BOOK REVIEW NOTES

RUSSIAN CONTRACT LAW FOR FOREIGNERS[1]

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The book by Maria Efremova, Svetlana Yakovleva and Jane Henderson aims to serve as a short introduction to Russian contract law for a foreign lawyer. Assuming that the target readership are mainly English lawyers the book's second aim, expressly stated by the authors (pp. i, 1), is to make lawyers from common law countries familiar with codified law, with Russian law being just an example.

The book covers most of the general law of obligations as well as some questions of formation and invalidity of contracts that belong to the general part of the Civil Code, with this preceded by a brief introduction into the Russian law dealing with its history, federal structure and state agencies of Russia, its court system, sources of law and legal profession.

1. An Introduction to Russian Contract Law

As far as its first and principal claim is concerned, that is to provide a foreign lawyer with an introduction to Russian contract law, this book is a success, in most ways that matter, and fills a need. It could have been written differently in one aspect or another, but there seems not much about it that could have been done better. Throughout the book, the authors keep a sense of proportion in many respects. While framing a short introduction like this, one is inevitably faced with many difficult choices concerning in particular the level of generalization, the extent to which the national concepts and terminology of both the reader and the legal system under examination are present in the text, and the balance between law in books and law in action. The respective choices made by the authors seem happy to me. It is only the way their general concept has been realized that sometimes suffers from minor inaccuracies.

Drawing an overall picture of the Russian contract law the authors go into necessary details every now and then correctly identifying the central issues of every

[1] Reviewed book: Maria Efremova et al., Contract Law in Russia (Hart Publishing 2014). XXII; 304 pp.

sphere of law in question. In most instances, the details go only as far as necessary and the generalizations do not lead to oversimplification.

The book is in English and the English lawyer is the target reader. Not surprisingly, both terminology and conceptual framework used by the authors are primarily those of the English common law. However, the Russian terminology in original Cyrillic and transliteration is also there to an extent sufficient to equip the reader with basic legal Russian, so that he would be able to bridge the gap between the explanations of the book and the realities of Russian law, with which he might be confronted. The relevant Russian concepts are introduced to the reader with help of their functional counterparts from the common law. This approach is obviously not able to offer any full matches and needs a lot of comparative research to be done in every particular issue concerned. A good illustration of the challenges brought on by this way of translation from one legal language to another is the attempt of the authors to find equivalents of the notorious English doctrine of consideration in Russian law (Ch. 5 of the book). The search for clear boundaries and functions of the doctrine on the one hand and for its counterparts on the European continent on the other seems to go on.[2] Under these circumstances it is not very promising to try to rethink the Russian contract law on this vague conceptual basis, especially considered that the functions of the relevant Russian concepts are often themselves far from being clear. Nevertheless, the approach may still be useful to achieve the introductory effect and its shortcomings can be very well tempered by explicit warnings to the reader. The authors do provide such a warning in the case of consideration (p. 108), but forget to do it in the case of registration of contracts. Controversial, perhaps even superfluous at least in some instances the requirement of state registration of contracts stands by itself and for some good reasons is not regarded as a kind of form requirements[3] as the authors put it (p. 76: 'The Civil Code distinguishes the following types of written form: simple; notarial; or subject to state registration'). This fact has to be taken into account not just for the sake of theoretical purity, but also because of its important practical implications. It may be left open whether it is a good

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[2] *See, e.g.,* Eugen Bucher, *England und der Kontinent. Zur Andersartigkeit des Vertragsrechts – die Gründe, und zu consideration*, 105 Zeitschrift für vergleichende Rechtswissenschaft 164, 171–184 (2006), available at <http://www.eugenbucher.ch/pdf_files/95.pdf> (accessed Mar. 13, 2015); Hein Kötz, *Indicia of Seriousness*, in 1 The Max Planck Encyclopedia of European Private Law 863–865 (Jürgen Basedow et al., eds.) (Oxford University Press 2012).

[3] *See, e.g.,* Информационное письмо Президиума ВАС РФ от 16 февраля 2001 г. № 59 «Обзор практики разрешения споров, связанных с применением Федерального закона «О государственной регистрации прав на недвижимое имущество и сделок с ним»» [*Informatsionnoe pis'mo Prezidiuma VAS RF ot 16 fevralya 2001 g. No. 59 'Obzor praktiki razresheniya sporov, svyazannykh s primeneniem Federal'nogo zakona "O gosudarstvennoi registratsii prav na nedvizhimoe imushchestvo i sdelok s nim"'* [Informational Circular of Presidium of the Supreme Commercial Court of the Russian Federation No. 59 of February 16, 2001, 'Overview of Practice on Resolution of Disputes Connected with the Application of the Federal Law on State Registration of Rights to Immovable Property and Transactions with It']], ¶ 14; *Татаркина К.П.* Форма сделок в гражданском праве России: Монография [Tatarkina K.P. *Forma sdelok v grazhdanskom prave Rossii: Monografiya* [Ksenia P. Tatarkina, Form Requirements in the Russian Civil Law: Monograph]] 110 (Tomsk State University of Control Systems and Radioelectronics 2012).

idea to ignore these subtleties of Russian law in an introductory book, but it is surely advisable to warn the reader about them.

The systematic exposition of the Russian contract law as fixed in the statutes and textbooks is not the only concern of the authors. At every turn, they keep in view the law in action as well, providing the reader with vast citations from the actual court decisions and occasionally making remarks on professional habits of Russian lawyers and existing usages of court practice and legal drafting. It goes without saying, that remarks of this kind usually rest on personal experiences of the author and can hardly pretend to be either universally valid, or representative. With this kept in mind, the reader will surely gain from the personal insights of the authors, enabling him to get a first impression of the Russian law in action based on a second-hand experience before he gets an opportunity to form his own opinion.

Much more has to be said about the practice of Russian courts as portrayed in the book. To begin with, I'd like to stress that it was definitely a wise idea to fill the book with a considerable amount of court decisions, not just mentioned in footnotes, but presented to the reader in abridged versions, vast enough to show the material solutions as well as popular patterns of judicial reasoning, and to familiarize the reader with the prevailing style of decision drafting. At the same time, here again, the reader has to be warned not to overestimate the data that can be taken from the decisions cited. Two things are worth remembering.

First, not every decision by the Supreme Commercial Court plays the same role. One has to draw a line between the ruling (*opredelenie*) and the resolution (*postanovlenie*) of the Court – to keep the English terms of the book. It is only the latter that contains an authoritative or even binding opinion of the Supreme Commercial Court on a particular legal problem, whereas the former gives an answer only to the question, whether a concrete case has to be brought before the Presidium of the Court, so that a resolution could be issued. This answer had[4] to be positive only in cases, where consistency of court practice, human rights or public interests were at stake (Code of Commercial Procedure of the Russian Federation, Art. 304(1), before August 6, 2014). Hence, a negative answer can never be said to ultimately approve the position taken by lower courts. Yet, the authors do very often speak about opinions of the Supreme Commercial Court, while in fact discussing mere rulings (*see, e.g.,* pp. 60–61: 'Another example of the Supreme Commercial Court *agreeing with the lower courts . . .*'; 64: '[I]n a case in 2010, the Supreme Commercial Court *agreed with the lower courts' logic . . .*'; 66–67, 71, 82, 97, 134: 'The Court *specifically stated* that the right of a party to an invalid contract to claim unfounded enrichment for the difference in value between their performance and the other party's constitutes an additional consequence of the invalidity' (while actually there is nothing, but a neutral description of the position, taken by the lower courts), 139: 'But the Supreme Commercial Court *has a clear position* on this . . .' *etc.* (emphasis added)). In point of fact even the rulings have exerted some

[4] Before the Court was abolished.

influence in practice, and still their role and weight are not to be compared with those of the resolutions. Thus, it is only in the light of this differentiation that the following assertion by the authors holds true: 'Case law gives useful clues to the precise meaning of legal rules, and when the cases have been cited by the topmost Russian courts as examples of the correct interpretation of the Civil Code, then irrespective of whether that is law creation or law interpretation, the example will be respected. Both lawyers advising clients and judges will take note' (p. 1).

Second, to summarize is to drop out details. The authors use the abridged versions of court decisions as a means to show the way, in which the courts apply a rule under consideration. Accordingly, they omit the details, which seem irrelevant for respective discussion. Sometimes it makes the decisions look odd and unreasonable, whereas in fact they are not. Inaccuracies of this kind are most likely due not only to the fact that the authors' analysis was not always careful enough, but also to a feature, typical of the reasoning style of Russian judges. Usually, the Russian courts are not content with just naming the key reasons, in itself sufficient to justify the decision; they tend in addition to enumerate all the reasons that support it in one way or another, without specifying the precise role of each of the *rationes decidendi* and the extent to which the final conclusion depends on each of them. To have an example of both, inaccurate summarizing by the authors and the described style of reasoning, one can go to p. 62 of the book, where the Ruling of the Supreme Commercial Court No. VAS-17142/10 of December 30, 2010, is discussed. The courts dismissed a claim for damages for breach of contract. One of the reasons was that the plot to build on had not been duly identified in the contract. The authors criticize the decision and make it look untenable: 'The court did not pay any attention to the fact that the address and dimensions could be sufficient to define the plot. The parties had clearly expressed their will to transfer the land plot and knew which plot it was. In declaring the contract not concluded the court was following a norm of the Code formally and keeping literally to the text, but failing to respect the parties' will as expressed in the contract.' First of all, the courts expressly say that the provided evidence does not establish either boundaries nor area, nor address of the plot, so that the criticism apparently misses the point. Anyway, that was just one of the reasons given by the courts. They also pointed out that the land plot didn't exist at all, that is to say, the larger plot, which would include the one in question, had never been subdivided. Moreover, there was no evidence that the building created by one of the parties to the contract was really situated on the large land plot provided by the other party. Aside from that the state agency, which entered into the contract in the name of the state, had actually no authority to do it.

The reader of the book is supposed to have some basic knowledge of the English common law generally and of contract law, but is not expected to have any precise idea of Russian contract law (or any other codified law), nor of Russian law as such. That is why the book supplies the reader with some 'useful information' about Russian law generally before starting with contract law (pp. 4–41). Here again the authors show their sense of proportion and give a very general account of Russian legal

history, its constitution, *etc*. with only few oversimplifications. Most of the basic knowledge needed to understand the following exposition of contract law is there. However, in my opinion one issue would deserve a more detailed discussion – the specific type of judicial activities, known to some countries with socialist experience and almost fully unknown outside this area, the binding general statements of supreme courts on abstract legal issues, that has no connection with any concrete case brought before the court. An English lawyer would hardly be able to understand this phenomenon mentioned in the book (pp. 28–29) without extensive explanations as to the way it works and the role it plays.

'The law is stated as at 1 September 2013' (p. 2). The book came out in the middle of a very special period of Russian legal history. The Russian law is undergoing currently a far-reaching transformation. Two different reforms happened to take place at the same moment: one of the civil law and the other of the court system. The former has stretched in time, so that new draft amendments become law from time to time. The authors have paid due regard to this fact: they inform the reader about the reform in general (pp. 15–16) and repeatedly refer to the drafts in their treatment of the respective questions (pp. 52–53, 60, 66, 78, 93, 100, 111, *etc.*). Yet, the reform goes on and a new updated edition of the book will become necessary very soon. The rules on assignment have been already changed; so that the part of the book dealing with them (Ch. 8, pp. 174–192) has become obsolete to a certain extent (*cf., e.g.,* the explanations on the non-assignment clauses (p. 184) or those on the liability of the original creditor (pp. 186–188)). Apparently, a draft bill touching upon almost every corner of the general part of the law of obligations is about to become law, which will necessitate a revision of large parts of the book. At the same time, it is worth mentioning that in many cases the reform just fixes in the Code the approaches developed by the courts so in effect the rules often remain the same (*cf., e.g.,* the passages of the book about the assignment of the rights that have not yet arisen (p. 179) or about the notification from the assignee (rather than the assignor) (p. 180)).

The other reform carried out recently was the abolition of the Supreme Commercial Court, which 'came as a great surprise' (p. 20) – to put mildly. The book describes it as an envisaged reform (pp. 20–21). It has become reality now. For the topics covered by the book, this event matters primarily because of an unprecedented productivity of the court in issuing the abstract general recommendations that came as a reaction on the fatal news. Many of them deal with central areas of contract law, termination of contract and contractual freedom among them, at times bringing radical changes. Their future impact will for sure depend on the political will of the 'new' Supreme Court. Be it as it may, they should be reflected in a revised edition of the book, unless it will become clear that courts do not pay them any attention at all. Above that, the abolition of the Supreme Commercial Court may stand for a conservative attitude of the Russian legislator as regards the changes triggered in the last years by the Court, whose activities were favoring a more independent judiciary and a permanent

dialogue with the academia, a less formal interpretation and application of the statutes, a more liberal contract law.[5] In a long-term perspective, this aspect might cause more fundamental changes of contract law than the first one.

Although at times controversial, the description of the substance of Russian contract law given in the book is for the most part defensible. One should keep in mind that the current state of Russian law is marked by a very high degree of uncertainty and a deeply felt want of *communis opinio* on nearly every essential legal problem. Therefore, any description of Russian law must remain controversial unless it gives a picture of a law, which is controversial itself.

Finally, there is no in-depth analysis in the book, which is only natural considering its genre. Sometimes, however, the authors cease to be purely descriptive and turn to criticisms and generalizations. These are not particularly convincing and could hardly be duly substantiated regard paid to the purposes of the book. Two statements may serve as good examples: 'Basically in Russian contract law the will of the legislator predominates over the will of the contracting parties, which may seem a rather incongruous legislative solution, considering that the main goal of contract law is to enforce agreements between parties on the terms they choose' (p. 50); and '[a]ny codification of contract law limits freedom of contract to some extent' (p. 75). Both of them are obviously too simplistic and need qualification. We'll come back to the second one later. As far as the first one is concerned, it is undoubtedly true that 'to enforce agreements between the parties on the terms they choose' is one of the principal goals of contract law, but it is by no means uncontested nowadays that it is the main one.[6] The extent, to which Russian law really deviates from the global or western trends as to the balance between freedom of contract and contractual justice, or to the measure of legislative interference with freedom of contract, may be an issue for a comparative research, but there is scarcely any reason to regard the Russian contract law as an odd man out in this respect.

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[5] To cite the book: '[T]he role of the courts, and particularly the commercial courts headed by the Supreme Commercial Court, is instrumental in the development of Russian contract law in practice. Despite some resistance by Russian legal theoreticians, it is clear that case law is a source of law in Russia, and the Supreme Commercial Court, particularly under its current Chairman, Anton Aleksandrovich Ivanov, has been trying to clarify and systematise the use of the Civil Code, and sensibly fill any gaps. Sometimes the Supreme Commercial Court is not consistent in its compulsory explanations and legal opinions, which gives rise to unfortunate inconsistencies. However, it is still early days' (p. 291).

[6] *Cf., e.g.,* James Gordley, The Philosophical Origins of Modern Contract Doctrine 230 (Clarendon Press 1991): '[T]here is widespread agreement that any viable theory of contract will have to take the fairness of a contract into account, yet there is no agreement as to how to do so;' David J. Ibbetson, A Historical Introduction to the Law of Obligations 248 (Oxford University Press 1999): '[T]he principal cross-current playing against the Will Theory was the idea that the law ought to strive towards a goal of achieving justice or avoiding injustice, rather than simply giving effect to the agreement of the parties;' Simon Whittaker & Reinhard Zimmermann, *Coming to Terms with Good Faith*, in Good Faith in European Contract Law 700 (Cambridge University Press 2000): '[O]ur study emphasizes the fact that *all* [England included. – *A.S.*] the legal systems included within our study have moved away or are in the process of moving away from a paradigm of contract which focuses almost exclusively on the autonomy of the parties.'

2. An Introduction to Codified Law?

The second claim of the book is to introduce a lawyer trained in a common law tradition to codified law. The authors are much less successful in this undertaking. They fail to specify peculiarities of a codified law on the one hand and suggest some highly questionable links between particular realities of Russian law and the fact it is a codified one on the other. Furthermore, the picture of Russian law drawn in the book is incomplete or sometimes even misleading in as far as its continental European character is concerned.

C. Raoul van Caenegem speaks about 'the contrast that every lawyer in England and on the Continent recognizes, [that is] the absence of codification in the lands of the common law. If common law stands for anything, it is absence of codes, and likewise civil law stands for codification.'[7] What is so special about a codified law? Why does the need exist to introduce an English lawyer to codified law? And, by the way, why all the fuss over codification of the English law?[8] It would be only natural to expect at least some general commentary on the issue in a book seeking to explain peculiarities of codified law to those, who are used to an uncodified one. After all, what is a code in the technical sense? Not even this question is dealt with appropriately. 'A Code is not a special type of legislation. It is a federal law which is passed under the normal procedure for adoption of a federal law, specified in the 1993 Constitution articles 105–107' (p. 25). It may well be true, when the focus is on the hierarchy of sources of law and the legislative procedure. At the same time, it ceases to hold true, as soon as the focus shifts to the techniques, systematics and aims of codification, its historical and philosophical background or its methodological and institutional presuppositions and implications.[9]

The idea of codification in the technical sense goes hand in hand with the idea of system of law, of its systematical coherence and clarity. The systematic order of the Russian Civil Code stems from the German *Pandektensystem* with the general part as its landmark. This fact is of great importance for the way the lawyers think in general and for the structure of the law of contract in particular. 'Many of the general rules about the law of obligations are not, in fact, to be found in Book Two, but in the general part: how contracts are to be concluded, the effect of error or metus on the validity of contracts, *etc.* And if, for instance, one is dealing with the sale of some hinnies or pigs, one has to consult – the order being determined by the rule of *lex specialis derogat legi generali* – the special rules about the purchase of livestock, the more general (but still fairly special) rules given for the contract of sale, the general part of

[7] Raoul C. van Caenegem, Judges, Legislators & Professors: Chapters in European Legal History 39 (Cambridge University Press 1987).

[8] *See* on that Alexandra Braun, *The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines*, in The Impact of Ideas on Legal Development (= 7 Comparative Studies in the Development of the Law of Torts) (Michael Lobban & Julia Moses, eds.) (Cambridge University Press 2012).

[9] *See, e.g.,* Jan P. Schmidt, *Codification*, in 1 The Max Planck Encyclopedia of European Private Law, *supra* n. 2, at 221–225.

the law of obligations and, finally, the general part of the BGB.'[10] It is almost as true for the Russian law of obligations as it is for the German. Not only is contract (*dogovor*) just one of the grounds of the obligations. The law of obligations is just one sphere of law among others, where договор plays its role. Thus, the obligation and the legal act (*sdelka*) are the central systematic concepts of the Civil Code, not the contract. The systematic choices of the Russian legislator traditionally predetermine the structure of both university teaching[11] and academic discussion, the '*Dogovornoe pravo*' ('Contract Law') by Mikhail Braginsky and Vasily Vitryansky[12] making a prominent exception.

Now, are the systematic choices of the legislator binding for academia? Well, yes and no. They are surely not as long as just the external structure of exposition is concerned. It might be, for instance, useful to take a systematic perspective different from that of the code in order to make it easier for law students to master the respective sets of rules.[13] A remarkable experiment of this kind is „Vertragsrecht" ('Contract Law') by Hein Kötz, a textbook by a German professor on German law addressed to German students and yet structured using the common law pattern.[14] Insisting on advantages of this approach the author does not hesitate to stress that it does not contest the thought-out and well-calibrated system of the code, its function being purely didactic.[15] It might, further, make sense to describe a national law with help of a different systematic framework to facilitate the access to it for a foreign observer. That is exactly what Basil Markesinis, Hannes Unberath and Angus C. Johnston do in their 'The German Law of Contract:' '[T]he arrangement of topics in the present book is already anglicised. Heretically, from the perspective of the BGB, we thus bring together groups of norms taken from the first two books of the BGB as far as they bear on the coming into existence of a contract, its enforcement and death, while leaving out other examples of a relationship of obligation such as delict. In fact, so far as we can see, this book is unique, for in Germany even books bearing the title "contract law" omit from their contents those contract law rules which are comprised in the General

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[10] Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition 31 (Juta & Co., Ltd. 1990).

[11] *See, e.g.*, Российское гражданское право: Учебник [*Rossiiskoe grazhdanskoe pravo: Uchebnik* [Russian Civil Law: Textbook]] (Evgeny Sukhanov, ed.) (Statut 2010). For a detailed discussion of the main textbooks from this point of view *cf. Белов В.А.* Закономерности структурирования гражданско-правовой науки как предмета университетского изучения // Вестник гражданского права. 2009. Т. 9. № 3 [Belov V.A. *Zakonomernosti strukturirovaniya grazhdansko-pravovoi nauki kak predmeta universitetskogo izucheniya // Vestnik grazhdanskogo prava.* 2009. T. 9. No. 3 [Vadim A. Belov, *Some Trends of Structuring the Science of Civil Law as Subject of University Learning*, 9(3) Civil Law Review (2009)]].

[12] *Брагинский М.И., Витрянский В.В.* Договорное право. Книги 1–5 [Braginsky M.I., Vitryansky V.V. *Dogovornoe Pravo. Knigi 1–5* [Mikhail I. Braginsky & Vasily V. Vitryansky, Contract Law, Books 1–5)]] (Statut 1999–2011).

[13] Arguably the first successful attempt of this kind are the *Gai Institutiones*, a textbook written in the second century AD by Gaius a law professor, who presented the Roman law of the time in a systematic order, completely different from those of the XII Tables or praetorian edict.

[14] Hein Kötz, Vertragsrecht (Mohr Siebeck 2009; 2nd ed., Mohr Siebeck 2012).

[15] Efremova et al., *supra* n. 1, at VI.

Part and tend to concentrate on special kinds of contracts and the issues raised by them.'[16] It has even happened that a new systematic perspective that had originally aimed nothing but to introduce a foreign lawyer into a national law became influential within the respective national tradition and triggered its systematic reshaping. An outstanding example of such a development is the story of the textbook on the French civil law that was written for the German reader by Karl Salomo Zachariä von Lingenthal, but became popular in France thanks to Charles Aubry and Charles Rau and influenced the further systematic development of French law.[17]

From this point of view, it is fully legitimate to represent Russian law in a systematic order, understandable to an English lawyer. 'The aim of this book is to explain Russian contract law to the English reader. It seeks to do this not in the usual way of Russian books on contract law, which is more or less to follow the order of the Russian Civil Code. Instead, our substantive chapters follow the trajectory of the formation, existence and discharge of a contract, which is the approach which would be more familiar to an English lawyer (or other lawyers from non-codified legal systems)' (p. 1). At the same time, the authors should obviously have informed the English reader not only that the order of the Code is different, but also what the specific structure actually is and why it is this way. The reader might, further, be interested to learn, that the Russian books on contract law follow the order of the Code not just because of an extremely positivistic approach of the academia, but because the Code itself being a brainchild of the academia suits the needs of the university teaching very well – at least as far as its system is concerned (remember the critics of the German BGB call it a *„kleiner Windscheid,"* that is an abridged version of a famous textbook).

However, the system of a code is there not just to make it more convenient for the user to work with it. The rules of a code are not just placed one after another in a user-friendly fashion, their sequence having nothing to say about the way they should be interpreted and applied (the authors themselves stress the importance of the system, though without explaining it in detail: 'From the outset, Russian law tries to be logical. It is inherent in having a codified system that order and categorisation are important' (p. 289)). To the contrary, the systematic choices of the legislator are to be seen as binding value judgments. Like cases should be treated alike. What the system of a code ultimately does is fixing some principal choices as to which cases are alike and which are not. Needless to say, that an insight into this system is a *sine qua non* for a proper

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[16] Basil Markesinis et al., The German Law of Contract: A Comparative Treatise 23 (2nd ed., Hart Publishing 2006).

[17] Karl S. Zachariä, Handbuch des französischen Zivilrechts (Mohr und Zimmer 1808; 4th ed., J.C.B. Mohr 1837; 8th ed., Ernst Mohr 1895); Carl S. Zachariae, Cours de droit civil français (F. Lagier 1839–1846; 2nd ed., Méline; Cans 1850; 3rd ed., Cosse 1856–1863). For a detailed discussion, *cf.* Karl H. Neumayer, *Die wissenschaftliche Behandlung des kodifizierten französischen Zivilrechts bis zur Dritten Republik*, in 1 Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert 173–196 (Vittorio Klostermann 1974); Andreas B. Schwarz, *Einflüsse deutscher Zivilistik im Auslande*, in *idem,* Rechtsgeschichte und Gegenwart: Gesammelte Schriften zur neueren Privatrechtsgeschichte und Rechtsvergleichung 40–41, 70 (Müller 1960) [hereinafter Schwarz, Rechtsgeschichte und Gegenwart]. For a brief discussion in English, *cf.* Raoul C. van Caenegem, An Historical Introduction to Private Law 148–150 (D.E.L. Johnston, trans.) (Cambridge University Press 1992).

understanding of a (codified) national law. The book provides no guidance in this respect, nor does it drive the reader's attention to the role of the system of the code.

Not necessarily successful are the attempts of the authors to link some features of the Russian contract law to its codified character and to infer from coexistence of the code with one particular feature or another in a given legal system, that there is a causal relationship between the two. Let us take the most important example of this unfortunate approach.

'*Any codification of contract law limits freedom of contract to some extent*. Courts applying the rules on contracts have a choice: to apply the Code provisions literally as a limitation means or to use legal mechanisms to broaden the freedom of the parties to choose contractual terms which suit their situation. Russian courts have tended to treat freedom of contract with suspicion and, as can be seen from this chapter, use every available method to limit freedom of contract as much as possible and often even go beyond the *limits set out in the Civil Code itself*' (p. 75).

'*Compared to non-codified English law*, parties are less free to choose the contractual terms they wish. *Merely the existence of the Civil Code is, possibly, the primary reason for that*. Civil Codes always contain a number of mandatory norms . . . that is, compulsory terms with which the parties must comply, whenever the particular conditions specified in the norm exist . . . *Classification of contracts into types (such as purchase-sale, bank account, lease, etc.) is another substantial limitation imposed by the Civil Code*. Even though parties are free to choose a contract of a type which is not described in the Code, courts are always tempted to regard a contract as belonging to one of the types listed in CC Part Two, thus imposing on the contract the application of the corresponding mandatory and dispositive norms, whatever the parties' original intention . . . The division of contracts into types and the use of mandatory norms are two fundamental limitations of freedom of contract which shape Russian contract law' (pp. 43–44) (emphasis added).

As appears from the passages cited above, the bad thing about a civil code in regard to freedom of contract is that it fixes particular types of contracts and through that invites the judges to force every contract they see into one type or another, thus depriving the parties of their right to make a contract, different from those enlisted in the code.

It might well be true that Russian judges tend to press all but every contract into a type fixed in the Code. This trend has been described and criticized in the literature,[18] has triggered a reaction of the Supreme Commercial Court[19] and has given an impetus

[18] *Карапетов А.Г., Савельев А.И.* Свобода договора и ее пределы Т. 2 [Karapetov A.G., Savel'ev A.I. *Svoboda dogovora i ee predely. T. 2* [Artyom G. Karapetov & Alexander I. Savel'ev, 2 Freedom of Contract and Its Limits]] 159–165 (Statut 2012) (without sufficient evidence though). The authors also hypothesize a connection between this trend and the idea of codification (pp. 159–160).

[19] Постановление Пленума ВАС РФ от 14 марта 2014 г. № 16 «О свободе договора и ее пределах» [*Postanovlenie Plenuma VAS RF ot 14 marta 2014 g. No. 16 'O svobode dogovora i ee predelakh'* [Resolution of Plenum of the Supreme Commercial Court No. 16 of March 14, 2014, 'On Freedom of Contract and Its Limits']], ¶ 5.

for drafting amendments to the Code.[20, 21] It might, further, be true that similar trends are registered in other legal systems. Thus, on the occasion of the centenary of the Swiss Law on Obligations of originally 1883 Eugen Bucher speaks about *„verkannte Typenfreiheit"* observing that the freedom to enter into a contract even if it doesn't match any type fixed in the code has to a large extent remained unnoticed.[22] His formula is, however, apt not only to confirm the suggestion that at least in some continental legal systems courts do tend to ignore the freedom to conclude so-called innominate contracts. It stresses at the same time that the reason of this development is not the code itself, but rather the misunderstanding of the code by judges and professors.

The general notion of contract and accordingly the 'law of contract' instead of the 'law of contracts' originate from a number of sources that were effective in the Middle Ages and Modern Era and, different as they were, led to the same result that is to say getting over the Ancient Roman *numerus clausus* of the enforceable contract types.[23] The general part of the law of obligations applicable to any obligation based on (any) contract, (any) delict or any other relevant set of facts was developed mainly by the representatives of the Law of reason and assimilated by the Pandectist school.[24] All this made it possible for the civil codes throughout Europe to include general provisions on obligation and contract that is general parts of the law of obligations and the law of contract.[25] Still they did not part with the good old contract types inherited from the Romans.[26] It is therefore legitimate to speak about a certain 'tension' between the two parts of the codes with different pedigrees and different underlying principles.[27]

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[20] Draft Federal Law on amendments to Parts One, Two, Three and Four of the Civil Code of the Russian Federation, and certain other legal acts of the Russian Federation No. 47538-6 approved by the State Duma at first reading on April 27, 2012, Art. 1(214) amending CC Art. 421(2). However, this block of the amendments has not become law yet.

[21] Efremova et al., *supra* n. 1, at 60.

[22] Eugen Bucher, *Hundert Jahre schweizerisches Obligationenrecht: Wo stehen wir heute im Vertragsrecht? Referat für den Schweizerischen Juristenverein (1983)*, 102(2) Zeitschrift für schweizerisches Recht 316–327 (1983), available at <http://www.eugenbucher.ch/pdf_files/29.pdf> (accessed Mar. 13, 2015) [hereinafter Bucher, *Hundert Jahre*].

[23] Helmut Coing, 1 Europäisches Privatrecht: Älteres gemeines Recht (1500 bis 1800) 398–406 (C.H. Beck 1985); *idem*, 2 Europäisches Privatrecht: 19. Jahrhundert 434–438 (C.H. Beck 1989) [hereinafter Coing, 2 Europäisches Privatrecht]; Gordley, *supra* n. 6; *idem*, Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment 14–31 (Oxford University Press 2006); Klaus-Peter Nanz, Die Entstehung des allgemeinen Vertragsbegriffs im 16. Bis 18. Jahrhundert (Schweitzer 1985); Bruno Schmidlin, *Die beiden Vertragsmodelle des europäischen Zivilrechts:* Das *naturrechtliche Modell der Versprechensübertragung und das pandektistische Modell der vereinigten Willenserklärungen*, in Rechtsgeschichte und Privatrechtsdogmatik (Reinhard Zimmermann et al., eds.) (C.F. Müller 1999); Zimmermann, *supra* n. 10, at 545–547.

[24] Andreas B. Schwarz, *Zur Entstehung des modernen Pandektensystems*, in Schwarz, Rechtsgeschichte und Gegenwart, *supra* n. 17; Franz Wieacker, Privatrechtsgeschichte der Neuzeit 238, 275–276, 373–375 (2nd ed., Vandenhoeck & Ruprecht 1967).

[25] Coing, 2 Europäisches Privatrecht, *supra* n. 23, at 434.

[26] For a historical overview of the main codifications in this perspective, *cf.* Markus Stoffels, Gesetzlich nicht geregelte Schuldverträge: Rechtsfindung und Inhaltskontrolle 50–102 (Mohr Siebeck 2001).

[27] Bucher, *Hundert Jahre*, *supra* n. 22, at 318; *idem*, Schweizerisches Obligationenrecht: Allgemeiner Teil ohne Deliktsrecht 93 (2nd ed., Schulthess 1988); Stoffels, *supra* n. 26, at 101.

In light of these developments, the codification can be seen as an invitation to rethink the role of contract types as fixed by the law, to come up with a new method of applying the rules set for each type, an invitation addressed to judges and academia. Yet, this invitation remains largely ignored.[28] Hence the problems in the court practice and the search for a new method of application of the respective rules[29] or a new role for them,[30] hence even the criticisms of the contract types as such.[31] Therefore, even if it is true to some extent that the contract types as fixed by the codes do cause methodological problems detrimental for the freedom of contract in certain respect, it is due not so much to the codes or to the idea of codification of private law, but quite to the contrary to the fact that the codes were misunderstood and accordingly were not able to overcome the older tradition.[32]

Moreover, there is another plausible explanation of the trend under discussion. It remains possible that the contractual scheme provided by the codes is well balanced and covers most of the contracts of real life, with the option to 'mix' the types kept in mind.[33]

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To sum up, as an introduction into the Russian contract law for a foreign lawyer the book is a success and a must-have for anyone trying to come to grips with the subject. For those lawyers with a common law background who are looking for an insight into the way a codified law works, it is perhaps not the best choice to study this book first.

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The authors of the book also speak in this context about 'tension,' with slightly different accents though '[i]n Russian law, there is a tension between freedom of contract – one of the fundamental principles of modern Russian contract law – and the convenience of particular types of contract having their terms set by the Civil Code (CC)' (p. 50).

[28] Bucher, *Hundert Jahre*, *supra* n. 22, at 318–319; Stoffels, *supra* n. 26, at 101–102.

[29] Bucher, *Hundert Jahre*, *supra* n. 22, at 319–327; Jürgen Oechsler, *Vertragstypen*, in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Eckpfeiler des Zivilrechts. Neubearb. 2008 (Selier; De Gruyter 2008).

[30] Judith Rochfeld, Cause et type de contrat (LGDJ 1999); Stoffels, *supra* n. 26, at 103–111.

[31] Felix Dasser, *Vertragsrecht ohne Vertragstypenrecht?*, in Aktuelle Aspekte des Schuld- und Sachenrechts: Festschrift für Heinz Rey zum 60. Geburtstag (Schulthess 2003).

[32] The authors do obviously realize it themselves: 'Draft Amendments to the Civil Code introduce a new provision which stipulates that norms for particular types of contract shall not be applicable to contracts which are not contracts of that type or mixed contracts. It can be argued that anyway *this follows logically from the current text of the Code*' (p. 60) (emphasis added).

[33] Heinrich Honsell, *100 Jahre Schweizerisches Obligationenrecht*, 130(2) Zeitschrift für schweizerisches Recht 20–21, 105 (2011); Dieter Medicus, Schuldrecht I: Allgemeiner Teil: Ein Studienbuch 29 (17th ed., C.H. Beck 2006).