The Common Frame of Reference in Europe

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A dozen years ago, as a relatively fresh-faced member of the Lando Commission on European Contract Law (CECL), I wrote a paper pointing out that the rules emerging in the Commission's text, the Principles of European Contract Law (PECL), appeared to be a mix of civil law and common law elements that to a considerable degree matched the position of the mixed system of Scots contract law—and indeed the position in South Africa.[1] A couple of years later the point was picked up for South Africa and considerably elaborated by my fellow-Lando Commissioner, Reinhard Zimmermann, in his Clarendon Lectures delivered at Oxford in 1999.[2] We both saw mixed legal systems as potential sources of inspiration for the Europeanisation, not only of contract law, but also of other aspects of law, such as unjustified enrichment and trusts. The mixed systems were models of how European private law might develop in a Europe drawing closer together in the framework of the ever closer union of countries and jurisdictions now known as the European Union. It was a theme that others were simultaneously taking further, notably Jan Smits from the Netherlands, and I think played its part in the greater interest that study of mixed systems has since attracted.[3]

 Professor of Private Law, University of Edinburgh; Scottish Law Commissioner. The views expressed in this Article do not represent those of the Scottish Law Commission. The Article was first presented on 14 May 2009 at the colloquium on "Mixed Jurisdictions as Models? Perspectives from Southern Africa and Beyond", jointly hosted by the International Academy for Legal Science and World Society of Mixed Jurisdiction Jurists at Stellenbosch University. The Article has been lightly revised, but I have left it in the relatively informal register of a conference presentation. I am grateful to Eric Clive and the colloquium participants for much helpful comment and discussion.

1. Hector L MacQueen, *Scots Law and the Road to the New Ius Commune*, Ius Commune Lectures on European Private Law No. 1, Universities of Maastricht, Utrecht, Leuven and Amsterdam in Co-operation with the Free University of Amsterdam and the University of Liege (Maastricht 2000). For PECL, see generally PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II (Ole Lando & Hugh Beale eds., The Hague, Kluwer 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW PART III (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds., The Hague, Kluwer 2003).

2. REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 126-58 (Clarendon Law Lectures 1999, Oxford Univ. Press, Oxford 2000).

3. *See, e.g.*, THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW (Jan Smits ed., Antwerp and Groningen, 2001); JAN SMITS, THE MAKING OF EUROPEAN PRIVATE

In 2006 Zimmermann and I together edited a collection with a triangular and critical comparison of PECL with Scots and South African contract law.[4] The project was conceived as a development of the earlier discussion about mixed systems as models for European private law. But it quickly became clear to us that the context of the discussion had changed, and with it so should the form of our book.

In the latter stages of the PECL project it had become obvious that the work was going beyond contract law and into the general law of obligations, including points such as assignment, where obligations began to intersect with property. In 1998 many members of the Commission (including myself, but not Zimmermann) were involved in setting up a Study Group on a European Civil Code. Basically this used the CECL methods across a much wider range of private law subjects.[5] PECL itself was completed and fully published by 2003,[6] and became the basis for the Study Group's work on specific contracts and other non-contract topics.

Whether or not coincidentally, the European Commission shortly afterwards began public consultation on a project which has become known as the Common Frame of Reference (CFR).[7] In simple terms, the argument was this. The European Union is fundamentally about the creation of a single market in Europe, in which the movement of goods, persons, services and capital is unimpeded by the borders of its Member States. To that end the European Union has always engaged in law-making activities, either imposing Europe-wide regulation on a range of matters (e.g., competition law or many aspects of intellectual property), or directing the Member States to harmonize their different laws on particular topics so as to ensure consistency of result across the market—that is to say, aiming to prevent national laws becoming means, conscious or otherwise, of dividing the market.

To take an example of the latter of importance for this Article, consumers should not have variable rights according to where they happen to be domiciled or active within the European Union. Yet the

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LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM (N. Kornet trans., Antwerp, Oxford & New York 2002).

4. EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES (Hector MacQueen & Reinhard Zimmermann eds., Edinburgh Univ. Press, Edinburgh 2006).

5. For the Study Group on a European Civil Code, and its publication series *Principles of European Law*, see http://www.sgecc.net/. Seven volumes of the *Principles of European Law* have so far appeared.

6. *See supra* note 1 for details of the publication of PECL.

7. For a brief account of the background, see EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES, *supra* note 4, preface, at viii-x.

European interventions were not themselves consistent or mutually coherent, and they not infrequently used language or concepts the legal import of which might be readily understood in some jurisdictions while being completely opaque on others—good faith being the classic example amongst many.[8] Indeed, it was not always clear that the most basic of ideas, such as that of contract itself, were understood in the same way throughout the Union.

So the CFR emerged initially as a "toolbox" of principles, concepts and terminology which would be commonly understood across the European Union, and which would be used consistently in future legislation as well as in revising and improving the existing texts (the *acquis communautaire*). Model rules would thus form part of the package. All this would be based on the *acquis* but also make use of the comparative work that had already gone into the making of PECL. The net would however be cast wider than general contract law, since the *acquis* dealt piecemeal with many specific contracts, product liability, aspects of property and securities law, and even in some respects unjustified enrichment. In any event, contract law could not be considered in isolation from other parts of private law. While the Commission was careful not to dub its brainchild the European civil code that the European Parliament had called for many times since 1989, and emphasized that there was no question of supplanting national laws, it did raise the possibility of what it called an "optional instrument" that might be a legal basis to which, for example, parties to cross-border transactions might choose to subject themselves as opposed to making a choice of national laws.

The Commission then did what its name suggests it does: in 2005 it commissioned the Study Group and another group called the Research Group on Existing EC Private Law (the Acquis Group), which was working critically on the coherence and structure of existing European legislation, to produce jointly a Draft Common Frame of Reference (the DCFR), with Principles, Definitions and Model Rules of European Private Law.[9] The commission's content owed everything to the work that was already far advanced in both Groups; and this explains why it has been possible to do the work in not much more than three years, the

8. *See* PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) vol. 1, intro., para. 59 (Christian von Bar & Eric Clive eds., Sellier, Munich 2009) (6 volumes) [hereinafter DCFR].

9. *Id.* para 2.

text of the DCFR having been published in February 2009.[10] This was however but an "outline edition"; the full DCFR, with detailed commentary and comparative annotations, appeared in six thick volumes in October 2009.[11]

All this meant that the MacQueen/Zimmermann volume could no longer simply discuss the extent to which the mixed systems of Scotland and South Africa had anticipated PECL. Instead we had to engage critically with PECL as an instrument which might become a basis for some sort of European model law, using our laws as the springboards for our criticisms and in turn reviewing those laws in the light of PECL. I think the resulting studies have certainly contributed to the revision of the PECL texts now incorporated in the DCFR. It should not be altogether surprising to find Eric Clive's chapter on interpretation voicing criticisms of PECL's provisions which have been largely picked up in the DCFR, since Clive has been one of the leading figures in the editing and construction of the latter.[12] But there are other examples. Gerhard Lubbe's brilliant analysis of assignment has had influence in the re-casting of that topic in DCFR Book III Chapter 5 Section 1.[13] My own chapter on good faith was a contribution to a debate the result of which has been a downplaying of, or perhaps greater specificity about, the role the concept plays in the regulation of contractual freedom in the DCFR than was apparent in PECL.[14]

However, most of the chapters, including the ones already mentioned, also used PECL as a basis for criticising Scots and South African law. One of the implicit general conclusions of the book was, I would say, that at least from a doctrinal point of view PECL represented an advance on both systems, and that it was sufficiently akin to what already existed in them that it, or perhaps a modified version, could advantageously and without major dislocation be adopted by law reformers in both jurisdictions. While this reflected the fact that PECL was obviously itself a mixed system, that was not the decisive factor for our contributors. What mattered was that the PECL rules lived up to the

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10. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) FINAL OUTLINE EDITION (Christian von Bar & Eric Clive eds., Sellier, Munich 2009).

11. *See* PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8.

12. Eric Clive, *Interpretation*, *in* EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES, *supra* note 4, at 176-202; DCFR bk. II, ch. 8.

13. Gerhard Lubbe, *Assignment*, *in* EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES, *supra* note 4, at 307-30; DCFR bk. III, ch. 5, § 1.

14. Hector MacQueen, *Good Faith*, *in* EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES, *supra* note 4, at 43-73; DCFR I.-1:102(3), III.-1:103.

claim to be at least better—or perhaps more complete—than those currently found in Scotland and South Africa.[15]

Possibly too this was because Scots and South African contract laws are uncodified, meaning that with their dependence on judicial precedent there are inevitably gaps and uncertainties in the law which can only be partially filled by legal literature. It is significant, I think, that Scottish texts on contract law published since the emergence of PECL have found it helpful to cite PECL, not only to fill gaps, but also to indicate structure, define concepts, and provide comparative guidance.[16] In this they were following a lead given by the Scottish Law Commission in the late 1990s, when in considering reform of the law on interpretation, breach of contract and penalty clauses the Commission referred to the models provided not only by PECL but also by the parallel UNIDROIT instrument, the Principles of International Commercial Contracts (PICC).[17]

It seems certain to me that, whatever happens to it in the political arena of the European Union, the DCFR will now play a role similar to that which has hitherto been played by PECL, but across a much wider range of law. Indeed the Scottish Law Commission, currently preparing its Eighth Programme of Law Reform to run from 2010-2014, has consulted on whether this should include "a Scottish contract code, based on the European draft Common Frame of Reference".[18] A letter sent to stakeholders by the Commission during the process of consultation also mentioned the narrower topic of formation of contracts;[19] a project on this subject would be bound to consider the PECL rules as now embodied in the DCFR. Given that the Commission's reports of a decade and more ago on formation, interpretation, breach of contract and penalty clauses remain unimplemented, there seems much to be said for the wider

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15. As Christian von Bar and Eric Clive made clear at the Second World Congress of Mixed Jurisdiction Jurists in Edinburgh in June 2007, however, the claim of the DFCR to attention also does not depend upon its being a "mixed" system (whether or not that is the case being really irrelevant to the future uses of the project). All the same, it may be easier for a mixed system to adjust and adapt to the contents of the DCFR than it is for ones such as England and France, which view themselves as exemplars of a particular and distinctive form, style and substance of law.

16. HECTOR L MACQUEEN & JOE THOMSON, CONTRACT LAW IN SCOTLAND (1st ed. 1987; 2d ed. 2000; 3d ed. 2007); W.W. MCBRYDE, THE LAW OF CONTRACT IN SCOTLAND (1st ed. 2001; 2d ed. 2007).

17. UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (Int'l Inst. for the Unification of Private L. (UNIDROIT), Rome 2004).

18. *See* Scottish Law Commission Web Site, http://www.scotlawcom.gov.uk/html/eighth_programme.php (last visited Dec. 8, 2009).

19. A copy of this letter, dated 6 February 2009, is in the possession of the author.

approach.[20] Amongst its current topics expected by the Commission to carry over into the new programme are aspects of assignation, trusts, and consumer remedies; on all of these the DCFR has something to say, and a great deal more than something usually.[21] Should the DCFR, or some part of it, be adopted by the European Commission as its own legislative toolbox, it will be imperative for national law reform also to be aware of it in ensuring that, as far as needful and possible, national laws do not fall seriously out of step with the rest of Europe.

At the same time, and especially if the DCFR takes on some life in positive law at a European level, it will be vitally important that the document itself be critically analysed and, over time, developed and kept up to date.[22] A European Law Commission has been mentioned as a possibility,[23] and I myself have been involved in discussions about continuing the DCFR work as an academic project, perhaps through a European Law Institute focused on private law.[24] Development might include going into areas not yet covered, such as property (including land), the family, wills and succession. Keeping up to date would be a matter, not only of monitoring implementation and effects but also of following legal practice, which is usually far ahead of academic concepts—a point to which DCFR research frequently found itself referring. But it would also be a case of picking up questions that have arisen in particular national laws but to which the DCFR provides no answer or guidance, or at least nothing obvious on its face.

An example of this latter kind of issue is, I think, what is known in England as restitutionary or gain-based damages for breach of contract.

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20. Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993); Report on Interpretation in Private Law (Scot Law Com No 160, 1997); Report on Penalty Clauses (Scot Law Com No 171, 1999); Report on Remedies for Breach of Contract (Scot Law Com No 174, 1999).

21. DCFR bk. III, ch. 5, § 1 (assignment), bk. X (trusts), bk. III, ch. 3 (remedies).

22. For some early critical comment, see, e.g., Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, *The Common Frame of Reference for European Private Law-Policy Choices and Codification Problems*, 28 OXFORD J. LEGAL STUD. 659-708 (2008); Antoni Vaquer, Farewell to Windscheid? Legal Concepts Present and Absent from the Draft CFR (Apr. 2, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372139; Martijn W. Hesselink, *The Common Frame of Reference as a Source of European Private Law*, 83 TUL. L. REV. 919-71 (2009).

23. Evidence of Mr. Jonathan Faull, Director General, Justice, Freedom and Security, European Commission, to the House of Lords European Union Committee Q 153 (Mar. 25, 2009), *available at* http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/9032503.htm.

24. *See* European Private Law News Blog, Edinburgh Law School (http://www.law.ed.ac.uk/epln/) entries for May 6, 2009 ("European Legal Research Association: Prague meeting") and November 4, 2009 ("Towards a European Law Institute").

For those to whom this concept is unfamiliar, the idea is that instead of damages being based on the loss suffered by the innocent party they are measured by the gain (or saving, as the case may be), made by the contract-breaker through the breach. The best-known example in England is *Attorney General v Blake*,[25] where an erstwhile spy broke his lifelong contractual duty to the United Kingdom by publishing his memoirs: the House of Lords held that the UK government could recover the royalties which this publication earned as damages for the spy's breach of contract. Another case in which commentators have suggested a gains-based approach to damages might have been used is *Ruxley Electronics & Construction Ltd v Forsyth*,[26] where a builder constructed a swimming-pool for a client but to a depth considerably less than provided for in the contract, thereby saving significant expenditure on the work. In both examples the loss of the innocent party is difficult or impossible to quantify; if breach of contract is to be appropriately deterred, stripping the contract-breaker of its gains from the breach thus seems the only effective approach.

The court in *Blake* made clear that a gain-based remedy for breach of contract was to be regarded as for use only in exceptional cases, without indicating with any precision or detail what the circumstances justifying the exceptional remedy might be. The English courts have not approached the precedent of *Blake* in an expansive fashion. The few successful subsequent claims have generally involved deliberate breaches of contract aimed squarely at gain or the avoidance of loss.[27] Professor Burrows suggests that at least two factors must be present to justify a *Blake*-type award: (1) cynical breach, deliberately calculated to make gains; (2) the inadequacy of normal compensatory damages in that these will not put the claimant in as good a position as if the contract had been performed.[28] Others have seen the remedy as a "monetised form of

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25. [2001] 1 AC 268.

26. [1996] AC 344, as discussed, e.g., in Janet O'Sullivan, *Loss and Gain at Greater Depth: The Implication of the* Ruxley *Decision*, *in* FAILURE OF CONTRACTS: CONTRACTUAL, RESTITUTIONARY AND PROPRIETARY CONSEQUENCES 1-25 (F Rose ed., Hart Publ'g, Oxford 1997). The claimant in fact recovered damages based on loss of amenity resulting from an inability to dive into the pool, a much larger claim for the cost of curing the non-performance having been refused as unreasonable given that the difference in value between the pool as it was and as it should have been was nil.

27. *Esso Petroleum Co. v Niad* [2001] All ER (D) 324 (Nov.); *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EMLR 25 (CA). Unsuccessful claims include *AB Corp. v CD Co., The Sine Nomine* [2002] 1 Lloyds Rep. 805; *World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2002] FSR 32, *aff'd*, [2002] FSR 33 (CA).

28. ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 406-07 (Oxford Univ. Press, Oxford, 2d ed. 2004).

specific performance,"[29] and argued, against the background that specific performance is not a generally available remedy for breach of contract in English law, that similar limitations may apply to gain-based recovery. In *Blake*, the leading speech, by Lord Nicholls, refers to "whether the [claimant] has a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of the profit."[30] Dr Edelman sees this requirement of a legitimate interest in performance as the genuinely distinctive characteristic of gain-based remedies in breach of contract cases.[31]

Commentators from the Common Law tradition have argued that the term "restitutionary damages" is inapt for generic use in cases of gain-based recovery for breach of contract. They propose that the phrase be restricted to those cases where the gain recovered is one that has been directly conferred upon the contract-breaker by the other party to the contract, while the recovery in cases like *Blake* and *Ruxley* should be described as "disgorgement damages", since there the gain has not involved any direct diminution of the other party's patrimony.[32] Others have further distinguished between two different measures of gain-based damages in such disgorgement cases.[33] The award in cases like *Blake* is said to be "subjective", based on the actual gain made by the contract-breaker. But there are other cases where a more "objective" measure is applied. The classic example is provided by the decision of Brightman J in *Wrotham Park v Parkside Homes*.[34] In this case, a housing developer broke the contract under which it had bought some land by building upon it more houses than permitted by the sale agreement. Damages were awarded on a "hypothetical bargain" approach, meaning that the developers were required to pay a sum of money such as they might reasonably have had to pay to get the seller to relax the covenant. This was although the judge found as a fact that the seller would never have

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29. JACK BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT 17 (Oxford Univ. Press, Oxford 1991).

30. [2001] 1 AC 268, 285.

31. JAMIE EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 189 (Hart Publ'g, Oxford & Portland, Oregon 2002).

32. *Id.* at 66-93; *cf.* ANDREW BURROWS, THE LAW OF RESTITUTION 461-62 (Butterworths LexisNexis, London & Edinburgh, 2d ed. 2002); PETER BIRKS, UNJUST ENRICHMENT 282 (Oxford Univ. Press, Oxford, 2d ed. 2005).

33. See especially two papers by Ralph Cunnington: (1) *The Measure and Availability of Gain-Based Damages for Breach of Contract*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 207-42 (D. Saidov & R. Cunnington eds., Hart Publ'g, Oxford & Portland, Oregon 2008); (2) *The Assessment of Gain-Based Damages for Breach of Contract*, 71(4) MODERN L. REV. 559-86 (2008).

34. [1974] 1 WLR 798.

entered any bargain of the kind—hence the "objectivity" of the award. But what the seller recovered can be seen as representing the developer's gain since the sum was calculated as a royalty of its profits from the development.[35]

Now recovery of this kind as damages is not at all familiar in the contract laws of other jurisdictions in Europe, and it is also currently rejected—or at least not known—in most of the leading mixed jurisdictions such as Scotland, Louisiana and South Africa. The exception to this rule amongst mixed jurisdictions is Israel, where it was held in the *Adras* case that a seller of goods who in breach of a commercial contract with the first buyer re-sold them to a second buyer willing to pay a higher price for them was liable in damages to the first buyer for the gain made from the second transaction.[36] The question appears never to have been addressed by a court in South Africa,[37] but in both Scotland and Louisiana relatively old judicial authority is clearly against this kind of claim.[38] The Louisiana case provides a particularly nice example of a gain being made through under-performance of a contract. The city of New Orleans contracted with the association for the provision of fire services over a period of several years. After the contract expired, the city discovered that the association had not maintained resources at the level needed to provide the services contracted for in the event of fire, and sued for damages for non-performance. It was held that as the city had suffered no loss, no substantial damages were recoverable. The association might have been enriched by savings of over $40,000, but such gains by the contract-breaker were irrelevant to its liability for breach of contract. It has

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35. There is a substantial debate on whether *Wrotham Park* damages should be seen, not as gain-based, but as compensatory (i.e., based on a notional loss to the seller). This is how the remedy was seen by the Court of Appeal in *World Wide Fund for Nature v World Wide Wrestling Federation* [2007] EWCA Civ 286. *But cf.* Craig Rotherham, 'Wrotham Park *Damages' and Accounts of Profits: Compensation or Restitution*, LLOYDS MAR. & COMMERCIAL L.Q. [2008] 25; Andrew Burrows, *Are 'Damages on the* Wrotham Park *Basis' Compensatory, Restitutionary or Neither?*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES, *supra* note 33, at 165-85; FRANCESCO GIGLIO, THE FOUNDATIONS OF RESTITUTION FOR WRONGS 83-92, 213 (Hart Publ'g, Oxford & Portland, Oregon 2007); EDELMAN, *supra* note 31, at 101, 179-81.

36. *Adras Bldg. Material Ltd v Harlow & Jones GmbH* (1988) 42(1) PD 221 (fully translated in 3 RESTITUTION L. REV. 235 (1995)).

37. *See* DANIEL VISSER, UNJUSTIFIED ENRICHMENT 692-98 (Juta & Co., Cape Town 2008).

38. *Teacher v Calder* (1899) 1 F (HL) 39; *City of New Orleans v Fireman's Charitable Ass'n* 9 So 486 (1891). *See further* John Blackie & Iain Farlam, *Enrichment by the Act of the Party Enriched*, *in* MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA 493-94 (Reinhard Zimmermann, Daniel Visser & Kenneth Reid eds., Oxford Univ. Press, Oxford 2004).

however been suggested that Article 2018 of the Louisiana Civil Code might now allow a gains-based award in such cases of breach of contract; but achieving this result requires fairly elaborate interpretation of Article 2018 alongside other parts of the Code, and the scope for recovery would certainly be limited, if it exists at all.[39]

Outside England, therefore, the principle that damages for breach of contract are about compensation for loss has generally stood firm. A gain-based approach has, however, some very obvious attractions as a remedial response to breach of contract. By taking away the incentive to breach, it helps keep parties to their bargains, and promotes good faith. There could be a link with the remedy of specific implement or performance: for example, that the debtor's gain arose from use of an asset s/he could have been specifically ordered to deliver or perform prior to the gain-creating use. It is also consistent with ideas of unjustified enrichment, however, inasmuch as the disgorgement of gains made through the use of another's assets—in this case, the innocent party's entitlement to the other's contractual performance—is a familiar aspect of the law in that area across Europe.[40] This is a point to which we will return below.

But there are also some obvious criticisms of gain-based remedies in the context of breach of contract. Law and economics analysts will not see the claim to another's gain as economically efficient in this context, especially if the innocent party has in fact suffered no or relatively little loss or could easily obtain a substitute performance in the market place.[41] Some have said that the contract-breaker's gain is merely a convenient way, or element, in measuring the innocent party's loss in complex cases.[42] Within the Common Law, gain-based damages seem to extend remedies characteristic of fiduciary relationships—ones where parties are obliged to promote another's interests ahead of their own—into the more arms-length relationship of ordinary contract law. While this may be acceptable in cases like *Blake* (since it concerned the profits made by a traitor to his country through publication of his memoirs), it is

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39. *See* Hector L MacQueen, *Unjustified Enrichment, Subsidiarity and Contract*, *in* MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 322, 336 (Elspeth Reid & Vernon Palmer eds., Edinburgh Univ. Press, Edinburgh 2009).

40. Peter Schlechtriem, Christoph Coen & Reiner Hornung, *Restitution and Unjust Enrichment in Europe*, 9 EUR. REV. OF PRIVATE L. 377, 382-83, 401-08 (2001) (gain-based remedies for breach of contract are briefly discussed at 403-04); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 4, at 4046-53.

41. BURROWS, *supra* note 32, at 484-85; EDELMAN, *supra* note 31, at 163-64.

42. G.H. TREITEL, THE LAW OF CONTRACT 992-1000 (E. Peel ed., Thomson/Sweet & Maxwell, London, 12th ed. 2007).

much less so in many other, more common situations. If decisions like the Israeli *Adras* case begin to become usual under these rules, for example, there are implications for otherwise normal commercial activity which will greatly concern business interests. As already noted, in the *Blake* case the House of Lords stressed that the new remedy was for exceptional cases; but "if the remedy is limited to exceptional cases, it will in effect become a matter of judicial discretion rather than genuinely rule-based law, with all the consequential uncertainty for contracting parties."[43] Again, although English decisions applying *Blake* have only allowed its deployment where the breach was deliberate and aimed directly at the gain or saving,[44] this approach also creates difficulties: "if it is essentially a remedy against cynical or intentional breach aimed at making the gain in question, there will have to be difficult inquiries into the motivations lying behind people's conduct."[45]

So what does the DCFR tell us in this debate? What should be the European answer to the question? Under the chapter heading "Remedies for Non-Performance [of an Obligation]", there is a section headed "Damages and Interest", and it is clear that damages are recoverable only in respect of loss suffered by the creditor in the obligation—the word "loss" being used several times in the five relevant articles.[46] The definition of loss in the DCFR serves mainly to clarify that the concept covers both economic and non-economic loss, and shows that we are talking only about detriment to the creditor in the obligation, not any benefit that may have accrued to the debtor (the contract-breaker, in the language I have been using previously).[47] The commentary to DCFR III.-3:701 confirms what is apparent from the text:

> A few of the laws [i.e., national laws] permit the creditor in particular circumstances to recover the gains made by the debtor through the non-performance, even if these exceed the loss to the creditor. The situations are so limited that this approach has not been adopted in these rules.[48]

So it would seem as though the DCFR is in the negative on gain-based remedies for breach of contract.

But if we turn to the DCFR's Book VII on unjustified enrichment, we find that, in line with the general European pattern already mentioned

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43. H. MACQUEEN & J. THOMSON, CONTRACT LAW IN SCOTLAND para. 6.17 (Tottel Publ'g, Edinburgh 2d ed. 2007).

44. *See supra* text accompanying note 27.

45. MACQUEEN & THOMSON, *supra* note 43, para. 6.17.

46. DCFR III.-3:701-705.

47. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 1, Definitions, at 74.

48. Commentary B, para. 2.

above,[49] enrichment may be constituted by use of another's assets,[50] and "disadvantage" by another's use of one's assets[51]—enrichment by taking or use or interference, in other words. "Assets" means "anything of economic value" and is not confined to property rights.[52] A right to receive performance due under a contract would appear to be such an asset. This is also confirmed, it is suggested, by the DCFR's general definition of "Right":

> "Right," depending on the context, may mean (a) the correlative of an obligation or liability . . . (e) an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially ordered . . .).[53]

The gain from use of another person's asset is "attributable to another's disadvantage," i.e., constitutes unjustified and therefore reversible enrichment, "especially where the enriched person infringes the disadvantaged person's rights".[54] Once more it seems clear that breach of a co-contractor's right to performance can fall within the scope of the rules.

The Commentary on the enrichment liability for use of another's asset states that the idea of "use"

> presupposes an intention to do the act which amounts to utilisation of the asset . . . [and] involves the limitation that the enriched party has in effect displaced another's (potential) enjoyment. . . . [F]urther . . . the act of interference with another's asset must be directed towards extracting utility from the subject-matter.[55]

Some link to the idea of deliberateness or cynicism on the part of the contract-breaker found in English law may be apparent here. The inadvertent or merely negligent breaker of a contract who happens to profit as a result of the breach will not be liable to disgorge the gain.[56]

Provided then that it is possible to switch from the law on non-performance of obligations under the DCFR, the way seems to be open for the innocent party in our scenario to recover the contract-breaker's

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49. *See supra* text accompanying note 40.

50. DCFR VII.-3:101.

51. *Id.* VII.-3:102.

52. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 1, Definitions, at 66; *see also id.* vol. 4, at 4005.

53. 1 *id.*, Definitions, at 79.

54. DCFR VII.-4:101(c).

55. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 4, at 4012.

56. *See further id.* at 4015.

deliberate gain under the book on unjustified enrichment. But is it possible to switch claims from contract to enrichment in this way? The unjustified enrichment book has a chapter on its relationship to other legal rules. These say that the book does not affect "any other right to recover arising under contractual or other rules of private law".[57] But if we have read the rules on damages correctly, they do not provide another right to recover. So there is no problem here.

DCFR VII.-7:101(1) says however that the unjustified enrichment book *is* affected where an enrichment is "obtained by virtue of a contract", so that other rules will govern the legal consequences if these rules "grant or exclude a right to reversal of an enrichment".[58] But two points immediately arise: (1) our contract-breaker's self-enrichment is *not* obtained by virtue of a contract, but rather by going against the contract; (2) only if we read the rules on damages as impliedly excluding other forms of recovery are the enrichment rules rendered irrelevant, because there is nothing express to that effect in the relevant Articles, or indeed elsewhere in the Chapter on remedies for non-performance. So it still seems open for the innocent contracting party to turn to unjustified enrichment as a basis for a claim against the contract-breaker.

Eric Clive, with whom I discussed this issue, drew my attention to DCFR VI.-6:101(4) in the Book on non-contractual liability arising out of damage caused to another (delict or tort, in the terminology of Scots and English lawyers respectively). The general position here is that damages are awarded for loss, to put the injured person in the position s/he would have been in had the legally relevant damage not occurred. But DCFR VI.-6:101(4) allows "as an alternative, but only where this is reasonable", that "reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any *advantage* obtained by the latter in connection with causing the damage".[59] It may be added that nothing in the DCFR prevents a claim under Book VI between contracting parties, as long as the creditor has suffered "legally relevant damage", that is to say, loss (economic or non-economic) or injury (i.e., the physical impact upon person or property of the creditor). This may be the tricky point if there is no economic loss flowing from the breach of contract (which I think by itself is not an injury within the meaning of Book VI). The national notes to this text

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57. DCFR VII.-7:101(3).

58. Note also *id.* VII.-2:101: "An enrichment is unjustified unless: (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract . . .".

59. Emphasis supplied.

show claims of this sort being allowed in the existing law of some jurisdictions on the basis that the loss to the innocent party can be best measured via the contract-breaker's profit, while other countries simply allow a claim in unjustified enrichment.[60] So the exact scope of DCFR article VI.-6:101(4) in relation to our scenario is not certain. Given the exceptionalism emphasized in the English decisions, it is also troubling that the only limitation upon the choice of a gain-based remedy here is "reasonableness". But the express provision for gain-based damages in non-contractual liability probably confirms that the silence of the general obligations/contract provisions on this possibility signifies that such recovery is not within their scope.

My overall sense at this stage is that the answer to my question about gain-based recovery for breach of contract is not clear on the face of the present DCFR text. We might be able to get a bit further with the general article (DCFR I.-1:102) on Interpretation and Development of the DCFR. Sub-paragraph (4) says that "Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them", since there is an underlying principle of justice recognized in relation to both contractual and non-contractual obligations by the DCFR: that people should not be allowed to gain an advantage from their own unlawful, dishonest or unreasonable conduct.[61] But given that the claim we are discussing is not widely recognized in the laws of Member States, and that it would therefore be rather important to know what the limits of such a claim might be if it is to be allowed at all, these general principles are a rather insecure basis for further development in this area.

In general, then, this topic seems to be a good example of where the DCFR itself needs further exploration and, perhaps, elaboration before it can become a model, whether for a European Civil Code or legislative toolbox, or, less ambitiously, for adoption or inspiration in national laws of obligations. The discussion needed will not be easy. An approach based upon the idea that gain-based recovery is somehow or other damages may lead to awkward questions about the application of such aspects of the general law of damages as causation, remoteness, contributory negligence and (perhaps) mitigation.[62] Again, if the

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60. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 4, at 3736-42.

61. DCFR Princ. paras 42, 48; PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), *supra* note 8, vol. 1, at 54, 57.

62. For these principles in the DCFR, see DCFR III.-3:701(1), 703, 704 and 705. See further on English law, EDELMAN, *supra* note 31, at 103-11, 160-62, 171-72; G. Virgo,

availability of specific performance is to offer some sort of guidance on when a gain-based remedy is appropriate, the DCFR entitles the creditor to such an order generally, rather than making it exceptional and subject to the discretion of the court as in England.[63] One limitation upon the general availability of specific performance in the DCFR, however, drawn from English law, is where the "performance would be of such a personal character that it would be unreasonable to enforce it".[64] Burrows has questioned whether such bars to specific performance also apply to prevent recovery of gains in English law.[65] It is certainly not obvious that this should be so.

An approach through enrichment law will also face difficulties, given the general perception of a need to restrict cases of gain-based recovery (if not to exclude them altogether) in the context of breach of contract.[66] Whether the DCFR's requirement that the enriching use be intentional and displace the other contracting party's entitlement, or its principal enrichment defence of disenrichment (change of position by the enriched) are really sufficient brakes upon liability for cases of this kind is far from clear.[67] Disenrichment would not have any obvious application in such commercial contract cases as *Adras*, for example. The reasonableness limitation used to restrict gain-based recovery in the non-contractual liability Book also seems to allow claims too widely for the breach of contract case. On the other hand, the pragmatic observation that claimants will only turn to the gain-based remedy in the rare cases where it gives more than the loss-based one or specific performance may well turn out to be the most effective limitation of all.

Apart from Israel, the only guidance on our question offered by the traditional mixed systems is in the negative or by way of silence. But where the guidance is negative, it is guidance that was laid down in the nineteenth century; and it is a legitimate question whether that guidance remains appropriate in the twenty-first century. I should not be taken as affirming that the guidance is inappropriate—old law can be good law—but it is challenged by other systems, and so needs review. The challenges are, however, not unequivocal about this development of the

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Restitutionary Remedies for Wrongs: Causation and Remoteness, *in* JUSTIFYING PRIVATE LAW REMEDIES 301-31 (C.E.F. Rickett ed., Hart Publ'g, Oxford & Portland, Oregon 2008).

63. DCFR III.-3:302.

64. *Id.* III.-3:302(3)(c).

65. BURROWS, *supra* note 28, at 399. *See further* EDELMAN, *supra* note 31, at 162-69.

66. The arguments of Edelman, *supra* note 31, at 93-98, for preferring a damages to an enrichment approach seem to be based more on his interpretation of particularities of English law than on general legal principles.

67. DCFR VII.-6:101.

law; and comparative research, reflection and consultation are therefore needed to determine the configuration of any change to be made via the DCFR or otherwise.

Let me turn finally to Africa. In the light of what I have been saying about the DCFR as a model in Europe, it should be fairly obvious that a further possibility is its use as a model elsewhere. There has indeed been interest in it outside Europe, especially, I believe, in Asia. The very existence of the DCFR shows the wrongness of the Legrand view that such projects are impossible.[68] In Africa the closest parallel already in existence is L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), which has created a uniform commercial law applying across 16 countries, mostly but not exclusively from the Francophone Civil law tradition.[69] Since a general law of contract is understood to be a current OHADA project using the UNIDROIT Principles as its starting point,[70] the possibility of making use of the general contract articles of the DCFR must already be present; and there may be room to consider other areas not yet dealt with in OHADA, such as lease of moveables, services contracts, and franchising. The DCFR may also be helpful in the ongoing modernization of existing OHADA Uniform Acts in areas such as sale and securities.

But is a "European" project which is basically about private rather than strictly commercial law the best model for post-colonial Africa? Several issues arise. What about the inclusion of customary law, a phenomenon for which contemporary Europe has little parallel, and which is certainly not recognized in any African sense of the phrase in the DCFR?[71] In Europe, it is controversial how far the DCFR deals with social justice;[72] this would be an even more important criticism in Africa. I would however note that the DCFR is not the only game in Europe for the Europeanisation of law, and the rule-making approach need not be the only method for Africa should the pursuit of legal unity, or harmony, become a general policy objective for the continent. Comparative law is

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68. *See e.g.*, Pierre Legrand, *Antivonbar*, 1 J. COMP. L. 13 (2006).

69. *See* BORIS MARTOR, NANETTE PILKINGTON, DAVID S. SELLERS & SÉBASTIEN THOUVENOT, BUSINESS LAW IN AFRICA: OHADA AND THE HARMONISATION PROCESS (GMB Publ'g, London & Philadelphia, 2d ed. 2007); UNIFIED BUSINESS LAWS FOR AFRICA: COMMON LAW PERSPECTIVES ON OHADA (Claire Moore Dickerson ed., GMB Publ'g, London & Philadelphia 2009); OHADA Web Site, http://www.ohada.org/. I am grateful to Claire Dickerson and Martha Simo Tumnde for information and guidance about OHADA.

70. MARTOR, PILKINGTON, SELLERS & THOUVENOT, *supra* note 69, ch. 3.4.2.2.

71. DCFR article II.-1:104(2) recognizes as binding "usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable."

72. *See, e.g.*, MARTIJN HESSELINK, CFR AND SOCIAL JUSTICE (Sellier, Munich 2008).

the fundamental basis for unification work, and it is a broad church embracing a variety of beliefs and approaches, even if the members of the church sometimes seem more interested in pursuing that which divides them than that which binds them together.

What seems to me one of the key goals of comparative law historically and today is that of legal unity. Time does not allow the detailed development of this observation, but it is certainly true that a theme of contemporary European comparative law is based upon the ideas that European legal systems are converging or convergent, that this is a good thing, and that it should be promoted through comparative work. Various contrasting methods exist. In some ways they reflect the distinct shapers of European law historically: the legislators, the professors and the judges. The DCFR stands for the legislative approach. But Reinhard Zimmermann argues that scholarship is the first step, showing by historical and comparative study the commonalities in European legal systems. He points in the direction of an eventually unified law, but the ground needs thoroughly prepared and investigated first. I think he believes that the DCFR goes too far too fast.[73] Sir Basil Markesinis on the other hand rejects historical studies and focuses instead on making foreign law known to the higher judiciary for use in deciding cases in convergent ways.[74]

The problem with these approaches is that, if legal unity is seen to be important from a policy point of view, neither by itself provides a means of knowing when we have got there, or even somewhere near it. Scholars notoriously disagree with each other (as the example of comparative law shows with particular intensity). Judges are also rather unpredictable, and anyway their law-making role within legal systems varies enormously, even at the highest levels. True legal unity may also be achieved only if the judges at the lowest rather than the highest levels of the court systems are deciding like cases broadly alike, and by reference to generally agreed common sources. There is also the problem of deciding which foreign laws to use, if the judge's own legal system will allow him or her to do so at all.[75]

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73. *See, e.g.*, Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 479-512 (2009).

74. *See, e.g.*, SIR BASIL MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM: THE STORY OF THE LAST THIRTY-FIVE YEARS (Hart Publ'g, Oxford & Portland Oregon 2003); SIR BASIL MARKESINIS & JÖRG FEDTKE, ENGAGING WITH FOREIGN LAW (Hart Publ'g, Oxford & Portland Oregon 2009).

75. See on this THE USE OF COMPARATIVE LAW BY COURTS, XIVth International Congress of Comparative Law, Athens 1997 (Ulrich Drobnig & Sjef van Erp eds., The Hague, London,

Uncertainty thus bedevils such non-legislative approaches; as also Jan Smits' arguments that law should be left to Europeanize and find the best rule for that process through a process of natural selection and competition between legal systems.[76] How do we know when we have the fittest rule for today as we progress up the evolutionary chain? The approach of the "Common Core of European Private Law" group based in Italy at least offers an empirical base of sorts, by investigating how different systems deal with particular hypothetical case studies, which may (but also may not) demonstrate that apparent doctrinal differences disguise a functional unity of outcome.[77] Even the comparative study of mixed legal systems may be seen as a distinct way of finding out how unity may be achieved in the face of apparently divergent sources.[78]

I think that all of these approaches can and do contribute to the achievement of legal unity, but none of them will do on their own, especially if time and certainty are seen as significant issues in the process. The PECL/DCFR approach is an experiment in convergence through comparative rule-making by representative groups. What it contributes, very importantly, is an attempt to formulate unified rules, and one that works on a systematic rather than an ad hoc or casuistic basis. Its results exist in a form which can be used, not only by the legislator (at whom perhaps it is principally aimed), but also by the judges and the professors. At least for the moment, it does not promote a dull, monotonous uniformity, but instead adds to the colour and variety of the options on offer.

I joined both the PECL and the DCFR projects a long time ago and I remain eager and willing to go on with this kind of work. It is a grand experiment. Is a European private law in the form of a civil code possible? That question is not fully answered even yet, since crucial tracts of private law have not really been touched upon in the work to date. But the DCFR goes a long way to show that the law of obligations can be Europeanized. It is now a question of policy and substance whether to make it so.

Boston, Kluwer 1999); MARKESINIS, *supra* note 74, at 35-37, 157-76; Hector L MacQueen, *Mixing It? Comparative Law in the Scottish Courts*, 6 EUR. REV. OF PRIVATE L. 735-53 (2003).

76. *See, e.g.*, Jan M. Smits, *Darwin at Work, Or: How To Explain Legal Change in Transnational and European Private Law*, *in* LAW, ECONOMICS AND EVOLUTIONARY THEORY (Peer Zumbansen & Gralf Calliess eds., forthcoming).

77. See the group's Web site, http://common-core.org/ (last visited Dec. 8, 2009), for a statement of approach and list of publications.

78. In addition to works by Zimmermann and the present writer cited above at notes 1, 2, and 4, see e.g., TRUSTS IN MIXED LEGAL SYSTEMS (J.M. Milo & J.M. Smits eds., Ars Aequi Cahiers, Nijmegen 2001).

If African unity in private as well as commercial law is thought to be a potentially good idea, then it is up to scholars to begin to explore it, preferably by a variety of routes; but one of those possible routes should be the soft-law-drafting one, to see what if anything can be achieved that way at this stage in the development of Africa. A way to start the latter, if time and resource will not allow the luxury of establishing study groups on all the topics that might be covered under the head of private law, might be systematic critical review from an African perspective of either the DCFR or, if that seems too much to swallow in one go, PECL (as revised in DCFR). The resource is a rich one, and it is waiting to be exploited.