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Editorial

Towards a New Swiss Law of Obligations: *BEWÄHRTES IST ZU BEHALTEN – NEUEM IST RAUM ZU SCHAFFEN*[*]

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1. OR2020

The harmonization of European private law has been a major theme in some of last year's European Review of Private Law (ERPL) editorials. Within the European Union (EU), the proposal for a Common European Sales Law (CESL) has given rise to a lively debate on the advantages and disadvantages of an opt-in system.[1] The recent recodification of private law in Central and Eastern Europe has rekindled a more general discussion on how to (re)codify private law.[2] Nor is this debate limited to Europe, as witnessed in the various ideas currently being mooted for the proposed Principles of Contract Law for Latin America.[3]

Last year, a new publication was added to the debate, to wit, the proposal for a modernized general part of the Swiss Law of Obligations – OR2020.[4] This is an academic project, much like the work of the Commission on European Contract Law[5] and the Study Group for a European Civil Code.[6] OR2020 purports to change domestic Swiss law and is therefore comparable to earlier internal recodifications such as those of the Dutch Civil Code (1992),[7] the German

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1 'Common European Sales Law: If It Does Not Help, It Won't Harm Either (?)', *ERPL* (*European Review of Private Law*) 2013, pp. 1–12.

2 'Recodification of Private Law: Central and Eastern Europe Set the Tone', *ERPL* 2013, pp. 897–906.

3 'Latin America Goes PECL', *ERPL* 2013, pp. 419–422.

4 C. HUGUENIN & R. HILTY (eds), *Schweizer Obligationenrecht 2020/Entwurf für einen neuen allgemeinen Teil, Code des obligations suisse 2020/Projet relatif à une nouvelle partie générale*, Basel, Zürich 2013, 699 pp.

5 O. LANDO & H. BEALE (eds), *Principles of European Contract Law, Parts I and II*, Kluwer Law International, The Hague 2000, 561 pp.; O. LANDO *et al.* (eds), *Principles of European Contract Law, Part III*, Kluwer Law International, The Hague 2003, 291 pp.

6 Study Group on a European Civil Code, *Draft Common Frame of Reference (DCFR)/Outline Edition*, Sellier, München 2009, 643 pp.

7 H. WARENDORF, R. THOMAS & I. CURRY-SUMNER, *The Civil Code of the Netherlands*, Wolters Kluwer, Alphen aan den Rijn 2013, 1301 pp.

Schuldrechtsreform (2002[8]), the various Central and East European Codes,[9] and the forthcoming (?) French Civil Code revision.[10] The project also bears some resemblances to the European projects referred to above. In the first place, Switzerland is a federal state that only recently has harmonized its own law of civil procedure.[11] Second, the Helvetian Republic is a multilingual nation. Third, the result of the exercise reveals some similarities with the pocket edition of the Draft Common Frame of Reference (DCFR).

There are also some obvious differences. Whereas procedural law has only recently been federalized in Switzerland, in relation to the substantive civil law this had already happened more than a century ago.[12] The aim of the current project is not, therefore, harmonization of the law but rather its modernization. Moreover, there is no doubt whatsoever concerning the jurisdiction of the Swiss state when it comes to recodifying the law of obligations.

In this editorial, I will provide a brief overview of the project (No. 3), followed by some substantive (No. 4), historical (No. 5), linguistic (No. 6), and methodological (No. 7) observations, before concluding with an appraisal (No. 8). Let us, however, start with some information concerning Swiss private law (No. 2).

2. A Code for the Ordinary Citizen

There is a saying in Switzerland that every citizen is entitled to their rifle[13] and to their Civil Code. As for the Civil Code (1911), the fact is that this has been drafted in such a user-friendly way that indeed every Swiss citizen may be deemed to understand its contents. This is due to the work of Eugen Huber for the *Zivilgesetzbuch* (1911)[14] and Walther Munzinger for the *Obligationenrecht*

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8 R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, University Press, Oxford 2005, 240 pp.

9 R. SCHULZE & F. ZOLL, *The Law of Obligations in Europe/A New Wave of Codifications*, Sellier, München 2013, 458 pp.

10 There are currently three such reform projects in France: the Catala, Chancellerie, and Terré texts. See, for the Catala text, J. CARTWRIGHT, S. VOGENAUER & S. WHITTAKER (eds), *Reforming the French Law of Obligations*, Hart, Oxford 2009, 915 pp. (reviewed favourably by E. DESCHEEMAEKER, 73. *MLR* (*Modern Law Review*) 2010, pp. 1086-1089, who is, however, highly critical of the Catala project). By the end of November 2013, the French government has proposed to Parliament to empower the Minister of Justice to enact the new general part by decree.

11 Swiss Procedural Code of 1 Jan. 2011. Initial reactions to the Code appear to be positive – see A. BONOMI *et al.* (eds), *Nouvelle procédure civile et espace judiciaire européen*, Droz, Genève 2012, 275 pp.

12 The *Zivilgesetzbuch* Centenary was marked with essays in *Rabels Zeitschrift* 2008, pp. 661-793 and *Zeitschrift für Schweizerisches Recht* 2007, pp. 5-386.

13 It is estimated that some 650,000 Swiss citizens keep their national service gun at home.

14 See A. FLÜCKINGER & J.D. DELLEY, in C. Chappuis, B. Foëx, L. Thévenoz (eds), *Le législateur et le droit privé/Colloque en l'honneur du professeur Gilles Petitpierre*, Schulthess, Genève 2006, pp. 123-143.

(1881),[15] who – exceptionally in the case of modern codifications[16] – did the work all by themselves.

The idea that justice should be capable of being understood by every citizen deeply permeates the Swiss system. Judges of the Swiss *Bundesgericht* discuss cases in public and their decisions, unlike, for instance, French and German decisions, are easy to read.[17]

Where we speak of 'a Swiss Civil Code', this raises a few more complications, because there are in fact two codes, in that the Civil Code (*Zivilgesetzbuch*) was actually preceded in 1881 by the Law of Obligations (*Obligationenrecht*).[18] The latter was originally envisaged as a part of the *Zivilgesetzbuch* but, for practical reasons, was ultimately never incorporated.[19]

In addition, where we use the German original text, this is not wholly correct either, because Swiss legislation is equally valid in the French language and indeed parts of OR2020 are drafted in French only.

For quite some time, the Swiss Code of Obligations had remained unchanged but for the recent amendment of the rules on prescription.[20]

3. Project Overview

The present project is the result of private academic research. It was started on 1 October 2007 and was finalized in 2012. It was coordinated by two academics from the University of Zürich, Claire Huguenin and Retro Hilty. The project involved 23 researchers drawn from all Swiss law faculties.[21] The team was a mix of well-established law professors and young researchers. The project was financed by the *Schweizerische Nationalfonds,* but the Federal Ministry of Justice also contributed. The aim is to restore clarity to the law and to fill gaps. It is intended

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15 See U. FASEL, 'Walther Munzinger – Vorreiter der Schweizer Rechtseinheit', *Zeitschrift für europäisches Privatrecht* 2003, pp. 345–352.

16 Even the Dutch Civil Code of 1992, which is often attributed exclusively to Eduard Maurits Meijers, was in fact completed only after the latter's death, in 1954, by several Commissions. See V. SÜTÖ, *Nieuw vermogensrecht en rechtsvergelijking – reconstructie van een wetgevingsproces (1947–1961)*, thesis, Leiden 2004.

17 See my paper 'Privaatrechtelijke rechtsvergelijking in de Duitse en Zwitserse rechtspraak', in D. Kokkini-Iatridou, F.W. Grosheide (eds), *Eenvormig en vergelijkend privaatrecht*, Vermande, Lelystad 1988, pp. 291–302.

18 See H. MERZ, 'Das schweizerische Obligationenrecht von 1881', in H. Peter, E. Stark, P. Tercier (eds), *Hundert Jahre Schweizerisches Obligationenrecht/Jubiläumsschrift*, Editions Universitaires Fribourg Suisse, 1982, pp. 3–29.

19 E. BUCHER, 'Der Weg zu einem einheitlichen ZGB der Schweiz', *RabelsZ* (*Rabels Zeitschrift für ausländisches und internationales Privatrecht*) 2008, pp. 661–685.

20 On the 2012 amendment, see P. PICHONNAZ, *Schweizerische Juristen-Zeitung* 2013, pp. 189–194 and P. TERCIER & P. FAVRE, *Schweizerische Juristen-Zeitung* 2013, pp. 281–289.

21 Basel, Bern, Fribourg, Genève, Lausanne, Luzern, Neuchâtel, St. Gallen, and Zürich.

that, on the basis of the project, the Swiss government will decide whether to adopt this proposal and, if so, to what extent.

4. The Substance

The reader with a working knowledge of the Swiss Law of Obligations[22] may, at first sight perhaps, be surprised at the lack of change in the draft text. In terms of its structure, nothing seems to have been altered. *Obligationenrecht* and *Zivilgesetzbuch* remain apart, as does Mercantile Law. Consumer law, if codified at all,[23] will remain separate from the Law of Obligations. At a more basic level, however, major changes are being proposed.

4.1. Withdrawal Period

Even though the new Law of Obligations may not cover consumer protection, its Article 16 seeks to introduce a far-reaching and general opportunity to withdraw from consumer contracts where the consumer has not had the chance to properly examine the good or service offered or to consider its risks.[24] In the present writer's opinion, this may mean that the person who bought, on the seller's premises, a consumer good that was wrapped, and was therefore incapable of examination, may withdraw from the contract within a period of 14 days.

4.2. Unforeseen Circumstances

One of the more conspicuous gaps in the present Swiss Law of Obligations is the lack of a provision on change of circumstances. The proposed Article 19 will empower the court to adjust or avoid the contract where the performance of an obligation becomes unreasonable owing to an unforeseeable change in circumstances. This provision is similar to the rule on change of circumstances in the 1992 Dutch Civil Code, which itself no longer reflects modern thinking. According to recent literature on the subject, the parties should be urged to seek a solution between themselves before going to law. A provision such as Article 92 of the proposed CESL would therefore be more appropriate in my opinion.[25]

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22 Henceforth, A. FURRER & A. SCHNYDER's *Handkommentar zum Schweizer Privatrecht*, Schulthess, Basel 2012, 1055 pp., will be used for references to current Swiss law.

23 The codification of Swiss consumer law was recently advocated by one of the OR2020 authors, i.e., C. HUGUENIN, together with D. GIAMPAOLO, 'Entwicklungen im schweizerischen Konsumrecht – plädoyer für ein integrales Konsumentenschutzgesetz', *Jusletter* 8 Jul. 2013. The paper is accompanied by a *Muster-Konsumentenschutzgesetz*.

24 Article 16, para. 1: 'Anyone who has concluded a consumer agreement without having had the opportunity properly to examine the good or service on offer, or to consider its risks, has the option of withdrawing from such agreement'.

25 See R. MOMBERG URIBE, *The Effect of a Change of Circumstances on the Binding Force of Contracts/Comparative Perspectives*, PhD thesis, Utrecht, Intersentia, Antwerp 2011, 325 pp.

4.3. Contractual Imbalance

Should a modern Code have a provision on *iustum pretium*?[26] The Swiss proposal provides the party of whom unfair advantage has been taken at the time of concluding the contract with the opportunity to regard the contract as unlawful (Art. 34).[27] To a certain extent, this is in line with Article 4:109 Principles of European Contract Law (PECL) on excessive benefit or unfair advantage.[28]

4.4. Sentimental Value of Pets

The Swiss civil law is nothing if not animal-friendly. This is apparent from Article 641a, paragraph 1 *Zivilgesetzbuch* (Civil Code), which exempts animals from the status of goods. This is also clear from Article 51 of the proposal. Paragraph 1 states that costs of medical treatment of household pets may be recovered even where they exceed the animal's financial value. In addition, under paragraph 2, where the animal in question dies, its sentimental value may be taken into account. These provisions are not new, but there was apparently some discussion as to whether they should be retained. This was not self-evident: 'À l'heure des catastrophes humaines, environnementales et écologiques, on peut se demander s'il était nécessaire de conserver ces règles spéciales' (p. 171). The decisive argument, however, turned out to be 'la nouvelle sensibilité de la population vis-à-vis de l'animal et d'améliorer le statut juridique de ce dernier' (p. 172).

4.5. Immaterial Damages

The availability of compensation for the sentimental value of animals suggests that compensation for such value may also be payable for loss of human life. This is indeed the case: 'En droit actuel, le tort moral est reconnu, à certaines

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26 See I. VAN LOO, *Vernietiging van overeenkomsten op grond van laesio enormis, dwaling of misbruik van omstandigheden*, PhD thesis, Open University, Heerlen 2013.

27 'Any contractual clause which, in breach of good faith, causes a substantial and unjustified imbalance between the contractual rights and the contractual obligations of one of the parties, shall be held invalid'.

28 Article 4:109 lid 1: 'A party may avoid a contract where, at the time of its conclusion:

(a) That party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and

(b) The other party was aware, or ought to have been aware, of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair, or derived a disproportionate benefit therefrom'.

conditions, à la victime de lésions corporelles ainsi qu'à la famille et aux proches en cas de mort' (p. 173). The proposal has failed to codify this case law, possibly because this is considered to be self-evident. The Swiss will have to content themselves with a more general provision.[29]

4.6. Loss of Holidays

According to the accompanying commentary, the general provision on immaterial loss is specifically aimed at liberalizing the Swiss courts' inclination to award compensation for such loss. An example given is that of compensation for lost holidays.[30] The Swiss law appears to have followed the decisions of the European Court of Justice on this topic.[31]

4.7. Disgorgement

An issue covered in many legal systems is the question of whether tortfeasors should pay compensation for illegal profits.[32] Switzerland has now opted for the

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29 Article 52, para. 1: 'The court may award compensation, subject to the requirements for liability having been met'. Para 2: 'Such compensation may consist in a sum of money or be awarded in some other manner'.

30 N. ZINGG, *La réparation des vacances gâchées en droit suisse: vers une redéfinition du préjudicie réparable au regard de la jurisprudence de l'Union européenne*, diss. Schulthess, Fribourg, Zürich 2011, 378 pp.

31 ECJ 12 Mar. 2002, C-168/00 *Simone Leitner* v. *TUI*.

32 C. ALEXANDER, *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht – Privatrechtliche Sanktionsinstrumente zum Schutz individueller und überindividueller Interessen im Wettbewerb*, Mohr, Tübingen 2010, 769 pp.; K. BARNETT, *Accounting for Profit for Breach of Contract/Theory and Practice*, Hart, Oxford 2012, 232 pp.; A.-F. BOCK, *Gewinnherausgabe als Folge einer Vertragsverletzung: eine rechtsvergleichende Untersuchung der vertraglichen Vorteilsherausgabe unter Berücksichtigung des schweizerischen, deutschen und englischen Rechts*, Helbing & Lichenhahn, 2010, 340 pp.; O. BÖGER, *System der vorteilsorientierten Haftung im Vertrag – Gewinnhaftung und verwandte Haftungsformen anhand von Treuhänder und Trustee*, Mohr, Tübingen 2009, 1143 pp; R. CUNNINGTON, 'The Assessment of Gain-Based Damages for Breach of Contract', 71. *MLR* 2008, pp. 559–586; J. EDELMAN, *Gain-Based Damages/Contract, Tort, Equity and Intellectual Property*, Hart, Oxford 2002, 279 pp.; M. EISENBERG, 'The Disgorgement Interest in Contract Law', 105. *Mich. L. Rev.* (*Michigan Law Review*) 2006, pp. 559–602; T. HELMS, *Gewinnherausgabe als haftungsrechtliches Problem*, Mohr, Tübingen 2007, 526 pp.; M. KRUITHOF, 'De vordering tot voordeeloverdracht', *Tijdschrift voor Privaatrecht* 2011, pp. 13–66; I. SOEFFKY, *Vertragliche Gewinnhaftung in Europa*, PhD thesis, Humboldt, Berlin 2002, Nomos, Baden-Baden 2004, 185 pp; A. TEMPLE, 'Disgorgement Damages for Breach of Contract', 20. *Denning L.J.* (*Denning Law Journal*) 2008, pp. 87–110; R. VEIL, 'Gewinnabschöpfung im Kapitalmarktrecht', *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2005, pp. 155–199.

possibility of allowing such compensation.[33] Article 69 of the proposal seeks to codify earlier case law that did allow compensation.[34]

4.8. Termination of Long-Term Contracts

In the opinion of the drafting group, one of the most important innovations to be introduced by the proposal is the opportunity to terminate indefinite contracts by giving notice. Under Article 144, this will be possible within a reasonable period. Article 145 even makes such termination possible without the need to observe such a time limit,[35] provided the party giving notice subsequently compensates the other party's loss, as has been added by Article 146.

4.9. Performance by a Third Party

One of the less important rules contained in the proposal is Article 85, which adds a provision on performance by a third party. The rules on this subject vary considerably among the various European legal systems, and even the European harmonization projects reveal differences on this topic and can be needlessly complex.[36] The Swiss provision appears to have struck the right balance here.[37]

4.10. Unfair Contract Terms

One of the aims of the Swiss proposal is to ensure that the Code remains easy to understand and therefore on the lean side. This can certainly be seen from the proposed regulation of unfair contract terms. Whereas the German *Bürgerliches Gesetzbuch*, following the reform of its law of obligations (*Schuldrechtsreform)*, requires ten paragraphs to cover this concept, the proposed Swiss *Obligationenrecht* contains a mere two provisions on this subject, i.e., the ubiquitous *contra proferentem* rule (Art. 32) and the unfair advantage provision

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33 R.H. WEBER, 'Gewinnherausgabe – Rechtsfigur zwischen Schadensersatz-, Geschäftsführungs- und Bereicherungsrecht', *Zeitschrift für Schweizerisches Recht* 1992, pp. 333–366.

34 'Any person who breaches the legally protected interests of another person, and thereby profits financially, shall compensate the beneficiary for such profit, unless he succeeds in proving that he was neither aware, nor should have been aware, of the infringement on the other person's interests'.

35 'Extraordinary termination. A permanent contract may be terminated at any time for good cause. "Good cause" shall be any circumstance which renders the continuation of the contract unconscionable for the party giving notice'.

36 See L. MACGREGOR & N. WHITTY, 'Payment of Another's Debt, Unjustified Enrichment and Ad Hoc Agency', 15.1. *Edinburgh Law Review* 2011, pp. 57–87; S. MEIER, 'Performance of an Obligation by a Third Party', in A. Burrows, D. Johnston, R. Zimmermann (eds), *Judge and Jurist/Essays in Memory of Lord Rodger of Earlsferry*, University Press, Oxford 2013, pp. 619–636.

37 Article 85, para. 2 reads: 'Performance by a third party against the wishes of the obligor discharges the former where the creditor accepts such performance'.

(Art. 33). There are no provisions regulating the conclusion of contracts with standard clauses, no bona fide test, and no lists of clauses deemed to be unfair. Granted, the latter does admit of one exception – for some reason, exemption clauses fail to enjoy the freedom with which the proposal approaches contracts that, for some reason, are exempted from the general freedom; the proposed Article 122 stating that an agreement entered into in advance and restricting or excluding the creditor's rights shall be invalid where the rights and obligations entered into by the parties would thereby be substantially changed. Nothing radically new here, since the current law of obligations, under Article 100, already makes provision for prohibiting exemption clauses. The new Article does make some changes in this regard, but these are not of major importance.

5. Previous Attempts at Recodification

Observers from abroad may wish to discover what is the link – if any – between the present text and the earlier proposed revision of liability law (*Haftpflichtrecht*). In 1988, the Federal Swiss Department of Justice established a commission tasked with the revision of the law of torts. In 1991, the Commission produced 102 proposals, whereupon the Department, four years later, commissioned Professors Pierre Widmer and Pierre Wessner to formulate draft legislation on the subject. The draft was published in 1999, but the Swiss government decided not to include this in the legislative programme for 2003–2007. In 2009, the project was dropped. The current proposal seems closer to the original *Obligationenrecht* than it is to the Widmer/Wessner draft.

However, there is at least on one point on which, to widespread acclaim,[38] the 1999 draft was adopted, i.e., as regards the organization of enterprises. Under the proposed Article 59, any commercial enterprise shall be liable for any loss caused in connection with that enterprise's activity, unless the business in question can provide evidence that its organization was such as to be inherently incapable of causing such loss.

6. Languages

Like the EU, Switzerland operates with a number of official languages,[39] German and French being the dominant ones. In the Federal Court, Italian is also an official language, but Rhetian does not have this status – nor does Schweizer Deutsch, the dialect widely spoken in northern, central, and eastern Switzerland. OR2020 is available in four languages: German, French, Italian, and English. The

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38 See O. WAESPI, *Organisationshaftung*, diss. Neuchâtel, 2005, 434 pp. Giuseppe Donatiello even proposes to extend this liability to contract law in his PhD thesis *Responsabilité du débiteur: de la délégation à l'organisation de l'exécution des obligations,* Schulthess, Genève 2010, 424 pp.

39 C. HUGUENIN, 'Die Mehrsprachigkeit der Schweizerischer Rechtskultur/Probleme und Chancen', *RabelsZ* 2008, pp. 755–772.

commentary that accompanies it is mostly in German and sometimes in French. The latter two are presented as the original languages, while the Italian and English texts are translations. It is not uncommon in Swiss texts for English to be used as an additional language.[40]

7. Methodology

Whenever academics undertake (re)codification projects, the methodology to be followed normally is not one of the primary concerns – and where, unusually, this is the case, it revolves round the question of whether it should consist in finding a common denominator or rather the best legal solution. More basic concerns such as the drafting of minutes and of executive summaries and the rendering of minority views and of votes are often overlooked. Not so in the case of the Swiss project. The editors are to be commended for the transparency they have achieved here. This is the result of the interaction with majority and minority views, the number of meetings and retreats devoted to it, and the quality of the researchers involved. Any national body charged with a similar reform project would be well advised to take a close look at the way the Swiss commission went about its task.[41]

Whether, and the extent to which, those foreign academics who served on the Advisory Board have contributed to the international impact produced by the project is something that can only be guessed at. They include an academic from Turkey, reflecting that country's close links with Switzerland,[42] the 'godfather' of the UNIDROIT Principles,[43] the honorary president of International Insurance Law Association (AIDA),[44] two academics from The Netherlands (possibly because of the recent revision of the Dutch Civil Code),[45] a Bulgarian with links to the European Centre of Tort and Insurance Law (ECTIL),[46] and a Frenchman teaching in Germany.[47]

8. Assessment

What are the chances of the proposed text becoming part of the law of obligations? From reactions in the Swiss press, it may be concluded that the drafters have at least found some political support, which means that the project

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40 A particular example of this is the *Handkommentar zum Schweizerischen Privatrecht*, which likewise contains the text of Arts 1–183 *Obligationenrecht* in the same four languages as OR2020.

41 OR2020, pp. 1–28.

42 Yesim Atamer (Bilgi University, Istanbul). See her 'Rezeption und Weiterentwicklung des schweizerischen Zivilgesetzbuches in der Türkei', *Rabels Zeitschrift* 2008, pp. 723–754.

43 Joachim Bonell (Rome).

44 Marcel Fontaine (Louvain-la-neuve).

45 Willem Grosheide & Anne Keirse (both Utrecht).

46 Christian Takoff (Sofia).

47 Claude Witz (Saarbrücken).

will not have been stillborn from the start. Swiss politicians will probably be less inclined to look askance at a less 'political' proposal than would be the case with draft legislation on consumer protection, family law, or landlord and tenant law – indeed, only recently did the Swiss Parliament reject proposed legislation on consumer protection, whereas the fate of the draft Law on torts has already been adumbrated above.

However, legislation is not the only option available. The parties to a contract are at all times free to use OR2020 as standard contract terms.[48] The project even suggests that, as is the case with CESL, OR2020 may be referred to as a legal system in its own right. Because Switzerland is often used as a forum for international arbitration,[49] it is not entirely inconceivable that contracting parties will refer to the substantive Swiss law as well.

Whatever may have been the practical impact of various academic projects,[50] it cannot be denied that they have significantly influenced academic life. Nowadays, in some European countries, it is inconceivable for a PhD on the law of contracts to be awarded without dealing with the PECL. It is likely that the project under review will be widely cited in Switzerland. It is also foreseeable that it will often be quoted abroad. The four languages involved will contribute to its use, as will the references to DCFR, PECL, and UNIDROIT Principles in the text.[51]

9. Balance

This is a truly excellent project. At the substantive level, the proposed provisions may not be particularly innovative, but they do reflect a modern and at the same time conservative trend in the default rules on contract law. When, last year, the *Deutscher Juristentag* discussed the obligation to make available to the other party a set of the proposed standard terms in b2b (business to business) contracts, it was suggested – not entirely in jest – that, as it lacks such an obligation, Swiss law is commendable as an option. As we have seen, such obligation remains absent in OR2020. Nor does OR2020 fill some of the gaps, such as colliding standard form contracts, which are invariably highlighted whenever any reform of CISG is mooted. In terms of methodology, the project has, as is demonstrated above,

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48 On the use of the UNIDROIT Principles in this way, see the various publications by BONELL.

49 According to H.J. SNIJDERS, *Tijdschrift voor Arbitrage* 2013, p. 93, 9% of all international arbitrations take place in Geneva, as against 30% in London, 7% in Paris, 7% in Tokyo, 7% in Singapore, and 6% in New York.

50 See my overview in 'Fifteen Years of European Private Law – at the Occasion of the 15th Birthday of the Trento/Torino Common Core of European Private Law Project', *Opinio juris*, vol. 2, 2009.

51 See also E. KRAMER, 'Der Stil der schweizerischer Privatrechtskodifikation – ein Modell für Europa', *RabelsZ* 2008, pp. 772–793.

achieved perfection. It may confidently be predicted that OR2020 will have a lasting impact in Europe.[52]

10. Articles in This Issue

This issue contains three papers. It begins with a contribution from Giuditta Cordero-Moss (Oslo). This paper is the outcome of a research project aimed at demonstrating that the identical wording of contract terms may produce diametrically opposed effects in law. This applies even in the case of arbitration clauses. From that point onwards, the current edition all but turns into a 'Groningen special'. First, Olha Cherednychenko examines the public invigilation of private relationships. The author proposes that we should henceforth address such issues in terms of a European regulatory private law – i.e., a body of law that challenges the leading role played by the private law in setting standards of behaviour in private relationships. Esther van Schagen then proceeds to examine the potential of regulatory impact assessments. She takes the view that these could play a significant role in redressing the unpredictable, inconsistent, and inaccessible aspects of the private law in its current state.

11. Case Note: the Hammock

The case note in this issue is also a Groningen affair. Bringing together a number of case notes from disparate jurisdictions and observing a deadline in the process require a great deal of diplomacy on the part of the coordinator. However, if the coordinator's name is Aurelia Colombi Ciacchi, the reader can rest assured that all is well. This once again proved to be the case for the annotations to the ruling by the Netherlands Supreme Court (*Hoge Raad*) in *Hammock*. Experts in the law of torts from Belgium, England, France, Germany, Ireland, Italy, and The Netherlands provide their view on this exceptional case, involving the collapse of a pillar co-owned by the victim and her boyfriend. This involves national liability law and the insurance cover in the jurisdictions concerned.

12. Conference Reports

The Commission on European Family Law (CEFL) is one of the active research groups modelled on the European Commission on European Contract Law. This body meets on a regular basis under the leadership of Katharina Boele-Woelki (Utrecht). The latest such gathering took place in Bonn (August 2013), and its proceedings are reported by Jacqueline Gray and Pablo Quinza (Utrecht). Another conference concerned the development of European consumer law and was held at Leuven on 20 September 2013 on the occasion of Jules Stuyck's retirement from academe.

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52 See also *ibid*.

13. Book Reviews

Allard Ringnalda (Utrecht) has provided us with a book review that goes way beyond the expectations made of our regular book features. The work in question is *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (2010) edited by Estelle Derclaye and raises various issues of orphan works and cultural heritage. Succession is an area of the law that has yet to achieve the prominence to which it is entitled, which is why we are particularly pleased to feature a review by Joelle Long (Torino) of *The Law of Succession: Testamentary Freedom. European Perspectives*, edited by Miriam Anderson and Esther Arroyo i Amayuelas. Another book edited by Esther Arroyo i Amayuelas, this time with Sergio Cámara Lapuente, is reviewed by Barbara Pasa (Torino). The book entails the proceedings of a conference held in La Rioja (Spain) in 2012 on the 2011 EU Directive on Consumer Rights and on the proposed CESL (2011).

14. New Managing Editor

For the past three years, we have enjoyed the management skills of Dr Marie-José van der Heijden of the Molengraaff Institute, Utrecht University. In September 2013, Marie-José accepted a new position as attorney with De Brauw, a major Dutch law firm, where she will be responsible for the conflict of laws desk – congratulations Marie-José! Unfortunately, this career move has entailed her resignation as Managing Editor of ERPL. The Editorial Board, Advisory Board, and Publisher are grateful to Marie-José for all the work she has done for us. Marie-José will be succeeded by Dr Jessy Emaus, who is also from the Molengraaff Institute, Utrecht University. Jessy read law at the University of Utrecht, from which she also acquired her PhD with a thesis on *Enforcing ECHR Rights by Means of Liability Law* (Boom, The Hague 2013, 427 pp.). We welcome Jessy in our midst and trust that she will gain much satisfaction from her new position.