

Tender of Performance, *Mora Creditoris* and the (Common?) Principles of European Contract Law

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I. PURPOSE

As every commercial lawyer knows, an obligor may commit a breach of contract merely by performing after the date his performance is due. Even if the quality of his performance is irreproachable, his tardiness alone may trigger liability. The common law seems to have

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assigned no specific label to an obligor's liability for delay. Among civilians, however, if an obligor's tardiness has resulted from his own failing, then his liability is known by an elegant Latin formulation, *mora debitoris* (mora=delay). By contrast, if an obligor's delayed performance results from his creditor's unpreparedness or unwillingness to accept a performance tendered on time, then the creditor incurs a liability dubbed in civil law systems *mora creditoris*.

The Principles of European Contract Law (PECL) do not contain an express regulation of *mora creditoris*. On a superficial reading, the institution seems to be unknown to the PECL drafters. Yet, according to Zimmermann, the PECL contain an innovative regulation of *mora creditoris*.¹ In fact, *mora creditoris* appears in the PECL index of terms and concepts.² For example, *mora creditoris* appears in comment (iii) to article 8:101. *Mora creditoris* also appears in relation to the regulation of the Italian Codice civile (note 4). But none of the other three references in the index leads, at least under this denomination, to *mora creditoris*, although this concept can be found, for example, in notes 1 and 2 to article 7:110 as well. Is the PECL index inaccurate? Of course not.³ The author of the index evidently has presupposed in the PECL the regulation of *mora creditoris*, which must be understood in conjunction with the provisions dealing with tender of performance. Perhaps this unstated assumption by the drafters of the PECL may be explained by the fact that *mora creditoris*—as an institution, I want to add immediately—is alien to the common law. On the Continent, *mora creditoris* seems alien to French law as well. As we shall see, the drafters searched among the differing European legal systems for a balanced approach to the creditor's failure to cooperate in receiving the debtor's performance.

Leaving aside the characterization of the creditor's uncooperativeness, let us examine instead measures available to a debtor who wants to perform in spite of his creditor's noncooperation. In regulating this situation, European systems of private law may be conveniently separated into three groups. Some codes regulate *mora creditoris* institutionally; in this group, the German BGB is the model, followed by the Italian, the Greek, the Portuguese, and the new Dutch Civil Code (NBW). By contrast, other civil codes do not contain a systematic

1. Reinhard Zimmermann, *Konturen eines Europäischen Vertragsrechts*, JURISTENZEITUNG 477, 489 (1995). By contrast, notes Zimmermann, the Unidroit Principles lack regulation of the same idea.

2. References herein are to HUGH BEALE & OLE LANDO, PRINCIPLES OF EUROPEAN CONTRACT LAW, Parts I and II 558 (2000).

3. In spite of the fact that, in my opinion, the reference to page 351 should be made instead to page 352.

regulation of *mora creditoris*, though the same conclusions have often been reached by doctrine and case law from regulation of tender of performance (*offres réelles, ofrecimiento de pago*). For this second group, the model is French law, whose approach is mirrored in Spanish law. Finally, a third group of uncodified European systems, led by England, lacks even a comprehensive conceptualization of tender and its effects. But as suggested below, judging English case law in terms of *mora creditoris*, the Channel is narrower than some would suppose.

A purpose of this Article is to show that *mora creditoris* may be seen as a receptacle that collects the requirements and the effects of the debtor's readiness and willingness to perform. Focusing on those requirements and effects, one notes in all the European legal systems a core of ideas based on the doctrines elaborated by the authors of the *ius commune*. This Article also inquires into the extent to which the PECL reflects this common core of ideas.

II. THE CREDITOR'S DUTY OF COOPERATION

Mora creditoris presupposes that the debtor cannot fulfill his obligation by himself, that is, his performance is bilateral rather than unilateral.⁴ If the activity is unilateral, the debtor alone can perform; for example, an obligation to transport goods. If the activity is bilateral, by contrast, the debtor needs the creditor's cooperation. This cooperation may assume different forms: e.g., allowing the obligor to enter a house that the debtor is contractually obliged to paint, or taking delivery of the goods from the debtor.⁵

During the nineteenth century, a great debate raged over the characterization of the creditor's cooperation with his debtor. Until then, doctrinal writers viewed *mora creditoris* as the reverse of *mora debitoris*.⁶ If the delay of a debtor resulted from his fault, then the same fault was required for *mora creditoris*. A prominent representative of the rational natural law, Christian Wolf, argued that the creditor was obliged to accept

4. FERRAN BADOSA COLL, DRET D'OBLIGACIONS 262 (1990); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS 817-18 (1996); E.G. McKendrick, *in* 1 CHITTY ON CONTRACTS 22-83 (28th ed. 1999); DIETER MEDICUS, SCHULDRECHT, Allgemeiner Teil 206 (12th ed. 2000).

5. *Cf.* s. 37.1 Sale of Goods Act—England—1979.

6. BARTOLUS A SAXOFERRATO, IN SECUNDAM DIG. VET. PARTEM COMMENTARIA (1574), sub. D. 13, 5 (const. pec.), 17 (sed si alia), 2; HUGO DONELLUS, COMMENTARII DE IURE CIVILI cap. XIII, § 12 (1827); SAMUEL STRYCKIUS, USUS MODERNUS PANDECTARUM a libro XXIII usque ad finium (1841), vol. XV, § 16; Gerardus Noodt, *De foenore et usuris*, in OPERA OMNIA (1786), t. I, at 298; the various authors of the European *ius commune* cited by ZIMMERMANN, *supra* note 4, at 818-19, and by ANTONI VAQUER, EL OFRECIMIENTO DE PAGO EN EL CÓDIGO CIVIL 128-30 (1997).

the debtor's performance.⁷ J. Kohler decisively attacked Wolf's point of view. Rejecting an opinion of Madai,⁸ Kohler denied emphatically any obligation to accept performance: "der Gläubiger ist nicht verpflichtet, die Leistung anzunehmen, es ist die Annahme ein Recht und nur ein Recht, keine Pflicht" ["the creditor is not bound to accept performance, since acceptance is a right and only a right and not an obligation"].⁹ The BGB drafters adopted this doctrine,¹⁰ and it quickly spread to other countries.¹¹

It goes without saying that a creditor is not obliged to accept a performance tendered by the debtor. If the creditor were so obliged, the debtor could compel him to accept, for example, the delivery of the goods. But none of the European legal systems authorizes the specific performance of such an obligation.¹² Neither does the PECL.¹³ According to a *communis opinio*, the creditor has no obligation to accept

7. CHRISTIAN WOLFIIUS, *JUS NATURÆ METHODO SCIENTIFICA PERTRACTATUM*. Pars quinta (. . .), pars V, cap. 4, § 727 (1765) ("si debitor rem totam tempore ac loco convento solvit; creditorem solutionem accipere tenetur"); see *id.* § 743.

8. CARL OTTO VON MADAI, *DIE LEHRE VON DER MORA* 450 (1837). For the debate, see UWE HÜFFER, *LEISTUNGSSTÖRUNGEN DURCH GLÄUBIGERHANDELN* 8 sqq. (1976); Christian Rabl, *Gläubigerverzug und beiderseits zu vertretende Unmöglichkeit der Leistung*, in *JURISTISCHE BLÄTTER* 488 (1997).

9. Jos. Kohler, *Annahme und Annahmeverzug. Eine civilistische Ahandlung*, in *JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHT* (later JHERINGS JAHRBÜCHER) 267 (1879). Before Kohler, Friedrich Mommsen, *Die Lehre von der Mora*, in *BEITRÄGE ZUM OBLIGATIONENRECHT* 134 (1855), had already denied any obligation to accept the tender in order to justify rejection of the requirement of fault in *mora creditoris*.

10. See, in particular, HÜFFER, *supra* note 8, at 14-16; see also BERNHARD WINDSCHEID, THEODOR KIPP, *LEHRBUCH DES PANDEKTENRECHTS* 447 & n.10 (9th ed. 1906).

11. For example, Italy and Spain. See CARMELO SCUTO, *LA MORA DEL CREDITORE* 93 (1905); Blas Pérez González, José Alguer, Spanish law notes to the translation of LUDWIG ENNECERUS, *DERECHO DE OBLIGACIONES* 291 (1933); and the decision of the *Tribunal Supremo*, *REPERTORIO DE JURISPRUDENCIA ARANZADI [RJA]* 1954, 3182 (Dec. 21, 1954). According to Treitel, "*mora creditoris* is not a breach of the creditor's duty." G.H. TREITEL, *REMEDIES FOR BREACH OF CONTRACT* 40 (1988).

12. Only South African law authorizes specific performance. See *Ranch Int'l Pipelines Ltd. v. LMG Constr. Ltd.*, 1984 (3) 861, 878 sqq. (Coetzee J.) (following De Villiers' unpublished thesis on *mora creditoris*, that concludes that "there is no reason why Ranch's duty to cooperate should not be enforced *in forma specificā*"); *Pienar v. Boland Bank*, 1986 (4) SALR (SA) 103, 110-11. But deposit has fallen into disuse (see D.J. JOUBERT, *GENERAL PRINCIPLES OF THE LAW OF CONTRACT* 218 (1987)), and therefore a debtor must be allowed to discharge his obligation. On this point, see *infra* Part VI.

13. Professor Lando offers an interesting example. Engaged to perform at a wedding party in the bride's home, a pianist's engagement is cancelled because the couple has decided not to marry. The pianist cannot force the couple to listen to his performance. See Ole Lando, *Non-Performance (Breach) of Contract*, in *TOWARDS A EUROPEAN CIVIL CODE* 337 (Arthur Hartkamp et al. eds., 2d ed. 1998).

performance.¹⁴ As a corollary, the debtor has no right to fulfill his obligation by forcing his performance upon the creditor. Nevertheless, the law still finds ways to protect the debtor. The debtor has a direct interest in discharging his obligation. Running of interest, penalties, and risk of deterioration of the goods figure among the disadvantages that the debtor's timely performance would avoid. Therefore, when the creditor prevents the debtor from fulfilling his contractual obligations, all legal systems entitle the debtor to set up as a defense a refused tender of performance. The defense is routinely accompanied by a deposit of the money, or the goods, with a public official or a tribunal in order to completely discharge his obligation. Later we will see in detail the effects that tender of performance can produce. The key point here is, that the debtor is not prejudiced by the creditor's refusal. While the debtor cannot compel his creditor to accept, the creditor's recalcitrance should nevertheless throw on the debtor no risks of negative consequences. On the contrary, the defaulting creditor now faces the negative consequences of his refusal (the "widrigen Folgen," as embodied expressly in § 1419 Austrian Civil Code).¹⁵ The creditor now bears a burden¹⁶ (*Obliegenheit, carga*).¹⁷

14. For example, in Germany: PETER SCHLECHTRIEM, *SCHULDRECHT, Allgemeiner Teil* 191 (4th ed. 2000), and PALANDT/HELMUT HEINRICH, *BÜRGERLICHES GESETZBUCH* § 293, Rn. 1 (60th ed. 2001). Spain: Antonio Cabanillas Sánchez, *La mora del acreedor*, in *ANUARIO DE DERECHO CIVIL (ADC)* 1365 (1987), and MANUEL ALBALADEJO, II-1 *DERECHO CIVIL* 118, 148 (9th ed. 1994). Italy: FRANCESCO GALGANO, II-1 *DIRITTO CIVILE E COMMERCIALE* 81 (1990); GIORGIO CIAN, ALBERTO TRABUCCHI, *COMMENTARIO BREVE AL CODICE CIVILE sub art. 1206* (4th ed. 1999). Netherlands: ARTHUR HARTKAMP, *CONTRACT LAW IN THE NETHERLANDS* 116 (1995). Austria: SILVIA DULLINGER, *SCHULDRECHT, Allgemeiner Teil* 37 (2000). Portugal: MÁRIO JÚLIO DE ALMEIDA COSTA, *DIREITO DAS OBRIGAÇÕES* 947 (1994).

15. Or, to state the issue as an English judge might: "If a patient makes it impossible for the dentist to complete his work successfully, the fault must rest with the patient." *Samuels v. Davis*, [1943] 1 K.B. 526, at 527 (Scott L.J.).

16. See, among others, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH/Reinhold Thode, § 293, Rn. 1 (3d ed. 1995); WOLFGANG FIKENTSCHER, *SCHULDRECHT* 36, 259-60 (9th ed. 1997); (*contra* ULRICH HUBER, *LEISTUNGSSTÖRUNGEN* 186-87 (1999), in spite of his statement that the creditor is not obliged to accept the performance tendered at 185-86); BADOSA COLL, *supra* note 4, at 264; LUIS DíEZ-PICAZO, II *FUNDAMENTOS DEL DERECHO CIVIL PATRIMONIAL* 111-12 (4th ed. 1993); HELMUT KOZIOL & RUDOLF WELSER, I *GRUNDRISSE DES BÜRGERLICHEN RECHTS* 247 (10th ed. 1995); DULLINGER, *supra* note 14, at 37; GIOVANNI CATTANEO, *LA COOPERAZIONE DEL CREDITORE ALL'ADEMPIMENTO* 50, 56-57 (1964); Matthias Storme, in *GOOD FAITH IN EUROPEAN CONTRACT LAW* 644 (Reinhard Zimmermann & Simon Whittaker eds., 2000). In English common law, "the Court may be willing to imply a term that the parties shall cooperate to ensure the performance of their bargain" [A.C. Guest, in I CHITTY ON CONTRACTS, *supra* note 4, at 13-011], but those implied terms are rather vague (J.F. Burrows, *Contractual Cooperation and the Implied Term*, in 31 *MOD. L. REV.* 390 (1968), and the cases quoted by both authors). Obviously, nothing prevents the parties from bargaining for their respective cooperation as an express obligation, as the scholars above quoted also acknowledge (*see also* TREITEL, *supra* note 11, at 39).

Article 1:202 of the PECL establishes a duty of cooperation: “Each party owes to the other a duty to cooperate in order to give full effect to the contract.” Although the use of the term “duty” and comment B suggest that “failure to cooperate is a breach of a contractual duty”¹⁸—leading to the concept of “non-performance” as defined in article 1:301(4)—, the PECL actually does not view this failure to cooperate as a breach of contract entitling the debtor to the usual array of remedies.¹⁹ This conclusion is confirmed in the same comment, pointing out that “the debtor also enjoys the rights and immunities conferred by articles 7:110 and 7:111,” that is, the debtor may avail himself of different self-help remedies which in any case imply that the creditor is compelled to take delivery or suffer the consequences of his refusal. The breach of such a “duty,” however, does not produce the consequences normally associated with a breach of contract. According to these provisions, the debtor may only deposit or sell the property, but he may not compel the creditor to accept the tendered performance. Hence, the debtor avoids the negative consequences of his (initial) nonperformance and may even be freed from his obligation notwithstanding the recalcitrant creditor’s uncooperativeness. But the latter cannot be forced to retreat from his recalcitrant stance.

III. *OBLATIO, OBSIGNATIO ET DEPOSITIO*

During the nineteenth century, German scholars like Madai, Mommsen, Kohler, Schey, and Hirsch comprehensively developed the doctrine of *mora creditoris*.²⁰ Until then, some of the effects now united under the rubric *mora creditoris* were linked to the tender of performance.

17. The concept of burden or *Obliegenheit* has been much disputed. See REIMER SCHMID, *DIE OBLIEGENHEIT* (1953); OLAF HENß, *OBLIEGENHEIT UND PFLICHT IM BÜRGERLICHEN RECHT* (1988); KARL LARENZ, MANFRED WOLF, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 264-66 (8th ed. 1997); ANTONIO CABANILLAS SÁNCHEZ, *LAS CARGAS DEL ACREEDOR EN EL DERECHO CIVIL Y EN EL MERCANTIL* (1988); ALBERT LAMARCA MARQUÉS, *EL HECHO DEL ACREEDOR Y LA IMPOSIBILIDAD DE LA PRESTACIÓN* 64 sq (2001).

18. In relation to the following “example”: “a party’s failure to accept a tender of performance constitutes a breach of the duty to cooperate where the other party has an interest in having such tender accepted” (BEALE & LANDO, *supra* note 2, at 12). It is difficult to imagine a debtor who tenders and has no interest in the acceptance of his tender, because the creditor’s refusal of the tender opens the door to the debtor’s remedies against the creditor.

19. The opposite view is expressed by Lena Olsen, *The Choice of the Aggrieved Party—An Analysis of the Remedies in the Principles of the European Contract Law*, EUR. REV. PRIVATE L. 21, 40 (1999).

20. MADAI, *supra* note 8; Mommsen, *supra* note 9; Kohler, *supra* note 9; JOSEF FREIHERRN VON SCHEY, *BEGRIFF UND WESEN DER MORA CREDITORIS IM ÖSTERREICHEN UND IN GEMEINEN RECHT* (1884); PAUL HIRSCH, *ZUR REVISION DER LEHRE VOM GLÄUBIGERVERZUG* (1895).

If the debtor offered to fulfill his obligation (*oblatio*), he was spared the negative consequences of his nonperformance. But if he wanted a full discharge, he had to seal the amount of money he tendered (*obsignatio*) and, immediately afterwards, deposit it with the court (*depositio*). A solution of Roman Law,²¹ this basic scheme was followed by authors of the European *ius commune*.²²

Notably, the scheme still prevails in the French *Code civil* and the Spanish *Código civil*. One might consider the BGB approach technically superior because it regulates *mora creditoris* institutionally. I do not agree. The two approaches reflect two traditions: the *ius commune*, on one hand, and the pandectist conceptual framework, on the other. And both approaches have virtues and drawbacks. Certainly, a scheme like that of the BGB, based upon a thorough regulation of *mora creditoris* has a systematic advantage. However, the regulation of *mora creditoris* has to begin with the rules on tender.²³ Moreover, some of the effects produced by a tender of performance cannot be linked to *mora creditoris*.²⁴

The PECL has opted for the *ius commune* approach. This approach, as we will see, is more suitable for the common law and the Scandinavian legal systems, which do not regulate *mora creditoris* as an institution. Nevertheless, the PECL regulation may be criticized. First, tender of performance is to be found in articles 6:108, 7:103, 7:109-111, 8:104, 9:201, and 9:303. While the core provisions—from the point of view of the effects—are articles 7:110-111 and 9:201, the requirements of a good tender have to be deduced mainly from articles 6:108, 7:103, and 8:104. More significantly, the PECL has disregarded a lesson of the *ius commune*: a tender without a refusal by the creditor produces no legal consequences.

IV. “TENDER AND REFUSELL”

Tender of performance becomes an autonomous source of legal effects only in case of a creditor’s refusal. If the creditor accepts the tendered performance, the effect is payment. Even if the debtor offers an *aliud*, the creditor’s acceptance discharges the obligation (article 8:104 PECL *a contrario*). Thus, in the common law world Brooke spoke of

21. Cf. ROGER VIGNERON, *OFFERRE AUT DEPONERE: DE L’ORIGINE DE LA PROCEDURE DES OFFRES REELLES SUIVIS DE CONSIGNATION* (1979).

22. See GEORG SCHULTZEN, *TRACTATUS DE OBLATIONE, OBSIGNATIONE AC DEPOSITIONE PECUNIAE SEU RES DEBITAE* (1775) (1st ed. 1632).

23. Cf. § 293 sqq. BGB.

24. See *infra* Part VII.

tender and refusell,²⁵ and in *Lea v. Exelby*²⁶ the court stated that “tender without alledging a refusal was not good.”²⁷

Thus, the use of the word *tender* in article 6:108 PECL seems inappropriate. “If the contract does not specify the quality, a party must tender performance of at least average quality.” Normally, the requirements of a valid tender are deemed to be identical to those required for a valid payment. But here a requirement of payment in relation to generic obligations must be deduced from a provision regulating tender of performance.²⁸ The same can be said of article 7:109. “[I]f the performance tendered does not suffice to discharge all of the obligations,” the article sets up several criteria in order to appropriate the party’s performance. Hence, those provisions concern performance. The debtor can fulfill its obligations, but only partially, and appropriation has to be declared, thus implying that the creditor has accepted performance. We do not confront here a problem of tender and its effects, but rather of performance. Obligations are (partially) discharged, and this is an effect that a bare tender of performance cannot produce.²⁹

However, not every refusal by a creditor produces the effects that will be discussed later. According to the authors of the *ius commune*, the refusal had to be *sine causa*.³⁰ “*Senza motivo legittimo*” (without legal ground) declares art. 1206 Italian *Codice civile*, and “*sin razón*” (without a reason) art. 1176 Spanish *Código civil*. The *causa* or *razón* for the refusal is the nonconformity of the tender with the contractual obligation.³¹ Article 8:104 PECL contemplates this eventuality: “a party

25. ROBERT BROOKE, LA SECONDE PART DU GRAUNDE ABRIDGEMENT *sub* Tender & refusell & paiment (1576); EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR A COMMENTARY UPON LITTLETON [207a] (16th ed. 1809) (referring to the plea of tender and refusal). On the Continent, for example, AUGUSTINUS BERIUS, CONSILIORUM *cons.* 194, n.28 (1601): “*ex hoc igitur solum, quod debitor habeat pecuniam solutioni paratam, creditor non constituitur in mora acceptandi, sed requiritur quod illi fuerit oblata, & ipse acceptare denegaverit.*”

26. (1602) 78 ER 1112. For similar reasoning, see also *Ball v. Peake*, (1660) 82 ER 941.

27. According to article 6:58 of the Dutch Civil Code, there is no *mora creditoris* if the noncooperation cannot be imputed to the creditor, who in that case can invoke *force majeure* on his part (HARTKAMP, *supra* note 14, at 117). If the creditor does not refuse the tender, he cannot be blamed for noncooperation.

28. Instead, the Unidroit Principles use the expression “render” performance (art. 5.6).

29. Compare with PECL articles 7:110-111, as discussed.

30. From CYNUS PISTORIENSIS, In CODICEM, ET ALIQUOT TITULOS PRIMI PANDECTARUM TOMI, ID EST, DIGESTI VETERI DOCTISSIMA COMMENTARIA *sub* C, 4, 32 (usur.), 19 (l. acceptam), n.2 (1578; reimp. 1964), to VINCENTIUS CAROCIUS, *Tractatus de oblationibus*, in TRACTATUS PRACTICABILES DE DEPOSITO, OBLATIONIBUS ET SEQUESTRO *quaest.* 7 (pars I), n.6 (1603). For more references, see VAQUER, *supra* note 6, at 62-67.

31. See JOHANNES BRUNEMANN, COMMENTARIUS IN QUINQUAGINTA LIBROS PANDECTARUM *sub* D. 45, 1 (verb. oblig.), 122 (qui Rome) (1752) (explaining that a tender

whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender”; *a fortiori* the previous tender has been ineffective and the debtor thus must make a *conforming* tender. The creditor’s rejection was therefore reasonable, and the negative consequences of a nonconforming tender remain with the debtor.

Furthermore, the creditor’s refusal has to be evaluated in light of the duty of good faith (article 1:201 PECL). In this last case, the reason for the rejection arises from the behavior of the parties, not a specific legal ground. For example, the creditor’s acceptance of a defective tender may unreasonably burden him.³² But the duty of good faith is also applicable to the creditor. Hence, he has to inform the debtor of the reason for refusing the tender, so that the debtor can make a new conforming tender according to article 8:104.³³ Article 7:103 PECL offers an example of good faith as well, by providing that a tender of performance made prematurely has to be accepted if it does not unreasonably prejudice the creditor’s interests.³⁴

V. THE REQUIREMENTS FOR AN EFFECTIVE TENDER

At first sight, one might conclude that the requirements of an effective tender of performance fully match the requirements of performance. That is true, as we will see, but, from a historical point of view, only partially. For an essential requirement of the tender is that it be *real*.

A. Oblatio Realis and Oblatio Verbalis

“*Non sufficit aliquem esse paratum solvere, nisi habeat pecuniam ad manus, qua offerat*” [“It does not suffice to be ready to pay without

“*contra conventionis legem*” is improper and can be refused with justification). On the requirements for a valid tender, see *infra* Part V.

32. The *ius commune* provides some good examples. CAROCIUS, *supra* note 30, *quæstio tertia de loco*, wonders “*an oblatio facta in popina, lupanari vel alio inhonesto loco valeat*” [“is a tender done in a tavern, in a brothel or in any other dishonest place valid”]. He answers that it depends upon the person of the creditor: if the tender is customarily made in such places, the tender is good; otherwise, it is bad. Much more recently, a judgment of the Spanish *Tribunal Supremo* of 10 June 1996 (RJA 5456) considered contrary to the “contractual good faith” a rejection of a tender after the time agreed for performance, because the parties’ behavior suggested that they had modified the time and the delay did not prejudice the creditor’s interests.

33. This provision is also applicable to the English common law: *Borrowman, Phillips, & Co. v. Free & Hollis*, 4 Q.B.D. 500 (1878). See also F.M.B. Reynolds, in *BENJAMIN’S SALE OF GOODS* 12-044 (5th ed. 1997). But it is not applicable in Scotland, according to HECTOR L. MACQUEEN & JOE THOMSON, *CONTRACT LAW IN SCOTLAND* 5.38 (2000).

34. Cf. the Spanish judgment quoted *supra* note 32.

having the tendered money in hand”].³⁵ “*Leges, qui requirunt oblationem intelliguntur de oblationi reali, non verbalis*” [“When the law requires tender it means a real tender, not a verbal one”].³⁶ Having the money ready to pay, or the goods ready to deliver, does not suffice for an effective tender. The debtor has to make the tender by displaying the promised object (*res*, hence, *oblatio realis*). This expression—*oblatio realis*—has taken root in the doctrine. The French and the Italian Codes refer to (respectively) *offres réelles* and *offerta reale*, and the BGB uses the distinction real/verbal tender as the main classification in §§ 294-295 (*tatsächliches Angebot, wörtliches Angebot*).

These two categories—real and verbal tender—are known in the common law cases. There we find statements such as “tender of money requires actual production of (not a mere offer to produce) the amount due,”³⁷ and such statements evoke the aforementioned Continental division. The requirement of an actual display of money by a debtor can be traced back at least to *Sucklinge v. Coney* (1598).³⁸ Nevertheless, the same idea seems to be implied in the prior statement that a debtor, besides being ready to pay, must also make a tender to the creditor.³⁹ It is worth noting the terms used: “tender of a money in a bag, as to say, I have money for you, is no good tender: and so it is of cheeses; to say, I

35. BARTOLUS, *supra* note 6, *sub* D. 20, 6 (quib. mod. pign. vel hyp. sol.), 6 (item liberatur), § qui paratus.

36. JOANNES DE IMOLA, IN PRIMAM INFORTIATI PARTEM COMMENTARIA *sub* D. 24, 3 (sol. matr.), 10 (si mora) (1580). For further references, see VAQUER, *supra* note 6, at 48 sqq.

37. Sir Guenter Treitel, in II ENGLISH PRIVATE LAW 8.353 (P. Birks ed., 2000); GUENTER TREITEL, THE LAW OF CONTRACT 698 (10th ed. 1999); CHITTY ON CONTRACTS, *supra* note 4, at 22-088.

38. 74 ER 1041: “it is not good tender to say I am ready,” although the debtor always held the money in bags, because there was no chance to count it. In the same sense, *Douglas v. Patrick*, (1790) 100 ER 803; *Dickinson v. Shee*, (1801) 170 ER 644; *Glasscot v. Day*, (1803) 170 ER 733; *Thomas v. Evans*, (1808) 103 ER 714; *Finch v. Brook*, (1834) 131 ER 1114. In *Re Farley ex parte Danks*, (1852) 42 ER 1138, the debtor did not show the money but made it jingle, and it was considered a good tender, since the creditor did not ask to see it. The expression “*paratus esse solvere*” can be found in the judgment in *Keating v. Irish* (by Coke), 125 ER 310, and in *Haldenby v. Tuke*, (1747) 125 ER 1358 (Abney J.: “*semper paratus* is of the essence of a plea of tender”). In law French, it turned into “*tout temps prist*”: BROOKE, *supra* note 25. *But see* Willes J. in *Smith v. Manners*, (1859) 141 ER 254 (“*tout temps prist* is the ordinary form of a plea of tender”).

39. (1505) 348. Anon, in J.H. Baker (ed.), Reports of cases by Johh Caryll, pt. II, at 483 (1999). William Salkeld, Reports of the Cases Adjudged in the Court of King’s Bench (. . .) Alphabetically digested under proper heads (. . .) [91 ER 862] points out that “it is not good to say *semper paratus fuit*, without alleging, that *obtulit se solvere*.” Without tender there cannot be a refusal [“*non enim potuit non accipere, cui nihil obatum est*,” according to Æmilius Ferretus, *De Mora*, in TRACTATUS ILLUSTRUM IN UTRAQUE TUM PONTIFICII, TUM CÆSAREI IURIS FACULTATE IURISCONSULTORUM, t. VI, p. II n.14 (1584)].

have cheeses for you, is but a verbal tender, and it is not good.”⁴⁰ The Continental categories of *oblatio realis* and *oblatio verbalis* seem to have crossed the Channel and become part of the common law.⁴¹

The *ius commune* authors, like the Roman lawyers before them,⁴² realized that an *oblatio realis* was sometimes impossible. For example, if an immovable was the object of the obligation, then a verbal tender⁴³ sufficed. An interesting case arose if the creditor gave notice that he would not accept the tendered performance. The creditor’s position could then be deduced from his attitude. As the debtor would be unnecessarily burdened if he were compelled knowingly to perform a useless act—e.g., bringing with him the money or the thing owed to the place of performance—a real tender was excused and a verbal tender had the same effect.⁴⁴

It is commonly said in the English sources that “there must be an actual production of the money, or a dispensation of such production.”⁴⁵ The German BGB distinguishes cases in which the tender has to be real from those in which it must be verbal; according to BGB § 295, a verbal tender by a debtor suffices when the creditor has declared that he will not accept the payment. The French and the Italian approaches differ slightly from the German. The Code Civil, usually requiring *offres réelles*, dispenses with them in the case of an obligation to deliver a corps certain at the place where it is situated. French law here accepts instead a mere *sommation* (interpellation),⁴⁶ a systematic approach that was much criticized by Marcadé.⁴⁷ The Italian Code requires an *offerta reale* in the case of delivery of money or movables at the creditor’s domicile, and an *offerta per intimazione* if the obligation has any other content (art. 1209),

40. Wiseman’s and Denham’s case, (1623) 78 ER 194.

41. There appears to be no material difference between the regulation of tender in *Wiseman’s and Denham’s case*, *id.*, and the treatment of the subject by the German author SCHULTZEN, *supra* note 22, cap. 1, n.4: “*realis vero oblatio tunc fieri dicitur, quando pecunia vel res offertur est presens, vel cum debitor speciem debitam creditori repraesentat, aut pecuniam anumerat, et simul ostendit se paratum esse illi eandem tradere*” [“tender is real when the tendered thing is present, or when the creditor displays the specific thing due, or the money is counted, and at the same time he shows he is ready to deliver it”].

42. Cf. ZIMMERMANN, *supra* note 4, at 819-20.

43. See the authors quoted by VAQUER, *supra* note 6, at 50 n.45.

44. See the doctrine reported by VAQUER, *supra* note 6, at 51 n.46. In *Jones v. Barkley*, (1781) 99 ER 434, Lord Mansfield pointed out that “[t]he party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and do a nugatory act.” *Id.* at 440.

45. *Dickinson v. Shee*, (1801) 170 ER 644; *Thomas v. Evans*, (1808) 103 ER 714; *Finch v. Brook*, (1834) 131 ER 1114.

46. CODE CIVIL art. 1264.

47. V. MARCADE, 4 EXPLICATION THEORIQUE ET PRACTIQUE DU CODE NAPOLEON 555 (1852).

such as the delivery of an immovable (art. 1216); yet, Italian civil code art. 1214 accepts an *offerta secondo gli usi* (a tender in accordance with usages).

An approach based on the distinction among different kinds of tender seems unsatisfactory.⁴⁸ The law cannot foresee all the possible objects of an obligation, and the law should avoid setting up classifications that will not cover all events. Shortly after enactment of the BGB, Rosemberg had advised against the real/verbal⁴⁹ dichotomy because it serves no useful purpose,⁵⁰ and the mode of tender is unimportant. To avoid the negative consequences of his nonperformance due to the creditor's uncooperativeness, the debtor simply has to try to perform.⁵¹ The debtor's duty is to prove that he was ready and willing to perform, and that he in fact performed to the best of his ability, despite the creditor's uncooperativeness. If the latter had cooperated, the contract would have been performed.⁵² Hence, the extent of a debtor's readiness to perform depends on the cooperation of the creditor and the content of his obligation, taking regularly into account the principle of good faith and the attitude of the creditor.⁵³

48. The speech of Singleton, J., in *Farquharson v. Pearl Assurance Co.*, [1937] 3 All E.R. 124, at 131, seems to overcome the distinction between a real tender and a verbal tender:

Now, it is not said in this case that the claimant had the money in his pocket, in so many words, but the arbitrator finds that the claimant called on Mr. French and offered to pay the premiums of both policies. From that I assume that he was ready and willing to pay. I assume, too, as I think I must, that the only reason that payment was not made was that Mr. French, the district manager of the respondent company, declined to accept payment. It is true there was no jingling of money (. . .) I am satisfied that the claimant was ready and willing to pay.

49. Leo Rosemberg, *Der Verzug des Gläubigers. Voraussetzungen und Wirkungen nach dem BGB unter Berücksichtigung des gemeinen Rechts*, JhJb 151, 152 (1901): "Der Schuldner hat bei Bringsschulden nicht «real» und bei Holschulden nicht «verbal» anzubieten, sondern der Schuldner hat immer das anzubieten, wozu er nach dem konkreten Schuldverhältnisse verpflichtet ist."

50. JOUBERT, *supra* note 12, at 216, following De Villiers' unpublished thesis on *mora creditoris*, cited *supra* note 12.

51. J. BEATSON, ANSON'S LAW OF CONTRACT 483 (27th ed. 1998): "Tender is attempted performance." *Accord* 9th ed. by Sir William R. Anson 292 (1899). The same is valid for South African law according to R.H. CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 468 (4th ed. 2001).

52. ZIMMERMANN, *supra* note 4, at 819.

53. This statement is valid for both continental laws and common law. In Germany: MEDICUS, *supra* note 4, at 207 (although later he says that a real tender is the rule and deals with the exceptional cases of verbal tender). In Spain, VAQUER, *supra* note 6, at 41 sqq. In Portugal, ALMEIDA COSTA, *supra* note 14, at 947-48. In *Poole v. Tumberidge*, 150 ER 738 (1837), Parke B. summarizes the question as follows: "It is also clearly stated, that the meaning of a plea of tender is, that the defendant was always ready to perform his engagement according to the nature of it, and did perform it so far as he was able, the other party refusing to receive the money." See also the dictum by the same Judge Parke in *Cotton v. Godwin*, 151 ER 715 (1849), *Startup v.*

By requiring a “conforming tender,” article 8:104 of the PECL jettisons the aforementioned approach of the German, Italian, and French Codes. The PECL approach corresponds with the regulation of the Spanish, the Portuguese, and the Dutch Codes, as well as the Swiss *Obligationenrecht*. None of these Codes contains any classification of tender of performance.⁵⁴ In these codes, readiness and willingness to perform are the key concepts.⁵⁵ The tender is only a manifestation of such readiness and willingness.⁵⁶ This explains why a tender is always required, unless a creditor has committed an anticipatory breach of contract.⁵⁷ In that case it is enough for the debtor to be ready to perform without tendering.⁵⁸ The negative consequences of the nonperformance

Macdonald, 134 ER 1029, 1036-37 (1843), and *Dixon v. Clark*, (1847) 136 ER 919 (1847), as well as CHITTY ON CONTRACTS, *supra* note 4, at 22-083, and RICHARD STONE, PRINCIPLES OF CONTRACT LAW 273 (3d ed. 1998) (“What amounts to satisfactory ‘tender’ (. . .) will depend largely on the terms of the contract.” quoting *Startup v. Macdonald*). *Elliott v. Nutcombe*, 77 ER 941 (1558), provides another good example: the rental for the lease had to be paid at the Palace of Exeter; as the palace was closed on the day for payment, the tender at the door of the palace was considered good. The same applies to South African Roman-Dutch law: “The debtor must, therefore, do whatever is necessary on his part to require the creditor to give his cooperation for the next step in making performance. Anything less will not be a proper tender. What is required inevitably depends upon the circumstances” (Joubert, *supra* note 12, at 216, who follows De Villiers); “[t]he debtor must have made a proper tender of performance. The debtor must in other words do everything that is necessary in terms of the contract to complete performance.” SCHALK, VAN DER MERWE ET AL., CONTRACT: GENERAL PRINCIPLES 268 (1993).

54. By contrast, Harvey McGregor’s *Contract Code* distinguishes, on one hand, a tender accompanied by production of money or property and, on the other hand, a tender of services accompanied by a declaration of readiness and willingness to render them (207b). But when the other party has made it clear that he will not accept the tender, it seems that no tender is needed (207a). As concerns the preliminary draft of the *Code européen des contrats*, in spite of the opinion of his coordinator (pp. 292-93), it is still modeled on the French and Italian pattern, for the debtor has to make “*une offre réelle ou par sommation*” (art. 105).

55. Ss. 28 and 37 Sale of Goods Act—England—1979; CHITTY ON CONTRACTS, *supra* note 4, at 22-083; Treitel, ENGLISH PRIVATE LAW, *supra* note 37, at 8.358; VAQUER, *supra* note 6, at 41-45, 60-61 (*disposición a cumplir*); SCHEY, *supra* note 20, at 109-10 (“*bildet die Erfüllungsbereitschaft des Schuldners die allererste Voraussetzung der mora creditoris*”).

56. Therefore, a tender unaccompanied by a readiness to perform is ineffective. Compare the statement by Antonius Négusantius, *De pignoribus et hypothecis, Tractatus admodum elegans & copiosus*, in TRACTATUM EX VARIIS IURIS INTERPRETIBUS COLLECTARUM t. IX, p. 5, m. 3, p. 2, n.16 (1549) (“*requiritur quod oblatio sit specialis et non sufficit generalis per ista verba offero me paratum facere ad adimplendia omnia*” [“tender has to be special, since it is not enough to say I am ready to perform any obligation”]), with the decision in *Scott v. Franklin*, 104 ER 142 (1815) (the mere declaration of readiness to pay any balance due was not considered a tender). Conversely, readiness to perform without tender is also ineffective (*supra* note 38). Therefore, the expression “still intends to tender” in article 9:303 PECL seems inappropriate. To make a proper tender, the debtor must be ready to perform; if he is only trying to be ready, he is not ready, and if the creditor demands performance, the debtor will not be able to perform. The distinction between “intending” and “in fact” tendering seems to make little sense, and even less sense when the article deals with a tender after time of performance.

57. See PECL arts. 9:201(2), 9:304.

58. See *supra* note 44.

can only be transferred to the creditor if the debtor shows, especially to the former, that an incomplete performance is only attributable to his creditor's noncooperation.

B. *The Conforming Tender*

A *proper* tender (article 7:111) is one that conforms to the contract (article 8:104). The PECL does not specify any more than this.⁵⁹ Article 9:401 adds that a party that accepts a nonconforming tender of performance may reduce the price. *A contrario*, the creditor can refuse a nonconforming tender without falling in *mora*. In general, one can say that the requirements of a good tender are the same as those for a good performance. Nevertheless, some questions arise when concrete requirements of performance are examined.

The first question relates to the integrity of performance. In principle, the creditor is not obliged to accept part performance. However, good faith duties cannot be ignored, and a refusal to take delivery cannot be unreasonable. The PECL contains no provision similar to art. 6.1.3 of the Unidroit principles, but the same result can be achieved if the principle underlying article 7:103 is taken into account. Assuming only a minor difference between tender and the performance, and that the creditor is not prejudiced by a partial acceptance, his refusal will violate the requirements of good faith.⁶⁰

According to article 7:103 PECL, *a contrario*, the creditor may not refuse a tender made before it is due if it does not unreasonably prejudice his interests. The PECL established an interesting balance between the

59. "[T]ender of payment, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place and mode of payment." ANSON'S LAW OF CONTRACT, *supra* note 51, at 484. This statement is applicable to all European laws.

60. See the discussions to case 6 in Storme, *supra* note 16, at 292 sqq. The decision of the Spanish *Tribunal Supremo* of 8 June 1992 (RJA 5171) provides a good example. Including accrued interest, the debtor was obliged to pay nearly 8.978.518 pesetas (\$53.962 \$), but he only tendered 8.860.250 (53.251,1 \$). In fact, the difference between the tender and the amount due was only 15.000 pesetas (90,15 \$); the court considered it a good tender. In the common law, several cases deal with the question. Older cases approved tender of a larger sum for a smaller one. [*The Wade's case*, 77 ER 232, at 233, by Coke: "if a man tenders more than he ought to pay is good, for *omne majus continet in se minus*"]. Later, the case law has made exacting factual distinctions. If a larger sum is tendered and the debtor asks for change and the creditor does not object, the tender is good: *Black v. Smith*, (1791) 170 ER 101; *Bevans v. Rees*, (1839) 151 ER 131. But the tender is not good if it can prejudice the creditor: *Betterbee v. Davis*, (1811) 170 ER 1309 (payment partially in bank notes). Tender of the whole minus the property-tax was insufficient in *Robinson v. Cook*, (1815) 128 ER 1064. The role of good faith can also be noted in *Polglass v. Oliver*, (1831) 149 ER 7: payment was tendered in country bank notes, but the creditor rested his refusal upon the deficiency in the amount tendered. The court rejected the subsequent allegation that the tender was not made in current coin.

interests of the parties, reflecting the fact that European national laws have a variety of approaches to the presumptive benefit afforded by the term, i.e., the time allowed for performance.⁶¹ Another debate centers on the moment when a debtor may tender his performance. In the *ius commune* it is possible to find the extreme statement that a performance can be timely even if made at the last moment of the term,⁶² though a milder approach is preferable. “*Attamen hoc verum, nisi post illum actum remanere aliquid faciendum, quod non posset intra terminum expediri*” [“Nevertheless, this is only true unless something else has to be done and it cannot be done within time of performance”].⁶³ To put this point in common law terms, “it is the last time of the day which the law appoints for a tender, but yet not so late in the day but that there may be time enough for the execution of the agreement in what is tendered.”⁶⁴ Later, in a case where the purchased oil was tendered the last day (Saturday) at 19:30, the court held that “the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods or the money tendered in order to ascertain that the thing tendered really was what it purported to be. Indeed without such an opportunity an offer to deliver or pay does not amount to a tender.” The case was accordingly decided in favor of the purchaser.⁶⁵ Once more, the principle of good faith plays a crucial role, since the PECL does not specifically regulate the timeliness of a tender. On the contrary, if time is of the essence of performance, a delayed tender may amount to a breach of contract and may be refused as non-conforming by the creditor.⁶⁶

61. See the comparative remarks in the notes to article 7:103 and K. ZWIGERT, H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 530, 533, 542-43 (Tony Weir trans., 2d ed. 1987). Concerning tender of performance, the English case law seems to be very strict. Tender before time of performance is “void” [*Phillips v. Rice Huish*, (1603) 79 ER 12], unless the creditor is already at the place of performance: *Hawley v. Simpson*, (1583) 78 ER 280; *Allen v. Andrews*, (1587) 78 ER 333. If the parties had agreed on a last day for performance, “the defendant could not make a tender to oblige the plaintiff to accept before the last day; and therefore since the last day is the time appointed (. . .), it shall not be presumed that the plaintiff was there before the time, ready to accept [*Harman v. Owden*, (1700) 91 ER 131 and 1315]. See also A.C. Guest, *IN BENJAMIN’S SALE OF GOODS*, *supra* note 33, at 8-039.

62. IV STEPHANUS GRATIANUS, DISCEPTATIONUM FORENSIUM JUDICIORUM *Disc.* 786, n.26 (1699). Compare now with the different perception in Storme, *supra* note 16, case 8 (delivery at 3:00 in the morning).

63. ALEXANDER LUDOVISIUS, AUREÆ DECISIONES S.R.R. *Dec.* 492 (1617).

64. *Lancashire v. Killingworth*, (1702) 91 ER 862.

65. *Startup v. Macdonald*, 134 ER 1029, 1036-37 (1843).

66. See article 8:103 in relation to articles 7:102 and 9:303 *a contrario*.

Article 7:101 of PECL sets forth the criteria for the place of tender of performance. If the place of performance has not been fixed,⁶⁷ then for an obligation to pay money, tender should be made at the creditor's place of business; for a nonmonetary obligation, tender should be made at the debtor's place of business (or his habitual residence if the parties do not have a place of business). This solution is not entirely satisfactory. In the case of a nonmonetary obligation, it seems illogical to expect the creditor to go to the debtor's place of business or habitual residence just to see if the latter tenders properly and to refuse the tender. According to French civil code article 1258 al. 6) and the Italian civil code art. 1208.6), tender must be made at the creditor's domicile; this rule seems to correspond to the principle of the *ius commune*.⁶⁸ This approach, too, may be criticized. Once again, the concept of tender has to be borne in mind. What constitutes a good tender depends on both the terms of the obligation, and the attitude of the creditor. For a tender of performance, the initiative belongs to the debtor, who wants to discharge his contractual duties. Hence, he must show his readiness and willingness to perform, implying that he must seek out the creditor. But if the debtor is aware that the creditor will refuse his tender, it is pointless to compel him to perform a useless act. To sum up, performance should be tendered at the place fixed for performance or at the creditor's place of business or habitual residence, unless the circumstances indicate that tender should be made elsewhere or not at all.

It is generally said that tender has to be unqualified.⁶⁹ Baldus set up a distinction between *conditio intrinseca et extrinseca*.⁷⁰ An intrinsic condition is essentially the expression of a debtor's right, and therefore under such a condition such a tender is effective. The condition may also be extrinsic, as in the case where an offer is made on condition of receiving a receipt for all current debts.⁷¹

67. See, for instance the old common law case *Gyggys v. Lewes* (1489), reported by Caryll, *supra* note 39, pt. I, at 18: if performance has to be rendered on certain land, "the defendant is not bound to search for the plaintiff anywhere else but on the land."

68. See VAQUER, *supra* note 6, at 97 sqq.

69. Expressly, MCGREGOR'S CONTRACT CODE 207.2.

70. BALDUS DE UBALDIS, IN QUARTUM ET QUINTUM CODICIS LIBROS COMMENTARIA *sub* C, 4, 32 (usur.), 19 (l. acceptam), n.23 (1586). For further details, see VAQUER, *supra* note 6, at 93-94.

71. *Glasscot v. Day*, (1803) 170 ER 733; *Huxham v. Smith*, (1809) 170 ER 1067; *Strong v. Harvey*, (1825) 130 ER 530. In *Evans v. Judkins*, (1815) 171 ER 50, the parties disagreed on the amount of the debt; Gibbs C.J. considered that "had the defendant offered to pay the •17 due, leaving open the plaintiff's right to an ulterior demand, that would have been sufficient; but an offer of payment clogged with a condition that it should be accepted as the balance due does not amount to a legal tender" (see also *Greenwood v. Sutcliffe*, [1892] 1 ch. 1). Instead, the opinion

Another debated topic is the effectiveness of a tender by a third person who is not an agent of a debtor. The *ius commune* authors Azo and Donellus denied that a third party nonagent could tender performance, but the majority of their contemporaries held a contrary view.⁷²

During the 19th century, the German Romanists rejected Donellus's opinion as well.⁷³ The common opinion among the representatives of the *école de l'exégèse* was that anyone who could perform could tender performance.⁷⁴ The PECL seems to follow this view.⁷⁵ But article 7:106 qualifies a third person's entitlement to intervene in a debtor's obligation. According to BGB § 267, NBW art. 6:73, and *Codice civile* art. 1180, the third person has to act with the assent of the debtor or must have a legitimate interest in performance.⁷⁶ The same requirements apply to tender of performance;⁷⁷ if they are not fulfilled, the creditor has a legal ground to refuse the tender.

In contrast to the person entitled to tender, the PECL contains no provision identifying the person entitled to receive performance. Baldus wondered "*cui est fienda oblatio*"; he answered, "*ei, qui potest recipere, & liberare oferente*."⁷⁸ Of course, the PECL assume that creditor and agent are among those who may receive performance and discharge the debtor. But also the *adiectus solutionis causa*, if the parties have agreed that payment has to be made to a certain person, an offer of performance to this person can only be qualified as a conforming tender (article 8:104).⁷⁹

approved the tender of a lesser sum under the condition of a receipt in full because the debtor managed to prove that he had offered to pay the whole debt in *Cole v. Black*, (1793) 170 ER 142.

72. For further details, see VAQUER, *supra* note 6, at 73-74.

73. MADAI, *supra* note 8, at 246-48; Mommsen, *supra* note 9, at 158-59.

74. C. DEMOLOMBE, *TRAITE DES CONTRATS OU DES OBLIGATIONS CONVENTIONELLES EN GENERAL* V (n.d.) 58; F. LAURENT, *18 PRINCIPES DE DROIT CIVIL* 180 (4th ed. 1887).

75. This is so especially because the comments to article 7:106 dealing with payment by a third person refer repeatedly to tender (BEALE & LANDO, *supra* note 2, at 338-39).

76. This result is consistent with the English case *Watkins v. Ashwicke*, (1585) 78 ER 389: "Where one tendered money upon a mortgage for an infant, who was not the guardian, nor was to have any interest in the land, that it was adjudged a bad tender." *But see* *Read v. Goldring*, (1813) 105 ER 314.

77. PALANDT & HEINRICH, *supra* note 14, § 294 BGB, Rn. 6; MÜNCHENER KOMMENTAR/Thode, *supra* note 16, § 293 BGB, Rn. 7; HARTKAMP, *supra* note 14, at 119; CATTANEO, *supra* note 16, at 144-45; Giampiero Borraccia, *in* PIETRO RESCIGNO, *CODICE CIVILE sub art.* 1208 (1992); VAQUER, *supra* note 6, at 72 sqq.

78. BALDUS, *supra* note 70, n.23, *tertio quaero*.

79. Even tacitly. In *Cropp v. Hambleton*, (1586) 78 ER 310, the lessee for two years customarily paid the rent to a Mary Briggs, servant of the lessor, who accepted it personally. The third year the lessee paid the rent to the lessor. The fourth year the lessee again paid the rent to Mary Briggs, but the lessor blamed her for taking it. The lessor then demanded the rent, and

No formal requirements are established in the PECL. Consistently with most European laws,⁸⁰ the PECL established no formal requirements for a valid tender. Hence, the debtor need not tender before witnesses, as he must under the common law.⁸¹ Nevertheless, as a precautionary measure, the debtor should seek evidence of his readiness and willingness to perform, in case the creditor claims nonperformance. The conformity of the tender is presumed.⁸²

VI. THE CONSEQUENCES OF A CONFORMING TENDER OF PERFORMANCE

A. *Tender of Performance is Not Performance, but Pro Solutione Haberi*

The PECL lacked a definition of performance. From the content of chapter 7 and the concept of nonperformance established in article 8:103, one can conclude that performance presupposes the complete fulfillment of the contractual obligation, although the creditor may accept an *aliud* as performance (e.g., article 8:104). Tender constitutes an attempted performance, but it is not performance. The debtor has not delivered the money or the property due, nor has he rendered the promised service. He still has possession of the money or the property, in accordance with articles 7:110 and 7:111. If he has not performed, he has not discharged his obligation, and therefore these later articles establish a proceeding to allow the debtor to discharge his obligation despite the creditor's non-cooperation.

Certain features of this situation seem unfair because the debtor has tried to perform and has, in fact, done his best to discharge his obligation. That is the reason why the law takes into account the behavior of the parties and spares the debtor the negative consequences of the nonperformance. Those negative consequences are transferred to the creditor because of his failure to cooperate. Tender of performance puts

when it was not paid, the lessor entered the leased premises. Although the court's interpretation of the facts is intricate, it held that there was a good tender. Mary Briggs, as agent of the lessor, was considered to be tendering the rent to the lessor. In my opinion, the decision seems an application of the principle of good faith (*venire contra factum proprium*).

80. The exceptions appear in the *Code civil* (art. 1258 al. 7) and the *Codice Civile* (art. 1208.7), since an *officiel ministériel* and an *ufficiale publico* are respectively required. The *Code européen des contrats* envisages a tender "*dans les formes prescrites, à sa demande, par le juge de première instance*" (art. 105.1). This article could mean that tender of performance has to be made before the court (*see infra* note 119 and the corresponding text).

81. For further details, see VAQUER, *supra* note 6, at 96.

82. This idea is implicit in articles 7:110 and 111. The debtor has to prove that he tendered the payment or performance and that the creditor refused it; the creditor has the burden of showing that the tender was not conforming or that the debtor was in fact not ready to perform. *See* MÜNCHENER KOMMENTAR/Thode, *supra* note 16, § 293 BGB, Rn. 15.

the creditor in *mora*. Some of the negatives consequences of nonperformance are gathered under the concept *mora creditoris*.⁸³

Before dealing with the creditor's default, we should stress that the first effect of tender of performance is that the debtor cannot be blamed for nonperformance. The contract remains unfulfilled because of the creditor's recalcitrance. Nonperformance may be attributed to the creditor, since the debtor has gone as far as he could to perform. The latter is not released from his obligation.⁸⁴ "*Sed cum in debitoris recta oblatione iniquum sit, ei nocere iniusta recusationem creditoris; ideo placuit . . . oblatione ista pro solutioni haberi.*"⁸⁵ This principle may be translated into English as follows: "[the party's] readiness to perform has been solely nullified by the other party. The rule, therefore, is that a tender of performance is equivalent to performance."⁸⁶

This idea underpins article 8:101(3) PECL, and corresponds to s. 38(1)(a) of the 1979 English Sale of Goods Act. According to the first provision, tender of performance bars the creditor from resorting to remedies for nonperformance.⁸⁷ According to the second one, after a conforming tender of performance, the party who has refused it cannot be considered as unpaid and, therefore, is prevented from exercising any of his remedies against the goods under s. 39 of the Act.⁸⁸

With his contractual obligation unfulfilled, the debtor is not discharged. Although he has no action against the creditor,⁸⁹ he may use the tender as a defense against a claim for nonperformance. Though tender is not performance, it is a means of preventing the negative consequences of the debtor's nonperformance, and is thus legally considered an equivalent to performance. This common approach in the

83. TREITEL, *supra* note 11, at 40.

84. ZIMMERMANN, *supra* note 4, at 820.

85. DONELLUS, *supra* note 6, n.2.

86. M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 569 (13th ed. 1996). The leading case is *Startup v. Macdonald*: "the law considers a party who has entered into a contract to deliver goods or to pay money to another, as having, substantially, performed it, if he has tendered the goods or the money." This case is also considered authoritative in Scotland. DAVID M. WALKER, 2 PRINCIPLES OF SCOTTISH PRIVATE LAW, BK. IV: LAW OF OBLIGATIONS 134 (4th ed. 1988).

87. See comment (iii) to article 8:101 in BEALE & LANDO, *supra* note 2, at 360.

88. S. 38(1) Sale of Goods—England—Act: "The seller of goods is an unpaid seller within the meaning of this act (a) when the whole of the price has not been paid or tendered." See BENJAMIN'S SALE OF GOODS, *supra* note 33, at 15-022 to 15-023 (by D.R. Harris); P.S. ATIYAH, JOHN N. ADAMS & HECTOR MACQUEEN, THE SALE OF GOODS 450-51 (10th ed. 2001); see also *Cohen v. Roche*, [1927] 1 K.B. 169.

89. Bartolus made this argument. BARTOLUS A SAXOFERRATO, IN PRIMAM CODICIS PARTEM COMMENTARIA *sub* C, 4, 54 (pact. int. emp. & ven.), 7 (l. si a te) (1574): "*Ad actionem consequendam non sufficit sola oblatio*"; see also Lando, *supra* note 13, at 337.

Continental *ius commune*⁹⁰ and English common law⁹¹—even quoting Pothier as a foundation⁹²—is still today the prevailing point of view.⁹³ Therefore, the debtor does not incur penalties⁹⁴ and is protected from paying damages and costs.⁹⁵

B. *Mora Creditoris or Breach of Contract?*

Until now there has been almost full congruence between the developments of the *ius commune*, the Continental national systems of law, and the English common law. Nevertheless, there are also significant differences among them. As *mora creditoris* is the reverse of

90. According to Baldus, tender provided the debtor an exceptio solutionis. BALDUS DE UBALDIS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA sub D, 3, 33 (procurat.), 73 (l. ri reus paratus) (1586). For more references, see VAQUER, *supra* note 6, at 109-10.

91. That was the meaning of the plea of tender. According to Blackstone, “. . .)[Y]et sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it.” WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 303 (1791). “The plea of tender is available to the promissor as a defence to a subsequent action against him for failure to perform.” CHITTY ON CONTRACTS, *supra* note 4, at 22-083. Read’s Trustee in Bankruptcy v. Smith, [1951] 1 Ch. 439, 447: “A good plea of tender is a defence, and accordingly the action fails, and is dismissed with costs.”

92. *Martindale v. Jones*, (1841) 113 ER 1181, 1184-85 (Lord Denman, J.).

93. See TREITEL, *supra* note 11. According to Treitel, “although the common law has no independent theory of *mora creditoris*. . . so far as remedies are concerned, this may lead to very similar (though not identical) solutions in civil and common law.” According to Hartkamp, “the debtor is in principle still bound. He will, however, be able to reject any claims based on failure in the performance.” HARTKAMP, *supra* note 14, at 117; VAQUER, *supra* note 6, at 106 sqq. Kohler pointed out that the effects of performance were anticipated at the time of tender. Kohler, *supra* note 9, at 379. According to Benjamin, “the effect of a valid tender of the price is that it prevents the seller from exercising any of the remedies against the goods under section 39 of the Act [lien, stoppage in transit, resale], since he is no longer an «unpaid seller» within section 38(1). But a valid tender does not discharge the buyer’s obligation to pay the price.” BENJAMIN’S SALE OF GOODS, *supra* note 33, at 15-022, 16-014.

94. On the approach of the continental *ius commune*, see VAQUER, *supra* note 6, at 113 n.30. Concerning the English common law, 348. Anon, reported by Caryll, *supra* note 39, pt. II, at 484: “if the obligor meets the obligee before the day and tenders him the money, the obligor is thereby excused of the bond.” See also *The Wade’s case*, 77 ER 232, 233: “if (. . .) the obligor or mortgagor, &c, makes a tender in the place, &c, to the mortgagee, &c, and he refuses it, the penalty is for ever saved.”

95. “[A tender can be pleaded] in bar of the damages only, for the debtor shall nevertheless pay his debt.” *Giles v. Hartis*, (1697) 91 ER 1066; “A tender (. . .) only goes in bar of damages.” *Johnson v. Clay*, (1817) 129 ER 195 (*per* Burrough, J.); (“If the defendant can maintain this plea, although he will not thereby bar the debt (. . .), yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff.” *Dixon v. Clark*, (1847) 136 ER 919 (1847); “The plea of tender only bars the damages.” *Smith v. Manners*, (1859) 141 ER 254 (Williams, J.); see also BENJAMIN’S SALE OF GOODS, *supra* note 33, at 16-014 n.18; CHITTY ON CONTRACTS, *supra* note 4, at 22-084.

mora debitoris, the prevailing view of the *ius commune* is that the creditor's failure to cooperate leads to a form of breach of contract.

Departing also from the Roman sources, the concept elaborated by the German pandectists shifted away from the *ius commune* approach. If the creditor incurs *mora creditoris*, this is because on one hand, performance is still possible and, on the other hand, there is no breach of contract and the contract is not terminated. The debtor is still bound. That is exactly the goal of the institution of *mora creditoris*: the relaxation of the duties of the debtor even though he continues to owe a validly subsisting obligation. Because the contract is not terminated, the creditor can claim performance. But, because nonperformance has resulted from the creditor's noncooperation, he will bear the negative consequences, in the form of an alleviation of the debtor's liability. Moreover, the debtor will have the opportunity to discharge his obligation by depositing, with an appropriate official, the money or the property due. In any case, the creditor only incurs *mora creditoris* to the extent that the obligation can still be performed; if a creditor's noncooperation renders performance impossible, he commits a breach of contract.⁹⁶

French law ignores the concept of *mora creditoris*. Tender of payment (*offres réelles*) empowers the debtor only to deposit the money or the property due. Cessation of interest running and alleviation of responsibility attach only to the official deposit.⁹⁷

In the common law, the refusal of a conforming tender amounts to a breach of contract. Like the debtor, the creditor is liable for breach of contract. Therefore, the remedies available to the debtor depend on whether the breach of contract is substantial.⁹⁸ Nevertheless, common law courts may evoke rather unsystematically the more systematic continental approach Continental approach.

96. MÜNCHENER KOMMENTAR/Thode, *supra* note 16, § 300, Rn. 3 ss; KOZIOL & WELSER, *supra* note 16, at 250; HARTKAMP, *supra* note 14, at 117; LAMARCA MARQUÈS, *supra* note 17, at 83-84; ALMEIDA COSTA, *supra* note 14, at 948.

97. See PHILIPPE MALAURIE & LAURENT AYNÈS, 6 COURS DE DROIT CIVIL. LES OBLIGATIONS 568 (7th ed. 1996); FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 1004-05 (6th ed. 1996). Concerning cessation of running of interest, see *infra* notes 105-107 and corresponding text.

98. ZIMMERMANN, *supra* note 4, at 818; TREITEL, *supra* note 11, at 40-41; HÜFFER, *supra* note 8, at 141 sqq; see, e.g., Gill & Duffus, SA v. Berger & Co., [1984] 1 All E.R. 438, 443 (per Lord Diplock). The same result obtains in Scotland. WALKER, *supra* note 86, at 134-35.

1. The Continental Approach

The concept of *mora creditoris* comprises a variety of effects. First, by tendering performance, the debtor cannot be in delay (*mora debitoris*). If the debtor's performance is delayed, a conforming tender (in that case, including moratory interest) brings the consequences of *mora debitoris* to an end (*purgatio moræ*).⁹⁹ The creditor's and the debtor's defaults cannot exist at the same time with regard to the same obligation; since the creditor is now in default because of nonperformance, the effects of *mora creditoris* prevail.

The main consequence of *mora creditoris* is doubtless the alleviation of the debtor's liability. The debtor no longer bears the risk of accidental destruction of the property due. Therefore, if the specific thing perishes, the debtor is discharged.¹⁰⁰ Of course, if the thing belongs to a genus, the conclusion might be a different one, because *genus nunquam perit*. Nevertheless, another effect that can be linked to a conforming tender of performance is the specification of the generic obligation, so that after the tender, the generic thing due is deemed to be a specific one.¹⁰¹ Roman law relaxed the debtor's liability, holding him responsible for only *dolus* and *culpa lata*.¹⁰² But this alleviation of responsibility is not accepted in all the Continental laws.¹⁰³

99. ZIMMERMANN, *supra* note 4, at 823; HARTKAMP, *supra* note 14, at 117; VAQUER, *supra* note 6, at 119 sqq. The same result obtains in South African Roman-Dutch law: JOUBERT, *supra* note 12, at 217; VAN DER MERWE ET AL., *supra* note 53, at 268.

100. “[*Quando scilicet, res oblata sine dolo et culpa debitoris perierit: tunc enim obligatio, si cum ea concurrat rei interitus, idem operatur, quod depositio, adeoque debitor omnino liberatur*” [“If the due thing perishes without fault or intention, the debtor is discharged in the same way as if deposit had taken place”]. SCHULTZEN, *supra* note 22, cap VI, n.3. This is still the position in the law of Germany [§ 300(1) BGB], Netherlands (art. 6:64 NBW), and Spain (arts. 1185, 1452.3, 1589 and 1590 *Código civil*); see MÜNCHENER KOMMENTAR/Thode, *supra* note 16, § 300; HARTKAMP, *supra* note 14, at 117; VAQUER, *supra* note 6, at 130 sqq; ALMEIDA COSTA, *supra* note 14, at 949-50.

101. ROBERT-JOSEPH POTHIER, *TRAITÉ DES OBLIGATIONS* 274 (1825); see now § 300(2) BGB; DULLINGER, *supra* note 14, at 38; VAQUER, *supra* note 6, at 148 sqq.

102. ZIMMERMANN, *supra* note 4, at 819. For a detailed account of the authors of the *ius commune*, see VAQUER, *supra* note 6, at 107 n.6.

103. It is expressly established in § 300(1) BGB. For the solution in Dutch law, see HARTKAMP, *supra* note 14, at 118. For Swedish law, see Jan Hellner, in *AN INTRODUCTION TO SWEDISH LAW* 245 (Stig Strömholm ed., 2d ed. 1991). The solution is discussed in Austrian law (DULLINGER, *supra* note 14, at 38-39; RABL, *supra* note 8, *passim*). The alleviation of responsibility is rejected in Spanish law. VAQUER, *supra* note 6, at 107 n.6. It is also accepted in South African law: JOUBERT, *supra* note 12, at 217; VAN DER MERWE ET AL., *supra* note 53, at 268; Jan Lotz, *Purchase and Sale*, in REINHARD ZIMMERMANN & DANIEL VISSER, *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA* 373 (1996); CHRISTIE, *supra* note 51, at 595-96.

The debtor's responsibilities may be alleviated to an extent, but the debtor is not freed from his obligation. In spite of the relaxation of his responsibility, he may be interested in a full discharge of his duties. The law allows the debtor to deposit the money or the property due. According to the common law, this deposit was to be judicial and a proper tender had to precede it; deposit without tender was completely ineffective.¹⁰⁴ All the Continental systems of law authorize a debtor to deposit what is owed.¹⁰⁵ If the obligation consists in a service, the debtor cannot deposit what is owed; instead, the judge may discharge the debtor, upon his demand. But in this last situation, *mora creditoris* is no longer at issue because the deposit discharges the obligation and the creditor cannot claim performance. *Mora creditoris* requires an existing obligation and presupposes that performance is still possible.

It was much debated whether a conforming tender was sufficient to stop the running of interest. Concerning moratory interests, the answer was easy: if tender of performance ends the condition of *mora debitoris*, accrual of moratory interest is consequently stopped. As for conventional interest, the common opinion among the authors of the *ius commune* was that only the deposit of the money could stop interest running.¹⁰⁶ There was, however, a dissident opinion on the question. Molinæus,¹⁰⁷ the great French jurist, tried to rebut the broadly received opinion, but his argumentation sprang mainly from equity. The success of his theory seems to have been rapid¹⁰⁸ but short lived, for Pothier rejected his point of view.¹⁰⁹ However, the solution of both the BGB and

104. For details, see VAQUER, *supra* note 6, at 136 n.66.

105. See, e.g., art. 6:67 sqq. NBW; § 372 sqq. BGB; art. 1257 CODE CIVIL and art. 1426 sqq. NOUVEAU CODE DE PROCEDURE CIVIL; art. 1210 sqq. CODICE CIVILE; art. 1176 sqq. CÓDIGO CIVIL, § 1425 ABGB, art. 841 sqq. PORTUGUESE CIVIL CODE; INGER DÜBECK, EINFÜHRUNG IN DAS DÄNISCHEN RECHT 199 (1996); Hugo Tiberg, in SWEDISH LAW: A SURVEY 133-134 (Hugo Tiberg, Fredrik Steitel & Pär Cronholt eds., 1994). For other references, see BEALE & LANDO, *supra* note 2, art. 7:110 n.2.

106. But the point was not free of debate. For further details, see VAQUER, *supra* note 6, at 122 sqq.

107. Carolus Molinæus (Charles Dumoulin), *Tractatus contractuum et usurarum*, in OMNIA QUÆ EXTANT OPERA, t. II *quæst.* 39, nn.296-303 (1681).

108. According to Charles Loyseau, Molinæus' opinion "*soit plutôt tenue en France, comme aussi elle est plus équitable*," although Loyseau himself considered "*la commune plus vraie que la sienne, en termes de Droict*." Charles Loyseau, *Traité de déguerpissement et de lotissement par hypothèque*, in LES OEUVRES DE MAISTRE CHARLES LOYSEAU Lib. 5, Chap. 9 n.15 (1678).

109. "[C]e que nous avons dit jusqu'ici, que les offres réelles (...) arrêtent le cours des arrérages, n'a lieu que lorsqu'elles ont été suivies, ou de consignation, ou de poursuites faites contre le créancier" ["Tender only stops interest running if followed either by deposit or a suit brought against the creditor."]. Robert-Joseph Pothier, *Traité de Contrat de Constitution de Rente*, in 2 OEUVRES DE R.-J. POTHIER 224 n.212 (1831). Pothier's point of view was followed by the

the *Codice Civile* recall Molinæus, since both contain provisions authorizing the stopping of interest after a conforming tender (§ 301 and art. 1207.1, respectively), although this conclusion hardly seems appropriate in other legal systems.¹¹⁰

Because the obligation has not been discharged, the creditor is still entitled to claim performance. Therefore, the debtor must remain ready and willing to perform, for if he does not fulfill the contract upon the creditor's demand, he falls into delay (*mora debitoris*) and the positive effects of his previous tender vanish. The debtor has to be ready to perform until the extinction of the obligation. The creditor, however, has to compensate the debtor for the major expenses flowing from his default.¹¹¹

2. Consequences of a Conforming Tender in the Common Law

Besides excusing the nonperformance of the obligation, as previously discussed, the goal of the tender of performance could be "to throw the risk of further controversy upon the other party."¹¹² This statement is overly general and could mean anything. But there is another statement that more nearly approximates the *ius commune* approach. "If a man setteth out his tythe, hay, or corn (the tender in our case is a setting forth of the tythe cheese) and the person refuseth to take it away, and it perish in keeping, I am excused for the perishing of it."¹¹³

representatives of the *école de l'exégèse*, except TOULLIER, 4 LE DROIT FRANÇAIS SUIVANT L'ORDRE DU CODE 86-87 (1848).

110. For example, concerning Spanish law, in my opinion, there is no legal ground to claim that interest charges are no longer incurred after a proper tender of performance. But I also think that if the debtor deposits the money in a bank, the creditor is not entitled to claim any higher interest than the bank rate (VAQUER, *supra* note 6, at 127 n.53). According to HARTKAMP, *supra* note 14, at 118, Dutch law requires the deposit of the money. In South African Roman-Dutch law, it is considered that the tender stops interest running because the requirement of deposit is simply ignored (JOUBERT, *supra* note 12, at 218).

111. MÜNCHENER KOMMENTAR/Thode, *supra* note 16, § 293 BGB Rn. 12; KOZIOL & WELSER, *supra* note 16, at 249; VAQUER, *supra* note 6, at 45; ALMEIDA COSTA, *supra* note 14, at 951.

112. Greenwood v. Sutcliffe, [1892] 1 Ch. 1, 10 (*per* Lindley, LJ).

113. Wiseman and Denham's case, (1623) 78 ER 195. But, the court nevertheless allowed a claim for damages for the annoyance caused by the smell of the cheeses and the impossibility of using some rooms of the debtor's house where the cheeses were kept. This result could correspond to the position of Coke, *supra* note 25, [207a], in relation to what he calls *bona peritura* [according to John Vaillant, note a to *Brikhed v. Wilson*, (1536) 73 ER 52]. In my opinion Coke's text is unclear, as it also refers to "the charge for the obligor to keep them," although dealing with *bona peritura* after tender and refusal the debtor has no duty to plead *uncore prist*.

Here the court shifts to the creditor the risk of accidental destruction of the tendered goods.¹¹⁴

Nevertheless, as *mora debitoris* is not an autonomous kind of nonperformance, but instead leads to a breach of contract, tender of performance does not end the debtor's delay. There is no *purgatio moræ*. Hence, after the debtor's failure to fulfill the contract upon the creditor's demand, tender of performance is ineffective.¹¹⁵ On the other hand, if the creditor's nonacceptance has led to a fundamental breach of contract, the debtor may terminate the contract and the creditor cannot now claim performance.

The debtor may also discharge his obligation by paying the money due into court. This is the equivalent to a deposit on the Continent. The debtor is freed from his obligation as well.¹¹⁶

Concerning the consequence of a conforming tender as to accrual of interest, the older cases seemed to provide that interest was stopped.¹¹⁷ Nevertheless, the modern law has shifted to a better balance of the parties' position. The leading case is now *Barratt v. Gough-Thomas*. According to it, the "tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time," because "it has to be considered that [the debtor] has had the benefit of the money."¹¹⁸

114. According to Stone, tender of performance "will lead to a discharge of the tenderer's liabilities." STONE, *supra* note 53, at 273. However, Stone does not identify the liabilities, beyond the statement that the obligation to pay is not cancelled.

115. "In pleading a tender, you must plead tout temps prist, which can never be after imparlance." *Wigmore v. Veal*, (1695) 88 ER 1180. "It is not enough to say that he was ready after the tender: the money was due before, and the neglect of payment was a delay, a breach of contract and a cause of action." *Sweatland v. Squire*, (1698) 91 ER 527; *Giles v. Hartis*, (1697) 91 ER 1066; *Whitlock v. Squire*, (1712) 88 ER 636; *Wood v. Ridge*, (1732) 92 ER 898; *Haldenby v. Tuke*, (1747) 125 ER 1358. As Lord Ellenborough CJ suggested in *Hume v. Peploe*, "in strictness a plea of tender is applicable only to cases where the party pleading it has been never guilty of any breach of his contract." *Hume v. Peploe*, (1807) 103 ER 306.

116. BLACKSTONE, *supra* note 91, at 304; ANSON'S LAW OF CONTRACT, *supra* note 51, at 483; CHITTY ON CONTRACTS, *supra* note 4, at 22-084. The same applies to Scots law: JAMES, VISCOUNT OF STAIR, THE INSTITUTIONS OF THE LAW OF SCOTLAND 277-79 (David M. Walker ed., 1981). Apparently in Coke's day if the creditor refused a conforming payment into court he lost the money deposited (*cf.* COKE, *supra* note 25, [207a]; SIR WILLIAM HOLDSWORTH, 8 A HISTORY OF ENGLISH LAW 80 (reprint 1966).

117. *Manning v. Burges*, (1663) 22 ER 678 (dealing with mortgage interest).

118. [1951] All E.R. 48-50; *Gyles v. Hall*, (1726) 24 ER 774; *Wiltshire v. Smith*, (1744) 26 ER 854 (dealing with the subject, but in both cases the tender was not properly made). The decision in *Barratt v. Gough-Thomas* was already anticipated in *Kinnaird v. Trollope*, [1889] 42 Ch.D. 610, *Edmonson v. Copland*, [1911] 2 Ch. 301, and *Webb v. Cross*, [1912] 1 Ch. 323. See also FISHER AND LIGHTWOOD'S LAW OF MORTGAGE 477 (8th ed. by E.L.G. Tyler, 1969); CHITTY ON CONTRACTS, *supra* note 4, at 22-084 n.42. In Scotland, STAIR, *supra* note 116, at 278, considered that *consignation* stopped the running of interest.

However, it has to be taken into account that the new civil procedure rules (1998) issued by the Civil Procedure Rules Committee under the Civil Procedure Act 1997 have apparently introduced a radical change in the current law. Parts 36 and 37 regulate payment into court in detail. According to Part 37, rule 3(1), “where a defendant wishes to rely on a defence of tender before claim he must make a payment into court of the amount he says was tendered.” It seems that a bare tender has no effect, and that payment into court—hence, deposit—is the only means to show his readiness and willingness to perform.¹¹⁹

3. Does the PECL Regulate *Mora Creditoris*?

Now that we have identified, in continental systems, the consequences of a conforming tender of performance, and now that we know that some of the consequences collected under the rubric *mora creditoris* are not alien to the common law, we may consult the PECL for its responses to those common solutions underlying both systems of law. As aforementioned, no particular chapter of the PECL deals with the creditor’s default, nor does the PECL systematically regulate the effects of a proper tender of performance.

Though not expressly established, the idea informing the regulation in articles 8:104, 9:201, 9:303, and 9:401 is that the refusal of a conforming tender may operate as a defense to the same extent as would performance. A proper tender of performance deprives the creditor of his right to terminate the contract and impedes any breach of contract. In other words, a conforming tender of performance leads to an excused nonperformance, because the creditor has caused the nonperformance. If nonperformance is excused, the creditor may not resort to any of the remedies for nonperformance (article 8:101).¹²⁰ Therefore, the debtor can bar any claim by his creditor based on his nonperformance. As result of articles 7:100 and 7:111, the debtor is nevertheless not freed of his obligation. According to those articles, if the debtor wishes fully to discharge his obligation, he should deposit the object he owes.

Concerning the deposit, the PECL distinguish between money (article 7:111) and property other than money (article 7:110).¹²¹ In the latter case, section (1) of the article establishes a duty to protect and preserve the property. Section (3) declares that if the property is liable to rapid deterioration or its preservation would be unreasonably expensive,

119. See CHITTY ON CONTRACTS, *supra* note 4, at 22-084 n.40; *supra* note 78.

120. See LAMARCA MARQUÈS, *supra* note 17, at 227 sqq.

121. See Zimmermann, *supra* note 1, at 489. The regulation resembles that of CISG (art. 85 sqq).

the debtor may take reasonable steps to dispose of it and is freed of his obligation by paying the net proceeds to the creditor. If the property is not subject to rapid deterioration, the debtor may resort to two self-help remedies in order to discharge his obligation. After notice to the creditor, he can either deposit the property on reasonable terms with a third person or sell the property on reasonable terms. In the first case, the deposit discharges the obligation. In the second, discharge occurs by payment of the net proceeds to the other party. If the creditor continues to reject the delivery, the debtor has to resort to article 7:111. The broad wording of section (2)(a) allows the deposit also of immovable property. Moreover, under section (4), the debtor is entitled to be reimbursed his reasonable expenses or to retain out of the proceeds of the sale any expenses reasonably incurred. Hence, the creditor bears the major expenses of performance flowing from his lack of cooperation, and this amounts to a slight correction of article 7:112. Of course, if the party's nonacceptance represents a breach of a contractual duty, the other party may exercise any of the remedies available for nonperformance. Notably the procedure for discharging the obligation by deposit or sale is anchored in the idea of self-help remedies for which there is no need for judicial intervention. Absent such intervention, nobody evaluates the conformity of the tender or the reasonableness of the steps taken by the debtor, and this lack of control may lead to practical problems and inconvenient results.¹²²

If the debtor has to pay money and the creditor refuses to take it, the debtor may discharge the obligation by depositing the money to the order of the creditor in accordance with the law of the place where payment is due (article 7:111). A preliminary notice to the creditor is required.¹²³ The deposit can be made in any manner authorized by the law of the contractual place of payment.

Furthermore, the wording of article 7:111 leads to the conclusion that only the deposit of the money stops conventional interest from running. Nevertheless, the opposite conclusion has to be reached concerning interest accruing for delay in payment of money. Although article 9:508(1) PECL only envisages "payment" ("from the time when payment is due to the time of payment"), yet since tender is equivalent to

122. *Accord* MACQUEEN & THOMSON, *supra* note 33, at 198.

123. Although the PECL do not envisage it, there is no need for a notice if the creditor is absent or the entitlement to receive performance is under dispute. In fact, tender of performance ought to be excused. *See*, by contrast, art. 105.5 *Code européen des contrats*. Deposit is apparently excused and a mere tender is enough to discharge the debtor. Such a regulation may be criticized. A better model seems to be art. 1176.2 Spanish CÓDIGO CIVIL (only tender is excused).

payment when the creditor refuses it without a reason, the offer of the money stops interest from running. The result is very similar to *purgatio moræ*. Article 9:303, regulating delayed tender, provides that tender deprives the creditor of the right to terminate the contract unless he gives notice of termination within a reasonable time. It should be stressed that this tender must be conforming and must include the interest conferred by article 9:508(1).

None of the other consequences of a conforming tender of performance are to be found in the PECL. In particular, the PECL has ignored the main effect, the shift of the risk of accidental destruction of the property.¹²⁴ Hence, the PECL's regulation of the scope of *mora creditoris* is limited. The only consequence of a bare tender of performance is therefore the excuse for nonperformance. The other aforementioned consequences are either linked to the deposit of the property or are simply disregarded.

VII. TENDER OF PERFORMANCE AND SYNALLAGMATIC CONTRACTS

According to article 9:201 PECL, “[a] party which is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed.” The article tries to set up an order of performance (see also article 7:104). No party has to perform without receiving the counterperformance from the other party. But, of course, without a chronological order of performance, the parties could find themselves at a stand-off. Therefore, it is enough if the party is ready and willing to perform. As we already know, the tender is the expression of the debtor's readiness and willingness to perform.

On the continent, this formulation (“ready and willing to perform”), rooted in the *exceptio non adimpleti contractus*, can be traced back at least to Baldus,¹²⁵ and corresponds with the developments of the common law.¹²⁶ The CISG and the Unidroit Principles contain similar provisions.¹²⁷

124. Zimmermann, *supra* note 1, at 490. By contrast, article 69(1) CISG provides that the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

125. BALDUS DE UBALDIS, IN SECUNDAM PARTEM DIGESTI VETERIS COMMENTARIA *sub* D, 19, 1 (act. emp. vend.), 13 (Juliani), § offerri (1586): “*In contractibus utro citroque obligatoris, non potest agere cum effectus ille qui non implevit contractum ex parte sua. Vel sic: Emptor agens ad rem suam, debet offerre pretium integrum, alias male agit*” [“In synallagmatic contracts the nonperforming party cannot bring any action for performance. In other words: the plaintiff must tender performance, otherwise the action fails”].

126. For early English law, see D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 76, 87 (1999). “There was an agreement that the plaintiff should pull down two

VIII. OTHER CONSEQUENCES OF TENDER OF PERFORMANCE

Finally, two other consequences of tender of performance cannot be linked to the concept of *mora creditoris*. If one party tenders performance, he acknowledges that he is the debtor and that the debt exists.¹²⁸ Consequently, as a way of recognizing the debt, a tender interrupts prescription, according to article 17:112 PECL.¹²⁹

IX. CONCLUSION

This Article has shown that the regulation of the institution of *mora creditoris* in the continental *ius commune* and the English common law are closer than one might at first imagine. The qualification as a breach of contract of a refusal to accept a proper tender generally corresponds to the conception of *mora creditoris* as the reverse of *mora debitoris* found typically in the *ius commune*. The dichotomy expressed in *oblatio realis/oblatio verbalis* is to be found in the English case law along with alleviation of a debtor's responsibility after he has tendered performance.

Certainly, the theoretical refinements of the German pandectists drew a conceptual border not only north of the Channel. The modern regulation of *mora creditoris* under the German, the Dutch, the Italian, the Greek, and the Portuguese Civil codes and the analogous concept of *mora creditoris* in Spanish jurisprudence are as foreign to French law as they are to English law or Scots law. Nevertheless, if instead of asking whether *mora creditoris* amounts to a breach of contract, the concept is conceived only as a *nomen iuris* for a set of effects (alleviation of

walls and build a house & for the defendant, that the defendant should pay him *pro labore suo*. The paying of the 10 l. was a condition precedent: if the plaintiff had alleged that he had offered to work, and the defendant has hindered him, it had been good." *Peters v. Opie*, (1672) 86 ER 120; *see also Blackwell v. Nash*, (1722) 88 ER 83, 93 ER 684; *Jones v. Barkley*, (1781) 99 ER 439-440 (per Lord Mansfield). In modern law, *see s. 38 Sale of Goods Act—England—1979*; Treitel, *in II ENGLISH PRIVATE LAW*, *supra* note 37, at 8.358. The same solution is valid in Scots law: *MACQUEEN & THOMSON*, *supra* note 33, at 5.8.

127. *See* CISG art. 58 and Unidroit principles 7.1.3, respectively.

128. The following statements may be instructively compared. "*Per talem oblationem inducatur debiti confessio; ita ut debitor a creditore conventus de oblatione excipiens; postea vero debitum semel oblatum in totum vel pro parte negans (. . .) audiendus non sit*" ["Tender implies the acknowledgement of the existence of the debt. Therefore the debtor who has tendered cannot deny that the debt exists"]. *SCHULTZEN*, *supra* note 22, cap VI, n.18. For further details, *see VAQUER*, *supra* note 6, at 145 n.86. "When a man professes that he was always ready to pay, he admits that there existed a debt which he was bound to pay." *Smith v. Manners*, (1859) 141 ER 254 (per Willes J) (*see also BLACKSTONE*, *supra* note 91).

129. Article 17:112 belongs to the third part of the PECL and has not yet been published in English. For a German translation of the rules on prescription, *see Grundregeln des Europäischen Vertragsrecht: Verjährung* (translation by Ulrich Magnus and Reinhard Zimmermann), *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 400 (2001).

responsibility, excuse for nonperformance, ability to deposit), the differences among the mentioned legal systems are not insurmountable.

The PECL seems to have sought a third way. While the *nomen iuris* has been avoided in the black letter rules, the PECL index recalls it. Tender of performance is the core concept, as it was in the *ius commune* and still is in the common law. Tender is acknowledged as an excuse for nonperformance, and allows the debtor to deposit, and thus, to discharge his obligation. However, the PECL contemplated no alleviation of responsibility, the main classical consequence of a conforming tender. Therefore, in my opinion, the regulation of the PECL could have gone further, by incorporating some rules prevailing in all the European laws.