

DEVELOPMENTS

Book Review - Reinhard Zimmermann, The New German Law of Obligations. Historical and Comparative Perspectives (2005)

*By James Gordley**

[Reinhard Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford University Press 2005, hardback, £40, ISBN 0-19-929137-3. \$ 74.00]

In 2002, the Modernization of the Law of Obligations Act came into force. Reinhard Zimmermann calls it “the most sweeping individual reform ever to have affected the [German Civil] Code...” (p. 1). Yet it was enacted in relatively short order, after merely a year and a half of discussion. The reason, supposedly, was the need to bring German law into conformity with the Consumer Sales Directive of the European Union, a task that had to be completed by January 1, 2002. In itself, that task required only minor changes in the German law of sales. However, the Ministry of Justice used this opportunity to propose major reforms in the rules governing prescription, remedies for non-performance, non-conforming goods, and consumer contracts. These reforms were based initially on an earlier reform proposal drafted by a committee of scholars in 1992, which had attracted little interest since 1994. Under enormous time pressure, German jurists then had to evaluate that proposal in light of both contemporary changes in legal thinking and European-wide projects for reform since 1992, and the Ministry had to respond. Zimmermann gives a clear and authoritative account of the changes made by the Law, the concerns that inspired them, and of the Law’s successes and failures.

In an initial chapter, he describes how the German Civil Code was made and how it has functioned over the last century. He then describes the four major elements of the reform.

* Shannon Cecil Turner Professor of Jurisprudence. School of Law, University of California at Berkeley. Email: gordleyj@law.berkeley.edu

The reform of the remedies for non-performance responded to a long and widespread complaint that the rules were too complex and tied to artificial and outmoded concepts of impossibility and fault (p. 39). As Zimmermann points out, however, the decision to base the reform on the 1992 proposal neglected ten years of scholarly debate and such projects as the new Dutch Civil Code, the Lando Commission's Principles of European Contract Law, and the Unidroit Principles. He points out that while the new rules are simpler because of haste in which they were prepared, they create doctrinal problems that have yet to be resolved. Moreover, though modernized, the rules still reflect older ways of thinking. That, however, may have its positive side. By preserving "well established and time tested experiences of a hundred years of legal development", the Law "contain[s] rules, and ideas, which can, and should be used to refine the international Principles" (p. 77).

In discussing liability for non-conforming goods, Zimmermann describes how the unreformed Civil Code was based on Roman rules, which worked well enough in their original context -- the sale of slaves and cattle -- but function less well in a complex economy. The purchaser could either rescind the transaction or claim a reduction in price; damages were recoverable only in exceptional cases; the prescription period was short and did not depend on whether the buyer knew or could have known of the defect. The reform, which abolished these features, was therefore "overdue" and a response to "the irrational survival of an antiquated doctrine" (p. 96). But the new system of remedies, being "hastily drafted ... does not display the intellectual maturity and the technical precision for which the [Civil Code] was once renowned" (pp. 119-220). Some provisions are unclear and some employ "so many subtle distinctions that, like the rules governing recovery of contractual damages under the *ius commune*, they may well be described as 'mare amplissimum, in quo pauci sine periculo navigarunt.'" -- a vast sea which few sail without peril (p. 120).

The law of prescription was also in dire need of reform. The reform reflects the modern approach taken by the Lando Principles: for example, periods of prescription are now more uniform, not excessively short (six months) or long (thirty years), and tied to the moment a party should be aware that he has a claim (pp. 128-29). Again due to haste, it still contains puzzles that will be a source of "doctrinal irritation." Moreover, the drafter failed to give a "reasoned motivation for their decisions, and so curtailed their influence over future developments in Europe" (p. 158).

The final great change made by the Law, and one that was not considered in the 1992 proposal, was to incorporate in the Civil Code a variety of special statutes enacted to protect consumers and other contracting parties. According to

Zimmermann, in principle, such a change is to be welcomed. The autonomy of the parties lies at the root of contract law, and autonomy is undermined when a party is not in a position to insist on fair terms but must accept the terms he is given (p. 206). Since a regard for fairness cannot be separated from the protection of autonomy, it would be anomalous if the Code ignored the one and not the other. Even the drafters of the original Code did not ignore the need for fairness despite their concern for autonomy (p. 163). The difficulty is that before the 2002 reform, many separate German statutes and EU directives dealt with distinct situations in which a party was thought to be in need of protection. Due to time pressure, many preexisting rules were simply pasted into the Civil Code without much effort to reconcile them with preexisting Code provisions or with each other, let alone to refine them in light of deeper consideration as to when and why parties should be protected. Thus “[t]he new provisions amending the Civil Code are easily recognizable in view of the fact that they tend to be long winded, badly drafted and ill-considered” (p. 200). Still, though drafters could have done a better job, Zimmermann acknowledges that in this field of law one cannot yet find “stable doctrinal structures” (p. 226). That being so, had the reform been more careful and thoughtful, the Code would still be a “permanent building site” on which new rules must be constructed. But Zimmermann concludes, “perhaps, a modern code of private law should rather resemble a building site, bristling with the cheery voices of craftsmen and artisans, than a museum, in which only the weary murmurs of an occasional tourist group can be heard” (p. 228).

This book gives a detailed, technical and clear account of how German law has changed. Yet it does more as well - it situates the changes within an historical and comparative context shaped by Roman law, by 19th century legal thinking, by the aspirations of the drafters of the Civil Code, by a century of legal interpretation and social reform, by directives of the European Union, by pan-European projects such as the Lando Principles, and by time pressure. Only in this context can one see why much of the law needed reform, and why it was reformed in the way that it was. It is a balanced assessment which praises the direction of the reform while condemning its sloppiness, which counsels attention not only to modern ideas and European trends but to past experience and the contribution that German law can make, and which describes both what has been done satisfactorily and what remains to be done. It is also a case study of how one very important legal change has occurred; as such, it sheds light on what to expect from future changes and how they can best be made.