

Reform of the Law of Obligations

The German Experience Fifteen Years On

*Moritz Bälz**

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I. INTRODUCTION

Inspired by the recent law of obligations reforms in France and in Japan, the 2017 conference in Lyon, from which the contributions in this volume derive, contemplated fundamental questions of private law reform. For the key civil law codifications of both jurisdictions, the French *Code civil* and the Japanese *Minpō*, it was the most comprehensive reform since their respective enactments in 1804 and 1898. As this volume demonstrates, such comparison offers intriguing insights by revealing both striking similarities and stark contrasts between the two reform projects. The following contribution aims at adding a third perspective to the bilateral dialogue by giving an – admittedly very brief – account of the German experience. As is well known, already in 2002 Germany had implemented a fundamental reform of its law of obligations (*Schuldrechtsmodernisierung*), mainly the law of contract. Looking at the German reform, as a third example which by now has stood the test of practice for more than 15 years, can hopefully enrich the French-Japanese comparison undertaken in this volume.

* Professor of Japanese Law and its Cultural Foundations, Goethe University Frankfurt.

Offering a succinct account of the German experience is a more ambitious task than it might seem at first glance. For the 2002 reform of the German law of obligations constitutes the most momentous reform of the German Civil Code (*Bürgerliches Gesetzbuch (BGB)*) since its inception. It can certainly not be the aim here to give a comprehensive account of the numerous and often fundamental changes and how they have played out since their enactment. Even less can this contribution summarize and evaluate the extensive and at times heated debates which preceded, accompanied and followed the reform.¹ Instead, at the risk of some rough generalizations, this contribution tries to highlight some key points of the German experience.

In what follows I shall start by outlining the historical background (II.) and the main aims of the reform (III.). The following part then will familiarize the reader with some key changes introduced by the reform (IV.). Finally, I shall attempt to give a very brief evaluation (V.) and conclude with some comparative observations (VI.).

II. HISTORICAL BACKGROUND OF THE REFORM

Overall, since first entering into force in the year 1900, the German Civil Code has proved remarkably resilient.² Despite radically different political regimes over the 20th century and major disruptions including two world wars, the code encountered few formal changes, the main exception being family law, where extensive changes aimed at overcoming the BGB's patriarchal structure.³ Even the transposition of European consumer directives

1 For more comprehensive reports on the German reform in English, see, among others, S. GRUNDMANN, Germany and the Schuldrechtsmodernisierung 2002, *European Review of Contract Law (ERCL)* 1 (2005) 128; M. REIMANN, The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations, *Tulane Law Review* 83 (2008/2009) 877; 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 University Comparative Law Forum* 1 at *ouclf.law.ox.ac.uk*; R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford 2005). For references to the vast literature in German, see, e.g., D. OLZEN, in: von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2: Recht der Schuldverhältnisse, §§ 241–243* (Berlin, Neubearbeitung 2019) *Einleitung zum Schuldrecht*, n. 180–205.

2 R. ZIMMERMANN, *Characteristic Aspects of German Legal Culture*, in: Reimann/Zekoll (eds.), *Introduction to German Law* (Munich 2005) 1, 13.

3 It should be noted that the regional scope of application has changed repeatedly, last but not the least with regard to the former East Germany, where from 1976 until the reunification of Germany in 1990 a socialist civil code (*Zivilgesetzbuch*) replaced the BGB.

into national law left the language of the code widely unchanged. This is because the directives were mostly implemented in special statutes, a process which can be conceived as de-codification.⁴ Similarly, also major changes in tenancy law and labour law mainly occurred outside the code. The sweeping changes to the code by the 2002 Modernization of the Law of Obligations Act (*Gesetz zur Modernisierung des Schuldrechts*)⁵ therefore stood as a clear watershed.

Discussions on the need for reform of the German law of obligations date back to the late 1970s.⁶ Germany witnessed particularly vivid discussions on the final report of an expert commission published in 1992.⁷ By the end of the 1990s, however, these discussions had mostly abated. Most people considered such ambitious a project highly unlikely to be realized in the foreseeable future. Like quite a few other reforms of German law in recent times, the reform eventually was triggered by changes in European law, in this case the 1994 European Consumer Sales Directive.⁸ The German legislature was required to implement new standards on consumer sales by 31 December 2001.⁹ But the reform eventually went far further.

It was the German Ministry of Justice which decided to use the momentum for reform, to opt for the so-called ‘big solution’ (*große Lösung*).¹⁰ The public was quite surprised when the Ministry in 2000 published a 630-page Discus-

4 S. GRUNDMANN/M.-S. SCHÄFER, The French and the German Reforms of Contract Law, *European Review of Contract Law* (ERCL) 13 (2017) 459, 467.

5 *Bundesgesetzblatt* 2001 I, 3138. A bilingual (German and English) synopsis of those provisions of the BGB which were affected by the Reform Act, prepared by Geoffrey Thomas and Gerhard Dannemann, is available in the German Law Archive at <https://germanlawarchive.iuscomp.org/?p=632>.

6 More extensively on the historical background of the reform, ZIMMERMANN, *supra* note 1, 30–35.

7 BUNDESMINISTERIUM DER JUSTIZ (ed.), *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts* (Bundesanzeiger 1992).

8 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *Official Journal L* 171, 7.7.1999, 12.

9 In the end, the reform transformed two more European directives into German law, namely Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, *Official Journal L* 200, 8.8.2000, 35, and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), *Official Journal L* 178, 17.7.2000, 1.

10 The Minister herself presented the rationale for such comprehensive reform in a 2001 article: H. DÄUBLER-GMELIN, Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform. Zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts, *Neue Juristische Wochenschrift* 2001, 2281.

sion Draft, which has been compared to “a bomb dropped on the German legal community”.¹¹ This Draft met with severe criticism from legal practitioners as well as from scholars.¹² However, in the end, by accepting part of the criticism and preserving the impetus for reform, the Ministry of Justice managed to push the reform through within little more than one year, letting one well-known scholar speak of a “veritable *Blitzkrieg*”.¹³ The new rules were promulgated in late 2001 and entered into force within less than six weeks on 1 January 2002. The BGB was re-promulgated on 2 January 2002.¹⁴

III. MAIN AIMS OF THE REFORM

From a comparative perspective, it is interesting to look at the aims which have driven this ambitious reform:

It has already been mentioned that the German legislature was obliged to transform new European standards on consumer sales into national law. The German Minister of Justice took the view, which was heavily contested at the time, that the changes required by European law were so fundamental that, in the interest of the integrity of the BGB, the opportunity should be used to modernize the law of obligations much more comprehensively.¹⁵ Specifically, this was assumed with a view to the rules on the buyer’s claim for performance (*Erfüllungsanspruch des Käufers*), the seller’s right to cure a defect (*Nachbesserungsanspruch des Verkäufers*) as well as the rules on prescription (*Verjährung*). By transposing the European rules on consumer sales into general contract law, the German legislature, therefore, opted to expand their scope in many respects from consumer sales to all sales, and from sale contracts to all types of contracts.¹⁶

Leaving this external trigger aside, the overall aims of the reform can be summarized as follows: Firstly, the reform was to eliminate some grave and widely perceived deficiencies of the existing Code. Most prominently, a broad consensus had long formed that the fragmented rules on prescription were in dire need of reform. To name just one more example, new rules on liability for non-conformity in sales law were widely seen as overdue.

11 REIMANN, *supra* note 1, 884.

12 For the diversity of this criticism, see SCHLECHTRIEM, *supra* note 1, sub I.2; for the scholarly criticism in particular, see, e.g., the contributions in W. ERNST/R. ZIMMERMANN (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform – Zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (Tübingen 2001).

13 REIMANN, *supra* note 1, 884.

14 Bundesgesetzblatt 2002 I, 42.

15 DÄUBLER-GMELIN, *supra* note 10, 2281.

16 GRUNDMANN/SCHÄFER, *supra* note 4, 468 et seq.

Secondly and importantly, the reform aimed at bringing the German law of obligations more in line with international developments. The BGB as it first entered into force in the year 1900 was a product of the heyday of nation states and national codification projects, it has been labelled “the crowning symbol of German legal unity”.¹⁷ Since then, international harmonization of laws, for Germany in particular the Europeanization of private law since the 1980s, changed the scene and challenged the national legislature even beyond the technical obligations to transform specific European standards into national law. The German minister of justice took the view that only by modernizing its law of obligations would Germany be able to have an impact on international developments and that a contract law conforming to international standards would offer substantial advantages for German business.¹⁸ Primarily, the reform took inspiration from the 1980 United Nations Convention on Contracts for the International Sales of Goods (CISG), e.g., with regard to the introduction of a general concept of breach, but also from other international models, such as the Principles of European Contract Law (PECL). It helped the German legislature in this context that the European Consumer Sale Directive had used the CISG as a model as well.

Thirdly, the reformers hoped to enhance the legitimacy, transparency, and legal certainty of the German law of obligations.¹⁹ Already the reform commission which had prepared the aforementioned 1992 report²⁰ had been given the task of preparing a draft which – last but not the least on the basis of case law and contractual practice – would make the law of obligations clearer and more in keeping with the times.²¹ Major parts of the reform were thus not meant to change the rules substantively but to codify recognized doctrines and to rephrase and reorganize existing rules.

IV. FOUR KEY AREAS OF THE REFORM

The reform covered mainly four areas: the rules on prescription (1.), liability for non-performance (2.), the codification of case law (3.), and the incorporation of a number of special statutes into the BGB (4.). The reform

17 ZIMMERMANN, *supra* note 2, 7.

18 DÄUBLER-GMELIN, *supra* note 10, 2289.

19 See B. DAUNER-LIEB, Kodifikation von Richterrecht, in: Ernst/Zimmermann, *supra* note 12, 305, 306, who convincingly points out that this aim, while uncontroversial in theory, is particularly difficult to achieve in practice.

20 See *supra* note 7.

21 See the explanations by the minister of justice at the time H. ENGELHARD, Zu den Aufgaben einer Kommission zur Überarbeitung des Schuldrechts, Neue Juristische Wochenschrift 1984, 1201.

was in fact – despite its name – mostly confined to contract law, and the name of the reform act can only be explained by the initially much broader scope of the project.²² The notable exception is the rules on prescription, which equally apply to claims arising in tort or unjust enrichment and, even beyond the scope of the law of obligations, to claims in property law, family law, and the law of succession.

1. Prescription

For legal practice, the new rules on prescription arguably constitute the most significant part of the reform. The pre-2002 highly differentiated prescription regime had long been criticized as overly complicated, inconsistent and in many cases inappropriate.²³ *Inter alia*, the general prescription period of 30 years (the former § 195 BGB), which in practice worked rather as the exception than the rule, was considered excessively long. By contrast, with regard to buyer's warranty claims under contracts of sale, the special period of only six months stipulated by the former § 477 BGB was considered unreasonably short. The latter had caused the German courts to expand tort law in rather questionable ways, by framing warranty claims as tort claims in order to help buyers of non-conforming goods whose contract claims could no longer be enforced.

The new regime (§§ 194–218 BGB) is influenced by the Principles of European Contract Law.²⁴ It is based on a short general prescription period of three years (§ 195 BGB), in part similar to the rule applicable for tort claims prior to the reform (former § 852 BGB). The new general prescription period runs from the end of the year in which the claim arises and the obligee obtains, or absent gross negligence should have obtained, knowledge of the circumstances giving rise to the claim and the identity of the obligor (§ 199 para. 1 BGB; so-called subjective system). As this alone would mean that claims could be brought decades after they arose, additional objective maximum prescription periods (longstops) apply – their being ten to thirty years, depending on the kind of claim – after which no claims can be enforced any longer irrespective of the obligee's knowledge (§ 199 para. 2 to 4 BGB).

Finally, there are specific prescription periods for certain categories of claims. In accord with the Consumer Sales Directive, in cases of non-conforming performance of sales contracts, § 438 BGB provides for a period

22 ZIMMERMANN, *supra* note 1, 2.

23 See H.-P. MANSEL/M. STÜRNER, in: Heidel/Hüßtege/Mansel/Noack (eds.), *Bürgerliches Gesetzbuch: Allgemeiner Teil – EGBGB, Vorbemerkungen zu §§ 194–218*, n. 1 with further references.

24 See ZIMMERMANN, *supra* note 1, 123.

of two years for movables, of five years for buildings, and of 30 years for certain third-party rights *in rem* (in particular, ownership) which entitle the third party to reclaim the object. Similarly, for defects in construction, § 634 a BGB provides for a period of two years for warranty claims for non-conforming movables, and of five years for defective buildings. Longer periods apply, both for sales contracts and construction contracts, where a defect has been fraudulently concealed (§§ 438 para. 3 and 634 a para. 3 BGB).

To mention just one more fundamental change introduced by the reform with regard to prescription, the parties now can agree not only to shorten but also to extend the period of prescription up to a maximum of 30 years (§ 202 para. 2 BGB). The latter was not permitted under the old regime.

2. *Liability for Non-performance*

Arguably most interesting from a doctrinal point of view are the changes which the reform brought about with regard to liability for non-performance in general, and for non-conformity in sales law and construction law in particular:

Before the reform, the BGB's general law of obligations provided for different remedies for impossibility (*Unmöglichkeit*) and for delay (*Verzug*). In addition, the rules governing particular types of contracts, such as sales and construction contracts, stipulated specific remedies for non-conformity (*Gewährleistungsrecht*), which gave rise to many questions of delineation. By contrast, the pre-2002 Code did not offer a general remedy for deficient performance. Nor did the statutory rules expressly cover consequential loss suffered due to deficient performance. This significant gap had long been filled by the courts using the non-codified doctrine of 'positive breach of contract' (*positive Vertragsverletzung*). The latter is familiar to Japanese readers, as it was – somehow ironically – later also transplanted into Japanese law despite the fact that the Japanese *Minpō* in its Art. 415, different from German law, did already provide for a comprehensive remedy.²⁵

The reform of the law of obligations introduced a central remedy based on the notion of breach of an obligation (*Pflichtverletzung*). According to the new core provision of § 280 para. 1 BGB, the obligee may claim damages for any breach of contractual duty, unless the obligor can show that he is not responsible for the breach. By introducing a comprehensive remedy the new regime in principle followed the model of the CISG. At the same time, the new approach resembles the concept of "non-performance" in the

25 Z. KITAGAWA, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* (Frankfurt a. M./Berlin 1970) 68 et seq. See also M. BÄLZ, *Japans später Beitritt zum UN-Kaufrecht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 73 (2009) 683, 700.

Principles of European Private Law. From a Japanese perspective, the decision of the German legislature to adopt such a comprehensive remedy can be considered a confirmation of the critique of Japan's reception of German doctrine as being in part excessive.²⁶

It should be noted that it was not without exceptions that the German reform followed international models. Notably, with regard to damages,²⁷ even the new rules, as opposed to the CISG, in principle require fault (*Verschulden*). The practical effect of this deviation from international standards should, however, not be overestimated, as under § 280 para. 1 BGB the responsibility of the obligor is legally presumed and may be given even without fault in certain cases.

The special rules on non-conformity (*Gewährleistungsrecht*) in sales and construction contracts were amended as well. While the details are complex, the legislature has opted in favour of preserving the unity of German sales law and adjusting, in principle, the general sales law to the rules of the European Consumer Sales Directive. Only certain rules apply exclusively to consumer contracts (§§ 474–479 BGB). Furthermore, various changes were made to harmonize the rules on non-conformity with the general rules on breach of an obligation.

3. Codification of Case Law

A third major part of the reform consists of the codification of various recognized doctrines.²⁸ Within a century since its enactment, the rules of the BGB had become covered by a thick layer of case law. The courts, often in a dialogue with academic scholars, had for decades worked on filling inevitable gaps, erasing inconsistencies, and adjusting rules to new economic and technical developments and societal changes. Thus, by the end of the 20th century, on many important points the pre-reform Code no longer reflected the rules as applied in legal practice. This phenomenon, of course, is not unique to Germany, reflecting instead the basic concept of codification. While completeness is no longer considered a realistic aim of a codification, it is the very idea of a code that it stipulates the key rules and principles of the respective field, a motif unsurprisingly found also in the law of obligations reforms in France and Japan. Actually, given the brief and gen-

26 A. KAMO, Blick aus Japan auf die deutsche Schuldrechtsmodernisierung. Eine Studie zur Rechtsübertragung, in: Artz/Gsell/Lorenz (eds.), Zehn Jahre Schuldrechtsmodernisierung (Tübingen 2014) 121, 132–133 [for a reprint of this article see ZJapanR/J.Japan.L 38 (2014) 171].

27 The fault requirement was given up with regard to revocation (*Rücktritt*).

28 For details, see, DAUNER-LIEB, *supra* note 19, 305.

eral wording of the original French *Code civil* and the original Japanese *Minpō*, it might feature there even more prominently.²⁹

The reform of the German law of obligations therefore introduced several of these *praeter legem* recognized rules into the BGB. To give a few prominent examples: The rule on liability for the violation of pre-contractual duties, the so-called *culpa in contrahendo*, was codified, rudimentarily though, in § 311 BGB. The principle of change of circumstances (*Wegfall der Geschäftsgrundlage*), introduced by the German courts after the First World War to cope with the economic slump, was, with some adjustments, now expressly stipulated in § 313 BGB. The general right to terminate long-term contracts for a compelling reason (*Kündigung aus wichtigem Grund*), which had long been accepted by courts and scholars alike, was incorporated into § 314 BGB.

These doctrines are now expressly mentioned in the Code and thus “made visible”. They were, however, mostly codified in rather general terms. § 314 BGB, to give only one example, defines only in very abstract form when a “compelling reason” is given. The prerequisites for the application and the consequences of the new rules, to a large extent, are left to be developed further by case law and legal scholars. Some have criticized the reform on this point as mostly symbolic and of little value for the operation of law.³⁰ On this point and as with regard to codification in general, a legislature must balance the aim of enhancing legal certainty through detailed and precise rules against the aim of leaving to the courts sufficient room to reflect further developments. No less importantly, as also the Japanese and the French reforms seem to demonstrate, a reform legislature must weigh the risk of aiming too high with regard to detailed rules – which are notoriously hard to agree upon – and of thus losing the impetus for reform altogether.

4. *Incorporation of Special Statutes on Consumer Protection*

The reform has greatly changed the face of the BGB due to the decision to incorporate various special statutes, mostly concerning consumer protection, into the Code. It has already been mentioned that, while the BGB had formally proved remarkably resilient for an entire century, the German legislature, often in order to transpose European standards on consumer protection into national law, had created a number of special statutes complementing the BGB. Prominent examples include the Standard Contract Terms Act,³¹

29 See, for Japan, KAMO, *supra* note 26, 124–125.

30 DAUNER-LIEB, *supra* note 19, 327–328.

31 *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (usually abbreviated as *AGB-Gesetz*). The law in its original form dates of 1977 and thus

the Consumer Credit Act,³² the Doorstep Selling Act³³ and the Product Liability Act.³⁴ The German legislature could have opted in favour of the French model and created a consumer code.³⁵ Instead, in order to apply consumer protection rules more easily and to harmonize them with general contract law, the 2002 law of obligations reform incorporated most of these special statutes into the BGB.³⁶ Some detailed and easily changing rules, in particular on information duties, were initially shifted into an ordinance and today can be found in the Introductory Code to the Civil Code.³⁷

As these consumer protection rules are mostly based on European law, incorporating them into the BGB had to ensure that the standards required by European law were fully met. Furthermore, European private law has its own concepts, not all of which are easily harmonized with German doctrine. This made it difficult to fit the rules of the various special statutes into the Code homogeneously. The law of obligations reform to a large extent simply inserted the existing provisions of the special statutes ‘undigested’ as new, very detailed paragraphs into the BGB. A true, more consistent codification, arguably, would have taken many more years. The result is that often these new paragraphs are perceived as alien elements in the Code, one prominent author going so far as to speak of “the ugly result of the reform”.³⁸

V. A VERY BRIEF ASSESSMENT OF THE REFORM 15 YEARS ON

With regard to the reform of the German law of obligations, we enjoy the benefit of assessing a reform project from considerable temporal distance. As opposed to Japan’s reform of the law of obligations, which will enter into force in April 2020, and the rules introduced by the French reform, which (with some exceptions) have applied since 2016, the new German

precedes the Council Directive 93/13/EEC of April 1993 on unfair terms in consumer contracts. While the latter is limited to consumer contracts, the German AGB-Gesetz as well as today’s §§ 305–310 BGB, which have succeeded the Act, in principle apply also to commercial contracts.

32 *Verbraucherkreditgesetz*.

33 *Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften*.

34 *Produkthaftungsgesetz*.

35 For an in-depth discussion of the various options available to the legislature, see K. RIESENHUBER, *Verbraucherschutz und Schuldrechtsmodernisierung*, in: Tadaki/Baum (eds.), *Saiken-hō kaisei ni kan suru hikō-hō-teki kentō. Nichidoku-hō no kanten kara*. Schuldrechtsmodernisierung in Japan – eine vergleichende Analyse (Hachijōji 2014) 147, 168–175.

36 Of the aforementioned special statutes, only the Product Liability Law, which is not part of consumer contract law, still remains a separate statute.

37 *Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)*.

38 REIMANN, *supra* note 1, 913.

law of obligations by now has stood the test of legal practice for quite some time. Giving a detailed assessment – if only of the most important of the new rules introduced by the reform – is presently neither feasible³⁹ nor required for the purpose of this volume. However, the temporal distance allows us to make some general remarks on whether the reform has achieved its key aims:

With regard to the aim to eliminate some widely perceived deficiencies of the pre-2002 Code, the prevailing view today seems to be that the new rules have brought substantial improvements on numerous, but certainly not on all points. For example, the new rules on prescription are generally regarded as simpler, more consistent and more adequate than those of the pre-2002 Code. However, controversies remain not only as to whether for individual rules more preferable options could have been chosen, but also as to whether, as a principle matter, the rules on prescription should not have followed the model of the Principles of European Contract Law more closely.⁴⁰ Similarly, most observers agree that consolidating the complex array of provisions on liability of non-performance overall was a good decision. Nevertheless, various individual rules have given rise to controversies, including such fundamental provisions as § 280 BGB. A few provisions, like § 444 BGB (concerning agreements excluding the liability of the seller), had to be clarified by another revision shortly after the 2002 reform. Considered as a whole, it is hard to deny that even the new regime remains rather complicated. This arguably limits its suitability to serve as model for other jurisdictions.⁴¹

The reform to a considerable extent has achieved its aim of contributing to the internationalization and Europeanization of German civil law. The reform not only transformed three European consumer directives into national law,⁴² it also clearly brought the rules of the BGB – which for its part continues to be “a characteristic manifestation of German legal culture”⁴³ – closer to international standards as expressed *inter alia* in the CISG and the Principles of European Contract Law. Again, the new rules on prescription, which were hardly connected to the aforementioned directives, can be named here. For example, their new basic approach to combine short subjective with longer objective prescription periods, can be similarly found in the Principles of European Contract Law as well as in recent reforms of

39 For a more comprehensive assessment, see, e.g., the contributions in M. ARTZ/ B. GSELL/S. LORENZ (eds.), *Zehn Jahre Schuldrechtsmodernisierung* (Tübingen 2014).

40 ZIMMERMANN, *supra* note 1, 158.

41 M. DERNAUER, *Der Schuldrechtsreform-Entwurf: Versuch einer Bewertung*, in: Tadaki/Baum, *supra* note 35, 412, 416.

42 See, *supra* note 8 and 9.

43 ZIMMERMANN, *supra* note 1, 4.

other jurisdictions, including Japan and France.⁴⁴ Indirectly the reform has forced German scholars to more intensively look beyond national borders and thus has diminished the national isolation of legal scholarship.⁴⁵ This should be valued as an important achievement of the reform.

As regards the aim of enhancing the legitimacy, transparency, and legal certainty of the BGB, a verdict is more difficult. More than 15 years after the reform, the courts are routinely applying the new rules. Overall, one can state that the system works without major mishaps being observed and that the rupture has been less severe as than some had feared.⁴⁶ It is noteworthy in this context that the courts to a large extent continue to apply pre-2002 case law, which thus shows a remarkable persistence.⁴⁷ The much-criticized legal uncertainty caused by the sweeping reform by now seems to have been reduced to a reasonable level. One can observe that those *praeter legem* doctrines codified by the reform in rather general language have gradually developed further over time. Whether one deplores that the legislator in 2002 missed an opportunity to regulate more specifically and to achieve substantial gains in legal certainty⁴⁸ in part depends on the degree to which one is willing to trust in the judiciary.

Nevertheless, even if the formerly heated debate has long abated, some observers still deplore the price paid for the reform with regard to the consistency and intellectual integrity of the Code.⁴⁹ Given the vigor of the idea that the Civil Code constitutes a system in Germany, this can be considered a substantial cost of the reform and reaches beyond matters of aesthetics.⁵⁰ Courts and, arguably even more so, scholars are certainly once again striving to strengthen doctrinal consistency; however, not all damage done to the Code can be repaired. The controversial decision to consolidate numerous special statutes into the Code is highly unlikely to be reversed in the

44 For parallels between Germany, Japan and France on this point, see Y. NAGATA, *Die Verjährung im japanischen Zivilrecht und ihre Reform* (Tübingen 2017) 193–194.

45 ZIMMERMANN, *supra* note 1, 36–37.

46 See, e.g., OLZEN, *supra* note 1, note 205 and H. SPRAU, in: Palandt (ed.), *Bürgerliches Gesetzbuch* (76th ed., Munich 2017), Einleitung note 10a; 2; cf. furthermore, as of 2012, CH. GRIGOLEIT, *System der Leistungsstörung. Einheitlichkeit und Differenzierung im kaufrechtlichen Leistungsstörungenrecht*, in: Artz/Gsell/Lorenz, *supra* note 39, 55, 58. With a view to the overall successful realignment of the general rules on non-performance and the rules on non-conformity in sales law and contract law, S. LORENZ, *Systematik und Neuordnung von Leistungsstörungen- und Gewährleistungsrecht im deutschen Recht*, in: Tadaki/Baum, *supra* note 35, 45, 79.

47 J. SCHMIDT-RÄNSCH, *Zehn Jahre Schuldrechtsreform*, in: Artz/Gsell/Lorenz, *supra* note 39, 143, 143–144.

48 DAUNER-LIEB, *supra* note 19, 327

49 For a representative voice, see, ZIMMERMANN, *supra* note 2, 16.

50 REIMANN, *supra* note 1, 914.

foreseeable future. A doctrinal reconciliation will never be achieved in full given that many elements introduced into the Code from European private law are not at the disposal of the German legislature. To be fair, even if the consolidation did make the face of the Code uglier,⁵¹ the divide in German private law as such, between the doctrinal structures of the Code and the concepts of European private law, would exist even if the legislature had opted against a consolidation and instead either kept the existing special statutes or opted for creating a French-style consumer code. On the positive side, incorporating consumer protection rules into the BGB has enhanced the awareness that consumer contract law forms an important part of contract law and should be developed as such, not as a less important and entirely independent body of rules.⁵²

VI. SOME COMPARATIVE OBSERVATIONS

Let us finally reflect on how the German reform of the law of obligation compares to its French and the Japanese counterparts contemplated in this volume. Given the limited space here, I shall focus in what follows on the aims of the reform. In this respect, compared to the Japanese and the French cases, we observe both substantial similarities and striking differences.

1. *Eliminating Existing Shortcomings of the Code*

The goal to eliminate existing deficiencies of the code can of course be found in all three reform projects. Arguably, it will be hard to find any comprehensive legal reform which does not purport to “improve” existing rules.

With regard to which specific rules in the law of obligations were amended, we observe some overlap. For example, the law of prescription has featured prominently both in the German and the Japanese project (France had reformed its prescription rules, prior to its law of obligations reform, already in 2007). Given that the pre-reform rules differed substantially and given that the same rule does not necessarily fit the needs in all jurisdictions, it is not surprising that many amendments in one of the three jurisdictions do not have exact counterparts in the others. There was, for example, simply no need to abolish a cause requirement in German or Japanese law, as such an element simply did not exist. The change of circumstances principle, which was codified in all three codes for the first time, was recognized already by German and Japanese doctrine prior to the reform, whereas its introduction into the French *Code civil* brought about an

51 See REIMANN, *supra* note

52 For a balanced view on this point, see, also RIESENHUBER, *supra* note 35, 175.

important substantive change as well. Whether or not the development of the principle of good faith (*principe de bonne foi*) into an overarching principle of French contract law can be called an elimination of a deficiency, it is from a German perspective a highly interesting step, one which clearly brought French contract law closer to the German.⁵³

2. *Internationalization*

As mentioned earlier, bringing the German law of obligations closer to emerging international standards constituted another major aim of the German reform. Similarly, internationalization constituted a major factor also in the French reform, even if it is not stipulated expressly in the ratification act. This does not come as a surprise given that, despite some setbacks regarding the efforts to create a European civil code, the influence of European law on the private law of all member states remains strong and various soft law instruments such as the Principles of European Contract Law continue to receive much attention.

In addition, in Germany and France there was a strategic goal at work. With the 2002 reform the German legislature did not only wish to learn from and to align German national law with international models; at the same time it hoped to preserve and extend the influence of German law on international developments.⁵⁴ Enhancing the attractiveness of French law both as a model for international harmonization projects and as law governing international contracts by choice of the parties arguably was even stronger a factor in the French case.⁵⁵

In Japan, by contrast, even though the original *Minpō* is the product of intensive reception of foreign, mainly continental European models, and despite Japan's rather belated accession to the CISG in 2008,⁵⁶ bringing Japanese rules closer to international models did not feature as prominently among the aims of the reform. Officially, the reform was, firstly, to modernise the *Minpō* in the sense of adjusting it to changes in socio-economic

53 GRUNDMANN/SCHÄFER, *supra* note 4, 470–472.

54 DÄUBLER-GMELIN, *supra* note 10, 2289.

55 See, from a comparative perspective, J. SMITS/C. CALOMME, The Reform of the French Law of Obligations. Les Jeux sont faits, *Maastricht Journal of European and Comparative Law* 23 (2016) 1040, 1042; H. J. SONNENBERGER, Die Reform des französischen Schuldvertragsrechts, des Regimes und des Beweises schuldrechtlicher Verbindlichkeiten durch Ordonnance Nr. 2016–131 vom 10.2.2016, *Zeitschrift für Europäisches Privatrecht* 2017, 6, 16–18, who doubts that the reform will make French law more competitive as the applicable law for international transactions, as other factors seem far more important.

56 See, BÄLZ, *supra* note 25.

circumstances since its enactment, and, secondly, to make the code more transparent and easier to understand for normal citizens.⁵⁷ This, certainly, does not mean that for the Japanese reform of the law of obligations the models of other jurisdictions – not least French and German law, as well as international conventions and principles – have not been studied intensively. The Japanese Ministry of Justice has compiled an impressive collection of comparative law materials assembled for the reform.⁵⁸ Japanese scholars, in particular, have contributed their deep comparative law knowledge during the various stages of the reform. Nevertheless, it appears that international models served mainly as sources of inspiration, rather than there existing the desire for international harmonization as an aim in itself. While, of course, the various actors had their individual views, key players instead emphasized the goal to create modern rules suiting Japan's specific (primarily domestic) needs.⁵⁹

3. *Enhancing Transparency and Legal Certainty*

Finally, as regards the aim of enhancing legal certainty and bringing the written law closer to law in practice, one can observe clear parallels. While all three codes, – the German BGB, the French *Code civil* and the Japanese *Minpō* – since their inception and over the dramatic ruptures of the 20th century have shown a remarkable resilience, in all three jurisdictions towards the end of the century pressure for legislative reform seems to have mounted. Many observers took the view that the time had finally come to recodify, reorganize and reinvigorate their respective civil codes.

57 *Shimon dai 88-gō* [Consultation no. 88 of the Minister of Justice with the Legislative Council of the Ministry of Justice at the 160th meeting, 28 October 2009], <http://www.moj.go.jp/content/000005084.pdf>. See also, M. DERNAUER, Der Schuldrechtsreformentwurf: Eine Bewertung, *ZJapanR/J.Japan.L* 39 (2015) 35, 38; M. OKUDA, *Saiken hōsei ni kan suru gaikan* [Overview of the Reform of the Law of Obligations], in: Tadaki/Baum, *supra* note 35, 3, 8; K. YAMAMOTO, Die Schuldrechtsreform 2020 in Japan und die Rechtsvergleichung, in: Yamamoto/Koziol (eds.), *Das reformierte japanische Schuldrecht. Erläuterungen und Text* (forthcoming, Tübingen 2021) sub II.1.

58 HÖMU-SHŌ MINJI-KYOKU SANJI KANSHITSU [Chamber of Councilor, Civil Bureau of the Ministry of Justice/Ministry of Justice] (ed.), *Minpō (saiken kankei) kaisei ni kan suru hikaku-hō shiryō* [Comparative law materials regarding the reform of the Civil Code (law of obligations)], Bessatsu NBL 146 (2014).

59 See, e.g., *Minpō kaisei kenkyū-kai* [Working Group for the Reform of the Civil Code], *Nihon Minpō-ten kaisei hōan I* [Draft for the reform of the Japanese Civil Code I] 160 et seq and 184 et seq. This is one of several academic groups which contributed to the preparation of the reform. For a detailed analysis, see, YAMAMOTO, *supra* note 57, sub III.2.

However, contemplating the three reform projects more closely, even this aim shows different nuances. As already mentioned, the Japan reform expressly aimed at making the *Minpō* more transparent to normal citizens. Such aim for most German jurists appears to be a very elusive goal, if not utterly unrealistic.⁶⁰ The BGB from its inception was a code designed as a highly technical code for professionals, aiming for abstraction and precision even at the expense of transparency for a general public. The codification of case law through the reform of the law obligations, undertaken to enhance clarity, strived to make it easier for professionals to apply the rules of the code. If the reform has at the same time made it easier to teach the law of obligations to law students, as most will agree it has,⁶¹ this constitutes a welcome by-product. But that even laymen would be able to know their rights and duties simply from reading the revised code clearly was not aimed for.

Which of the three reform projects will in the long run prove most successful in achieving more transparency is, as of now, difficult to say. While the German reform profited from extensive discussion on a reform of the law of obligations reaching back to the 1970s, the reform in its final form was pushed through by the Ministry of Justice in an extremely short time. The legislature certainly could have achieved more with regard to consistency and precision had the Ministry of Justice not feared the rare momentum for reform could be lost altogether if the debate were continued much longer.

It has been said that for the German BGB, “the future for [its] intellectual integrity [...] does not look bright”.⁶² This is because the German reform of the law of obligations, the most comprehensive since the enactment of the BGB, has not brought reforms of the law of obligations to an end. Besides a major reform of the law of damages prepared more or less in parallel and enacted shortly after the reform of the law of obligations,⁶³ various European directives, *inter alia* on consumer rights,⁶⁴ mortgage credit,⁶⁵ and

60 DERNAUER, *supra* note 57, 38–40. See, generally, also DAUNER-LIEB, *supra* note 19, 306–307, with further references in note 8. It should be noted that, of course, there are critics of this aim of the Japanese reform also among Japanese scholars. See, e.g., T. SUIZU, Die Schuldrechtsreform in Japan – betrachtet aus dem Blickwinkel der Kodifikationsidee, *ZJapanR/J.Japan.L* 32 (2011) 249, 258–259.

61 GRIGOLEIT, *supra* note 46, 58; OLZEN, *supra* note 1, 205.

62 ZIMMERMANN, *supra* note 2, 17.

63 *Zweites Schadensrechtsänderungsgesetz*, in force since 1.8.2002.

64 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, *Official Journal L* 304, 22.11., 64.

65 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, *Official Journal L* 60, 28.2.2014, 34.

package travel,⁶⁶ have since 2002 required implementation, and extensive new provisions on treatment contracts (§§ 630a et seq. BGB) and, most recently, architecture and engineering contracts (§§ 650p et seq. BGB) have been added to the code. German lawyers have grown used to the fact that German private law has become a “permanent building site where two architects are working simultaneously, one in Berlin and one in Brussels/Strasbourg”.⁶⁷ Thus, rather than promising a new century of resilience, the sweeping reform of the year 2002 has marked the beginning of a period of continuous reform. At least for the German BGB, preserving consistency and transparency of the code therefore remains a major challenge for the future as well.

66 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, Official Journal L 326, 11.12.2015, 1.

67 As predicted by W.-H. ROTH, *Europäischer Verbraucherschutz und BGB*, *Juristenzeitung* 2001, 475, 488.