/Faust (n. 18), 190 ff.

[191] The same rule applies, as far as the claim for damages in lieu of performance is concerned: § 281 III BGB. It is supposed to apply to cases where the debtor is under a duty to refrain from doing something: *Anwaltkommentar*/Dauner-Lieb (n. 31) § 281, n. 25 and § 323, n. 21; P. Huber, in: Huber/Faust (n. 18), 33; Lorenz/Riehm (n. 18), 105 f. Both Faust and Lorenz/Riehm draw attention to the fact that the rule is misconceived since there is no imaginable situation where a warning would be meaningful. If, for example, a person has acted in contravention of a duty not to compete, a warning no longer makes sense as far as that specific contravention (as well as the legal consequences flowing therefrom) is concerned.

debtor's breach of duty, or if the breach has occurred after the creditor has defaulted in accepting performance. There is, of course, one major point of difference between the requirements for termination and those for a claim for damages in lieu of performance: availability of the remedy of termination does not depend on whether or not the debtor has been at fault.[192] At the same time, this is one of the most significant substantive differences between the old German law of breach of contract and the new.[193]

4. The mechanics of termination

How does termination work and what does it entail under German law? As under the old law, termination is effected by declaration to the other party.[194] Also under the old law, termination entails that both parties are released from their duties to perform and that they have to render restitution of what has already been performed. Restitution, however, is not to be rendered in terms of the law of unjustified enrichment: the code, rather, makes available a specific restitution regime for this purpose (§§ 346 ff. BGB). Formally, it applies because it constitutes a set of *leges speciales*. Doctrinally, the existence of this specific restitution regime has always been justified by pointing out that termination does not remove the entire contract (be it *ab initio* or *ex nunc*) and does not, therefore, create a situation where the performance can be said to have been made 'without legal ground',[195] but instead transforms a relationship aiming at the implementation of the contractual programme originally agreed upon into a contractual winding-up relationship.[196] The pertinent

[192] This difference is not in conflict with the policy mentioned above, text to note 189; since it does not in any way raise the possibility of the rules on termination being subverted by the remedy of damages in lieu of performance.

[193] *Abschlußbericht* (n. 7), 31; Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 236; Canaris, (2001) *Juristenzeitung* 522; for a comparative evaluation, cf. also Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 296 ff. Cf. also Bucher, *Mélanges Schmidlin* (n. 128), 421 ff.; Medicus, in: Basedow (n. 82), 189.

[194] § 349 BGB (old and new version).

[195] This is the essential prerequisite for the application of § 812 I BGB; for details, see Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach', (1995) 15 *Oxford Journal of Legal Studies* 403 ff.

[196] BGHZ 88, 46 ff.; BGH, NJW 1990, 2068 f.; Dagmar Kaiser, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (13th ed., 1995), Vorbem. zu §§ 346 ff., nn. 53 f.; *Palandt*/Heinrichs (n. 53), § 346, n. 2. For the new law, see Johannes Hager, in: *Anwaltkommentar* (n. 31), § 346, n. 13.

legal rules – hitherto giving rise to a jungle of disputes[197] – have been significantly simplified and streamlined.[198] In the first place, they are now directly applicable, rather than merely applicable *per analogiam*, to statutory rights of termination.[199] Secondly, they deal with the position of the party terminating the contract as well as with that of the other party.[200] Thirdly, they attempt to provide a comprehensive regulation concerning the legal consequences of termination rather than deal with a number of important questions (such as the liability in case of restitution) by way of reference to other parts of the code.[201] And fourthly, they no longer juggle with devices like excluding the right to terminate or granting a claim for damages in order to achieve an appropriate allocation of risks[202] but resort to the single device of a restitution in value if restitution in kind is no longer possible.[203]

The basic principle is therefore this: after termination both parties are obliged to return to each other whatever they have received under the contract; if restitution in kind is impossible, the value of the performance has to be made good. The details are still fairly complex (and also not regulated in the most lucid manner imaginable).[204] In particular, the duty to make good the value is excluded in a number of situations, the most important of which is the one where the object received has deteriorated or has been destroyed in spite of the fact that the person declaring termination has observed the kind of diligence which he usually observes in his own affairs (*diligentia quam in suis*).[205] As a result, the risk of accidental destruction or significant deterioration 'jumps back' to the other party: The latter has to return

[197] For details, see Reinhard Zimmermann, 'Restitution after Termination for Breach of Contract in German Law', (1997) *Restitution Law Review* 13 ff.

[198] For a concise overview of the changes, see Faust, in: Huber/Faust (n. 18), 238 f.; cf. also Arnd Arnold, 'Das neue Recht der Rücktrittsfolgen', (2002) *Jura* 154 ff.

[199] § 346 BGB old version as opposed to § 346 BGB new version; see Zimmermann, (1997) *Restitution Law Review* 14 f.

[200] For the old law, see (1997) *Restitution Law Review* 15 f.

[201] See § 347 BGB old version (on which, see (1997) *Restitution Law Review* 22).

[202] §§ 350 f. BGB old version; see (1997) *Restitution Law Review* 18 ff.; cf. also Art. 82 CISG.

[203] § 346 BGB; see *Anwaltkommentar*/Hager (n. 31) § 346, nn. 26 ff.; Faust, in: Huber/Faust (n. 18), 243 ff.; Lorenz/Riehm (n. 18), 216 ff.

[204] See, for example, the criticism in Dagmar Kaiser, 'Die Rechtsfolgen des Rücktritts in der Schuldrechtsreform', (2001) *Juristenzeitung* 1057 ff.

[205] § 346 III no. 3 BGB.

whatever he has received while the party declaring termination is released from his duty to make restitution. The problem is usually discussed in the context of contracts of sale. If A has sold, and handed over, a car to B, the risk has passed to B.[206] It is not difficult to see the reason for this approach. The car is now within B's 'sphere': he is in charge of it, he can use it and exercise control, and he can guard and protect it from any interference. It is only equitable that, as a corollary, he also has to carry the risk (even if he still lacks title). It is not easy to see why termination of the contract should reverse this kind of risk distribution.[207] After all, the car is still in the purchaser's, not in the seller's garage: The mere act of termination does not move it back from the purchaser's to the seller's sphere of influence.

The rule (which also applied under the old law and goes back, far beyond the BGB, to the Roman principle of *mortuus redhibetur*)[208] is justified on the basis of the consideration that the purchaser terminates the contract because the vendor has not performed his obligation, or has not performed it properly. And even though the vendor has not necessarily been at fault, he has none the less committed a breach of duty. Thus, he appears to be the better candidate for carrying a loss for which none of the two parties is responsible.[209] It can easily be predicted that the soundness of this rule will remain a matter of dispute.[210]

5. Comparison

If we now attempt to assess the major points of discrepancy and agreement between termination according to the revised German law of obligations and the *Principles*, the picture looks as follows: (i) The mechanism of termination is the same, at least in general, since according to the *Principles* a party's right to terminate the contract is to be exercised by notice to the other party (Art. 9:303 (1) PECL).[211] Thus,

[206] § 446 BGB.

[207] This has been emphasized, particularly clearly, by Ernst von Caemmerer, '"Mortuus redhibetur": Bemerkungen zu den Urteilen BGHZ 53, 144 und 57, 137', in: *Festschrift für Karl Larenz* (1973), 621 ff., 631 ff.

[208] See *Law of Obligations* (n. 32), 330 ff.; cf. also (1997) *Restitution Law Review* 21 f.

[209] Begründung, in: Canaris (n. 9), 782.

[210] For criticism, see *Anwaltkommentar*/Hager (n. 31), § 346, nn. 48 ff.; Lorenz/Riehm (n. 18), 220 f.; Kaiser, (2001) *Juristenzeitung* 1063.

[211] Cf. also Art. 7.3.2 (2) PICC.

in particular, there is no requirement of court proceedings to effect termination.[212] (ii) Sometimes, however, even a notice of termination is dispensable because the contract is terminated automatically. The German rule of § 326 BGB relates to cases of impossibility, Art. 9: 303 (4) PECL refers to the situation where a party is excused under Art. 8:108 in view of an impediment which is total and permanent.[213]

(iii) Both under German law and under the *Principles*, termination of the contract releases both parties from their obligations for the future.[214] As far as past performances are concerned, the comments to the *Principles* are at pains to make clear that, unlike in French law, termination does not operate retrospectively.[215] The reasons for adopting this position are, essentially, that (a) the creditor should not be precluded from claiming damages for his loss of expectations,[216] (b) there may be a number of provisions in the contract which are clearly intended to apply even if the contract is terminated, such as dispute settlement clauses,[217] and (c) it would be inappropriate to attempt to undo the exchange of performances for the past where a contract is to be performed over a period of time.[218] In all these respects German law adopts the same view. Termination no longer precludes a claim for damages based on the contract.[219] Moreover, termination merely transforms the contractual relationship

[212] As is the case, e.g., in France and Spain; for a comparative analysis, see Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 302 f.; Schlechtriem, in: Basedow (n. 167), 172 ff.

[213] Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 303 draws attention to the fact that the difference between termination *ipso iure* and by notice to the other party is not great in practice. The Unidroit *Principles* do not have a rule comparable to Art 9:303 (4) PECL.

[214] Art. 9:305 PECL; cf. also Art. 7.3.5 (1) PICC. In Germany this is not expressly stated in the code but presupposed as being self-evident: Lorenz/Riehm (n. 18), 216.

[215] Lando/Beale (n. 49), 420, 422. For a comparative assessment of the effects of termination, and especially the limited value of general statements to the effect that termination operates either retrospectively or prospectively, see Treitel (n. 113), nn. 282 ff.

[216] Art. 8:102 PECL; Art. 7.4.1 PICC.

[217] See Art. 9:305 (1) PECL; 7.3.5 (3) PICC; these provisions have their origin in Art. 81 I 2 CISG.

[218] Lando/Beale (n. 49), 420.

[219] This is now specifically stated in § 325 BGB and constitutes a significant change to what had hitherto been recognized. Under the old law, termination and damages were regareded as mutually exclusive remedies. This was, very widely, regarded as unsatisfactory: see, e.g., *Abschlußbericht* (n. 7), 19, 31; Zimmermann, (1995) *Juristenzeitung* 485 f.; Koziol, in: Basedow (n. 125), 205 ff.; Meier, (2002) *Jura* 196 f.; Gsell (n. 154), 122 ff. The intellectual origin of the new approach lies in Art. 45 II CISG.

and therefore does not affect provisions like dispute settlement clauses. And for all contracts to be performed over a period of time the code now contains a special provision granting the aggrieved party a right to terminate the contract 'for an important reason'.[220] This type of termination is called *Kündigung* and merely operates *ex nunc*.[221] Apart from that, the *Principles* adopt a liberal approach to the restitution of benefits received under the contract.[222] The general rule is stated more clearly in the Unidroit *Principles* than in the *Principles of European Contract Law*: on termination of the contract either party may claim restitution of whatever he has supplied, provided that he concurrently makes restitution of whatever he has received. If restitution in kind is not possible or appropriate, the value of the performance may be recovered whenever this is reasonable.[223] This is broadly in accordance with German law, particularly in view of the fact that the latter no longer makes a person lose his right to restitution if he is responsible for his inability to return the object received but, like the *Principles*, uses the device of a restitution in value.[224] The most significant difference between the *Principles* and German law, in this area, lies in the degree of specificity of the respective rules provided by both systems.[225]

(iv) Concerning the requirements for termination, German law has now also abandoned its insistence on fault; this is in line with the *Principles* (and the

[220] § 314 BGB. The provision merely codifies a rule that had previously been generally recognized by the courts and legal literature; it had been based on an analogy to §§ 626, 723 BGB. See, e.g., *Anwaltkommentar*/Krebs (n. 31), § 314, n. 1; Lorenz/Riehm (n. 18), 120 ff.

[221] For comparative discussion, see Treitel (n. 113), n. 283; Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 240 f.; Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 293 f., 313.

[222] For an express statement to this effect, see Lando/Beale (n. 49), 429.

[223] Art. 7.3.6 (1) PICC. The *Principles*, on the other hand, have four rules concerning rejection of property reduced in value, recovery of money paid, recovery of property, and recovery of performance that cannot be returned: Artt. 9:306 – 9: 308 PECL. Restitution is confined to situations where one party has conferred a benefit to the other party without having received the promised counter-performance in exchange.

[224] *Supra*, text to note 203.

[225] The *Principles* remain on a high level of generality whereas the German rules attempt to provide detailed rules on the liquidation of the relationship between the parties; cf. also Schlechtriem, in: Basedow (n. 167), 176 f. For an overview of the position under German law, see Faust, in: Huber/Faust (n. 18), 240 ff.; Lorenz/Riehm (n. 18), 215 ff.

international development in general).[226] (v) Termination under the *Principles* is available in cases of fundamental breach of contract.[227] The BGB, on the other hand, requires the granting of a period of grace before the remedy of termination is available.[228] In theory, this looks quite different. It must, however, be kept in mind that there are exceptions to this requirement in certain cases of serious breach.[229] The *Principles*, on the other hand, allow the creditor to elevate a non-fundamental delay in performance to a fundamental one by means of granting a grace period.[230] This does not, however, apply in cases of a defective performance.[231] (vi) Both under the Principles and in German law, the creditor normally only loses his right to choose between claiming performance and terminating the contract at the time when he gives notice of termination.[232] Up to that moment, the law thus effectively gives him the right to speculate at his debtor's expense: he may keep the debtor in suspense and make his decision dependant upon the development of the market.[233] The draftsmen

[226] Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 296 ff.; Schlechtriem, in: Basedow (n. 167), 166 f.

[227] Art. 9:301 (1) PECL; Art. 7.3.1 PICC. The notion of fundamental non-performance is defined in Art. 8:103 PECL; cf. also Art. 7.3.1 (2) PICC; for comparative discussion, see Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 266 ff.

[228] Where the debtor infringes ancillary duties which do not affect the performance as such, the creditor may terminate the contract if he can no longer reasonably be expected to accept performance: see § 324 BGB and *supra* VIII. 3. This may be regarded as a form of fundamental breach.

[229] § 323 II BGB; cf. *supra* note 190

[230] Artt. 8:106 (3), 9:301 (2) PECL; cf. also Art. 7.1.5 (3) PICC. The rule has been inspired by § 326 BGB old version (see Lando/Beale (n. 49), 377) and had, previously, also been adopted by Artt. 49 I (b) and 64 I (b) CISG ('Nachfrist allemand').

[231] This is stated expressly in Lando/Beale (n. 49), 374 f. and also follows clearly from the wording of Art. 8:106 (3), 9:301 (2) PECL. The position, insofar, is the same under CISG, see *Staudinger*/Magnus (n. 136), § Art. 49, n. 21. Schlechtriem, in: Basedow (n. 167), 167 f. appears to interpret the *Principles* differently.

[232] For the *Principles*, see Art. 8:106 (3) second sentence, where it is stated that the creditor *may* in his notice provide that if the other party does not perform within the period fixed by the notice the contract shall end automatically.

[233] However, under the *Principles* the creditor loses his right to terminate the contract unless he gives notice within a reasonable time after he has or ought to have become aware of the non-performance: Art. 9:303 PECL; cf. also Art. 7.3.2 PICC. According to § 350 BGB, the debtor may give the creditor a reasonable time for exercising his right of termination; the right of termination lapses if termination is not declared before the expiry of that period.

of the revised German law of obligations did not regard this as a problem in view of the fact that the debtor, after all, has committed a breach of duty.[234]

IX. OTHER REMEDIES

The remaining remedies for breach of a contractual duty can be dealt with fairly briefly. Firstly, there is the modern German version of the *exceptio non adimpleti contractus* (§ 320 BGB); it has remained unchanged by the reform and finds its equivalent in Art. 9:201 (1) PECL.[235] If under a reciprocal contract one party would normally have to perform first, he may refuse to perform if he realizes, after conclusion of the contract, that his claim to the other party's counter-performance is endangered as a result of that other party's lack of ability to perform (§ 321 BGB). This is termed the 'defence of precariousness' (*Unsicherheitseinrede*) and it is new insofar as the defence is no longer confined to a deterioration in the financial circumstances of the other party.[236] The BGB, in this respect, has moved somewhat closer to the provision of Art. 9:201 (2) PECL which focuses on situations where it is clear that there will be a non-performance by the other party.[237]

Secondly, and even apart from the provision of § 321 BGB, anticipatory non-performance has now found a place in the new code. Where the debtor has seriously and definitively refused to perform (*Erfüllungsverweigerung*) the creditor does not have to fix an additional period for performance in order to claim damages for non-performance (§ 281 II BGB) or to terminate the contract (§ 323 II no. 1 BGB). § 323 IV BGB specifically states that this applies even if such refusal has occurred before the time for performance has arrived, and the same rule has to be read into § 281 II BGB.[238] These rules were recognized even under the old law, though only on the

[234] See Begründung, in: Canaris (n. 9), 762; P. Huber, in: Huber/Faust (n. 18) 189. For a comparative discussion of the problems relating to the creditor's *ius variandi*, see Flessner, (1997) 5 *Zeitschrift für Europäisches Privatrecht* 305 ff.

[235] Cf. also Art. 7.1.3 PICC. For historical background, see Wolfgang Ernst, *Die Einrede des nichterfüllten Vertrages* (2000); for a comparative discussion, see Treitel (n. 113), nn. 188 ff.

[236] § 321 BGB old version. For comment on the reform, see *Abschlußbericht* (), 158 ff.; *Anwaltkommentar*/Dauner-Lieb (n. 31), § 321, n. 1; P. Huber, in: Huber/Faust (n. 18), 180 ff.

[237] Cf. also Art. 71 I CISG. The rules provided by CISG and PECL are not, however, only applicable in situations where one party has to perform first.

[238] This view is also taken by *Anwaltkommentar*/Dauner-Lieb (n. 31), § 281, n. 20 and by Faust, in: Huber/Faust (n. 18), 120.

basis of case law and legal doctrine.[239] Also according to Art. 9:304 PECL, the contract may be terminated where, prior to performance, it is clear that there will be a fundamental non-performance;[240] and the comments make clear that a party which exercises a right to terminate the contract for anticipatory non-performance has the same rights as on termination for actual non-performance and is therefore entitled to claim damages.[241]

Thirdly, the right to price reduction is still confined, in German law, to its traditional areas of application, i.e. the law of sale (§ 441 BGB) and contract for work (§ 638 BGB).[242] Proposals to generalize this remedy, and, more specifically, also to

[239] *Palandt*/Heinrichs (n. 53), § 276, n. 124, § 326, nn. 20 ff. For a detailed discussion, see U. Huber II (n. 34), §§ 51 – 53.

[240] Cf. also Art. 7.3.3 PICC and Art. 72 CISG.

[241] Lando/Beale (n. 49), 418. For a comparative assessment, cf. also Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 237 f.

[242] Generally on the rules relating to liability for latent defects in the law of sale after the reform, see P. Huber, in: Huber/Faust (n. 18), 290 ff., 317 ff.; Lorenz/Riehm (n. 18), 254 ff.; Daniel Zimmer, Thomas Eckhold, 'Das neue Mängelgewährleistungsrecht beim Kauf', (2002) *Jura* 145 ff. What used to be called *Wandelung*, i.e. the old *actio redhibitoria*, has now been absorbed by the general remedy of termination (§§ 440, 323, 326 V BGB); damages (previously available under either § 463 BGB or the remedy of 'positive breach of contract') can now be claimed according to §§ 440, 280, 281, 283 and 311a BGB. The remedies for latent defects have, insofar, been integrated into the general rules on breach of duty (non-performance). The creditor may, however, only resort to termination, price reduction, or damages, if the debtor has failed to make good his failure in performance (by either removing the defect or delivering a substitute which is free from defects). The creditor, in other words, first has to give the debtor a chance to cure the defect (§§ 437 no. 1, 439 BGB). Doctrinally, this claim is based on the creditor's original right to specific performance. As far as the *Principles* are concerned, see Art. 9:102 PECL (Art. 7.2.3 PICC, Art. 46 CISG): the creditor is entitled to specific performance, 'including the remedying of a defective performance'. Cf. also Art. 8:104 PECL (right to cure a non-conforming tender before due date for performance or where the delay is not such as to constitute a fundamental non-performance). On the duty to cure, see Treitel (n. 113), nn. 276 ff.; Schlechtriem, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 226 f.; the comparative notes in Lando/Beale (n. 49), 369 f., 401 f.; Urs Peter Gruber, 'Die Nacherfüllung als zentraler Rechtsbehelf im neuen deutschen Kaufrecht – eine methodische und vergleichende Betrachtung zur Auslegung', in: *Das neue Schuldrecht, Jahrbuch Junger Zivilrechtswissenschaftler 2001*, 187 ff.; on the device of *purgatio morae* (not adopted by the BGB) see *Law of Obligations* (n. 32), 823. The remedies for defects in work done under a contract of work (§ 634 BGB) mirror those for defects in contracts of sale.

apply it to contracts of service,[243] have not been implemented. They would have brought German law into line with Art. 9:401 PECL. The way in which the reduction has to be calculated is very similar though not identical to the one prescribed by the BGB.[244]

The rules on *mora creditoris*, fourthly, have only very slightly been adjusted by the reform of the law of obligations.[245] As under the old law, the creditor is not obliged to receive performance but only entitled to do so. Unlike the creditor in the case of *mora debtoris*, the debtor in the event of *mora creditoris* does not have a right to sue for damages or to terminate the contract: by not accepting performance the creditor does not commit a breach of contract. The rules on *mora creditoris* are merely designed, in certain respects, to relieve the position of a debtor who has done whatever the law expects him to do.[246] The position, therefore, is different to the one prevailing in England where a creditor can be held responsible for breach of contract in the same way as a debtor.[247] The approach adopted in the *Principles of European Contract Law* (but not in the Unidroit *Principles*) is structurally similar to German law though the regulation found in Artt. 7:110 and 7:111 PECL is, on the one hand, less specific than §§ 293 ff. BGB; on the other hand, it also deals with matters considered in another systematic context in German law.[248] The *Principles* also do not provide for a relaxation of the debtor's liability as does § 300 I BGB; nor do they contain a risk rule on the model of § 300 II BGB.

[243] See Manfred Lieb, 'Dienstvertrag', in: Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (vol. III, 1983), 209 ff.; most recently, see Konrad Rusch, 'Gewinnabschöpfung bei Vertragsbruch – Teil II', (2002) 10 *Zeitschrift für Europäisches Privatrecht* 132 f.

[244] For German law, see § 441 III BGB (corresponding to what was previously recognized and contrary to a rule contained in the discussion draft and the government draft); see Canaris, (2001) *Zeitschrift für Rechtspolitik* 335. For the *Principles*, see Art. 9:401 PECL. The difference lies in the fact that the relevant moment for the comparison of the real and the hypothetical value is the conclusion of the contract, according to § 441 III BGB, and tender of performance, according to Art. 9:401 PECL.

[245] On the change of § 296 BGB (which is consequent upon that in § 286 II no. 2 BGB), see *Anwaltkommentar*/Dauner-Lieb (n. 31), § 296, n. 2; Lorenz/Riehm (n. 18), 175.

[246] §§ 293 ff. BGB; see *Law of Obligations* (n. 32), 817 ff.; Treitel (n. 113), n. 35.

[247] See Treitel (n. 113), n. 36; cf. also the comparative discussion in Uwe Hüffer, *Leistungsstörungen durch Gläubigerhandeln* (1976), 134 ff.

[248] Zimmermann, (1995) *Juristenzeitung* 489 f.

X. CONCLUDING OBSERVATIONS

It has been said that the most striking feature of the new German law relating to breach of contract is the simplicity of the structure of its rules.[249] This appears to be an exaggeration. None the less it is true that the structure of the new rules is more easily comprehensible than that of the old law. Moreover, the new rules have moved considerably closer to the system of remedies which is increasingly recognized internationally and which has found its most modern manifestation in the *Principles of European Contract Law* and the Unidroit *Principles of International Commercial Contracts*. Both sets of Principles have been taken into consideration during the last stages of the German reform process.[250] They should now much more readily be resorted to as a comparative baseline for evaluating, interpreting and developing the new German rules.[251] On the other hand, however, German law contains a number of rules and ideas which can, and should, be used to refine the international *Principles*. This is true, particularly, where the new rules reflect well-established and time-tested experiences of one hundred years of legal development under the old law of obligations. Where the BGB now adopts new thinking patterns or attempts to tailor new doctrinal tools for solving the old problems, its value within contemporary comparative discourse is considerably reduced: for it will take many years before it can safely be assessed whether these tools and thinking patterns have stood the test of legal practice.[252] There is place for some scepticism, as far as rules like § 275 II or § 311a BGB, or the coordination between the old established different forms of breach of contract and the new general concept of 'breach of duty' are concerned. Even now, barely three months after the enactment of the new law, these issues are surrounded by profound doctrinal controversies.[253] At the same time, German legal

[249] Zimmer, 2002 *Neue Juristische Wochenschrift* 12.

[250] Cf. *supra*, note 43.

[251] On the role of the *Principles* within the system of legal sources in a national legal system like the German one, see Claus-Wilhelm Canaris, 'Die Stellung der "Unidroit Principles" und der "Principles of European Contract Law" im System der Rechtsquellen', in: Basedow (n. 82), 5 ff. For a statement in favour of a 'harmonizing' approach towards the interpretation of national law (within which the *Principles* are obviously of major significance), see Walter Odersky (the former President of the German Federal Supreme Court), 'Harmonisierende Auslegung und europäische Rechtskultur', (1994) 2 *Zeitschrift für Europäisches Privatrecht* 1 ff.

[252] Zimmer, (2002) *Neue Juristische Wochenschrift* 12, even predicts that decades will pass before the courts have applied the new rules in a way that re-establishes legal certainty.

[253] Cf., e.g., *supra* III. 3. (concerning the application of § 275 II BGB).

doctrine is still in the process of readjusting itself to the new situation. Thus, of the first two textbooks on the new law which have appeared simultaneously in Germany's major legal publishing house, the one adopts a structure which is essentially remedy-based[254] whereas the other presents the law as if it were structured according to the different forms of breach.[255] This does not necessarily reflect a weakness in German law's attempt to strike a balance between the system established before the reform and the purely remedy-based structure of the *Principles*. The *Principles*, too, will need some more specific rules for certain typical forms of breach: the claim for the substitute in cases of impossibility and the rules on mora debitoris may be mentioned as examples. The process of a critical evaluation of *both* the new German law of breach of contract and of the rules relating to non-performance under the *Principles* has only just started.

(May 2002)

[254] Huber/Faust (n. 18).

[255] Lorenz/Riehm (n. 18).

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