Unifying the Law of Impossibility

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods[1] (Convention), an attempt to unify the law concerning international sales of goods, was announced on April 10, 1980. The Convention is the latest step in a process which has been under way since before 1930,[2] and is the direct descendent of the Hague Uniform Law on the International Sale of Goods.[3] International legal scholars anticipate more widespread acceptance of the Convention due to the substantive improvements over its predecessor as well as the wider representation the Convention enjoyed in its drafting.[4]

There are various yardsticks for judging the success of a uniform law. The first is the extent to which the law represents a true compromise in approach. Does the new legislation adopt formulations from the wide variety of legal systems represented in its drafting? Such compromise is important because it enables concerned parties (*i.e.* parties to a contract, attorneys and judges) to understand and apply the uniform law. A second yardstick is the result of application of the uniform law. Regardless of method, does application of the uniform law produce legal

1. U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 10, 1980) [hereinafter cited as Convention].

2. For a summary of the history of the unification of the law of international sales of goods, see Historical Introduction to the Draft Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97.5 (Mar. 14, 1980); Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979); KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, at xxxi-xxxvii (H. Dölle ed. 1976).

3. Convention Relating to a Uniform Law on the International Sale of Goods (with annex), *opened for signature* July 1, 1964, 834 U.N.T.S. 122, I U.N. Register of Trade Law Texts 39 [hereinafter cited as Hague Law]. It has been ratified or acceded to by Belgium, Gambia, Federal Republic of Germany, Israel, Italy, the Netherlands, San Marino, the United Kingdom and Northern Ireland.

4. *See* Hermann, *The Contribution of UNCITRAL to the Development of International Trade Law*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 35, 38 (Horn & Schmitthoff eds. 1983) [hereinafter cited as TRANSNATIONAL LAW].

consequences which correspond to the various concepts of justice of the legal systems represented in its drafting? This is important in convincing parties to choose (or at least not to exclude) the uniform law to govern their transactions. The success of uniform law can also be judged pragmatically, based on the contribution it makes to the goal of legal unification. Has the law been adopted by a significant number of countries, thereby assisting in the creation of a truly transnational law of international commercial transactions?[5]

It is too early to tell whether the Convention will contribute to the creation of transnational law by gaining wide acceptance.[6] Comparative legal analysis, however, can be applied to the Convention to determine whether the law is successful in terms of the other two criteria: first, whether the law represents a formula which blends various legal approaches and is thus comprehensible to parties from a wide variety of legal backgrounds; and, second, whether results obtained from its application will be acceptable to members of varying legal systems.

This Article focuses on the Convention's regulation of situations in which a party to a contract is unable to perform because performance has become "impossible."[7] Various elements of both common law (from Anglo-American principles) and Continental civil law (from German principles)[8] will be considered. The Convention's regulation of breach of contract and impossibility represents a hybrid of both common- and civil-law approaches. In general, the Convention will impose or limit liability for breach in a manner acceptable to jurists from both systems.

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5. For a discussion of transnational law, see Horn, *Uniformity and Diversity in the Law of International Commercial Contracts*, in TRANSNATIONAL LAW, *supra* note 4, at 3-18; Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, *id.* at 19-31; Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

6. Although by December 1984 only 6 nations had ratified the Convention, acceptance of a uniform law takes time. The predecessor of the Convention, the Hague Law, was opened for signature on July 1, 1964, but did not enter into force until August 18, 1972, when it was finally ratified by five nations.

7. The term "impossibility" has been used in this paper to avoid confusion. The doctrine discussed has many labels in Anglo-American law, including "acts of God," "*force majeure*" and "frustration." The term "frustration" has been avoided since it is used to describe both impossibility and situations where performance is not impossible, but has merely become commercially futile. Such latter cases are also called "frustration of the venture" and have their origin in the "Coronation Cases." For a discussion of this doctrine, see CALAMARI & PERILLO, CONTRACTS, §§ 3-10 (1981); TREITEL, THE LAW OF CONTRACT, at 591-93 (4th ed. 1975); 18 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1954 (3d ed. 1979).

8. The term "German law," as used in this analysis, refers to the German Civil Code and doctrines arising therefrom. It does not refer to the Hague Law, although this law has been ratified by Germany, and has been effective in Germany since April 16, 1974. BURGERLICHES GESETZBUCH [BGB] II 146, 148 (1974) (W. Ger.).

When measured by the compromise and result yardsticks the Convention is thus a success.

II. INITIAL DIFFICULTIES

A. Reconciling Two Legal Systems

Those drafting a uniform law are confronted with the difficult task of adopting characteristics from legal systems which are often conceptually worlds apart and then integrating them into an independent, workable and meaningful system of regulation. To synthesize civil- and common-law principles is difficult. Because civil-law systems are based upon codes which contain short, precise paragraphs, they must necessarily classify, divide and categorize. Common-law systems, on the other hand, are not confined to numbered paragraphs which claim to regulate all legal relations and events. Thus, the common law can be much more general, and can set forth principles which will be further modified and applied in a practical fashion to later cases.[9]

Although the application of civil or common law to any particular case may produce similar results, the paths leading to the results will often be completely different; the civil-law lawyer will ask many questions which never occur to the common-law lawyer. The dichotomy between private and public law, or between civil and commercial law, for example, might not interest the common-law lawyer, whereas the distinction would be crucial to the civil-law lawyer.[10]

The law of contracts presents one of the widest conceptual gaps between civil- and common-law systems. The law applicable to contracts in Germany is called the law of obligations (*Schuldrecht*). It deals with each person's duty to perform separate undertakings. *Schuldrecht* is not limited to contractual relations, but also applies in areas which would fall within the common-law fields of tort or property law. Each of these undertakings is regulated separately, and there are additional provisions regulating the possible relation or interdependence of the two parties' duties. German law, however, neither assumes nor requires that a bind-

9. For a discussion of the advantages and disadvantages of the more "general" common-law system, see *Rechtsvergleichung — Zur neueren Entwicklung des Vertragsrechts in Europa*, Report of the Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg, in GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS, 1 BUNDESMINISTER DER JUSTIZ 59, 60 (1981) [hereinafter cited as Max-Planck-Institut Report]. *See also* Weitnauer, *Vertragsaufhebung und Schadensersatz nach dem einheitlichen Kaufgesetz und nach geltendem deutschen Recht*, in RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG 71, at 112-13 (Wahl, Serrick & Niederlander eds. 1967).

10. *See* Max-Planck-Institut Report, *supra* note 9, at 60.

ing obligation consist of two interdependent performances or promises to perform.[11]

B. Defining Terms

An additional problem in comparative legal synthesis is the understanding of basic terms. This is caused by the conceptual disparity between different systems and is aggravated by problems of translation. An underlying conceptual similarity between two systems may be unintentionally veiled by the use of different terms. In the same way, a conceptual gap between the two systems may be veiled by the use of identical terms. The law of contracts presents difficulties in this respect. In order to understand the comparative analysis of the doctrine of impossibility, key terms must be defined and discussed. The two most important terms are breach and damages.

1. Breach of Contract

To a common-law lawyer, the term breach is a very broad one. Breach includes every case in which a contracting party's actual performance differs from that which was originally promised, no matter how insignificant the deviation and regardless of whether the actual performance is just as valuable to the promisee as that which was promised.[12] In sales contracts, breach includes cases which would be handled under various doctrines by a civil-law lawyer, including cases where the promisor fails to deliver, delivers late, delivers to the wrong location, delivers the wrong amount, delivers goods with legal or physical defects, delivers goods different from those promised or fails to perform one of his incidental duties to the contract (for example, packaging, insurance or transport). While the common-law concept of breach may be further broken down into categories such as "fundamental" or "anticipatory," a finding of any breach is sufficient for legal consequences to attach under common-law principles. In general, any breach entitles the nonbreaching party to damages. Even a breach which results in no harm to the promisee gives rise to a claim for nominal damages.[13] Although substantial or fundamental breach is required for avoidance of the contract, all

11. *See, e.g.*, the doctrines of commission (*Auftrag*) BGB §§ 662-76; loan (*Leihe*) BGB §§ 598-606; and bailment (*Verwahrung*) BGB §§ 688-700. These three doctrines may all be considered "considerationless" contracts.

12. RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981); 12 WILLISTON, *supra* note 7, § 1454 (1970); 11 *id.* § 1339A (1968).

13. RESTATEMENT (SECOND) OF CONTRACTS, § 346 (1981); 2 WILLISTON, *supra* note 7, § 223 (1959); 11 *id.* § 1339A (1968); TREITEL, *supra* note 7, at 617.

breaches are considered substantial in contracts for the sale of goods.[14]

The common-law concept of breach most nearly corresponds to the German legal term *Leistungsstörungen* or irregularities in performance.[15] In contrast to the common law, however, a finding of an irregularity in performance (breach) must be further differentiated before legal consequences such as damages can be determined. The major types of breach traditionally recognized in German civil law are delay (*Verzug*), impossibility (*Unmöglichkeit*) and warranty liability for defects in goods (*Sachmängelhaftung*). Because of the difficulty of fitting all cases of breach into these categories, two other broad doctrines of breach were developed. Although grounded on principles contained in the German Civil Code (*Bürgerliches Gesetzbuch* or *BGB*), these new doctrines were developed by legal scholars and judges. They include faulty performance of incidental contractual duties (*Schlechterfüllung einer verträglichen Nebenpflicht*) and disappearance of the basis of the transaction (*Wegfall der Geschäftsgrundlage*).[16]

The civil-law doctrines set out above fit under the general common-law rubric of breach.[17] They do not, however, necessarily give rise to causes of action for damages under German civil law. Thus, a German lawyer, in analyzing a case of late delivery which does not result in substantial harm to the promisee, or in analyzing a case of breach of implied warranty, might conclude that such irregularities in performance do not constitute a breach because they do not entitle the promisee to an action for damages.[18] For the purposes of this Article, breach will be used in its expansive common-law sense.

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14. This "perfect tender" rule has been embodied in Section 2-601 of the United States Uniform Commercial Code, which allows a buyer to avoid the contract "if the goods or the tender of delivery fails *in any respect* to conform to the contract" (emphasis added). U.C.C § 2-601 (1977).

15. EMMERICH, DAS RECHT DER LEISTUNGSSTÖRUNGEN 2-3 (1978).

16. The first doctrine is divided into two subcategories: positive breach of contract (*positive Vertragsverletzung*) or *culpa in contrahendo*. The second doctrine is equivalent to the common-law doctrine of frustration of the venture, discussed *supra* note 7. For a good discussion in English of these various theories, see HORN, KOTZ & LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 107-109, 141-143 (1982).

17. One category of faulty performance of incidental contractual duties, *culpa in contrahendo*, would not be treated as a contractual problem under common law. An example of such a case would be where a shopper in a grocery store fell on a banana peel which was lying on the floor of an aisle. Such a case would be a tort problem at common law. For a discussion of the doctrine of *culpa in contrahendo*, see HORN, KOTZ & LESER, *supra* note 16, at 108, 159; *see also* ZWEIGERT & KOTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 354-355 (1969).

18. Breach of implied warranty gives rise only to avoidance or reduction of the price (*Wandelung* or *Minderung*). Damages are available only for breach of an express warranty. BGB §§ 459-463.

The Convention generally adopts the common-law system of a single, "uniform" breach. Any type of breach gives rise to a cause of action for damages along with the other remedies to which a party may be entitled.[19] This initial similarity between the Convention and common law, although important, should not obscure civil-law influences or lead to the misconception that the common law and Convention are identical on this point. The Convention's system of regulation, in line with German contract law, is more cautious than the common law in permitting avoidance.[20] The Convention provides a more flexible approach to confirming the contract, either by allowing faulty performance to be remedied, or by denying avoidance and compensating merely with damages.[21] A good example of this flexibility is the grace period, or *Nachfrist*, which serves two purposes: to allow a dilatory party more time to perform and to delay avoidance.[22] The categorization of different types of breaches under German law also fulfills these purposes: the contract is confirmed in cases of breach where to do so would not cause great harm to the promisee and the faulty performer is allowed an opportunity to remedy, or must somehow compensate for his faulty performance. Thus, the initial impression that the Convention breach is identical to the common-law breach is not correct. It would be more accurate to say that the Convention approach is based upon a common-law principle of damages for all breaches but tempered with the civil-law characteristic of more flexible remedies.

2. Damages

The common-law concept of damages may also be seen as "uniform." In all cases of breach an award is given to put the innocent party in the position he would have been in had the contract been performed. This compensation includes lost profits or the "benefit of the bargain"

19. Convention, *supra* note 1, art. 45 (seller's breach), art. 61 (buyer's breach).

20. The contract may only be avoided in cases of "fundamental" breach (as defined in *id.* art. 25) or in cases other than fundamental breach, only if a party fails to perform after the lapsing of a grace period; *id.* at art. 49 (for seller's breach), art. 64 (for buyer's breach).

21. *Id.* Examples of the flexible remedies contained in the Convention are: the claim for substitute goods (art. 46(2)); claim for repair of nonconforming goods (art. 46(3)); and a right to reduce the price for nonconforming goods (art. 50).

22. There are actually two types of grace periods provided in the Convention. The first type (from the German *Nachfrist*) applies to both buyer (art. 47) and seller (art. 63). This grace period for a reasonable length of time must be accorded a nonperforming party in cases of nonfundamental breach before the contract may be avoided (art. 49(1)(b) for avoidance by the buyer; art. 64 (1)(b) for avoidance by the seller). In addition, there is a second type of grace period written into the law. According to Article 48, the seller is accorded a right to perform in certain cases even after the date for delivery. *Id.*

plus all other losses arising out of the breach,[23] but is limited by a requirement of foreseeability.[24] As mentioned previously, if the innocent party suffers no losses as a result of the breach, nominal damages will be awarded.[25]

There is no corresponding general theory of damages which applies in all cases of breach in German law. Instead, two major methods of calculating recovery are used depending upon the type of breach involved.[26] The first of these measures corresponds to common-law damages. It seeks to place the injured party in the same economic condition he would have been in had the contract been performed and is called "performance" (*Erfüllungs*) or "positive" interest damages (*positives Interesse*). This measure of damages is the rule in cases of breach where damages are awarded.[27]

The second measure of damages provided for by German law is calculated independently of both lost profits and contract price and is equal to the expenditures the innocent party has made in reliance upon the contract.[28] It therefore seeks to put the nonbreaching party not in the position he would have been in had the contract been performed but rather in the position he was in before he started to negotiate. In order to emphasize the purpose of compensating reliance losses and denial of lost profits, this measure is called negative (*Negatives*) or reliance interest damages (*Vertrauensinteresse*). This measure of damages is awarded less frequently. It is not viewed conceptually as contract damages by German jurists since it is awarded in cases where either the contract is considered void *ab initio*, or where existence of the contract is irrelevant.[29]

23. Robinson v. Harman, 154 Eng. Rep. 365, 367 (1848); Lieberman v. Templar Motors Co., 236 N.Y. 139, 140 N.E. 222 (1923); *see also* TREITEL, *supra* note 7, at 623; CALAMARI & PERILLO, *supra* note 7, at 521; 11 WILLISTON, *supra* note 7, §§ 1338, 1339 (1968).

24. Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

25. *See supra* note 13 and accompanying text. The awarding of nominal damages has merely symbolic value and was created to satisfy the jurist's desire for symmetry, *i.e.*, damages in *all* cases of breach.

26. For a discussion of the further, or "maintenance", damages (*Erhaltungsinteresse*) which are awarded in cases of positive breach of contract, see KOPCKE, TYPEN DER POSITIVEN VERTRAGSVERLETZUNG 133 (1965).

27. It is the more common measure of damages in cases of impossibility (BGB §§ 280, 325) and is awarded in cases of delay (BGB § 326), breach of express warranty (BGB § 463) and in certain cases of positive breach of contract. BGH NJW 1969, 975; MEDICUS, BURGERLICHES RECHT, § 14 IV 2 (1981).

28. For further discussion of this measure of damages, see BGB § 122 (for cases of rectification (*Anfechtung*)) and BGB § 307 (for cases of initial objective impossibility). This measure of damages is also awarded in cases of *culpa in contrahendo*. 1 LARENZ, LEHRBUCH DES SCHULDRECHTS, § 9 I 3 (12th ed. 1979).

29. The contract is considered void *ab initio* both in cases of initial objective impossibility

This negative interest may be awarded in certain impossibility fact patterns where Anglo-American law would award damages and is therefore relevant to this analysis.

The Convention's general provision for damages is contained in Article 82. There is only one measure of damages which corresponds to common-law damages and civil-law positive interest damages.[30] Article 82 provides that damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the losses foreseeable to the breaching party at the time the contract was entered into, in light of the facts and circumstances which the breaching party then knew or ought to have known.

III. THE LAW OF IMPOSSIBILITY

As was seen above, the civil- and common-law systems of regulation are conceptually very different. This civil law/common law disparity is also apparent in the civil- and common-law impossibility doctrines. At first glance, the civil-law lawyer appears to analyze cases by classifying them according to various criteria which appear superfluous to the common-law lawyer. On the other hand, the common-law lawyer seems to have renounced all attempts to analyze and, so it would seem to the civil-law lawyer, merely produces a result (*i.e.*, liable or not liable) without analytical guidelines. Both would be precipitous in their judgments of the other's system.

A. Scope of the Law

The role of the doctrine of impossibility in both the civil and the common law must be examined to fully understand the synthesizing task the Convention drafters faced. Analysis must not be limited to an examination of the individual provisions dealing with impossibility without first looking at the broader perspective, because the two systems of regulation begin from different starting points.

(BGB § 306) and in cases of rectification (BGB § 119). In cases of *culpa in contrahendo*, whether a contract actually arises out of the precontractual dealings is irrelevant to the cause of action or the calculation of damages.

30. The measure of "negative damages" was specifically rejected in the formulation of the predecessor of the Convention, the Hague Law; *see* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 463. Since according to the Convention formulation damages are based upon "loss," nominal damages are apparently not available.

1. Civil-Law Impossibility: The German Example

Under the German approach, the first determination upon breach is whether performance is still physically possible for the promisor. If so, a case of "delay" is presented and specific performance will be available. Costs caused by the delay will be reimbursed,[31] or if performance is no longer valuable to the innocent party due to the delay, damages will be awarded.[32] The civil-law doctrine of "impossibility"[33] deals with those cases of breach where performance is no longer physically possible for the promisor, *i.e.*, where the primary claim for specific performance would be meaningless.[34] The scope of this doctrine is thus much broader than its common-law counterpart. Perhaps to the surprise of a common-law lawyer, the following examples would all fall under the civil-law doctrine of impossibility.

Example 1

Seller (*S*) sells identified goods to Buyer (*B*), which are in transport at the time of contracting. Unknown to either party, the ship upon which the goods were loaded sank without a trace the day before contracting. *S* is unable to deliver the promised goods and breaches his contract with *B*. A suit against *S* for specific performance would be meaningless.

Example 2

S sells a car to *B* which he has not yet bought from the true owner *T*. When *S* approaches *T* to buy the car, it turns out that *T* is not interested in selling at any price. *S* is unable to deliver the promised car and breaches his contract with *B*. A suit for specific performance against *S* would be meaningless.

Example 3

S sells his car to *B*, to be delivered in the future. Two days before deliv-

31. BGB § 286(1). These damages are analogous to those awarded for positive breach of contract; *see supra* note 27.

32. BGB §§ 286(2), 326(2).

33. German law actually recognizes two terms: ***Unmöglichkeit*** and ***Unvermögen***. These have been translated in this paper as objective and subjective impossibility respectively.

34. Specific performance plays a much larger conceptual role in German law. In cases of breach, the law does not immediately turn to substitutional remedies, such as damages, but has recourse first to a claim for performance. Contrary to common law, specific performance is not an exceptional remedy, and is generally available to a nonbreaching party unless performance is impossible. This is based upon the Roman law principle that the law does not require performance of the impossible, *impossibilium nulla est obligato*. For an excellent comparative legal treatment of specific performance, see ZWEIGERT & KOTZ, *supra* note 17, at 162-168.

ery, *S* receives a better offer for the car, and sells and delivers the same car to *C*. *S* is unable to deliver the promised car to *B* and thereby breaches his contract with *B*. A suit for specific performance against *S* would be meaningless.

2. Common-Law Impossibility

The doctrine of impossibility is applied in far fewer cases in Anglo-American systems. As in the civil law, performance must be physically impossible for the nonperforming party. Additionally, the nonperforming party must not have been in any way involved in the circumstances causing the impossibility; such events must have been beyond the control of the nonperforming party. This "control" facet of common-law impossibility is not expressly emphasized in common-law analysis. It is generally not considered as one of the prerequisites for application of the impossibility doctrine.[35] Nonetheless, it is an inherent requirement. Where events causing impossibility were within the control of the nonperforming party, the impossibility doctrine will not be applied and the party will remain liable.[36] Thus, a party is liable for any event which was within his control. The requirement that the impossibility be caused by outside forces is made clear from the traditional labels of common-law impossibility: *force majeure* and acts of God.

Additionally, common-law impossibility is present only when it is shown that the nonperforming party did not expressly or implicitly agree to assume the risk of impossibility caused by outside forces.[37] The more restrictive scope of common-law impossibility also fails to include any case where performance was impossible at the time of contracting, despite the fact that such impossibility was beyond the control and not within the scope of the risks assumed by the nonperforming party. Such situations are governed by the common-law doctrine of mistake.[38]

35. *See, e.g.,* CALAMARI & PERILLO, *supra* note 7, at 478. Perhaps it would be better to say that the questions presented are: (1) Was there an unexpected event? (2) Did that event make performance impossible or impracticable? (3) Upon whom should the risk of the unexpected contingency be visited?

36. This may be labelled "self-induced frustration," Bank Line Ltd. v. Arthur Capel & Co., 1919 A.C. 435, 452. Or damages may be denied on the basis of considerations of justice. CALAMARI & PERILLO, *supra* note 7, at 501. This principle is discussed in Williston under the title of "fault." What is truly important is that the promisor himself shall be free from fault. On the other hand, impossibility because of an act of God will not necessarily excuse performance since there may be an agreed assumption of risk. 18 WILLISTON, *supra* note 7, § 1936 (1978).

37. Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47, 50 (1944); *see generally* TREITEL, *supra* note 7, at 593; 18 WILLISTON, *supra* note 7, §§ 1934, 1972A (1978).

38. For a general discussion of the doctrine of mistake, see CALAMARI & PERILLO, *supra*

In comparing the scopes of the civil- and common-law impossibility doctrines, all three of the civil-law examples given above fall outside the scope of the common-law doctrine. The first example is the classic mistake case. The second and third examples would not be considered examples of impossibility, for in both cases the events causing the impossibility were within the control of the nonperforming party. Although the civil and common law differ in scope, the results of their application are roughly the same. While German law applies its doctrine of impossibility in many more cases, application of the impossibility doctrine does not necessarily relieve a party of liability. The common-law doctrine is applied more restrictively but relieves liability in all cases.

3. Convention Impossibility

The Convention deals with impossibility in Article 79, entitled "Exemptions." Article 79 provides that a party is not liable for a failure to perform contractual obligations if he or she can prove that the failure was due to an impediment beyond his or her control *and* that he or she could not reasonably be expected either to have taken the impediment into account at the time of contracting or to have avoided its consequences. The scope of the new provision more closely resembles common-law impossibility. Its application is limited to cases where nonperformance is due to an impediment "beyond the control" of the nonperforming party and where the impediment was not within the scope of the party's assumed risks. In contrast to the common law, the control aspect is express and emphasized in the Convention.

In the civil-law examples cited earlier, the Convention, like the common law, would apply neither to a case where a seller enters into two contracts for the sale of the same car (Example 3), nor to a case where the seller sells a car which he or she only hopes to acquire but does not yet own (Example 2). In each of these cases, not only is the impediment within the seller's control but the seller could also have been expected to have taken the impediment into account or to have avoided it.

The Convention, like the civil law, applies to cases where the impediment existed at the time of conclusion of the contract (*i.e.*, common-law cases of mistake). This was made clear in the drafting reports on Article

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note 7, at 299-311, 498-499; RESTATEMENT (FIRST) OF CONTRACTS § 502 (1932). This conceptual difference between initial "mistake" and subsequent "impossibility" has been abandoned by the Second Restatement. RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 266 (1981).

79, and in the official commentary.[39] Also, like the civil law, Article 79 is applicable in cases of defects in goods and cases of partial impossibility.[40] Thus, the Convention combines aspects of both common- and civil-law impossibility in one uniform regulation and is a compromise between the common and the civil law. The regulation includes within its scope more cases than at common law but fewer than at civil law.

B. Approach of the Impossibility Laws

As discussed above, German law applies the impossibility doctrine in all cases of breach where the party owing performance is unable to perform. In such cases, German law conclusively presumes that the promisee's claim for specific performance is extinguished.[41] German law then examines a variety of factors to determine whether the nonperforming party should remain liable for the breach. These factors include the following:

1. Initial or Subsequent Impossibility

Was performance of the contract impossible at the time the parties contracted to perform? Since a party is better able to guarantee his present capability to perform than his future capability,[42] a nonperforming party is held to stricter liability in cases of initial impossibility.

2. Subjective or Objective Impossibility

Would performance be impossible for anyone or is it impossible only

39. Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, U. N. Doc. A/CONF.97/5, art. 65, Nr.4 (1980).

40. On the question of defects in goods, see Kirchhof, Die Sachmängelhaftung nach deutschem recht im Vergleich zur Haftung für vertragswidrige Sachen nach dem Einheitlichen Gesetz über den internationalen Kauf beweglicher Sachen 275-277 (Munich 1970, unpublished dissertation); SWIEGERT & KOTZ, *supra* note 17, at 219; KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 440 (these sources discuss the Hague Law, but their remarks are also pertinent to the Convention). On the question of partial impossibility, see Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 234-6 (1979) (discussing both the Hague Law and the Convention).

41. In cases of initial subjective impossibility, there is no claim for specific performance since the contract is void *ab initio* (BGBl § 306l). For cases of subsequent impossibility without fault, the primary claim for specific performance is expressly extinguished (BGB § 275). In other cases, the claim is extinguished through logical analysis of the impossibility doctrine along with the application of the Roman law principle of *impossibilium nulla est obligato*. BGH NJW 1971, 2065; FIKENTSCHER, SCHULDRECHT, § 44(II)(2a) (6th ed. 1976).

42. *See* MEDICUS, *supra* note 27, at § 14 I, Nr. 285; BURGERLICHES GESETZBUCH [BGB] art. 306, annot. 31 (Palandt, 11th ed. 1967) [hereinafter cited as Palandt]; 2 MOTIVE ZUM BGB, at 45, 46 (1888).

for the nonperforming party?[43] If a party contracts to sell his original Picasso and it is destroyed, for example, performance is objectively impossible since no one on Earth could deliver the painting. A party who sells his car twice (as in Example 3), or who sells a car he does not yet own (as in Example 2), is only subjectively prevented from performing since the parties with title to the cars at the time of delivery would be able to perform. A nonperforming party is held to a higher standard of liability in cases where performance is still humanly possible.

3. Fault of the Nonperforming Party

Who is responsible for the impossibility? Did an act or omission of the nonperforming party cause the impossibility, did the other party to the contract prevent performance or was neither party responsible? Generally, a party is liable only for his or her own acts or omissions. This concept has been called the "fault" principle (*Verschuldensprinzip*) of German law and it is usually pointed to as the greatest conceptual difference in the frameworks of the common- and civil-law approaches to breaches. Civil law requires that the nonperforming party be somehow "responsible" for a breach before it will impose damages. According to the general civil-law view, a party will be held liable for all intentional and negligent acts.[44] There are, however, liability-expanding provisons in the German Civil Code which create absolute liability in special cases.[45] German case law also infers absolute or "guaranty" liability in some cases such as cases of initial subjective impossibility. Finally, a party will be liable in all cases where he expressly agreed to remain liable. This is the case, for example, when a party agrees to deliver goods to a region despite a war waging in that region.[46]

43. *See* BROX, 1 ALLGEMEINES SCHULDRECHT, Nrs. 225, 228 (9th ed. 1981); MEDICUS, *supra* note 27, at § 13 I 1a, aa; Palandt, *supra* note 42, at art. 275 annot. 2; FIKENTSCHER, *supra* note 41, at § 42 IV 1 a. For a discussion of the objective/subjective factor in common law, see CALAMARI & PERILLO, *supra* note 7, at 497-98; 18 WILLISTON, *supra* note 7, § 1932 (1978); Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647).

44. BGB § 276.

45. Examples of such provisions are BGB § 278 (expanding liability for third parties engaged to assist in performance of the contract); BGB § 279 (for cases of unidentified goods); BGB § 287 (for cases when impossibility occurs after a party was already in breach); BGB § 459 (warranty liability for goods).

46. *See generally* KOLLER, DIE RISIKOZURECHNUNG BEI VERTRAGSSTORUNGEN IN AUSTAUSCHVERTRAGEN (1979); *see also* ZWEIGERT & KOTZ, *supra* note 17, at 191.

C. Regulation of Impossibility

1. Civil-Law Approach

In civil-law cases of initial impossibility (common-law mistake), two legal conclusions are possible. If performance is objectively impossible for this nonperforming party, *e.g.* if the goods to be sold have already been destroyed, the contract is void *ab initio*.[47] If the nonperforming party knew or should have known of the impossibility at the time of contracting, he or she will be liable for negative interest damages.[48] In cases where the initial impossibility is subjective, the nonperforming party will be liable for damages *in every case*, regardless of fault.[49] Thus, guaranty liability for contractual performance is not unknown to German law.

For cases of subsequent impossibility, the distinction between subjective and objective is no longer material; both will be treated similarly.[50] In that situation, however, the question of fault plays a role. The nonperforming party is liable for damages only when he or she is responsible for the impossibility.[51] The nonperforming party is responsible for the impossibility when the impossibility is caused by his or her intentional or negligent conduct or when liability is increased by another provision of the Civil Code. An example of a liability-expanding provision is Article 279 of the *BGB*, which states that a party who is obliged to supply unidentified or generic goods under a contract will be responsible for any impossibility, regardless of fault.[52] In cases of subsequent impossibility, where the nonperforming party is not at fault, and no provision creating absolute liability is applicable, the nonperforming party will not be liable for damages for his nonperformance.[53]

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47. BGB § 306.

48. BGB § 307. This requirement of "knew or must have known" is similar to the fault requirement for subsequent impossibility.

49. The case of initial subjective impossibility is not expressly covered in the BGB. Doctrine in this area has been developed by decision and legal commentary: Judgment of Oct. 21, 1908, Reichsgericht, Republic of Germany, 69 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 355; Judgment of Sept. 26, 1908, Reichsgericht, Republic of Germany, 60 RGZ 247, 250; Judgment of Dec. 16, 1952, Bundesgerichtshof, Republic of Germany, 8 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 222, 231; Judgment of Oct. 28, 1953, Bundesgerichtshof, Republic of Germany, 11 BGHZ 16, 22; Palandt, *supra* note 42, at art. 306 annot. 3; MEDICUS, *supra* note 27, at § 14 I 1; FIKENTSCHER, *supra* note 41, at § 43 III 4.

50. BGB § 275(2).

51. BGB §§ 280, 325.

52. For a list of other examples, see *supra* note 45.

53. BGB §§ 323, 324.

2. Common-Law Approach

Comparative law specialists, in examining the civil-law approach to cases of impossibility and to contractual liability in general, have focused on one aspect which distinguishes and characterizes the civil-law approach: the element of fault. In contrast, common-law contract liability is characterized as "guaranty" liability.[54] Fault generally plays no role here; the only limitations on this guaranty liability are the outer limits of the risks deemed to have been undertaken by the parties upon contracting.[55] The question then is whether the nonperforming party assumed the risk of the impediment occurring. If no express intent is shown, implied intent must be inferred for liability to attach.[56]

Upon a finding of impossibility, the civil-law lawyer questions whether the nonperforming party was somehow at fault through his own act or omission. The common-law lawyer, on the other hand, examines the express or implied intent of the parties at the time of contracting: when party *A* promised to perform, did the parties mean for *A* to bear the risk that the impediment in question would occur? Examining the various elements of the civil law and common law in detail, the two systems are not as divergent as they appear at first glance and may be reconciled to some extent.

First, common-law impossibility is not devoid of the element of fault. As was briefly outlined above, there is an implied requirement in the common law that the promisor not be responsible for the event which makes performance impossible if the promisor is to escape liability. That is, the promisor will not be excused from guaranty liability unless the impossibility was beyond his or her control. This control element of common-law impossibility performs the same function as the German fault concept. For example, where a seller is prevented from supplying goods sold due to the destruction of the goods through the seller's own

54. *See* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 439-40; ZWEIGERT & KOTZ, *supra* note 17, at 217; SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 95 (1981).

55. *See* CALAMARI & PERILLO, *supra* note 7, at 476; 6 CORBIN, CORBIN ON CONTRACTS §§ 1320-72 (1962). The RESTATEMENT (SECOND) OF CONTRACTS bases its doctrine on a formulation borrowed from U.C.C. § 2-615 that the nonoccurrence of the impediment was a "basic assumption on which the contract was made." RESTATEMENT (SECOND) OF CONTRACTS §§ 261-266 (1981). This determination, however, is also based upon "a judgment as to which party assumed the risk of its occurrence." *Id.* at 311.

56. In the original impossibility case, this was done by finding an implied term in the contract. Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863). In the United States this method has been abandoned, and the risk will generally be imposed by law; *see* CALAMARI & PERILLO, *supra* note 7, at 499; 18 WILLISTON, *supra* note 7, § 1931 (1978).

willful or negligent act, German law would view this as a case of impossibility with fault, resulting in liability for damages. Anglo-American law would not apply the impossibility doctrine to such cases because the impossibility was self-induced. Therefore, guaranty liability attaches, no excuse is available and damages would be due. The fault element of German civil law is thus contained in the common-law "control" factor.

Not only are there elements of fault inherent in the common-law system, but guaranty and scope-of-risk elements are also found in the German system. As discussed above, in cases of initial subjective impossibility, liability for damages is owed regardless of fault. In such cases, German law provides for guaranty liability. Guaranty elements are also provided in the liability-expanding provisions of the Civil Code. For example, when a promisor is unable to perform due to his own insolvency or when he is unable to deliver generic unidentified goods, guaranty liability prevails.

Scope-of-risk reasoning is also not totally foreign to the civil law. One facet of the principle of freedom of contract is the ability of a party to assume risks. By expressly doing so, the party can expand liability beyond the normal fault liability. That is, the party can agree to remain accountable for events outside of that party's control. This may be done by express agreement or by implied assumption of risk. Thus, where a party is not strictly at fault for nonperformance, he or she may still be responsible due to an assumption of the risk according to German legal reasoning.[57] Assumption of risk reasoning has often been applied in cases where the promisee is responsible for the promisor's nonperformance. Express scope-of-risk language (*Risikosphäre* or *Risikoübernahme*) has been employed to expand liability beyond normal fault borders.[58]

The strict conceptual demarcation between civil-law fault liability and common-law guaranty plus scope-of-risk liability is thus not as distinct as it would initially appear. The civil law contains elements of guaranty liability in cases of subjective initial impossibility or in cases where absolute liability provisions of the Civil Code apply. There are also cases where liability will be expanded by a scope-of-risk approach. The fault principle is not exclusively a civil-law element but it is also built into the common-law approach. When a party is unable to perform due to his own act or omission (*i.e.*, fault), such impossibility will be considered to be within his or her control and liability will attach.

57. *See* Nachschlagewerk des Bundesgerichtshofs [BGH LM] Nr.8 at § 325; BGH NJW 720 (1960).

58. BGH LM Nr.1 at § 324; Palandt, *supra* note 42, at § 25 III.; ESSER, 2 ALLGEMEINES SCHULDRECHT, § 34 III 2 (5th ed. 1976); MEDICUS, *supra* note 27, at § 13 III, Nr.269.

3. United Nations Convention

The Convention is based upon the more general common-law regulation.[59] It consists of a formula equivalent to an assumption of risk element. In addition, the formulation also contains an express control element. According to the language of Article 79, in order for a nonperforming party to be relieved of liability for damages, that party must show that:

1) the impediment was beyond his or her control;

2) he or she could not have been expected to take the impediment into account;

3) he or she could not have been expected to avoid the impediment or its consequences; and

4) he or she could not have been expected to overcome the impediment or its consequences.

The concepts of civil-law fault and common-law control are incorporated in the first requirement of Article 79. German law would find legal fault in cases of intentional or negligent behavior. In such cases, the impediment will not be beyond the party's control according to Article 79. The second, third and fourth requirements of Article 79 are tests for assumption of risk, which although characterized as a common-law concept, is present in both common- and civil-law systems.

As with the common-law approach, the Convention does not address the timing, subjectivity or objectivity of the impossibility. Upon more thorough examination, however, these considerations are all implied by the wording of the paragraph; and application of common, civil or Convention law will generally produce the same result.

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59. *See* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 217; Weitnauer, *supra* note 9, at 112. These sources discuss the predecessor of Article 79, namely Article 74 of the Hague Law. The formulation of the two provisions, however, is nearly identical, and the remarks cited are applicable likewise to the Convention. It is interesting to note that one writer (and delegate to the United Nations Convention) finds the formulation of the two laws to be based upon the civil-law concept of fault. *See* Nicholas, *supra* note 40, at 233-34. This seems due to a misunderstanding of the idea of fault at civil law, and a misreading of his cited authority. Whereas he cites Stoll's contribution to the KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, in support of his statement that the Hague Law is based upon civil-law concepts, Nicholas, *supra* note 40, at 233, Stoll's analysis states just the opposite:

"b) *Strong influence of English Law.* In conformity with the avowal of *Rabel*, the solution of Art. 74 is closest to the legal concepts of English Law."

"Article 74, as to its theoretical conception, is closer to foreign law — in particular English law — than to German law, which proceeds from a principle of fault in cases of breach (BGB § 276) and distinguishes between legal types of breach (impossibility, delay)." KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 442.

For example, no specific mention is made of initial impossibility in the Convention language. As discussed above, German law holds a party to a higher degree of liability for his present capability to perform than for his future capability. This policy is found in the second requirement of Article 79. A party cannot have been expected to take the impossibility-causing impediment into account. A party will be expected to take an initial impediment (*e.g.* the sinking of the ship laden with the goods) "into account" more than a future impediment. A further example of German subjective impossibility that will be covered by the first, second and third requirements of the Convention is a situation where a party sells a car not yet acquired or sells a car which the seller no longer owns since it has been sold to another. The sale of a car not yet owned is an avoidable impediment and the seller will be liable for damages under the Convention.

IV. CONCLUSION

The respective provisions of civil and common law concerning impossibility seem irreconcilable at first glance. This impression is misleading. While the many elements employed in an analysis of impossibility under a civil-law approach (as exemplified by the German system) are not expressly mentioned in the common law, the policies underlying the civil-law elements are considered.

Common law begins with an assumption of guaranty liability, with damages for all cases of breach. This guaranty concept also prevails in various situations in German law where absolute liability is provided. It was also made part of the Convention. Common-law analysis does not expressly include the German fault concept. Nonetheless, through the common-law requirement that impossibility not be induced by a party's own act or omission, this fault element is present in common law. The Convention expressly includes this concept in its requirement that an impediment be beyond a party's control. Although always labelled a common-law consideration, assumption of risk reasoning is present in German law. This concept is also the backbone of Article 79 of the Convention.

In terms of its scope, the Convention law has adopted characteristics of both systems. While initially it appears that the provision is applied in accordance with the common-law approach, the Convention actually regulates a broader field of cases, including within its bounds, for example, the common-law doctrine of mistake. It also applies in cases of defects in goods and partial impossibility. The Convention

would satisfy the sense of justice of both the common- and the civil-law jurist. In general, civil-law cases of impossibility with fault give rise to claims for damages whereas cases without fault do not. At common law, if responsibility factors similar to fault are present, legal impossibility does not exist, and absolute liability for damages attaches. Application of the Convention will result in similar conclusions.[60]

The Convention, with its general formulation, may be interpreted slightly differently in Germany than in England or the United States due to the above-described methodological predispositions with which lawyers from each system view contract liability. Thus, in examining whether a party could have been expected to take an impediment into account, a jurist schooled in fault liability may be more likely to excuse nonperformance than a jurist schooled in guaranty liability. This may be seen as a disadvantage to those concerned with achieving absolute uniformity in the formulation and application of law. From a pragmatic point of view, however, some room for interpretation is necessary for any uniform law to be acceptable to, and to correspond with, the concepts of justice embodied in each individual system.

60. The measure of damages accorded by German law may differ from that of the Convention and common law due to the fact that the civil law awards different categories of damages. However, most jurists agree that application of German and Convention Law will produce similar results. *See, e.g.*, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT, *supra* note 2, at 442; ZWEIGERT AND KOTZ, *supra* note 17, at 217; STOTTER, INTERNATIONALES EINHEITS-KAUFRECHT 342 (1975) (once again, sources discuss Hague Law, but remarks are applicable to the Convention as well).