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Article III.3:302 DCFR on the Right to Enforced Performance of Non-monetary Obligations: An Improvement – Albeit Imperfect – Compared with Article 9:102 PECL

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ABSTRACT: The Draft Common Frame of Reference (DCFR, Interim Outline Edition 2008) contains a provision concerning the right to enforced performance of non-monetary obligations (Article III.3:302 DCFR). This provision is the successor of Article 9:102 of the Principles of European Contract Law (PECL) and it is quite different. The leading question in this article concerns whether the DCFR provision on the right to enforced performance is an improvement compared with that of the PECL, in the sense that it meets the objections raised by the author against the PECL provision. First, the content of Article 9:102 PECL provision will be outlined briefly. Second, the PECL provision will be evaluated, and three objections will be raised against it; one concerns the terminology used in the provision, the second concerns the absence of a link with procedural law, and the third concerns the substance of the provision as a somewhat unfortunate compromise. Third, the question of whether the new DCFR provision eliminates the objections will be answered. The conclusion is that the DCFR provision is an improvement compared with that of the PECL. However, on a terminological level, the author suggests a few modifications. Furthermore, the author criticizes the apparent lack of attention for procedural law.

ZUSAMMENFASSUNG: Der *Draft Common Frame of Reference* (DCFR, Interim Outline Edition 2008) enthält eine Bestimmung über das Recht, die Erfüllung eines nicht auf eine Geldforderung gerichteten Anspruchs zu erzwingen (Artikel III.3:302 DCFR). Diese Vorschrift ist der Nachfolger von Artikel 9:102 PECL und enthält durchaus Unterschiede. Die entscheidende Frage dieses Beitrags ist, ob die in der DCFR enthaltene Bestimmung über das Recht, der Erfüllung zu erzwingen, im Vergleich zu der Bestimmung der PECL eine Verbesserung der Rechtslage dahingehend darstellt, dass sie die durch den Verfasser gegen die Vorschrift der PECL geäußerten wegräumt. Aus diesem Grund erfolgt zum ersten eine Darstellung des Artikels 9:102 PECL. Zum zweiten wird eine Beurteilung der PECL Vorschrift vorgenommen, und es werden drei Kritikpunkte gegen diese Bestimmung geäußert, wobei der erste die in dieser Vorschrift verwendete Terminologie, der zweite die mangelnde Verbindung zum Verfahrensrecht und der dritte den Inhalt dieser Norm betrifft, der als ein etwas unglücklicher Kompromiss angesehen werden kann. Zum Dritten wird die Frage beantwortet, ob die neue, in der DCFR enthaltene Bestimmung die Kritikpunkte ausräumen kann. Die Schlussfolgerung dieses Beitrags ist, dass die in der DCFR enthaltene Bestimmung im Vergleich zu der Vorschrift der PECL eine Verbesserung darstellt. Allerdings stellt der Verfasser im Hinblick auf einige Begrifflichkeiten einige Änderungsvorschläge vor. Darüber hinaus bemängelt der Verfasser die fehlende Abstimmung mit dem Verfahrensrecht.

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1. Introduction

Many contracts create obligations between parties, and an obligation means that one party (the debtor) is bound to perform a certain act or deed. The other party (the creditor) may expect performance from the debtor and in fact to this end *relies* upon the contract. The expectations raised by and the reliance upon the contract should materialize in a sanction in favour of the creditor, if the debtor does not perform voluntarily in time. Otherwise, the contract would have no value as a legal instrument to show a binding agreement between parties.

Over time, many civil law jurisdictions on the European continent have adopted a right-based approach. In other words, the creditor has a right to enforce performance of the contractual obligation, and this right is considered as a natural consequence of an important principle underlying contract law in civil law jurisdictions: *pacta sunt servanda*. In principle, the creditor can invoke the right at any time from the moment the obligation is due. Normally, the creditor will only explicitly invoke the right to enforced performance if the debtor commits a breach of contract. According to the civil law approach, the creditor can then rely on his right to enforced performance. The imputability of the breach of contract is not relevant for a successful claim, as performance is a primary, contractual *right* and not a *remedy*.

According to common law – in Europe, it is mainly English law – a creditor does not have an automatic right to enforced performance. On the contrary, enforced performance – or specific performance, as the common law lawyer would say – is a *secondary remedy* issued by the court if the creditor has requested the court to order specific performance of the obligation. In theory, only in a limited number of cases will the court order specific performance. However, the creditor has a right to claim damages instead of performance. Damages are available as of right: breach of contract need not be imputable to claim damages.

This fundamental theoretical difference between common and civil laws has created a challenge in formulating a provision in the Principles of European Contract Law (PECL) on the issue of enforced performance of the contract. The result was laid down in Article 9:102 PECL on enforced performance of non-monetary obligations, and this provision could be seen as a convergent compromise between the two approaches. The starting point is the civil law approach, that is, the creditor is granted a right to performance, but the provision is considerably influenced by the common law approach. The most important example is that performance cannot be claimed if the creditor can reasonably obtain performance of the obligation from another source. Furthermore, the common law term *specific performance* has been used in Article 9:102 PECL.

A first edition of the Draft Common Frame of Reference (DCFR) has been issued in 2008, and this document also contains a provision concerning the right to enforced performance (Article III.3:302 DCFR). This provision is the successor

of Article 9:102 PECL and it is quite different.[1] The leading question in this article concerns whether the DCFR provision is an improvement compared with that of the PECL, in the sense that it meets the objections raised against the PECL provision.

First, the content of Article 9:102 PECL provision will be outlined briefly. Second, the PECL provision will be evaluated, and three objections will be raised against it; one concerns the terminology used in the provision, the second concerns the absence of a link with procedural law, and the third concerns the substance of the compromise. Third, the question of whether the new DCFR provision eliminates the objections will be answered. After this exercise, a conclusion will be drawn as to whether the DCFR provision is an improvement compared with that of the PECL.[2]

2. Structure of Article 9:102 PECL

2.1 Objectives of the PECL

First of all, when the success of Article 9:102 PECL is assessed the reader should keep in mind the objectives of the PECL. It is impossible and unfair to evaluate the quality of a provision without taking into account its conceptual background. It is, for example, possible to conclude that Article 9:102 PECL is not a useful provision to refer to in a consumer contract. However, this statement would lack any relevance if Article 9:102 PECL had never been construed to be referred to in consumer contracts but

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[1] C. von Bar, E. Clive & H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law (DCFR Interim Outline Edition 2008)* (Munich: Sellier European Law Publishers, 2008), <www.storme.be/DCFRInterim.html>. The final outline edition of the DCFR has been published in February 2009: C. von Bar, E. Clive, & H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law (DCFR Outline Edition 2009)* (Munich: Sellier European Law Publishers, 2009), <www.webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf>. The provisions relevant for this article have not been changed in the final outline edition. The term 'successor' is in my opinion in accordance with the intention of the drafters: 'In Books II and III the DCFR contains many rules derived from the PECL. (…) However, the PECL could not simply be incorporated as they stood. Deviations were unavoidable (…)'. Introduction, 30.

[2] Since the publication of the DCFR (Interim Outline Edition 2008), several books and articles have been published. These contributions are mainly (not all of them) concerned with general questions about the function, purpose, and future of the Common Frame of Reference (CFR). See, e.g., (not exhaustive), R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (Munich: Sellier European Law Publishers, 2008); R. Schulze, & T. Wilhelmsson, 'From the Draft Common Frame of Reference towards European Contract Law Rules', *European Review of Contract Law* 4, no.2 (2008): 154, 168; C. Mak, 'The Constitution of a Common Frame of Reference for European Contract Law', *ERCL* 4, no.4 (2008): 553, 565; H. Eidenmüller et al., 'The Common Frame of Reference for European Private Law', *Oxford Journal of Legal Studies* 28, no.4 (2008): 659, 708; J.M. Smits, 'The Draft Common Frame of Reference (CFR) for a European Private Law: Fit for Purpose?', *Maastricht Journal of European and Comparative Law* 15, no.2 (2008): 145, 148; nearly all contributions are dedicated to the DCFR in the following issues of legal journals: ERCL (2008), 3 and the *Juridica International* (2008), I; I will of course refer directly to relevant publications for this contribution in footnotes if necessary.

only in contracts between professional, commercial parties. According to the Lando Commission, the PECL have both immediate and long-term objectives.[3] Whether at the national or the European level, they are available for immediate use by parties making contracts, by courts and arbitrators in deciding contract disputes, and by legislators in drafting contract rules. Considering the long-term objective, the PECL aim to support the harmonization of general contract law within the European Union.[4] These goals vary widely and are quite ambitious. However, it should be taken into account that the PECL are a set of *academic* principles. They are not binding and they have not provided any case law, since no jurisdiction is bound by them.

2.2 Article 9:102 PECL: Scope, Main Rule, and Exceptions

Article 9:102 PECL deals with the right to enforced performance of non-monetary contractual obligations. The right to performance of monetary obligations – that is, the right to receive payment of a sum of money – is dealt with in Article 9:101 PECL, which is beyond the scope of this article.

Article 9:102. Non-monetary obligations:

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
(2) Specific performance cannot, however, be obtained where:
  (a) performance would be unlawful or impossible; or
  (b) performance would cause the obligor unreasonable effort or expense; or
  (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or
  (d) the aggrieved party may reasonably obtain performance from another source.
(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

The commentaries accompanying the PECL are absolutely clear about the primary meaning of this provision:

> The aggrieved party has not only a substantive right to demand the other party's performance as spelt out in the contract. The aggrieved party has also a remedy to enforce this right, e.g. by applying for an order or decision of the court.[5]

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[3] O. Lando & H. Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague: Kluwer Law International, 2000), xxiv.
[4] *Ibid.*, xxiv.
[5] *Ibid.*, 394.

The Lando Commission has clearly chosen to adopt the continental approach. Enforced performance is available to the creditor as of right. Nevertheless, it is remarkable that the term to circumscribe this right is derived from the common law, that is, *specific performance*. The reason given is that there is no better, generally understood term.[6] The validity of this choice will be discussed below.

In principle, the creditor has a right to enforced performance according to Article 9:102 PECL, but, as in other continental systems, the right is not absolute and is limited by several exceptions. Article 9:102, section 2 PECL acknowledges four of these.[7] Therefore, it seems that the PECL has chosen to adopt the continental approach completely. A further indication is that the comments on Article 9:102 PECL explicitly state that granting an order for performance is not at the discretion of the court and that national courts should grant performance even in cases where they are not accustomed to do so under their national law.[8] However, the discrepancy between the civil and common law approaches is acknowledged.[9] Moreover, by screening the exceptions in greater detail, the uncertainty of the content and scope of the different exceptions might entail that the common law approach to enforced performance as a remedy is definitely not abandoned.

According to the first exception of Article 9:102 PECL, specific performance cannot be obtained where performance would be unlawful or impossible. This exception seems comprehensive, but, as the comments suggest, the question arises as to what exactly the term *impossible* means.[10] Special attention is given to this in the following paragraphs.

The second exception comprises the same problems, but the possibility of misunderstanding seems to be smaller. According to Article 9:102 PECL, performance cannot be required if it were to involve the non-performing party in unreasonable effort or expense.[11] The exact meaning of *unreasonable* is the main problem here, as the commentaries also acknowledge; they suggest an extremely limited application of this exception. In any event, it is out of the question for the court to apply the *iustum pretium* rule on the basis of this exception. In other words, a low contract price as such can never be sufficient to rely on unreasonable effort or expense. The exception is largely incorporated to circumvent discussions of theoretical possibility. For example, the needle in the haystack can theoretically be found, but the effort and

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6 *Ibid.*, 394.

7 Furthermore, Art. 9:102, section 3 PECL stipulates a duty to complain within a reasonable time. However, this particular aspect does not fall within the scope of this article and will not specifically be dealt with.

8 Lando & Beale, n. 3 above, 396.

9 *Ibid.*, 395.

10 *Ibid.*, 396.

11 *Ibid.*, 396.

the costs incurred are unreasonable. The illustrations mentioned in the comments underline the small likelihood of occurrence.

The third exception in Article 9:102 PECL excludes the possibility of claiming performance if performance means the provision of services or work of a personal character or if it depends upon a personal relationship. This provision contains a double exception for two widely diverse situations. The first part of the exception covers the case of the obligation that depends on a personal effort by the debtor. If the obligation can only be performed by the debtor, it cannot specifically be enforced. First, personal liberty would be interfered with, and second, a satisfactory performance can never be guaranteed if performance is not voluntary. The third exception is slightly confusing with regard to the formulation, as it is not clear whether a labour contract as such is covered by this exception. Can a labour contract as a whole be considered a 'provision of services' or does the exception require a more detailed evaluation of the content of the contract to assess the possibility to claim specific performance? In German as well as in Dutch law, this distinction is quite subtle.[12] The comments suggest the possibility of general enforceability of a labour contract, as long as services or work that may be or could be delegated are concerned. However, the procedural consequences are not clear, because the PECL do not deal with rules of procedure. It is therefore not certain whether a claim for performance of a labour contract that does not require personal services can be accompanied by an order for a periodic penalty payment. This is a highly relevant element, because lack of such a possibility effectively obstructs the practicality of invoking the right to performance.

The second group of cases the provision wants to exclude is one where a personal relationship – for example, between a doctor and a patient or between a lawyer and his client – underlies the contract. According to the comments, such a contract cannot be subject to enforcement, because the personal nature of such a relationship can only exist if both parties cooperate sincerely.[13] The comments suggest that a negative obligation can also be subject to this exception if this obligation amounts to enforced action. The most frequently used example is the non-competition clause, which cannot be enforced if it is too far-reaching. If an employee is forbidden to work in the same function for another company within 200 kilometres of his present work location, he is effectively forced to remain in the employ of his current employer. Hence, such a clause can probably not be enforced.[14]

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[12] See s. 3.2.2 (example 2) for a more detailed explanation.

[13] Lando & Beale, n. 3 above, 397.

[14] In common law, a distinction is usually made between contractual obligations to do and contractual obligations or duties not to do with regard to specific relief. The remedy to obtain performance of the first category is specific relief (instead of mandatory injunctions outside the case of contractual obligations), whereas the prohibitory injunction is the available remedy for the second category. In the example mentioned, the indefinite situation of indirect specific performance does not provide a

The last exception mentioned in Article 9:102 PECL is probably the most controversial one. This exception excludes a right to require performance if the aggrieved party can more easily obtain performance from other sources. This is definitely an attempt to satisfy the common law lawyer. The essence of the remedy of specific performance in English law is its secondary availability. In general, only if damages are inadequate is specific performance available for the creditor.[15] Consequently, this implies application of the remedy of specific performance if the creditor cannot obtain performance of the obligation elsewhere.

3. Evaluation of Article 9:102 PECL: Three Objections

In this section, three objections will be formulated against Article 9:102 PECL, each on a different level. The first is that several important words and phrases used in Article 9:102 PECL are not unequivocal. The wordings appear to make sense, but close reading reveals important ambiguities.

The second objection is that Article 9:102 PECL is incomplete without any procedural rules on how a substantive right to performance can be converted into a real claim. Only the availability of a substantive provision can lead to different solutions if different procedural regimes are applied.

The third argument is of a substantive nature: Article 9:102 PECL opts for the continental approach. However, the provision tries to meet the common law way of thinking by excluding the right to performance in cases where cover transactions are possible. It will be argued that this compromise eventually does not lead parties to choose Article 9:102 PECL as a part of the contract governing rule, because it cannot be predicted with a sufficient amount of certainty which cases fall under the main rule and which ones under the exception.

3.1 Objection I: Terminological Choices Are Illogical and Confusing

In comparative law, using the appropriate and the most intelligible language is one of the fiercest challenges, as the use of vague terminology can lead to gross misunderstanding for all readers. The most striking example in Article 9:102 PECL concerns the term *specific performance*. It is not clear why this term was chosen; the only explanation provided in the comments on the PECL is that no good alternative

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ready-made solution. See, for example, A. Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford: Oxford University Press, 2004), 529.

[15] A nuance is necessary here: In English law, specific performance may formally be a discretionary and secondary remedy, but in many situations relatively clear criteria are available to conclude beforehand whether specific performance is available. In specific groups of cases, specific performance is readily available instead of damages: for example, in the case of the sale of land. Land is considered a unique good, for which substitute damages are not an adequate remedy, even if the buyer is a real estate manager who sells the piece of land immediately. Burrows, n. 14 above, 456, 459.

existed.[16] However, that does not seem a valid reason, as *specific performance* has long been a common law term with a specific meaning.[17] From a common law point of view, specific performance can only be obtained by a court order and it is not considered the creditor's default option. According to Article 9:102 PECL, the creditor is 'entitled to specific performance'. This could be interpreted to mean that the creditor has only a right to ask the court to decide whether an order for specific performance will be granted. There is no compelling positive reason that the right of the creditor should be denoted as a *right to specific performance*. The only negative reason – and the only argument spelled out in the comments – is that there is no reasonable alternative for the chosen wording. However, that might be too pessimistic, as is shown in the next paragraph.

Another terminological issue is the use of the term *obligation* in the provision. Although the PECL are designed to govern only contractual relationships, in the various national legal systems the creditor can enforce performance of more obligations than only contractual ones and of more duties than only obligations. Consequently, the right of the creditor to performance in the various national legal systems is commonly not only available in the case of contractual obligations but also in the case of other duties.[18]

In addition, a comment on the term *impossibility* (Article 9:102, section 2a and Article 3:302, section 3a) is also relevant. In the comments, only factual impossibility is mentioned as a certain exception. However, considering the Dutch and especially the German legal system, *impossibility* as a legal term deserves a more

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[16] Lando & Beale, n. 3 above, 394.

[17] G.H. Treitel, *Remedies for Breach of Contract* (Oxford: Clarendon Press, 1988), 46 or E. Mckendrick, *Contract Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2008), 939, 940.

[18] See, for example, s. 241 BGB, which is considered to be the basis in law for the right to enforced performance in German law. It contains the term *Schuldverhältnis*, which can be translated as *obligation*. However, an obligation does not mean only a *contractual* obligation. Contracts are only one of the sources from which an obligation can evolve, albeit the most important one. Obligations can also evolve from the law or from a semi-contractual or semi-delictual basis (e.g., unjustified enrichment). See MünchKommBGB/*Kramer* Bd. 2a, s. 241, RdNr. 53 et seq.
A comparable but even wider application of the right to enforced performance can be found in the Dutch Civil Code (BW), Art. 3:296 BW. This provision applies to duties as well as obligations (in Dutch: *verplichting*). For example, the duty to proceed with negotiations can be enforced with Art. 3:296 BW, although in case law the risk of uncertainty of the content of such a duty is emphasized. However, it is not clear what can be done if a party does not comply with his or her duty to negotiate. A claim for damages then seems the most likely solution. See HR 15 mei 1981, *Nederlandse Jurisprudentie (NJ)* 1982, 85 m. nt. CJHB, *Stuyvers' Beheer/Eugster*; HR 18 juni 1982, *NJ* 1983, 728 m. nt. CJHB *Plas/Valburg*; HR 11 maart 1983, *NJ* 1983, 585 m. nt. PAS, *Huurdersvereniging Koot BV/Handelsonderneming Koot BV*; see for a case law overview: Verbintenissenrecht I (Blei Weissmann) Titel 5 Overeenkomsten in het algemeen (Kluwer Losbl.), Art. 217-227 I, aant. 86-100.

thorough explanation than the comments suggest.[19] Are moral, legal, and economic impossibilities also included in this exception? If so, what then is their exact meaning? This potential confusion can lead to the situation in which two parties can conclude a contract on the basis of the PECL, whereby they both interpret the meaning of the various statements according to their own legal system. Unless a problem in the performance of the contract occurs, mutual agreement and understanding exist, but this is an illusion. Both parties claim to understand the regime, but they may interpret the same terms in a different way.

3.2 *Objection II: The Absence of Procedural Rules Leads to Uncertainty*

The comments on Article 9:102 PECL explicitly state that rules on the means and the procedure of enforcement of a judgment for performance must be left to the national legal systems.[20] This statement seems to put an end to all discussions about dealing with the question of how the right to enforced performance – if the creditor can rely on this right – must be achieved. The question is whether a strict distinction can be made between the substantive right to enforced performance and the action to convert the right into a substantive claim. However, a solution is not readily available. Two examples demonstrate that not only the English jurisdiction, but also the Dutch and German jurisdictions make different choices in assessing rules as substantive or procedural.

3.2.1 *Example 1: Performance or Damages?*

At first sight, a right to enforced performance without the accompanying authority to effectuate the right does not represent any value compared with a claim for damages. In English law, this approaches reality because damages are generally available as of right to the creditor. Breach of contract is generally sufficient for claiming damages, irrespective of the cause of the damages. Furthermore, in English law, substantive and procedural laws are more or less integrated as far as the remedy of specific performance is concerned. The order for specific performance is a court order. If the debtor does not comply with the court order, he is in contempt of court. Therefore,

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[19] For German law, see *inter alia* PWW/*Schmidt-Kessel* (2006), s. 275; KompaktKom-BGB/*Willingmann/Hirse*, s. 275; MünchKommBGB/*Ernst* Bd. 2a, s. 275; C. Canaris, 'Die Reform des Rechts der Leistungsstörungen', *Juristenzeitung* 56 (2001): 501, 502; R. Zimmermann, *The New German Law of Obligations* (Oxford: Oxford University Press, 2005), 43, 49; B. Markesinis, H. Unberath & A. Johnston, *The German Law of Contract*, 2nd edn (Oxford: Hart Publishing, 2006), 406, 418; H. Unberath, *Die Vertragsverletzung* (Tübingen: Mohr Siebeck, 2007).
For Dutch law, see *inter alia* M.B.M. Loos, 'Chapter 9, Particular Remedies for Non-performance', in *The Principles of European Contract Law and Dutch Law: A Commentary*, ed. D. Busch (Nijmegen: Ars Aequi Libri, 2002), 354; G.J.P. de Vries, *Recht op Nakoming en op Schadevergoeding en Ontbinding Wegens Tekortkoming* (Deventer: W.E.J. Tjeenk Willink, 1997), 26 et seq.

[20] Lando & Beale, n. 3 above, 395.

the court can impose sanctions and, in the most serious cases, even imprisonment.[21] This heavy sanction is one of the factors which restrain the court from allowing the order if it foresees a breach of contract.[22]

However, in civil law systems – with the emphasis on the possibility of keeping the contract alive – an action for damages will only succeed if the breach of contract is imputable. Surprisingly, in Dutch as well as in German law an alternative route can be chosen to remedy the breach without having to deal with the imputability requirement. Instead, indirect execution of the right to performance leads to the same result. According to Article 3:299 BW, the court can authorize the creditor to accomplish performance himself or via a third party if the debtor does not do what he is obliged to. According to Article 3:299, section 3 BW, the debtor has to compensate the creditor for the costs and effectuation of the authorization. Via this alternative route or detour, the creditor can circumvent the requirement of imputability in the case of claiming damages, by relying on his right to performance without actually having the obligation performed by the original debtor.

In German law, a comparable instrument is available to the creditor, but it is considered a procedural tool. Therefore, the provisions to rely on can be found in the German Code of Civil Procedure (ZPO).[23] The question then is whether the cited comment is still valid. Can procedural rules really be left outside the scope of substantive law, and which rules must be assessed as procedural and which as substantive? In my opinion, the drafters of the PECL also readily ignore this crucial issue. It is hardly possible to construe a valuable right to enforced performance without taking into account procedural measures to make enforcement possible. It may be possible to avoid the problem by labelling the rules concerning enforced performance as substantive, as happens in Dutch law, but this does not solve the fundamental issue of the interconnection between substantive and procedural laws in general.

3.2.2 Example 2: Performance of a Labour Contract

In Dutch law, according to Article 7:659, section 2 BW, the claim for performance of the employer is admissible but cannot be enforced by means of imprisonment or a *dwangsom* (a periodic penalty payment for non-compliance with the court order to perform the obligation). The underlying thought here is that the possibility of enforcement of a labour contract by the employer would amount to slavery. However, the employee cannot stop performing his obligations without consequences, since employee non-performance constitutes a breach of contract. The employer will then

[21] N. Lowe & B. Sufrin, *The Law of Contempt*, 3rd edn (London: Butterworths, 1996), 603, 604. This book gives a thorough overview of the exact scope and nature of the different sanctions in the case of contempt.

[22] *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1.

[23] See, e.g., Musielak/*Lackmann* (2007), ZPO, s. 887.

have to use the remedy of damages, but he cannot use coercion to force his employee to work. Again, in German law the issue of enforcement of contracts concerning personal services is dealt with in the ZPO.[24]

This example raises the question of how Article 9:102 PECL, section 2c should be interpreted. Specific performance cannot be obtained if the performance consists in the provision of services or work of a personal character. Does this mean that a claim for performance of a labour contract is inadmissible or that the performance cannot be enforced by, for example, a periodic penalty payment? The problem is that the application of one provision could lead to divergent results in the different legal systems because of dissimilarities in the law of procedure. This consequence is undesirable because one of the PECL's objectives is to achieve more uniformity in private law.

3.3 Objection III: Article 9:102 PECL Is Too Great a Compromise: The Apparent Logical Convergence of Civil Law and Common Law Has Undesirable Consequences

Leaving aside the arguments relating to terminology and to procedural law, a critical view on the substance of Article 9:102 PECL is also necessary. The criticism underlines the difficulty of formulating a reasonable alternative, a 'third way', which combines the best aspects of both systems. It has already been stated that the Commission has, in principle, opted for the civil or continental law approach, in which the right to enforced performance is the central element. The court has no discretionary power to grant the order outside the exceptions mentioned in section 2. This approach is preferable for two reasons. The first is one of practice. The German as well as the Dutch system, both relatively modern civil law systems, accept the right to enforce performance and the accompanying claim as a self-evident and essential part of their contract law system. Other continental systems one way or another also recognize the right to enforced performance.[25] Therefore, it would have been problematic to introduce a compromise that is based on the idea that enforced performance is not available as of right, because a majority of European users of private law would not feel comfortable in employing such a compromise, either in a theoretical or a practical sense. Does the same argument not also apply to the compromise in Article 9:102 PECL with regard to the common law lawyer? The answer is, in essence, affirmative, but Article 9:102 PECL tries to take English law peculiarities

[24] Musielak/*Lackmann* (2007), ZPO, s. 888.

[25] For example, in French law: Vital is the distinction between obligations to give (which are 'self-executing' in the words of B. Nicholas) and obligations to do or not to do. According to Art. 1142 Code Civil, in the second case this provision seems to treat damages and enforced performance on the same level, but it has been decided in case law that performance is the primary remedy. See B. Nicholas, *The French Law of Contract*, 2nd edn (Oxford: Clarendon Press, 1992), 216 et seq.; Lando & Beale, n. 3 above, 399.

into account in the exceptions. Furthermore, the right to enforced performance as a primary remedy in continental law systems is of such interest that it is also valid to argue that more countries adopt the civil rather than the common law approach.

The second reason is that a right to enforced performance gives the creditor a strong position not only in court but also in negotiations between the contracting parties. A right is stronger than a remedy, even more so if the availability of the remedy is dependent on a decision of the court. In a recent study, the question has been raised as to whether enforced performance should still be a primary remedy.[26] One of the arguments against it is that the remedy is rarely used. However, it should be remembered that the mere possibility of claiming performance increases the chance of obtaining adequate damages. This secondary effect should not be underestimated.

The identity of Article 9:102 PECL as a compromise between two systems becomes obvious in section 2d. This fourth exception – performance cannot be claimed if a cover transaction is available – is definitely the most controversial, essentially because it is too vague. The essence and meaning of the provision are clear: The creditor who can obtain elsewhere the goods or the services he contracted for with the non-performing debtor should do so. The term *reasonable* is essential. What effort can be asked of the creditor to seek performance elsewhere? Even in English law, examples of controversial cases can be found. According to Lord Edmund Davies in *Société des Industries Metallurgiques S.A. v. The Bronx Engineering Co.*, the circumstance in which the plaintiff had to wait nine to twelve months for a special machine, which had not been delivered by the original debtor, did not release the creditor to obtain a substitute, and the fact that he would suffer severe damage was not enough to grant specific performance, as other manufacturers could produce the same machinery.[27] Mak has criticized this exception in her recent dissertation, especially where sales contracts are concerned. She concludes that even in the case of buying ordinary chairs, a cover purchase is not per definition better for the creditor. The general formulation of the exception overlooks the possibility that

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[26] H. Lando & C. Rose, 'On the Enforcement of Specific Performance in Civil Law Countries', *International Review of Law and Economics* 24 (2004): 473, 487. I am aware of the controversies in the law and economics debate on the value of a strong right to enforced performance. However, this article is not the place to elaborate on this discussion. See, for a recent overview of the law and economics literature, G. Hesen & R. Hardy, 'Is the System of Contract Remedies in The Netherlands Efficient from a Law and Economics Perspective?', in *Specific Performance in Contract Law: National and Other Perspectives*, ed. J. Smits, D. Haas & G. Hesen (Antwerpen: Intersentia, 2008), 287, 326.

[27] *Société des Industries Metallurgiques S.A. v. The Bronx Engineering Co.* [1975] 1 Lloyd's Rep. 465. Lord Edmund Davies specifically distinguishes from *Behnke v. Bede Shipping Co. Ltd.* [1927] 1 K.B. 659; (1927) 27 Ll.L. Rep. 24 KBD, which is generally cited as supporting the proposition that specific performance can be ordered if goods are 'commercially' unique. Furthermore, Davies warns of a too general application of this case, because in *Behnke* it was not just a common ship that was being sold but a highly specific ship for which no reasonable substitute existed.

specific performance could have been possible for the seller at a lesser cost and with less inconvenience to the buyer than the making of a cover purchase. Specific performance would then be the more 'appropriate' remedy. Furthermore, both creditor and buyer are effectively deprived of the possibility to choose the remedy they want, which can also be considered a disadvantage of this exception.[28] This last element deserves attention, as the comments underestimate the power of the debtor's position created by this exception. The creditor may be the party to choose the remedy he or she wants, but if the creditor chooses performance there is always the risk that the debtor will not cooperate. As long as the extent of the *reasonable* clause is not clear, the burden of proof may be easily overcome. Following the *Bronx* case, the debtor has only to show that the creditor could obtain performance from another source, even if this causes a serious problem for the creditor. Consequently, it is by no means precluded that the creditor has made a 'wrong' choice. The creditor will therefore be tempted to opt for damages as a remedy because he avoids the risk of expensive and lengthy proceedings.

4. Structure of Article III.3:302 DCFR

In January 2008, the Study Group on a European Civil Code and the Research Group on EC Private Law (the Acquis Group) published the DCFR. The DCFR contains principles, definitions, and model rules on European private law; they are partly based on the PECL, but the DCFR covers a wider area. For this article, Article III.3:302 DCFR on performance of non-monetary obligations is relevant. This provision can be seen as the successor of Article 9:102 PECL, and the question is of whether the successor meets the objections raised against the PECL provision.

First of all, the DCFR objectives should be compared with those of the PECL to exclude the possibility that the provisions may be different and also serve different ends. The drafters have formulated three purposes of the DCFR. First, the DCFR provides a possible model for an actual or 'political' CFR. Although it is not clear what the status of this eventual political CFR will be, this objective of the DCFR does not really seem to interfere with those of the PECL. Where the PECL have initially been construed as a prelude to a European Civil Code, the DCFR at least aims to be a contribution to a further step in European harmonization. Second, the DCFR is an academic text and is meant to stand on its own. The DCFR should heighten awareness of a European private law and furnish this idea with a new foundation that increases understanding of 'the others' and promotes collective deliberation in Europe. The PECL have a comparable objective. Third, the DCFR should be a possible source of inspiration. The drafters refer directly to the PECL, which are incorporated in a

[28] V. Mak, *Performance-Oriented Remedies in European Sale of Goods Law (diss. Oxford)* (Oxford: Hart Publishing, 2009).

revised form. Therefore, it can be concluded that the PECL and the DCFR generally have comparable objectives.

Article III.3:302. Non-monetary obligations:

(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.
(2) Specific performance includes the remedying free of charge of a performance, which is not in conformity with the terms regulating the obligation.
(3) Specific performance cannot, however, be enforced where:
   (a) performance would be unlawful or impossible;
   (b) performance would be unreasonably burdensome or expensive; or
   (c) performance would be of such a personal character that it would be unreasonable to enforce it.
(4) The creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.
(5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

The provision has more or less the same structure as Article 9:102 PECL. However, the scope of Article III.3:302 DCFR is wider because the provision does not only cover contractual but also non-contractual obligations. This follows from Article III.1:102 DCFR. The changes compared with Article 9:102 PECL are mainly terminological, although an important substantive change has also taken place. The controversial exception on cover transactions on the right to enforced performance (Article 9:102, section 2d PECL) has not survived a further step to harmonization. In Article 3:302 DCFR, this exception has been deleted. The creditor is no longer denied the possibility to claim enforced performance in the event that he could rely on a substitute transaction by a third party. The creditor may choose to claim performance by the original debtor. As a small compensation, in section 5, the drafters of the DCFR have tried to minimize the eventual negative aspects of a strong and overall right to performance. This section is most interesting because the drafters have tried to combine legal and economic features to anticipate the behaviour of the creditor invoking the right to enforced performance. If he or she relies on this right *unreasonably* and incurs losses that would not have been incurred had he or she chosen a cover transaction, the creditor cannot claim the losses from the debtor. This unusual but interesting solution will be assessed in the next paragraph.

Furthermore, it is useful to stress here that section 2 of Article 3:302 DCFR is a separate section, whereas, in Article 9:102 PECL, section 1 is de facto

a combination of sections 1 and 2 of Article 3:302 DCFR. The object of both sections is to indicate that partly or fully performed obligations are just as much subject to a performance claim as obligations that are not performed at all, as long as performance is not in accordance with the contract. In Article 9:102 PECL, this was circumscribed by the phrase *defective performance*, but the drafters of the DCFR apparently considered this to be too unclear. However, this new section cannot be read without attention being paid to Article 3:201–204 DCFR. In these articles, the complement of Article 3:302, section 2 DCFR can be found, because the debtor who delivers a non-conforming performance is given the opportunity to remedy the defects in the performance.[29]

5. Article III.3:302 DCFR: An Effective Successor?

The leading question is whether the objections against Article 9:102 PECL are sufficiently met by Article III.3:302 DCFR.

5.1 Objection 1: Is the DCFR Provision Terminologically Coherent and – at Least – Less Confusing than the PECL Provision?

First of all, the DCFR drafters generally paid considerable attention to the terminology issues and they have taken measures to deal with several of them. One of the most significant improvements is the structural use of the term *creditor* and *debtor* throughout the DCFR. Furthermore, the terms *contract* and *obligation* are used in a more meticulous manner. For example, a *contract* is concluded but an *obligation* is performed.[30] In addition, a list of terms is added to the provisions, so the idea of a set of provisions that are understood by every user in the same way is acknowledged.

Although on a general level some improvements can be discerned, in Article III.3:302 DCFR, opportunities to improve terminology seem to have been missed. As already described, the term *specific performance* is not preferable to circumscribe the right of the creditor, mainly because of the specific meaning in the common law. As, for example, McKendrick has emphasized, the term *specific performance* has a highly specific and limited meaning, rooted as an equitable remedy and systematically opposed to the common law remedy of damages.[31] It is preferable not to use *specific performance* in a European context, especially not in the new Article 3:302 DCFR. However, the drafters have not changed this term. This is even more remarkable because the substantive change of the provision has led to a further deviation from the common law and to a more solid choice for the civil law approach. This could create confusion for the common law lawyer, because he or she could be misled

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[29] See also P. Varul, 'Performance and Remedies for Non-performance: Comparative Analysis of the PECL and DCFR', *Juridica International* no. I (2008): 104, 110.

[30] von Bar et al., 2009, 30.

[31] McKendrick, n. 17 above, 940.

by the term *specific performance* in the European provision, thinking that the DCFR had adopted the common law approach. In addition, the common law term does not suit civil law lawyers either, because they might think that *specific performance* in English law does not differ substantially from the DCFR description of *specific performance*.[32]

Thus far, it remains unclear which reasons support this decision by the DCFR drafters. The reason to adopt the term *specific performance* in the PECL was that there was no satisfactory alternative available. In my opinion, this argument is no longer strong, if indeed it has ever been. Markesinis uses the term *enforced performance* based on Treitel.[33] This suggestion should be followed for at least three reasons. The first and most important one is that the term emphasizes the content of the right itself. The debtor has generally not performed voluntarily or has indicated the intention not to do so. Consequently, the creditor wants to force the debtor to perform his or her obligation. The creditor wants the actual performance, not compensation. The second reason is that the term *enforced performance* is not specifically attached or connected to a specific legal system. The European systems recognize in some way a remedy or right that resembles the right to enforced performance without using this term, so enforced performance as such does not cause potential confusion with national terms. That is the main advantage of an 'artificial' term. The disadvantage is generally the risk that the meaning of the construed term is not immediately clear. However, this risk seems to be minor in this particular case, because the term used is comprehensible. The third good reason to use *enforced performance* instead of *specific performance* is that it indicates a clear link between substantive and procedural laws. The right to enforced performance does not represent a valuable right if it cannot be converted into an enforceable claim. Neither the PECL nor the DCFR govern the procedural aspects of substantive rights, but in the case of enforced performance this strict distinction cannot be made.

Other terminology issues are of less importance and not all problems can be easily solved. In the previous section, attention was paid to the term *impossible*, which is a dangerous term because of its varied meanings in different jurisdictions. However, a reasonable alternative is not immediately available. The reasons for some terminological changes are not immediately clear to me; for instance, the phrase *performance would cause the obligor unreasonable effort or expense* (Article 9:102, section 2c PECL) has been altered to *performance would be unreasonably burdensome or expensive* (Article III.3:302, section 2b DCFR). The new formulation seems to be more restrictive than the old; however, the comments on the draft

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[32] The choice of language is of course a point of debate in its own. See, for example, R. Sefton-Green, 'Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality', *ERCL* 4, no.3 (2008): 281, 303. Sefton-Green considers the DCFR as an attack to linguistic plurality, but she also seems to reject the idea of English as the default *lingua franca* in the EU.

[33] Markesinis et al., 393.

provision should be awaited to understand the drafters' reason for the new formulation and to see whether they intended only a terminological change or a substantive one as well.[34]

5.2 *Objection II: Is Sufficient Attention Paid to the Link with Procedural Law in Article III.3:302 DCFR?*

The artificial distinction between substantive and procedural laws seems not to have been dealt with in the new provision. Although this problem is serious, the drafters may have felt unauthorized to say anything on this subject. In my opinion, they should have stated explicitly that the link between substantive and procedural law is too close to overlook and too tight to unwind and to separate the two laws. The example of the right to enforced performance provides material for this assumption.

5.3 *Objection III: Are the Substantive Problems Solved by the New Provision?*

At this point, the draft provision seems to have created a new way of dealing with problems of convergence in law. As mentioned earlier, the controversy between civil and common laws ('right' versus 'remedy') has not been well dealt with in Article 9:102 PECL; hence, a radical solution was necessary, though surely not easy to find. I consider that the drafters succeeded in this attempt and in an unconventional manner.

For instance, in the new provision, a much more solid choice for the civil law approach has been made. Taking into account the exceptions, the creditor has the right to enforce the performance of the obligation, *even if the creditor could obtain performance from another source*. This exception to the right to enforced performance in Article 9:102 PECL has been deleted. At first sight, this exception seemed to be a reasonable way to integrate a common law idea into the civil law, right-based approach. However, it generated too much uncertainty. At this point, it should be repeated that even under (English) common law the availability of specific performance in the case of alternative ways of obtaining a substitute performance is subject to discussion.

On a substantive level, deleting the 'alternative source' exception decreases the influence of the common law. Can Article III.3:302 DCFR still be seen as a compromise between civil and common law? The drafters have tried to anticipate the

[34] A possible source of inspiration can be found in the Unidroit Principles in the provision on performance of non-monetary obligations, i.e., Art. 7.2.2 Principles of International Commerical Contracts (PICC), section b: 'Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless performance or, where relevant, enforcement is *unreasonably burdensome or expensive*.'

negative effects of the civil law approach if the creditor has the possibility to rely on the right to enforced performance where a substitute is relatively easy to obtain. In section 5, a correction with regard to the strong right of the creditor has been formulated. The creditor is liable for extra losses if he or she relies *unreasonably* on the right to enforced performance if there is a *reasonable* substitute available that does not involve *significant* effort or expense. It is clear that this section has been added to stimulate the creditor to choose the most efficient remedy. This section generally follows practice in which the creditor will not hesitate to claim damages from the original debtor and to obtain performance elsewhere if possible. However, it should be taken into account that, unlike in common law, damages are not available as of right. Breach of contract is not the only requirement that has to be fulfilled. The breach should also be imputable (Article III.3:701 DCFR). This can be one of the reasons to allow the creditor to rely to a large extent on the right to enforced performance. The formulation of the exception creates several thresholds that need to be crossed before the creditor is really forced to bear his or her own losses. The terms *unreasonably*, *reasonable*, and *significant* deserve explanation. The comments should be awaited to see which cases the DCFR drafters have in mind with regard to where the creditor should think twice before relying on a right to enforced performance.

6. Conclusion

The question this article intended to answer was whether the DCFR provision on the right to enforced performance is an improvement upon its PECL predecessor, in the sense that it successfully counters the objections against the PECL provision. My conclusion is that for the most part Article III.3:302 DCFR does so. The drafters of the DCFR are generally outspoken regarding the terminology issue. They have streamlined the new provision and have made it more coherent with other provisions in the DCFR by introducing the terms *creditor* and *debtor*. However, I consider they erred by failing to grasp the opportunity to change the term *specific performance* to (right to) *enforced performance*. *Specific performance* as a legal term is too closely connected with the common law to avoid confusion. This is even more remarkable, and undesirable, since the drafters have clearly adopted the civil law approach on a substantive level. Nevertheless, the terminology issue may be here the result of a compromise, because in fact it is the only common law residue in the provision. The substantive change is the major improvement. The choice for a strong right to enforced performance without the vague exception that performance is not available in the case of cover transactions is a good one. Both creditor and debtor have a more precise idea of the scope of the right to enforced performance. The last difficult point is the absence of the role of procedural law. I have indicated that knowledge of the procedural consequences is essential in the case of invoking the right to enforced performance. This problem is not covered in the new provision; hence, divergence in

several jurisdictions might still continue on the basis of the same substantive provision. However, the problem cannot be solved by changing the words, since the drafters of the DCFR did not intend to design procedural provisions. On a political level, the decision makers should now be aware of the inevitable link between substantive and procedural laws as far as enforcement is concerned. Convergence of substantive law of enforcement of contracts is indeed exceedingly difficult to achieve without changes in procedural law.