Book Reviews

Hein Kötz, *Abschluss, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag*, (Vol. 1), Hein Kötz and Axel Flessner, *Europäisches Vertragsrecht*, Tübingen (J.C.B. Mohr (ed.)) (1996)

The past 50 years have witnessed a dramatic change in Europe's political, social, economic and legal fabric: piece-by-piece both small and big walls have crumbled and unification has taken large steps forward. The boundless common market for goods and people is no longer Utopia. For a long time the legal community has focused on the development of appropriate legal standards to be laid down in various codes or regulations to secure the progress; but despite all these efforts, there is at present no genuine European private law. Hein Kötz and Axel Flessner are among those who share the vision of eventually creating such a European private law through the Europeanization of jurisprudence, legal literature and formation. The purpose of the reviewed treatise on the European Law of Contract derives from these thoughts. Without being confined to the limitations of a single national legal system Kötz sets up a readily understandable system resulting from a comparative study of the different existing national conceptions. Thus the book could be an important element in the preparation of a European civil code and in the interpretation of national or unified law. But the foremost purpose of this publication is to serve as a text book in legal teaching to help European law students in different countries to appreciate the wider world beyond their own. This treatise on the European Law of Contract will be published in two volumes. The first one dealing with the formation, validity and terms of the contract as well as the effects of the contract on third parties is written by Kötz, Professor for Comparative Law and author of numerous important publications in the field of comparative law.[1] The second volume on specific performance and the breach of contract is yet to be published and is written by Axel Flessner, Professor for Comparative Law in Berlin.

Kötz deals with the general principles of the law of contract. The text is divided into 14 chapters, each dealing with a classic topic of private law: theory and practice of the law of contract, the bargain process and the formation of the contract, certainty of contractual terms, indications of seriousness, requirements of form, capacity of parties, interpretation, control of the freedom of contract, illegality and

[1] *See*, for example, Zweigert Konrad and Kötz Hein, *Einführung in die Rechtsvergleichung* (Tübingen, 1996, 3rd ed.).

European Journal of Law Reform, Vol. 1, No. 1/2

immorality, mistake and misrepresentation, duress and undue influence, agency, contracts for the benefit of third persons and assignment. The comparative spirit of the book reveals itself in the choice of mostly non-technical subject headings. These reflect the functional problem to be dealt with and therefore avoid falling into the trap of national dogmatic categories that sometimes cloud the view for a pragmatic and adequate solution. A good example of this is the fourth chapter, entitled *Seriositätsindizien* (indications of seriousness), which discusses the meaning and relationship between seemingly different issues like the French, Italian and Spanish *cause*, the English consideration and the form requirements in case of gifts (pp. 77 et seq.).

Chiefly, the authors have set out to write a text book for law students (p. VII), therefore it has to stand up to close scrutiny didactically. Kötz achieves this objective mainly through his masterful and colourful use of language and through his ability to concentrate on the essentials, leaving out technical or dogmatic details that only pertain to a specific legal system. Furthermore, the book contains a good mixture between the theory of law and its practical effects which is also reflected in the commendably sparse use of footnotes that focus on court decisions rather than literature.[2] The chapter on contracts for the benefit of third persons perfectly exemplifies this (pp. 371 et seq.). After throwing light on the historical and economic background of these types of contracts, the reader is well equipped to grasp the practical relevance of the different legal theories. The main question is always if, and if so on which conditions, the third party has the right to claim performance of the contract or damages arising from a breach of contract. The question arises when a hospital buys contaminated units of stored blood which cause the patient to become sick.[3] Does the patient have separate contractual claims? The chapter discloses that every European legal system has rules to deal with the problem in one way or the other. By employing a casuistic approach it is shown *inter alia* that the scope of the contracts with effects on third parties is in inverse proportion to the quality of protection through the law of torts. This is also the explanation for the strange German and Austrian figure of the *Vertrag mit Schutzwirkung für Dritte*. Neither German nor Austrian law contain the powerful English maxim of *respondeat superior*. For this reason they had to construct a contractual claim to protect the innocent bystander.[4] The chapter is rounded off with a depiction of the effects of the contract for the benefit of third persons.

---

[2] It is, on the other hand, suprising to find only a fairly old text book as the sole representative for Swiss law (Eugen Bucher, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (2nd ed., Zurich, 1988) and none for Austrian and Italian law in the list of the most important treatises (p. XV).

[3] Cour de Cassation Civil, 17 December 1954, JCP 1955.II.8490.

[4] *See*, for example, the landmark decision Reichsgericht, 10 February 1930, *Entscheidungen des Reichsgerichts in Zivilsachen (RGZ)*, at pp. 127, 218, 221. A tenant hired somebody to fix his gas heater. When the heater exploded due to the worker's error causing the cleaning woman to be injured, the court awarded her damages on the basis of a contractual claim.

The reading of the *European Law of Contracts* can be highly recommended. Not only does it reach far beyond the scope of a student's text book on comparative law, it also helps the practician to gain an insight into the underlying principles of some fundamental topics of private law. Comparative studies or future drafts or revisions of national or international European codes of private law will find ample resources and pieces of information to avoid mistakes that have been made elsewhere. Its worth is increased by its questioning of familiar theories that are taken granted and many unknown treasures of other legal system are unearthed. Finally it is enjoyable to read, something that cannot be said of too many legal oeuvres.

Dr. Markus Müller-Chen,
Muttenz