Germany and the *Schuldrechtsmodernisierung* 2002

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Abstract: The Schuldrechtsmodernisierung of 26 November 2001 is probably the largest reform of German codified contract law undertaken for a century. The three substantive law parts of this reform are discussed in this contribution: the new regime on breach of contract, the new regime on limitation, and the new law on sales and works contracts. Reference is made also to a fourth major element, the integration of consumer law into the civil code. It is argued that German law now follows a uniform concept of breach and distinguishes quite convincingly with respect to three major remedies. It is argued, that the reform was quite successful.

I. Overall perspective

1. Reforms

German contract law has undergone a number of important reforms over the last 2–3 three years that are located in the Civil Code, or *Bürgerliches Gesetzbuch (BGB)*. The Civil Code is divided into various parts including Book 1 (general provisions), Book 2 (which covers contracts and torts or 'obligations') and three parts on property, family law and wills and estates respectively. More specifically, Book 1, section 3 (§§ 104–157 BGB) contains the Civil Code requirements for the formation of contracts while Book 2, sections 1–7 (§§ 242–432 BGB) cover all the other 'general' contract law questions and section 8 of Book 2 (§§ 433–808 BGB) deals with specific contracts.[1] By 2000

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1 The table of contents of these parts reads as follows:
Book 1 (General Part), *section 3* (Juristic Act): (1) legal capacity, (2) declaration of [legally binding] intention, (3) contract, (4) condition precedent and subsequent, (5) representation, (6) ratification.
Book 2 (Obligations), *section 1* (Content of Obligations): (1) duty to perform (§§ 241–292 BGB), (2) delay of the creditor; *section 2* (Standard Contract Terms, §§ 305–310 BGB); *section 3* (Obligations Based on Contracts): (1) formation, content and termination (§§ 311–319 BGB), (2) synallagmatic contracts (§§ 320–326 BGB), (3) promises to third parties, (4) penalty clauses, (5) rescission, retreat in case of consumer contracts (§§ 346–359 BGB); *section 4* (Extinction of obligations, §§ 362–397 BGB): (1) performance, (2) depositing of money or securities, (3) set-off, (4) release; *section 5* (assignment of a claim, §§ 398–413 BGB); *section 6* (assumption of an obligation, §§ 414–418 BGB); *section 7* (Plurality of Debtors and Creditors, §§ 420–432 BGB); *section 8* (Spe-

certain reforms to aspects of the Civil Code had been enacted as a consequence of the European Directive on Credit Transfers. The government used the Directive as a starting point or model for an 'active' or far-reaching transposition of European Community (EC) law. Preferring to do more than just copy the Directive, the government extended its cover to domestic as well as EC level transfers of credit. Compared to the former conservative government's practice, this was a major shift in approach to the transposition of EC legislation, but the change it effected was to only one specific contract (§§ 676a *et seqs.* in Book 2, section 8, title 12) and, moreover, that contract is not seen as being highly significant as a model for the others. What followed was the reform of late payment of 30 March 2000, the introduction of an electronic signature of 13 July 2001 and the changes concerning the amount of damages of 19 July 2002 (including damages for pain and suffering).[2] All these reforms dealt with issues concerning the general contract law parts of the Civil Code but their immediate and overall effect was to change only a small number of rules (namely §§ 126a, 247, 253, 286, 288 BGB). All these reforms certainly are small when compared with the *Schuldrechtsmodernisierung* of 26 November 2001; probably the largest reform of German codified contract law undertaken for a century.[3] All these reforms took place within the Civil Code, the

cific Types of Contracts and Obligations): (1) sales contracts and exchange (§§ 433–480 BGB), (2) Timeshare contracts, (3) … etc. (9) works contracts and similar contracts (i.e. travel contracts, §§ 631–651m BGB), … etc. (26) restitution (§§ 812–822 BGB), (27) obligations arising from torts (last title of book 2, §§ 823–853 BGB).
Parts of this translation and all the translations of particular provisions below have been taken from Prof. Dannemann's translation which covers all new provisions and is available at www.iuscomp.org/gla/statutes/biblstat4.htm. I am particularly grateful to my colleague at Humboldt-University that he has granted permission for this. For a translation of the old version of the BGB, ie of all provisions unchanged (and not translated by Prof. Dannemann) see S. Goren, 'The German Civil Code' (As Amended to January 1, 1992), (rev. Edition, 1995); full translation into Italian now by S. Patti, (Milan/Munich: Giuffrè and Beck, 2005).

2 See *Bundesgesetzblatt* (German Official Journal) 2000 I, 330; 2000 I, 330; 2001 I, 1542; and 2002 I, 2674 respectively. On the reform of credit transfers: S. Grundmann, 'Grundsatz- und Praxisprobleme des neuen deutschen Überweisungsrechts', (2000) 46 *Wertpapiermitteilungen* 2269; of electronic signature: A. Roßnagel, 'Das neue Recht elektronischer Signaturen – Neufassung des Signaturengesetzes und Änderungen des BGB und der ZPO' (2001) 25 *Neue Juristische Wochenschrift* 1817; of late payment: D. Medicus, 'Bemerkungen zur Neuregelung des Schuldnerverzugs' (2000) 20 *Deutsche Notarzeitschrift* 256; and of amount of damages: G. Wagner, 'Das Zweite Schadensrechtsänderungsgesetz' (2002) 29 *Neue Juristische Wochenschrift* 2049. More changes related to general contract law and the core specific contracts in: *Bundesgesetzblatt* 2002 I, 2850; 2003 I, 2676.

3 *Bundesgesetzblatt* 2001 I, 3138. There is a host of literature, for instance: B. Dauner-Lieb / T. Heidel / M. Lepa / G. Ring, *Das Neue Schuldrecht* (Heidelberg: C. F. Müller, 2002);

Bürgerliches Gesetzbuch, and the *Schuldrechtmodernisierung* even led to a reintegration of major parts into this Code.

2. Contents of the Schuldrechtsmodernisierung 2002

The reforms referred to above merit a discussion of at least five pages each. However, the relative importance of the *Schuldrechtsmodernisierung* dictates that the limited space available here should be almost exclusively devoted to an examination of that significant reform (unfortunately this approach also dictates that there is no opportunity to consider important case law decided over the last few years).[4]

The *Schuldrechtsmodernisierung* included *four major fields of interest*: sales and works contracts, integration of consumer law, breach of contract (mainly damages and rescission), and limitation. While the reform of sales and works contracts was integrated into the part on specific contracts (§§ 433–479 BGB, Book 2, section 8, title 1), integration of consumer contract law and the new regime on breach of contract were incorporated within the general part on contracts (mainly §§ 280–288, 312a–312f, 323–326, 346–359 BGB, Book 2,

L. Haas / D. Medicus / W. Rolland / C. Schäfer / H. Wendtland, *Das neue Schuldrecht* (Munich: Beck, 2002); M. Henssler / F. Graf von Westphalen (eds), *Praxis der Schuldrechtsreform* (Recklinghausen: ZAP-Verlag, 2nd ed 2003); P. Huber / F. Faust, *Schuldrechtsmodernisierung* (Munich: Beck, 2002); S. Lorenz / T. Riehm, *Schuldrechtsmodernisierung* (Munich: Beck, 2002); M. Schwab / C. H. Witt (eds), *Einführung in das neue Schuldrecht* (Munich: Beck, 2002); in English: P. Schlechtriem, 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe' (2002) *Oxford U Comparative L Forum 2* at ouclf.iuscomp.org; H. Schulte-Nölke, 'The New German Law of Obligations: an Introduction' at http://www.iuscomp.org/gla/literature/schulte-noelke.htm; R. Zimmermann, 'Breach of Contract and Remedies under the new German law of obligations' at http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf; T. M. J. Möllers, 'European Directives on Civil Law, The German Approach: Towards the Re-codification and New Foundation of Civil Law Principles' (2002) 6 *European Review of Private Law* 777; G. D'Alfonso, 'The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and "Europeanization" of the BGB' (2003) 6 *European Business Law Review* 689; S. Grundmann, 'European Sales Law – Reform and Adoption of International Models in German Sales Law' (2001) 2–3 *European Business Law Review* 239; for a summary in French see H. Grothe, 'La Réforme du droit allemand des obligations' (2004) *Revue de droit international et de droit comparé* 243.

4 For this development see, for instance, F. Graf von Westphalen, 'Die Entwicklung des AGB-Rechts im Jahr 2001' (2002) 23 *Neue Juristische Wochenschrift* 1688; A. Spickhoff, 'Die Entwicklung des Arztrechts 2001/2002' (2002) 24 *Neue Juristische Wochenschrift* 1758; T. Langheid / C. Müller-Frank, 'Rechtsprechungsübersicht zum Versicherungsvertragsrecht 2002' (2003) 6 *Neue Juristische Wochenschrift* 399.

sections 1 and 3). The new regime on limitation relates to all areas of the law covered by the Civil Code and was therefore included in Book 1, the General Part of the Civil Code (§§ 194–202 BGB). This law was intended to transpose the Sales Directive, the E-Commerce Directive and the Late Payment Directive (although, for the latter, there had been an earlier reform (see n 1 above)).

II. New regime on breach of contract

There was a huge debate in Germany about the Schuldrechtsmodernisierung, which included 200 (out of 500) private law professors signing a petition published in the *Frankfurter Allgemeine Zeitung* calling for the reform to be postponed. More time for reflection was asked for.[5] All this did not relate (or if it did it was only marginally related) to the reintegration of consumer law into the Code (namely §§ 312a–312f, 355–359 BGB)[6]; nor did it relate to the extension of the Sales Directive to all sales and the transposition of that Directive; nor was it concerned with limitation – although the changes in this area relevant to contract and sales law were radical. This heated debate was focused on changes to the general part of the Civil Code concerning the law of obligations and specifically on the new regime for breach of contract (namely §§ 280–288, 323–326, 346–354 BGB). It was incorrect to say, however, that there had not been sufficient time for discussion of the reforms. The proposals for reform had been based mainly on a reform project started in 1980, discussion of which had lasted for more than a decade and resulted in the so-called *Schuldrechtskommission* of 1992.[7] The new regime proposed by the Ministry of Justice was based on these results, and while some changes

5 See, for instance W. Ernst, 'Zum Fortgang der Schuldrechtsreform', in W. Ernst and R. Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform – zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (Tübingen: Mohr, 2001) 559, 603–605 et passim; contra C.W. Canaris, 'Die Reform des Rechts der Leistungsstörungen' (2001) 10 *Juristenzeitung* 499, 523–524. Similar for Europe: W. van Gerven, 'Codifying European Private Law – Top down and bottom up', in S. Grundmann and J. Stuyck (eds), *An Academic Greenpaper on European Contract Law* (The Hague *et al*: Kluwer, 2002) 405, 432: '*Festina lente*'.

6 Large majority for this: see for instance H. Dörner, 'Die Integration des Verbraucherrechts in das BGB', in R. Schulze and H. Schulte-Nölke (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, (Tübingen: Mohr, 2001) 177, 177–178; S. Grundmann, 'Generalreferat: Internationalisierung und Reform des deutschen Kaufrechts', in S. Grundmann, D. Medicus and W. Rolland (eds), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (Cologne: Heymanns, 2000) 281, 284–288; T. Pfeiffer, 'Die Intergration von "Nebengesetzen" in das BGB', in W. Ernst and R. Zimmermann, n 5 above, 481, 484–500 and 523–524.

7 Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (Bonn: Bundesanzeigerverlag, 1992).

were introduced by another expert commission in the months leading up to the introduction of the reforms, the so-called *Leistungsstörungskommission* of 2001, those changes were not, in my view, important.[8]

One important change to the general part of the Civil Code on obligations was the explicit inclusion of certain legal concepts developed in doctrinal research and in case law, including: the principle of changed circumstances ('*Wegfall der Geschäftsgrundlage*', new § 313 BGB); *culpa in contrahendo* (new § 311 para 2 BGB)[9]; '*positive Vertragsverletzung (pVV)*', which refers to any breach of contract other than late performance or impossibility (complete non-performance). These new rules did not really change the law in outcome. The *pVV* (now made explicit for instance in § 281 para 1 BGB, see below) became part of the new concept of breach, which has become a unitary concept of breach, as in the UN Convention.

1. New concept of breach

The new regime of breach of contract can be found in the general part of the Civil Code on obligations (§§ 280–288 BGB (damages)[10], and 323–326 BGB

8 See for the results (and the texts amended): C. W. Canaris, n 5 above, 524; for the legislative history also the materials collected by C. W. Canaris, *Schuldrechtsmodernisierung 2002* (Munich: Beck, 2002); see S. Grundmann, 'Der Schadensersatzanspruch aus Vertrag – System und Perspektiven' (2004) 204 *Archiv für civilistische Praxis* 569 (with ample reference also for the following).

9 These two provisions read as follows:
§ 313 (1) If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form. (2) If material assumptions that have become the basis of the contract subsequently turn out to be incorrect, they are treated in the same way as a change in circumstances. (3) If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract. In the case of a contract for the performance of a recurring obligation, the right to terminate is replaced by the right to terminate on notice.
§ 311 (2) An obligation with duties in accordance with § 241 (2) also arises as a result of (a) entry into contractual negotiations, (b) preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interest or other interests or entrusts them to that party, or (c) similar business contact.

10 These provisions read as follows:
§ 280 (1) If the obligor fails to comply with a duty arising under the obligation, the obligee may claim compensation for the loss resulting from this breach. This does not

(rescission)),[11] and is referred to in the regime for sales law (§ 437 BGB, with very minor modifications in § 440 BGB).[12] The latter reference is perhaps not

apply if the obligor is not liable for the failure. (2) The obligee may demand compensation for delay in performance only if the additional requirement in § 286 is satisfied. (3) The obligee may demand compensation in lieu of performance only if the additional requirements of § 281, § 282 or § 283 are satisfied.

§ 281 (1) In so far as the obligor fails to perform when performance is due or fails to perform properly, the obligee may, subject to the requirements of § 280 (1), demand compensation in lieu of performance if he has fixed to no avail a reasonable period within which the obligor is to perform or to effect supplementary performance. If the obligor has performed only in part, the obligee may demand compensation in lieu of full performance only if he has no interest in performance in part. If the obligor has failed to perform properly, the obligee may not demand compensation in lieu of performance if the breach of duty is immaterial. (2) A period for performance does not have to be fixed if the obligor seriously and definitely refuses to perform or if there are special circumstances which, after each party's interests are balanced, justify the immediate assertion of a claim for compensation. (3) If the type of breach of duty is such that, it is not feasible to fix a period for performance, a warning notice replaces the fixing of such a period. (4) The claim for performance is excluded once the obligee has demanded compensation in lieu of performance. (5) If the obligee demands compensation in lieu of full performance, then the obligor may claim, in accordance with §§ 346 to 348, the return of whatever he has performed.

§ 282 If the obligor infringes a duty under § 241 (2), the obligee may, subject to the requirements of § 280 (1), demand compensation in lieu of performance if he can no longer reasonably be expected to accept performance by the obligor.

§ 283 If, by virtue of § 275 (1) to (3), the obligor does not have to perform, the obligee may demand compensation in lieu of performance. § 281 (1), second and third sentence, and (5) apply mutatis mutandis.

§ 284 Instead of demanding compensation in lieu of performance, the obligee may demand reimbursement of the expenditure which he has incurred in reasonable reliance on the receipt of performance, save where the purpose of that expenditure would not have been achieved even if the obligor had not breached his duty.

§ 285 (1) If, as a result of a circumstance under which § 275(1) to (3) relieves the obligor of the obligation to perform, the obligor obtains a substitute or a substitute claim for the object owed, the obligee may demand surrender of what has been received as substitute or an assignment of the substitute claim. (2) If the obligee may demand compensation in lieu of performance, then, if he uses the right laid down in subsection (1) above, the compensation is reduced by the value of the substitute or substitute claim he has obtained.

§ 286 (1) If, after notice from the obligee to perform, such notice having been given after performance became due, the obligor fails to perform, that notice puts him in default. The bringing of an action for performance and the service of a demand for payment in summary debt proceedings is equivalent to a notice to perform. (2) Notice to perform is unnecessary, if (a) a time for performance is determined according to the calendar, (b) an event must precede performance and an appropriate time for the performance is fixed in such a way that it can be calculated according to the calendar from

surprising given that these reforms to the regime for breach of contract were modelled on the UN Convention and the EC Sales Directive. That being

the date of the event, (c) the obligor seriously and definitely refuses to perform, (d) having regard to each party's interests, special reasons justify the occurrence of default with immediate effect. (3) The obligor of a claim for remuneration is put in default at the latest if he fails to perform within 30 days after the due date and receipt of an invoice or equivalent payment statement; this applies to an obligor who is a consumer only if a specific reference to those consequences has been made in the invoice or payment statement. If the time at which the invoice or payment statement reached the obligor is uncertain, an obligor who is not a consumer is put in default at the latest 30 days after the due date and receipt of the counterperformance.

§ 287 During a period of default the obligor is liable for any negligence. He remains liable for performance even in the event of fortuitous events, unless the damage would have occurred even if performance had been made on time.

§ 288 (1) Interest is payable on a money debt during the period of default. The rate of default interest is 5 % per annum above the basic interest rate. (2) In the case of legal transactions to which a consumer is not a party the interest rate for claims for remuneration is 8 % above the basic rate. (3) The obligee may claim higher interest on a different legal basis. (4) The right to claim additional loss is not excluded.

§ 241 (2) to which reference is made in § 282 reads as follows: An obligation may require each party to have regard to the other party's rights, legally protected interests and other interests.

§ 275 to which reference is made in § 283 reads as follows: (1) A claim for performance cannot be made in so far as it is impossible for the obligor or for anyone else to perform. (2) The obligor may refuse to perform in so far as performance requires expenditure which, having regard to the subject matter of the obligation and the principle of good faith, is manifestly disproportionate to the obligee's interest in performance. When determining what may reasonably be required of the obligor, regard must also be had to whether he is responsible for the impediment. (3) Moreover, the obligor may refuse to perform if he is to effect the performance in person and, after weighing up the obligee's interest in performance and the impediment to performance, performance cannot be reasonably required of the obligor.

11 These provisions read as follows:

§ 323 (1) If under a synallagmatic contract the obligor fails to effect performance when due or to perform in accordance with the contract, the obligee may terminate the contract, if he has fixed, to no avail, an additional period of time for performance. (2) A period of time does not have to be fixed if (a) the obligor seriously and definitely refuses to perform, (b) the obligor fails to perform by a date specified in the contract or within a specified period and, in the contract, the obligee has linked the continuation of his interest in performance to the punctuality of that performance, or (b) special circumstances exist which, after each party's interests have been weighed, justify immediate termination. (3) If the type of breach of duty is such that, it is not feasible to fix a period for performance, a warning notice replaces it. (4) The obligee may terminate the contract before performance becomes due if it is obvious that the preconditions for termination will be satisfied. (5) If the obligor has performed in part, the obligee may terminate the entire contract only if he has no interest in partial performance. If the obligor

so, EC law, and in particular its case law and the indirect effect of the Sales Directive, is important for the purpose of interpreting §§ 280–288 BGB and §§ 323–326 BGB.[13]

has failed to perform in accordance with the contract, the obligee may not terminate the contract if there has been no more than an immaterial breach of duty. (6) Termination is excluded if the obligee is solely or overwhelmingly responsible for the circumstance which would entitle him to terminate the contract or if a circumstance for which the obligor is not responsible materialises at a time when the obligee is in default through non-acceptance.

§ 324 If the obligor breaches some other duty under § 241 (2) under a synallagmatic contract, the obligee may terminate the contract if he can no longer reasonably be expected to abide by the contract.

§ 325 The right to claim compensation in the case of a synallagmatic contract is not precluded by termination.

§ 326 (1) If, by virtue of § 275 (1) to (3), the obligor is released from his obligation to perform, the claim for counter-performance lapses; in the case of part performance § 441 (3) applies mutatis mutandis. Sentence 1 does not apply if the obligor under § 275 (1) to (3) does not have to effect supplementary performance in the event of a failure to perform in accordance with the contract. (2) If the obligee is solely or overwhelmingly responsible for the circumstance releasing the obligor from the need to perform pursuant to § 275 (1) to (3), or if the obligor is not responsible for that circumstance and this occurs at a time when the obligee is in default through non-acceptance, the obligor retains his claim for counter-performance. He must, however, allow a deduction for whatever he saves as a result of release from performance, he acquires through the utilisation of his labour elsewhere, or he maliciously fails to acquire. (3) If, pursuant to § 285, the obligee demands the surrender of a substitute obtained for the object in respect of which the obligation is due or assignment of a substitute claim, he remains bound to effect counter-performance. Counter-performance is, however, reduced in accordance with § 441 (3) in so far as the value of the substitute or of the claim for compensation is less than the value of the performance due. (4) To the degree that counter-performance is effected although not due under this provision, whatever is effected may be reclaimed under §§ 346 to 348.

For § 241 (2) and § 275 BGB to which reference is made here, see last n.

12 These provisions read as follows:

§ 437 If the thing is defective, then, if the requirements of the following provisions are satisfied and save as otherwise provided, the buyer may (a) demand supplementary performance under § 439; (b) terminate the contract under §§ 440, 323, and 326 (5), or reduce the purchase price under § 441; and (c) claim compensation under §§ 440, 280, 281, 283 and 311a, or reimbursement for wasted expenditure under § 284.

§ 440 provides for one additional exception to the prerequisite of a fixing of a time limit contained in § 281 (see n 10 above) and this exception applies only to sales. It reads as follows: Except in the cases of § 281 (2) and § 323 (2), it is not necessary to fix a period of time if the seller has refused to perform both forms of supplementary performance under § 439 (3) or if the form of supplementary performance to which the buyer is entitled has failed or would be unreasonable for him. A repair is deemed to have failed after two unsuccessful attempts, unless, having regard in particular to the

This regime in the general part of obligations (§§ 280–288 BGB and §§ 323–326 BGB) has been highly disputed.[14] Simply put, the *Schuldrechtskommission* introduced a uniform concept of breach of contract in which complete non-performance (impossibility), defective performance and late performance were treated in the same way (with only very minor exceptions). While it is correct that in the last few months the *Leistungsstörungskommission* has reintroduced the distinction between these three different types of breach (dealing with impossibility in § 283 BGB and with late performance in §§ 286–291 BGB (§§ 289–291 BGB being less important)), this return to a distinction that had been very important under the old regime, is of very little practical significance today. The new law in effect distinguishes between damages which supplement performance and those that provide a substitute for it (§ 280 BGB and §§ 281–283 BGB respectively). In the case of impossibility, only damages which substitute performance are relevant and this is stated in § 283 BGB, but in practice the same result would be reached by applying the general rule on damages for substituting performance contained in § 281 BGB. Given the burden which damages for substituting performance impose on the debtor (see below b), a creditor is entitled to receive such damages only in certain circumstances including: when he has given the debtor a second chance to perform which the debtor has failed to take; or whenever the creditor's interests in recovering that damage are such that they prevail over the interests of the debtor in receiving a second chance to perform (§ 281 para 2 BGB). In case of proved impossibility, however, there is of course no value to the debtor in being offered a second chance to perform. Thus impossibility and complete non-performance does not, in effect, follow a regime that is different from that for the other types of breach of contract (namely defective performance).

The case of late performance is different. In that case, recovering the damages which supplement performance (§ 280 BGB) depends not only on breach and fault (as in all other cases of § 280 BGB, see below b), but also on the sending of a reminder (§ 286 BGB). While this gives rise to a real divergence between this regime and those applying to other cases of breach, the difference is only significant when the relevant contract fails to make use of § 286 paragraph 2 and 3 BGB. Those paragraphs from the Civil Code provide that there is no obligation on the Creditor to send a performance reminder where the contract stipulates that: performance must be complete on a certain day (this

nature of the thing or of the defect or the other circumstances, a different conclusion is appropriate.

13 See case C-28/95 *Leur-Bloem* [1997] ECR I-4161, especially 4200–4202 (ECJ); case C-130/95 *Giloy* [1997] ECR I-4291, 4302–4304 (ECJ).

14 For the following, see, more in detail, S. Grundmann, n 8 above.

exception existed under the old law); or, performance must be completed within an agreed period of time (for example, a clause requiring payment within 14 days, and this exception came in only as part of the reform). Thus if a contract is properly drafted, a creditor can claim damages in case of late performance without sending a reminder, on the basis of fault and breach only, as in all other cases of breach.

Thus non conformity with the contract is the only meaningful category of breach. It can be described as leading to three possible remedies that depend upon the satisfaction of certain prerequisites: non conformity and fault lead to damages which supplement performance (this is so in the case of poor performance, impossibility, and in the event of late performance (provided, that is, the contract takes advantage of § 286 paragraph 2 and 3 BGB)); non conformity and fault in circumstances where the debtor has been given a 'second try', or the interests of the creditor prevail over those of the debtor in receiving a second chance, leads to damages substituting performance and to a right to rescind the contract irrespective of fault.

2. Remedies

Damages which supplement performance, damages which substitute performance and rescission are the three remedies available under the current regime for breach of contract and they are much more clearly distinguished today than they were under the old law. Today, rescission can be combined with both forms of damages – a major change compared to the old law. Thus, for instance, a creditor who has received defective goods that have caused him loss of property or profits can rescind the contract (and ask for restitution of what he has paid the debtor) and at the same time and in addition ask for damages. As has been said: (1) damages which supplement performance (§§ 280, 286–288 BGB, n 9 above) are based on any kind of non performance and fault; (2) damages substituting performance (§§ 281–283 BGB, n 9 above) are based on any kind of non performance and fault where the debtor has been given a 'second try' or the interests of the creditor prevail; and, (3) exactly the same requirements, except for fault, give rise to a right to rescind the contract (§§ 323–326 BGB, n 10 above).

Unfortunately while the two types of damages have been regulated in the same context (§§ 280–288 BGB, n 9 above), rescission, the most important alternative to damages in practice, is contained in a different context (§§ 323–326 BGB, n 10 above). This makes the law difficult to read and, moreover, the distinctions made within the regime of damages are not convincing insofar as impossibility (§ 283 BGB, n 9 above) seems to be, but is not, a category which changes anything in outcome and insofar as both types of damages could be

distinguished still more clearly, as separate bases for claims. The system is in practice, however, rather more convincing. In typical cases, the economic impact which rescission and damages substituting performance have on the debtor (typically the professional in the deal) is much more sensible than that of damages supplementing performance. In the first two cases, the debtor loses in two respects: he loses any financial gains from the bargain (often about 30 % of the price) and where he sold new goods he receives back used goods, or where he has invested in a service, he loses that investment. He is lucky if he looses only 10–15 % as compared to the price of the new goods or the investment (which may be the level of loss in functioning secondary markets such as the market for used motor vehicles). Rescission and damages substituting performance are different in only one respect which is not really important for the calculation which the debtor has to make to ascertain what he has lost or must give up, unless the bargain was particularly advantageous or disadvantageous. In both cases he gets back what he has delivered (loosing the gain from the bargain and receiving as used what he has delivered as a new product). The only difference is that in the case of rescission he must also return the payment he received from the other side, whereas in the case of damages substituting performance, he has to pay the other party what she needs to obtain the same product or service from another professional. The Debtor thus has to pay the price of a substitute product or service and, again, this will typically include the mark-up placed on that product or service by a second professional. Because of the risk of these two losses, it is appropriate to give the debtor a second chance, unless the interests of the creditor in not waiting clearly prevail. The second difference between both remedies relates to consequential losses, if they occur (typically only in the case of professional clients). These losses can be asked for only as damages substituting performance and therefore only if there was fault. Except for these two rather marginal differences, rescission and damages substituting performance produce the same results.

Both losses do not occur where only damages supplementing performance are owed. Typically, 'repair' will cost the debtor only the financial gain from the bargain, perhaps less, in which case, while he may not gain from the bargain, he will not loose from it either. If, however, he does stand to loose, the level of his loss will be less than in the case of damages substituting performance and, in the large majority of cases, less also than in the case of rescission. The latter is different only if consequential losses, owed only as a form of damages, are particularly high.[15] Therefore, damages supplementing

15 Traditional doctrinal thinking would rather hold that the sequence is different: rescission being the least far reaching remedy, damages which supplement performance the next, and damages which substitute performance being the furthest reaching. See, for

performance do not require the giving of a second chance. This is typically the case under the new law, even in the event of late performance, and for good reason.

The unitary concept of breach, in which any breach of contract is treated equally (including defective performance, late performance and complete lack of performance, including impossibility) and the distinction between the three types of remedies, are the cornerstones of the new regime of breach of contract in German Law. They apply both generally (by their inclusion in General Part of the Civil Code on obligations) and to specific contracts such as sales contracts (reference made there to the General Part, for instance in § 437 BGB, see n 12 above), which have been included in the reform process (sales and works contracts). In three respects the changes brought about by certain aspects of the new regime (namely the three remedies) are particularly significant.

3. Fault or strict liability

The first is the requirement of fault. German law, including German contract law, continues to adhere to the requirement of establishing fault before awarding damages (although there is a presumption of negligence whenever there is a breach of contract (§ 280 para 1 [2] BGB)). The scope of this requirement has, however, been considerably reduced. This is true for all cases of rescission where fault is no longer required in any case (see below e). A similar tendency may also, in effect, be visible in the context of sales law insofar as vicarious liability might be dramatically extended (see below 4). In addition, the negligence requirement rule, § 276 BGB, has been changed to include explicit recognition that implicit agreement is what really matters:[16] Strict liability can always be implied from the circumstances, namely where the seller or provider of services promises performance from a class of goods or

instance, C. W. Canaris, n 5 above, 514. It is exactly for this reason (according to these authors) that in the second and in the third case, fault is required, not in the first. The requirement of fault, however, is presumed to be fulfilled (§ 280 para 1 [2] BGB) and typically much less of a 'protection' for the debtor than that of receiving a second chance.

16 § 276 BGB now reads: (1) The obligor is liable for deliberate and negligent acts or omissions, unless the existence of a stricter or more lenient degree of liability is specified or to be inferred from the other subject matter of the obligation, in particular the assumption of a guarantee or the acquisition risk. The provisions of §§ 827 and 828 apply mutatis mutandis. (2) A person acts negligently if he fails to observe the relevant accepted standards of care. (3) The obligor cannot be relieved in advance of liability for deliberate acts or omissions.

services. Most radically, § 311a para 2 BGB now provides that a debtor can be at fault for obstructing performance if the obstacle to performance either results from the debtor's negligence; or, albeit that the obstruction is out of the debtor's control, he could have known about it.[17] At first sight, it would seem as if this rule did not apply generally to all kinds of defective performance and that it only applied to cases of impossibility arising before the contract has been entered into. There is, however, no good reason why this rule should not apply generally. If it did, however, it would really reflect the standard contained in Article 79 of the Vienna Convention on the International Sale of Goods: only strictly unforeseeable obstacles can not be imputed to the debtor. This is largely the standard of 'force majeure' for which the debtor is also not responsible under a strict liability regime. Then the new German Law in § 311a para 2 BGB, comes very close to a strict liability regime.

4. Amount of damages

There is a second major change that relates to the amount of damages recoverable under the current law. In the year *Simone Leitner* was decided and it was held that immaterial losses are recoverable under EC Law (in the case of package travel),[18] the German legislature took two important steps in the same direction. First, the rule on pain and suffering was placed in the general part of the law of obligations, now § 253 para 2 BGB,[19] while formerly it had been a rule of tort law only (then § 847 BGB). This rule provides for awards of compensation for immaterial damages in cases of personal injury (for intrusion into health and life and personal freedom). As a result of the new positioning of this rule, compensation can be granted on the basis of rules that fall outside the domain of tort law. They mainly include rules imposing strict liability in traffic accidents and with respect to the risks associated with industrial production (such as product liability), but they also include rules associated with certain contractual relationships (such as medical treatment).

17 § 311a (2) BGB reads as follows: The obligee may, at his option, demand compensation in lieu of performance or reimbursement of expenditure to the extent provided for in § 284. This does not apply if, at the time of the conclusion of the contract, the obligor had no knowledge of the impediment to performance and was not responsible for his lack of knowledge. § 281 (1), second and third sentence, and (5) apply mutatis mutandis.

18 Case C-168/00 *Simone Leitner v TUI* [2002] ECR I-2631 (ECJ).

19 § 253 BGB now reads: (1) A non pecuniary loss can only be compensated in money in the cases determined by the law. (2) In cases of bodily harm and injury, violation of freedom or of sexual self-determination an equitable compensation for the loss, that is not pecuniary loss, can be claimed.

The rule permitting awards for immaterial loss continues, however, to cover only personal injury and does not extend to lost amenities and other types of immaterial damage, with one exception. Secondly, there is now a rule contained in § 284 BGB (see n 10 above) which provides for some form of compensation when one party has made an investment for her enjoyment or other immaterial purpose. If this purpose is not achieved because of the other contracting party's fault, she may claim damages in the amount of the investment made and lost (in other words, she may ask the other party to compensate her for her investment, not just for restitution of the payment made in the contract (rescission)).

In general, however, German Law remains rather restrictive with respect to recovering for immaterial damages, in a way that is inconsistent with certain accepted moral values: if holidays are not pleasant enough, the party that suffers must be compensated (in the sense provided for in § 651 f para 2 BGB, which existed before *Simone Leitner*). Conversely, if the only child is killed in front of his or her mother, the mother does not get compensation for pain and suffering.[20]

5. Rescission

The regime of rescission has also changed considerably. Two developments are particularly important and laudable.[21] First, in all cases the right to rescind no longer requires there to be fault on the part of one party to the contract. The position was different under the old law according to which the regime of general contract law required fault before rescission, whereas under sales law and other specific areas rescission was possible despite an absence of fault. This development is laudable because any party should have the right to withdraw from their side of a bargain (and get back her investment) without being subject to any further condition, whenever the other party does not or cannot perform their side of the bargain (for further reaching criticism of the requirement of fault see above). Secondly, the right to rescind is no longer prevented by the fact that the party exercising this right is not able to return what they received; it may be in that case that the party unable to grant resti-

20 See Bundesgerichtshof (German Private Law Supreme Court), (1971) *Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ)* 56, 163. This is different only, if pain and suffering damage her own health.

21 For the relevant provisions see n 11 above. On the regime of rescission, see more in detail, for instance, J. Hager, 'Das Rücktrittsrecht', in B. Dauner-Lieb / T. Heidel / M. Lepa / G. Ring (n 2 above) 174; J. Kohler, 'Das Rücktrittsrecht in der Reform' (2001) 56 *Juristenzeitung* 325; and in English: see reference in n 3 above.

tution in kind has to pay damages instead (see § 346 para 2 BGB).[22] Again, this change in the law is laudable. If one party does not perform properly, it is less intrusive for her to get back only damages and not the performance she made in nature than it would be for the other party completely to loose her right of rescission.

III. Limitation

The system of limitation has completely changed as well.[23] The first major change is that the number of cases which are treated differently from one another has been radically reduced. There had been hundreds of different

22 § 346 BGB, the core rule on the effects of rescission, reads: (1) If one party to a contract has reserved a right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any performance received is to be returned, as are benefits derived from such performance. (2) The obligor must pay compensation for value rather than effect a return, where (a) the return or surrender is excluded because of the nature of what has been acquired, (b) he has consumed, transferred, encumbered, processed or transformed the object received, (c) the object received has deteriorated or has been destroyed; any deterioration resulting from the proper use of the object for its intended purpose is, however, disregarded. If the contract specifies a counter-performance, such counter-performance is to be taken as a basis for calculation of the compensation for value. (3) There is no duty to pay compensation for value (a) if the defect which gives the right to termination became apparent only during the processing or transformation of the item, (b) in so far as the obligee is responsible for the deterioration or destruction or the damage would also have occurred in his hands, (c) if, in the case of a statutory right of termination, the deterioration or destruction has occurred in the hands of the person entitled even though he has taken the care which he usually takes in his own affairs. Any remaining enrichment must be given up.
The rules on the question in which cases a right to rescind the contract arises, are to be found in a different place, ie §§ 323–326 BGB (see n 11 above).

23 There is – again – a host of literature, for instance: F. Bydlinski, 'Die geplante Modernisierung des Verjährungsrechts', in Schulze/Schulte-Nölke (n 5 above) 381; H. Eidenmüller, 'Zur Effizienz der Verjährungsregeln im geplanten Schuldrechtsmodernisierungsgesetz' (2001) 56 *Juristenzeitung* 283; in English: see reference in n 3 above. The two core provision, §§ 195 and 199 BGB, read as follows: § 195: The standard limitation period is three years. § 199 (1) The standard limitation period begins upon the expiry of the year in which: (a) the claim has arisen, and (b) the obligee becomes aware of the circumstances giving rise to the claim and of the identity of the obligor or ought to have become aware of those matters but for his gross negligence. (2) Irrespective of how they arose and irrespective of awareness or grossly negligent lack of awareness, claims arising out of death, injury to body, health, or liberty are time-barred 30 years from the date upon which the act, breach of duty or other event causing the loss occurred. (3) Other claims for compensation are time-barred (a) irrespective of knowledge or grossly negligent lack of knowledge, ten years after they arose and (b) irrespective of when they arose and of knowledge or grossly negligent lack of knowledge, 30 years

rules on limitation, but now, with a small number of exceptions relating to land, claims based on titles, return of possession to the owner and in family law and wills and estates (§§ 196–197 BGB), limitation occurs after three years from the moment when the creditor knew or should have known about his claim (§§ 195, 199 BGB). The argument in support of this change was to effectively give the creditor the chance to enforce his claim. Formerly, Germany had terms of limitation between six months (sales law) and thirty years from the moment of the creation of the claim (often these claims were not even known to the creditor before limitation occurred). This primary form of limitation is supplemented by a rule that applies in the small number of cases where the creditor does not and could not know about his claim. In that case the limitation occurs, independent of knowledge, at a particular moment determined by the legislation (§ 199 para 2–4 BGB). This rule is meant to make the debtor safe from suit, but only after a relatively long period of time (that is, after 10 years, or 30 years in the cases of personal injuries because these may be less well detectable and/or of more existential importance).

Interest groups, mainly in industry, objected and managed to avoid the same regime becoming applicable to all parts of sales law. For remedies in the case of non-conformity with a sales contract, there is now a separate regime (contained in § 438 BGB) with a limitation of two years running from the moment of the creation of the claim (delivery). The argument has been that this is the minimum which the Sales Directive asks for and German sellers should not be put at a competitive disadvantage. Apart from this exception, the regime, largely due to the intervention of *Zimmermann*, appears as a laudable and simple modern solution.

IV. Sales and works contracts

The most intensive reform, besides the limitation reforms, were to sales law and of works contracts. In respect of the latter, however, the regime is not really new, while for sales law it is. The duty to deliver goods in conformity with the contract is now a duty owed under the contract (§ 433 BGB)[24] – non-

from the date on which the act, breach of duty or other event causing the loss occurred. The period which ends first is decisive. (4) Irrespective of knowledge or grossly negligent lack of knowledge, claims other than claims for compensation are time-barred ten years after the date upon which they arose. (5) If the claim is for an obligation of forbearance, the date of the infringement of that obligation replaces the date on which the claim arose.

24 The core provisions, §§ 433–435, 439 and 441 BGB, read as follows (for §§ 437 and 444 BGB see n 12 above):

conformity is no longer only a basis on which the client can ask for restitution of the price. This has the legal consequence that the client can now ask for damages based on defective performance and for replacement or repair (§ 437

§ 433 (1) By a contract of sale the seller of a thing is bound to hand over the thing to the buyer and to transfer to him ownership of the thing. The seller must procure the thing for the buyer in a state that is free from defects as to quality and defects of title. (2) The buyer is bound to pay to the seller the agreed price and to take delivery of the thing purchased.
§ 434 (1) The thing is free from defects as to quality if, upon the passing of the risk, the thing is in the agreed quality. If the quality has not been agreed, the thing is free from defects as to quality (a) if it is fit for the use specified in the contract, and otherwise (b) if it is fit for the normal use and its quality is such as is usual in things of the same kind and can be expected by the buyer by virtue of its nature. For the purposes of sentence 2, No. 2, above, condition includes features which the buyer may expect by virtue of public statements concerning the thing's features that are made by the seller, the producer (§ 4 (1) and (2) of the Product Liability Act) or persons assisting him, in particular in advertisements or in connection with labelling, unless the seller was not aware of the statement nor ought to have been aware of it, or at the time of the conclusion of the contract it had been corrected by equivalent means, or it could not influence the decision to purchase the thing. (2) There is a defect as to quality also where the agreed assembly of the thing has not been properly performed by the seller or persons employed by him for that purpose. Moreover, there is a defect as to quality of a thing intended to be assembled if the assembly instructions are defective, save where the thing has been assembled correctly. (3) Delivery by the seller of a different thing or of a lesser amount of the thing is equivalent to a defect as to quality.
§ 435: The thing is free from defects of title if third parties cannot assert against the buyer, in relation to the thing, any rights or can assert only such rights as are assumed in the sales contract. Entry in the land register of a right that does not exist is equivalent to a defect of title.
§ 439 (1) As supplementary performance, the buyer may, at his option, demand the removal of the defect or supply of a thing free from defects. (2) The seller must bear all expenditure required for the purposes of supplementary performance, in particular carriage, transport, labour and material costs. (3) Without prejudice to § 275 (2) and (3), the seller may refuse the form of supplementary performance chosen by the buyer if such performance is possible only with unreasonable expense. In that connection, it is necessary to have regard in particular to the value of the thing when free from defects, the significance of the defect and the question whether the defect could be remedied by the other form of supplementary performance without material detriment to the buyer. The buyer's claim is restricted in this case to the other form of supplementary performance; the seller's right to refuse also that supplementary performance under the conditions laid out in sentence 1 above is unaffected. (4) If the seller delivers a thing free from defects for the purpose of supplementary performance, he may demand the return of the defective thing in accordance with §§ 346 to 348.
§ 441 (1) Instead of terminating the contract, the buyer may, by declaration to the seller, reduce the price. The exclusion in § 323 (5), sentence 2, does not apply. (2) If the buyer or the seller consists of more than one person, price reduction may be declared only by

BGB), all remedies not available under German Law before 2002 (with some exceptions for replacement). Furthermore, because there is a primary duty to deliver a product in conformity with the contract, it is now being discussed whether there may even be vicarious liability for defects caused by the producer or within the distribution chain. That liability may arise because the seller is also responsible for any misleading publicity made by the producer or within the distribution chain under Article 2 para 2 lit. d of the Directive (transposed literally in § 434 para 1 BGB for all sales contracts, not only consumer sales). The distinctions between defects in quality and defects in kind (*peius*, *aliud*), defects in quality and defects in quantity (*peius*, *minus*), and defects in title and defects in substance, are no longer relevant (see §§ 434, 435 BGB). What matters is non-conformity with the contract, which is, as has been suggested, a unitary concept of breach – as in general contract law. Furthermore, German Law has made it quite clear that this is a subjective standard, based primarily on agreement between the parties (See § 434 para 1 BGB).

All this reflects the standard contained in the EC Sales Directive[25] – perhaps with the one exception that the regime of this Directive has been extended to incorporate the question of damages. The order of the remedies provided in the Directive has also been followed (Article 3 of the Directive, transposed correctly in §§ 437–441 BGB) and is basically the same as explained for general contract law (giving a 'second try' to the seller whenever the contract is partly resolved). There are, however, three characteristics, that are original in the German transposition: the regime has been transposed not only for sales to consumers but to all sales,[26] there are very few rules from the directive that have been limited to consumer relationships (the few that have been are the reversal of the burden of proof in the first six months after delivery, and the mandatory character of the regime, see §§ 474–479 BGB). The regime for breach of contract and remedies has become a model for the whole of contract law; it has largely become general contract law (see section 2 above), in fact § 437 BGB transposes the directive by making reference to this general regime! Furthermore, there is a quite extraordinary (and partly questionable)

or to all such persons. (3) In the case of price reduction, the purchase price is reduced in the ratio which the value of the thing free of defects would, at the time of the conclusion of the contract, have had to the actual value. Where necessary, the price reduction is to be estimated. (4) If the buyer has paid more than the reduced purchase price, the excess amount is to be refunded by the seller. § 346 (1) and § 347 (1) apply mutatis mutandis.

25 See therefore for all these questions: M. C. Bianca and S. Grundmann (eds), *EU Sales Directive: Commentary* (Antwerp/Oxford: Intersentia, 2002).

26 For good reasons, see S. Grundmann, 'Consumer Law, Commercial Law, Private Law – how can the Sales Directive and the Sales Convention be so similar?' (2003) 14 *European Business Law Review* 237.

rule on recourse (transposing the rather open rule contained in Article 4 of the Directive) in § 478 BGB, which provides for recourse and allows deviations by agreement only if the parties find an equivalent alternative arrangement.[27]

V. Conclusion

Sales Law in Germany is no longer Roman ius commune (as it was in many other continental countries as well, at least before the European Sales Law reform). It is now Americo-European ius commune, based on the regime of the UN Convention on the International Sale of Goods. This also applies to all sales and works contracts. The changes in the substance of sales law are also quite substantial. The general regime of breach of contract has become much more transparent, the system has been improved and is now very much in line with the system of the Convention. The changes to the substance of the general regime of breach of contract may not be so important. Indeed breach of contracts in general and breach of sales contracts now follow the same lines (there is direct reference from one to the other in § 437 BGB – see n 12 above) and this implied far more substantive changes in sales law than in the general regime of breach of contract. The regime of limitation has undergone fundamental change as well, as important as the one in sales law – both in system-

27 § 478 BGB reads as follows: (1) If the businessperson has had to take back a newly manufactured thing because of a defect in it or the consumer has for this reason reduced the price, it is not necessary for the businessperson to fix the period of time which would otherwise be necessary in order to enforce, against a third party businessperson who had sold him the thing (supplier), his rights under § 437 on account of the defect asserted by the consumer. (2) In the case of the purchase of a newly manufactured thing the businessperson may demand that his supplier reimburse the expenditure which the businessperson had to incur in relation to the consumer under § 439 (2) if the defect asserted by the consumer already existed upon the passing of the risk to the businessperson. (3) In the case of subsections (1) and (2) above, § 476 applies, except that the period begins upon the passing of the risk to the consumer. (4) The supplier may not invoke an agreement made before notification of the defect to the supplier which derogates, to the detriment of the businessperson, from §§ 433 to 435, 437, 439 to 443 or from subsections (1) and (3) above or from § 479 if the obligee with the right of recourse is not granted another equivalent remedy. Without prejudice to § 307, sentence 1 does not apply to an exclusion or restriction of the claim for compensation. The provisions referred to in sentence 1 apply even if circumvented by other arrangements. (5) Subsections (1) to (4) above apply mutatis mutandis to claims of the supplier and of the other buyers in the supply chain against the respective sellers if the obligors are businesspersons. (6) § 377 of the Commercial Code is not affected.

atic approach and in outcome. Furthermore, consumer law has been integrated.

The reform is total; it is radical in terms of changing the system, but at least in sales law and for questions of limitation, also in outcome. The reform may not always be a masterpiece, but it has definitely improved the quality of German contract law and has done so substantially. Some authors consider the reform represents a complete reversal of approach:[28] from the age of de-codification[29] to the age of re-codification and in this sense it is particularly important. In fact, for the first time, one of the large Member States has substantially reintegrated into its Civil Code important parts which had been enacted outside and has tried to find a new systematic framework for many new problems which have arisen over the last few decades. A discussion about whether the German approach represents an example to be followed, has already begun in other Member States with venerable old Codes.[30]

28 For instance R. Schulze, 'Schuldrechtsmodernisierungsgesetz e prospettive di unificazione del diritto europeo delle obligazioni e dei contratti', in G. Cian (ed), *La riforma dello Schuldrecht tedesco: un modello per il futuro diritto europeo delle obbligazioni e dei contratti?* (Padova: Cedam, 2004) 161; W.-H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic National Codes – Problems and Consequences' (2002) 6 *European Review of Private Law* 761; T. M. J. Möllers, reference n 3 above.

29 N. Irtì, *L'età della decodificazione* (Milano: Giuffrè, 1979, 4th ed 1999).

30 Namely Italy and Austria which are, besides France and Germany, the two countries which had one particularly prestigious, old Code: See M. Schauer and C. Fischer-Czermak (eds), *Das ABGB auf dem Weg ins 3. Jahrtausend* (Vienna: Manz, 2003); and G. Cian, n 28 above.