

## BOOKS RECEIVED AND BOOK REVIEWS

Pietro Sirena (ed), *Il diritto europeo dei contratti d'impresa – autonomia negoziale dei privati e regolazione del mercato* (Milan: Giuffrè, 2006) 56 Euro.

1 The book contains 29 contributions (including lengthy introductions or conclusions) by authors who can be called the cream of the crop of Italian private law scholarship and some young promising scholars. These contributions should cover the whole of the *acquis communautaire* on contract law. While it is true that the book seems to deal only with 'business' contracts, this concept is conceived to include all rules concerning contracts which have to have a business enterprise as one of the partners to the contract. This, however, is all European contract law (see Grundmann, *European Review of Private Law* 2001, 505), and the editor of the book reviewed is, of course, aware of this. The sub-title indicates that both the margin of freedom of contract and the far-reaching regulatory impact – as well and perhaps even primarily in so-called consumer contracts (with business) – are what provoked most interest. This is a concept of contract law and business contract law which is very much inspired by the characteristics of the *acquis communautaire* as it stands (business orientation, focus on regulatory aspects and only to a very limited extent also on default rules).

The way in which these contributions are ordered is, however, very different, not inspired by EC Law but rather by national law. In fact, they follow an order which would be normal in Italian doctrinal private law treatises: starting from a chapter on (1) the scope, then one on (2) the sources of the law, continuing with the (3) phenomenon of contracts and formation and (4) nullity and remedies, and eventually reaching (5) interpretation. Thus, the interesting inherent question is how the material of the *acquis communautaire* and a clear focus on business contracts and contract regulation in the narrow sense can be brought in line with a long standing national private law tradition.

For this purpose, the editor had the ingenious idea of taking the steering board of the – by far – most prestigious Italian journal on private law, the *Rivista di Diritto Civile*, and of combining it with a few other outstanding scholars such as Prof. Alpa (Rome, 'La Sapienza'), the president of the Italian Bar Association, Prof. Patti (Rome, 'La Sapienza'), secretary general of the large Italian-German Jurists' Association, or Prof. Roppo (Genova University), author of one of the leading textbooks and editor of this journal. Thus, not only the perspective is one of longstanding national dogmatic tradition, but the players are as well. This is not a book written by comparatists or those specialising almost exclusively on European private law, but by those having the outstanding expertise in substantive contract law, here Italian. The advantage is obvious: the book shows how the heart of Italian scholarship would give dogmatic form to the *acquis communautaire*. The price, however, is obvious in quite a few pieces as well: there is less expertise in the *acquis* considered and some contributions roam elsewhere.

Thus, the approach of this endeavour to give dogmatic form to the *acquis communautaire* (from one national perspective) is quite different from a similar first attempt to reach this same goal in German literature. The book on System Building and Principles in European Contract Law by Karl Riesenhuber (see review of this book in *European Review of Contract Law* 2005, 290), is written by one author only and by a rather young one. This has advantages: coherence is certainly higher, the book is certainly more focused in fact on EC

Law solely. This has its disadvantages as well, among them that we see only one author's opinion. The approach, however, is very similar. Riesenhuber as well, very much on the basis of Canaris' system building approach (an approach developed for describing mainly German Law), 'reconstructs' EC Contract Law from the national law's perspective.

Some parts are particularly noteworthy, among them is a contribution on pre-contractual information, a question which is paramount for the *acquis* as it is heavily concentrating on information duties, and so too are two more general contributions: on business contracts in EC Law and on consumer law respectively.

2 When Roppo writes on pre-contractual information duties, he starts out by stressing the large importance of this area and in fact (as one of the few authors to do so) quite consistently concentrates on EC Law. Here, he sees four kinds of information rules (much more consistently than in autonomous Italian Law which he describes in his textbook): rules which do not prescribe the giving of information but make information given (though voluntarily) binding; rules which prescribe that a full picture be given if any information is given; information duties which have the consequence that the information given will be part of the contract; and information duties where the legal consequence is not specified. He then more generally hails the rather broad picture of information rules. On the other hand, he criticizes the virtually complete absence of the specification of legal consequences and sanctions in EC Law. He even sees a risk of 'information mannerism', also in national law, ie an inconsistent abundance of information rules with no bite (lacking sanctions). In his concluding remarks, he sees that information rules in fact prevail in European contract law – at least in sector specific rules, less so (in Roppo's opinion) in the more general measures such as the Sales and the Unfair Contract Terms Directives.

3 Much broader is the theme of Monateri's contribution on business contracts in EC Law. The author starts out with the influence of EC Treaty Law, namely fundamental freedoms, on contracts. Here he sees a deregulatory tendency (as many have done before him), but then interprets this, quite ingeniously, as a typical example for Böhm's influential idea of a private law society. In fact, via fundamental freedoms, states would seem to be put under scrutiny, just as are enterprises under EC competition law (also in the EC Treaty). Thus, party autonomy – extended across borders via fundamental freedoms – is the principle at least in internal market transactions and the states have to justify exceptions. They become just one player among others in the private law society. Monateri then turns to comparing this approach with important contract law developments which claim that they have their legitimacy under EC Law or are aimed at further developing it ... and he realises that these significantly clash with that approach. The one tendency is developing general principles of law from a common heritage, namely Roman Law. In this respect, Monateri points out that these principles in Roman Law are certainly not based on a civil law society prevailing, i.e. that the rules found there do not embody a conscious choice to further the market as a discovery procedure. The second tendency is the development of Principles of European Contract Law. In this respect, Monateri distinguishes between 'crystal' contract law ('rude', in English harsh) and 'mud' contract law ('rugiadoso', in English dewy), the first restricting the regulatory content of contracts very much to what has literally been agreed upon and favouring long, exhaustive contracts, the second developing implied terms rather abundantly. He sees the first type more related to the paradigm of private law society, the second more to the PECL, namely because the dominating role of 'good faith', often overriding party agreement.

Somehow related in style and also in content is one of the various introductions, placed much later in the book. Natalino Irti is known in Italy for giving, over and over again, striking titles to a tendency broadly felt by the whole scholarly community (*L'età della decodificazione* 1979, *Nichilismo giuridico* 2002, etc). Irti sees the roots of a philosophy of consumer law in Hegel's *Grundlinien einer Philosophie des Rechts* of 1821 (§ 236) where one reads 'The differing interests of producers and consumers may conflict with each other. Even if the right balance is found automatically, the equalisation needs independent and conscious regulation. (...) However, the effects of external events and remote influences, particularly on the large industrial sectors, cannot be anticipated by those individuals who are dependant upon these industries. This means that general provisions and guidance are essential.'<sup>1</sup> At first sight, this looks like the classical paternalistic justification of consumer law (which was strong in the 70s and 80s, but now is declining). Indeed, Irti insinuates as much by relying on the intellectual authority of Hegel. On the other hand, the scope of this type of 'consumer' protection does not at all reach as far as today's consumer law. In fact, what Hegel writes about is the protection of markets against fraud – unfair competition – and the prohibition of giving misleading information (if information is given at all) – again a rule which in EC Law and most national laws nowadays is seen as one not of consumer, but of general law. In other words, one should not confuse all rules protecting contact partners (also in information questions) with consumer law. There are protective devices also in general contract and market law, also with respect to information duties.

This short contribution – as with the one by Monateri – shows, however, how ingenious Italian thinking about EC Contract Law can be and often is.

4 Notwithstanding differences in quality between the many contributions, it might be quite interesting an exercise to do what Sirena has done for Italy in some other countries with a long-standing doctrinal tradition. It is an interesting approach to understand and find system in the *acquis communautaire* on contracts – applying national doctrinal systems whose development has had the time to develop over centuries.

Stefan Grundmann

**Filippo Ranieri, Europäisches Obligationenrecht (2<sup>nd</sup> edition, Vienna/New York: Springer 2003) 742 pages, hardback, € 115,-, ISBN 3-211-01440-3**

Filippo Ranieri's book 'Europäisches Obligationenrecht' (European Law of Obligations) was published in its first edition as a study- and textbook. The subtitle and foreword of the second edition, which is more than double in size, show it to now be a handbook. Nonetheless, nothing has been changed with respect to concept and structure. As the author

- 1 Die verschiedenen Interessen der Produzenten und Konsumenten können in Kollision miteinander kommen, und wenn sich zwar das richtige Verhältnis im Ganzen von selbst herausstellt, so bedarf die Ausgleichung auch einer über beiden stehenden mit Bewusstsein vorgenommenen Regulierung. (...) Vornehmlich aber macht die Abhängigkeit großer Industriezweige von auswärtigen Umständen und entfernten Kombinationen, welche die an jene Sphären angewiesenen und gebundenen Individuen in ihrem Zusammenhang nicht übersehen können, eine allgemeine Vorsorge und Leitung notwendig.

points out, the second edition should merely realise in full what was laid as a cornerstone in the first edition.

Ranieri's book bears witness of his profound knowledge of European comparative law and the roots of contemporary civil law systems. Of Italian origin, after legal studies in Italy and Germany, a doctor's degree under the supervision of Rodolfo Sacco and many years as a referee at the Max-Planck-Institute for European History of Law in Frankfurt, Filippo Ranieri was actually predestined for the chair in European Civil Law and Recent European History of Law in Saarbrücken, Germany, which he is holding since 1995.

According to the general concept, Ranieri's book is still characterised by its didactic approach and its richness of legal sources, which, wherever possible, are kept in their original language. It further concisely and elegantly combines a vertical and horizontal comparison of laws. Another salient feature of the book, although less commendable, is that, by and large, it restricts itself to domestic law and, within these limits, to particular issues in the law of obligations.

The book is now divided into 15 chapters (first edition: 9) and starts with the historic and systematic principles of contract law in Europe (ch 1, 11–43). This overview is followed by a chapter concerning the theory of declaration of intention (45–70). The next chapters govern the formation of contract in the absence of the parties (71–131), by including standard terms (133–214) and through agency (215–269). Further chapters deal with defective and wrong delivery of goods in sales contracts (271–330), mistake as to quality (*Eigenschaftsirrtum*) and warranty with regard to specific goods (331–377), stipulation and transfer of property (379–431), assignment of rights (433–467), contracts of suretyship (469–511), violation of duties of care (513–538), the law of torts and compensation for purely economic loss (539–595) and recovery of damages for nervous shock (597–636). The book concludes with two chapters dealing with benevolent intervention in another's affairs and the question of whether the intervenor who suffers loss during the act of intervention may claim damages (in German case law: '*Rettungsfälle*') (637–662) and good faith and equitable jurisdiction in the exercise of legal rights (663–707). Compared to the first edition, the chapters on standard terms, agency, mistake as to quality of the goods, stipulation and transfer of property, assignment of debts and contracts of suretyship are new. The issues which were already included in the first edition have been up-dated and slightly amended. Sporadically, EC law is now considered as well.

Despite its subtitle, the book is not written in the style of a handbook. Ranieri consciously refrained from providing a systematic illustration of the entire European law of obligations, perhaps due to volume and time restrictions. Although the chosen issues are of primary importance and characterised by continuous development, they fall far short of covering the law of obligations in its entirety. Thus, his book has remained a compilation of – carefully researched – sources, which are supplemented by useful introductory and connecting texts, and has, compared to the first edition, been amended by singular supplementary aspects. As far as general principles of contract law are concerned, the right to specific performance and its surrogates as well as the issue of penalty clauses and joint and several obligations is (still) lacking, as are other central topics, such as general provisions on breach of contract, and here, in particular, provisions on the right to terminate the contract. The fact that the law of unjust enrichment has not been included is understandable, as it is one of the most complicated areas and, from a comparative law point of view, difficult to describe. With regard to the – from a civil lawyer's perspective – specific part of contract

law, which generally embraces special provisions on various types of contract, only the provisions on warranty in case of delivery of defective goods and the contract of suretyship have been discussed. The issue of compensation of damages for nervous shock is interesting, as are peculiarities of security interests, such as the passing of title without the physical handing-over of the goods (*abstrakte Sicherungsübereignung*). They are, however, rather specific, and, in the latter example, actually more relevant to the law *in rem*.

Within the selected issues, the subject matter is not comprehensively portrayed, either; the examples are far from comprehensive and are presented in a style more akin to essay-writing. The Anglo-Saxon law is altogether a little on the short side. The structure of the analysis and the selection of the legal systems addressed in the various subchapters could have been more uniform and systematic. The reader might, for example, have expected some introductory remarks on freedom of contract and its limits, especially since recently, remarkable developments took place. Case law reflecting the current discussion receives cursory attention in the chapter on contracts of suretyship; still, the fundamental debate on freedom of contract does not affect only that kind of contract. It certainly would also have been interesting to support the overviews on the structure of the continental European legal systems with a domestic typology of the various contracts types. In the chapter dealing with *bona fides* and judicial control of exercise of legal rights, the author starts with several far reaching questions on judicial revision and adjustment of statutory and contractual provisions and announces that answers are to follow. However, the following reference to *exceptio doli*, as it existed in classic Roman Law and *ius commune*, already constitutes an initial topical and territorial limitation. Apparently, the author only wishes to clarify whether and how the *exceptio-doli*-theory has survived in the legal systems of continental European law, which are, as is well-known, affected by Germanic and Roman law. He accomplishes this task by discussing the questions of forfeiture of a right prior to that right becoming time barred and the defence of a claim being time barred, respectively, as well as the objection that form requirements are not fulfilled. All these topics are particularly interesting and practically significant. In this respect, however, two more issues would have needed consideration, in particular when aiming at an audience of civilian lawyers: the issue of irrefutable presumption of implied disclaimer is of particular importance with a view to French law. Likewise, the institutions of *bonne foi* and the doctrine of *abus de droit* have been the subject of constant development in recent times. Ranieri, however, by merely stating general remarks in this respect, declares them to be insignificant. Such an excerpt-style, which is, with reference to that particular chapter, largely based on previous publications of the author, hardly satisfies the standard expected of a handbook.

A certainly positive feature is the way that the author structures and presents the various topics. Every issue is historically explained and/or introduced by a short list of leading cases. Hereby, the author avoids the danger of a narrow approach based, for example, on German or other domestic theoretical constructions. Consequently, the textbook does satisfy the author's intention of publishing a pan-European study book, at least for the German-speaking area.

Another commendable feature is the inextricable combination of historic and comparative perspectives. Certainly, the legal development in each state can only be traced briefly, but the author portrays the essential features of each line of development in a most successful manner. This holds particularly true for the chapter on formation of contract and law of torts.

A further strength of this book is its didactic concept, which constitutes a combination of study- and textbook. Addressing, first and foremost, German speaking students, as the author explicitly points out, the book is most certainly a suitable supplement to a comparative private law course. The legal questions chosen as examples are virtually exclusively of primary importance, or at least, typical. Students with basic knowledge of their own legal system should already be quite familiar with such questions. The texts that introduce and combine the source material are plain and graspable. They regularly set out the relevant aspects. Casual marginal notes and well directed footnotes provide basic knowledge on the type of source, on individual authors and national particularities concerning form and substance of legal texts. For example, who Pothier and Savigny were, and who is hiding behind the Lando Commission, are explained. An abstract from a teaching book on the methodology of the German *Pandektistik* by Windscheid is accompanied by the statement that it was a famous teaching book of its time. The reader learns about the structure of the most important continental European codifications, or the style in which decisions are made and lines of reasoning approached, etc.

The body of the book is comprised of the numerous legal sources, which consist of excerpts from previous and current norms (conventions, laws and model laws; emphasised in shaded style), decisions, annotations and study books. These sources constitute approximately three quarters of the entire volume; they have been chosen purposefully and are, all in all, a harmonious and coherent composition. Often, they point out strategic considerations of the legislator or significant statements in case law and literature. At the same time, they demonstrate the style of legislation and the manner in which decisions are made and study books of the particular country written. Thus, every reader can not only follow the author's train of thought on the basis of the depicted texts, but can also form his own opinion outside that scope. Fortunately, the sources are mainly depicted in their original language. Whereas English and French statutory and case law have not been translated, a German translation has been supplied for the Latin, Italian, Dutch, Polish, Portuguese, Swedish and Spanish legal texts. Greek texts are reprinted only in German. In foreign-language texts, the facts of the case and the reasoning of the court have been summarised in German. This is, all in all, a good and pragmatic compromise between originality and comprehensibility. At the same time, the German-speaking lawyer can observe that the gems of comparative law can only be truly uncovered if he has, at least, a working knowledge of French and English, and basic knowledge of Latin, Italian and Spanish.

Due to the greatly increased importance of the law of the European Community, Ranieri has granted it some occasional space in his second edition. This holds true for the Directive on distance selling, the Directive on unfair terms in consumer contracts, the Directive on certain aspects of the sale of consumer goods and associated guarantees and the Directive concerning consumer credit. Nonetheless, the consideration of EC-Directives (by Ranieri attributed to the EU) and the case law of the European Court of Justice could clearly be expanded. The general adversity to unification of law through directives that the author seems to have – and he has a point – must not obstruct the fact that the core topics of the national laws of obligations are increasingly influenced by law of the European Community. After all, however, the author has taken prominent international conventions and sets of rules into account, such as the UN Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law (PECL), the UN Convention on the Assignment of Receivables in International Trade and the UNIDROIT Principles of

International Commercial Contracts. Additionally, the results of research groups like the Study Group on a European Civil Code are occasionally considered.

The book is continuously well-documented and gives sufficient references for further in-depth studies of the questions raised. Of particular utility are the indices on case and statutory law, which are arranged according to countries, as well as the index of topics and persons.

Considering the book not as a systematically conceptualised handbook, but rather as a text book, which follows the didactic approach of introducing the reader to certain fundamental topics of the law of contracts and obligations of the most important European private law systems, it can be unconditionally recommended to all those interested in comparative private law.

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