

OXFORD

Studies In European Law

The Constitutional  
Foundations of  
European Contract Law  
*A Comparative Analysis*

Kathleen Gutman

EUROPEAN

EUROPE

EUROPEAN

# The Constitutional Foundations of European Contract Law

*A Comparative Analysis*

KATHLEEN GUTMAN

**OXFORD**  
UNIVERSITY PRESS

OXFORD  
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide. Oxford is a registered trade mark of  
Oxford University Press in the UK and in certain other countries

© K Gutman 2014

The moral rights of the author have been asserted

First Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system, or transmitted, in any form or by any means, without the  
prior permission in writing of Oxford University Press, or as expressly permitted  
by law, by licence or under terms agreed with the appropriate reprographics  
rights organization. Enquiries concerning reproduction outside the scope of the  
above should be sent to the Rights Department, Oxford University Press, at the  
address above

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

Library of Congress Control Number: 2014951369

ISBN 978-0-19-969830-1

Printed and bound by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and  
for information only. Oxford disclaims any responsibility for the materials  
contained in any third party website referenced in this work.

OXFORD STUDIES IN EUROPEAN LAW

*Series Editors*

PAUL CRAIG

*Professor of English Law at St John's College, Oxford*

GRÁINNE DE BÚRCA

*Professor of Law at New York University School of Law*

The Constitutional  
Foundations of European  
Contract Law

*A Comparative Analysis*

## OXFORD STUDIES IN EUROPEAN LAW

### *Series Editors*

Paul Craig, Professor of English Law at St John's College, Oxford and  
Gráinne de Búrca, Professor of Law at New York University School of Law

The aim of this series is to publish important and original research on EU law. The focus is on scholarly monographs, with a particular emphasis on those which are interdisciplinary in nature. Edited collections of essays will also be included where they are appropriate. The series is wide in scope and aims to cover studies of particular areas of substantive and of institutional law, historical works, theoretical studies, and analyses of current debates, as well as questions of perennial interest such as the relationship between national and EU law and the novel forms of governance emerging in and beyond Europe. The fact that many of the works are interdisciplinary will make the series of interest to all those concerned with the governance and operation of the EU.

### OTHER TITLES IN THIS SERIES

- |  |  |
|--|--|
| The Constitutional Foundations of<br>European Contract Law<br>A Comparative Analysis<br>Kathleen Gutman                    | The Legal Effect of EU Agreements<br>Mario Mendez  |
| The Criminalization of European Cartel<br>Enforcement<br>Theoretical, Legal, and Practical Challenges<br>Peter Whelan      | The Foundations of European Union<br>Competition Law<br>The Objective and Principles of<br>Article 102<br>Renato Nazzini |
| Fundamental Rights in Europe<br>Challenges and Transformations in<br>Comparative Perspective<br>Federico Fabbrini          | The Emergence of EU Contract Law<br>Exploring Europeanization<br>Lucinda Miller  |
| The Principle of Loyalty in EU Law<br>Marcus Klamert   | Participation in EU Rule-making<br>A Rights-Based Approach<br>Joana Mendes   |
| Constitutional Pluralism in the EU<br>Klemen Jaklic  | Regulating Cartels in Europe<br>Second Edition<br>Christopher Harding and Julian Joshua                                  |
| EU Consumer Law and Human Rights<br>Iris Benöhr  | Religion and the Public Order of the<br>European Union<br>Ronan McCrea   |
| The Principle of Mutual Recognition<br>in EU Law<br>Christine Janssens   | Governing Social Inclusion<br>Europeanization through<br>Policy Coordination<br>Kenneth A Armstrong                      |
| The Coherence of EU Free<br>Movement Law   | Judicial Control in the European Union<br>Reforming Jurisdiction in the<br>Intergovernmental Pillars<br>Alicia Hinarejos |
| Constitutional Responsibility and the<br>Court of Justice<br>Niamh Nic Shuibhne  | EU Counter-Terrorist Policies and<br>Fundamental Rights<br>The Case of Individual Sanctions<br>Christina Eckes           |
| European Law and New Health Technologies<br>Edited by Mark Flear, Anne-Maree Farrell,<br>Tamara Hervey, and Thérèse Murphy |  |
| European Agencies<br>Law and Practices of Accountability<br>Madalina Busuioc   |  |

*This book is dedicated to the memory of my mother and father,  
Donna and Stanley Gutman*

## Foreword

Kathleen Gutman's book, which is based on her PhD thesis, is an impressive piece of academic work. As her PhD supervisor, I was a first-hand witness of her openness towards different ideas and critical comments, her perseverance in constructing a convincing argument, and the enormous amount of research and analytical thinking that she put into it.

This book contains a detailed and cohesive assessment of the constitutional foundations of European contract law. It is not, however, limited to examining the vertical allocation of powers between the EU and its Member States in the field of contract law. As she herself explains, the exercise of powers at EU level 'is not the only element in the debate about European contract law, but it is an important one that permeates the others'. Accordingly, the book also looks at alternative and complementary routes to the adoption of instruments that aim to achieve a degree of convergence between the contract laws of the Member States. This shows that the development of European contract law has not only a 'top-down' dimension in accordance with the EU constitutional principles of conferral, subsidiarity and proportionality, but may also be the result of a 'bottom-up' approach.

In addition, the book is enriched by Kathleen Gutman's expertise in US law. As a secondary research focus, the book embarks on a very interesting comparative study with regard to the constitutional dimensions of contract law on both sides of the Atlantic. Throughout her meticulous analysis, the author draws important lessons from the US experience on issues such as the federalization of contract law, federal common law, the uniform law process and the Uniform Commercial Code.

Like all great classics, this book is divided into three parts. Part I defines the context in which the debate about European contract law should, in the author's view, take place. At the outset, she brings to the reader's attention the fact that there are no universal definitions of key concepts such as 'contract law' and 'private law'. Accordingly, by defining those key concepts, the author stresses the importance of semantic clarification as the pre-condition for a productive discussion. Next, she moves on to examine the EU legislative instruments that constitute the 'hard core' of the EU contract law *acquis*, and the way in which the ECJ has interpreted them. Written with an audience unfamiliar with the American contract law framework in mind, this Part of the book also comprises a concise account of the way in which the constitutional dimensions of contract law have developed in the US.

In Part II, the book sets out, in a chronological order, the main events that have given rise to the debate about European contract law. It looks, for example, at the influence of the Commission's three seminal Communications on European contract law, as well as at the reasons that triggered the adoption of the Consumer Rights Directive. This part of the book seeks to determine, in particular, whether the constitutionality of European contract law has ever been considered, either implicitly or explicitly, at European level.

Once the contours of the debate about European contract law have been drawn, Part III begins by examining whether the EU has power to act in the field of contract law. To that end, the author explores whether and, if so, to what extent Articles 81, 114, 115, 169, 352 TFEU may operate as appropriate legal bases for the adoption of a European contract law instrument. In so doing, she examines the problems connected with the principles of subsidiarity and proportionality that the EU legislator

may encounter. The absence of legislative competence at EU level does not, however, put an end to the Europeanization of contract law. For example, by looking at the US experience, the strengths and weaknesses of softer policy-making techniques, such as the Open Method Coordination (OMC), are also examined.

Finally, the concluding chapter of the book supports the contention that Article 114 TFEU and, as the case may be, Article 352 TFEU constitute a proper legal basis for the adoption of a European contract law instrument. Whilst Articles 81, 115, and 169 TFEU may not secure compliance with the principle of conferral, they have, nonetheless, an indirect role in highlighting the viability of the EU's internal market competence under Article 114 TFEU. As to the OMC, she notes that, because of its limitations, it may only serve as a complementary route for pursuing the European contract law project.

Written in a clear and entertaining style, this book succeeds in providing a solid analytical basis for future debates about European contract law. It is a thoughtful and rigorous study that addresses a challenging set of questions for lawyers, scholars and students in both Europe and the US. Overall, the book written by Kathleen Gutman is an excellent contribution to the literature on European Union law and I warmly congratulate her.

Prof. Dr. Koen Lenaerts  
Vice-President of the Court of Justice of the European Union



## *Series Editors' Preface*

The European Union has adopted a range of measures in the field of private and contract law, and a debate on the desirability and feasibility of harmonizing European contract law has been active for some years now. Kathleen Gutman's book makes an informative and important contribution to this debate by focusing not just on the movement to unify or harmonize European private law, but specifically on the question of the legal and constitutional basis for EU contract law.

Noting that the political and legal debate on the unification of European private law has proceeded apace with surprisingly little attention being given to the underlying question of the nature and scope of the EU's competence to take action in this field, the author sets out to remedy that deficit in this book. The chapters in the first part of the book address both abstract and concrete aspects of the topic, from a survey of different models of approximation of contract law, to an examination of some of the major pieces of EU contract legislation such as the Doorstep Selling Directive, the Consumer Credit Directive, the Commercial Agents Directive and the Unfair Contract Terms Directive, and to an analysis of the approach of the EU Court of Justice.

These EU-focused chapters are followed by an interesting and instructive comparison with the experience of the United States in which contract law has been treated as remaining largely within the purview of states, with federal intervention coming largely in the form of restatements, uniform and model laws, and the Uniform Commercial Code. Analysing the various instruments and approaches adopted in the US context, the author warns against any easy assumption about the success of the US approach to the question of a uniform American contract law or its applicability to the EU context, and points to the range of tensions and debates which continue in the United States today.

In the second part of the book, Gutman presents the evolution of the debate which has taken place in Europe since the earliest days of European integration on the feasibility and desirability of harmonizing private law, and surveys the various academic and institutional contributions to this debate. She traces the debate across the decades, leading to the emergence of the Common Frame of Reference and numerous initiatives which followed it, and giving particular attention to the influential interventions of the Commission in the debate.

The final chapters of the book are devoted to an examination of what Gutman calls the constitutionality of the adoption of EU measures in the field of contract law – including their possible legal basis in provisions of the Treaties dealing with the internal market, consumer law and civil justice – as well as their compliance with principles of subsidiarity, proportionality and sincere cooperation. She concludes by arguing that the EU enjoys sufficient competence to adopt an appropriate European contract law instrument under the internal market provisions of the Treaty, perhaps in conjunction with the residual powers clause, and alongside various alternative and complementary routes such as the Open Method of Coordination.

This is a very clearly written, meticulous, and comprehensive work on an important subject of considerable contemporary interest in EU and private law. It should be of considerable interest to scholars and students of European integration and to contract and private lawyers alike.

Gráinne de Búrca  
Paul Craig

## Acknowledgments

This book is based on my doctoral thesis defended at the University of Leuven in 2010. Unknowingly, what started out as a glance at an issue of the *European Review of Private Law* became both an academic and personal passion. One could even say that this subject found me, instead of the other way around. It combined my interests in various fields of European Union law, such as constitutional, private, and procedural law, and their counterparts in American law. It also captured my penchant for delving into subjects that had not yet been fully explored in either the European or the American settings. Yet, there were some trade-offs in undertaking this work, and truthfully, at times, it resembled something akin to the 'Myth of Sisyphus', where the more I attempted to go forward, the more I became mired in a sea of further unknowns, innumerable complexities, and of course considerable controversy. Thankfully, there were several persons who helped me along the way to bring this book to completion.

First and foremost, to my promoter, Professor Dr Koen Lenaerts, under whom I worked as a doctoral assistant and a post-doctoral fellow at the Institute for European Law of the University of Leuven, words cannot do justice to the ways in which he has given me invaluable guidance and helped me to grow in my academic career generally. I would also like to thank the other members of my doctoral jury, Professor Dr Wouter Devroe for his never-ending encouragement, as well as Professor Dr Jules Stuyck, Professor Dr Verica Trstenjak, and Professor Stephen Weatherill, all of whom prompted me to rethink and fine-tune my analysis of various points.

Secondly, there are several members of the Law Faculty of the University of Leuven, including Professor Dr Geert De Baere, Professor Dr Sophie Stijns, Professor Dr Geert Van Calster, Professor Dr Walter van Gerven, and Professor Dr Piet Van Nuffel, who inspired me along the way. And in the United States, a special note of appreciation goes to Professor Stephen Wallenstein for his support since my days as a law school student at the Duke University School of Law.

Thirdly, there are various persons and institutions without which the research for this book would not have been possible. I would like to thank the staff of the Law Library of the University of Leuven, particularly Jorinde Sercu who went beyond the call of duty to process my interlibrary loan requests and locate various publications on my behalf. I would also like to thank the Historical Archives of the European Commission, Claude Kappella of the European Economic and Social Committee Document Registry, and, most importantly, the European Parliament Document Registry for locating numerous documents that were pivotal to my research. I am further indebted to Pierre Schmitt for his translation of certain materials, and to Frans Van de Ven and Robin Schouten for their help with the logistics of relocating my research materials overseas.

Turning to the United States, I would like to express my utmost appreciation to Rodney A Ross of the Center for Legislative Archives. His invaluable assistance in locating various Congressional bills and responding to my numerous questions helped to make this book what it is, and, in fact, these materials proved to be one of the most eye-opening and exciting parts of my research. I would also like to thank the staff of the Law Libraries of Harvard University, New York University (NYU), and especially the University of California at Berkeley (Boalt) for allowing me access to their facilities and helping me to locate publications that would have been difficult to find elsewhere.

Fourthly, I owe a debt of gratitude to all those persons at Oxford University Press who helped to bring this book to print. In particular, this includes my editor Natasha Flemming for her patience and understanding throughout the process.

Finally, on a personal note, I feel grateful to say that I have four sets of ‘families’ whose support has been invaluable. My first ‘family’ is the Institute for European Law of the University of Leuven, which in addition to the above comprises Viviane Verbist, the Administrator of the Institute, and my colleagues, past and present—Angelina, Janek, Jos, Karl, Kristien, Marlies, Nana, Nathan, Pieter-Augustijn, Roel, Tim, Timothy, Tina, Tinne, Vanessa, and Vincent. My second ‘extended family’ from the second floor of the Valk and neighbouring buildings includes Hanne, Katrien, Sanderijn, Charline, Pierre, Thalia, Iasson, Govert, Bart, Dimitri, Jed, Thomas, Valérie, and so many more. My third ‘family’ consists of my friends in Belgium and the United States, especially Marianick and Patrick, Yolande and Carl, Vanessa and Bruno, Elke and Stefan, Glory, Lex, Alice, and TGS. Finally, there is my real ‘family’, including my best friend and soul sister Paula, my partner in life Luis, and my surrogate sister and aunt, Julie and Carol, respectively. And to my late mother and father, Donna and Stanley Gutman, who did not live to see this book in print, thank you for making my dreams possible and giving me the courage to follow them.

Admittedly, with the completion of this book—which generally reflects the state of the activities and law as of 1 June 2013—the all-consuming debate about European contract law and European private law continues to progress. Given the fast-paced nature of this debate, it is surely a challenge to complete any work in this area that will not be superseded by events soon after, or even before, publication. Nevertheless, if this book can play some part in helping to facilitate the ‘constitutional conversation’ about European contract (and private) law in the European Union and the ‘comparative conversation’ with the United States, then that is more than I could have hoped for.

KRG

# *Abbreviations*

AALS	Association of American Law Schools
ABA	American Bar Association
ABAJ	American Bar Association Journal
ABLJ	American Business Law Journal
ADR	Alternative Dispute Resolution
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AJLH	American Journal of Legal History
Ala L Rev	Alabama Law Review
ALI	American Law Institute
Am Bankr LJ	American Bankruptcy Law Journal
APSR	American Political Science Review
BEUC	Bureau Européen des Unions de Consommateurs (European Consumers' Organization)
BCICL Rev	Boston College International and Comparative Law Review
BIICL	British Institute of International and Comparative Law
B2B	Business-to-business
B2C	Business-to-consumer
Buff L Rev	Buffalo Law Review
Bus Law	Business Lawyer
Cal L Rev	California Law Review
CAP	Common Agricultural Policy
Case WRL Rev	Case Western Reserve Law Review
CCBE	Council of Bars and Law Societies of Europe/Conseil des barreaux européens
CCPA	Consumer Credit Protection Act
CDC	Centre de droit de la consommation
CDE	Cahiers de droit européen
CECL	Commission on European Contract Law
CESL	Common European Sales Law
CFR	Common Frame of Reference
CFSP	Common Foreign and Security Policy
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEL	Columbia Journal of European Law
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Col L Rev	Columbia Law Review
Comm LJ	Commercial Law Journal
Cons LJ	Consumer Law Journal
Const Comm	Constitutional Comment
Cons Fin LQ Rep	Consumer Finance Law Quarterly Report
CML Rev	Common Market Law Review
CoR	Committee of the Regions
Croatian YELP	Croatian Yearbook of European Law and Policy
CSECL	Centre for the Study of European Contract Law
CST	EU Civil Service Tribunal

CYELS	Cambridge Yearbook of European Legal Studies
DC	District of Columbia
DCFR	Draft Common Frame of Reference
DCT	Draft Constitutional Treaty
DG	Directorate General
Del J Corp L	Delaware Journal of Corporate Law
DJCIL	Duke Journal of Comparative and International Law
Duquesne BLJ	Duquesne Business Law Journal
EAEC	European Atomic Energy Community
EBLR	European Business Law Review
EC	European Community or (after Article number) Treaty establishing the European Community before the entry into force of the Lisbon Treaty
ECB	European Central Bank
ECCG	European Consumer Consultative Group
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECL	European Contract Law
ECLG	European Consumer Law Group
E Const L Rev	European Constitutional Law Review
ECR	European Court Reports
ECSC	European Coal and Steel Community
Edin L Rev	Edinburgh Law Review
EEC	European Economic Community or (after Article number) Treaty establishing the European Economic Community
EESC	European Economic and Social Committee
EGC	General Court
EHLASS	European Home and Leisure Accidents Surveillance System
EIPA	European Institute of Public Administration
EIPR	European Intellectual Property Review
EJL & Econ	European Journal of Law and Economics
EJLR	European Journal of Legal Reform
ELF	The European Legal Forum
ELI	European Law Institute
ELJ	European Law Journal
Elon L Rev	Elon Law Review
ELR	European Law Review
Emory LJ	Emory Law Journal
EMU	Economic and Monetary Union
ENISA	European Network and Information Security Agency
EPL	European Public Law
ERA	Academy of European Law
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EU	European Union or (after Article number) Treaty on European Union before the entry into force of the Lisbon Treaty
EUVR	Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht/Journal of European Consumer and Market Law
Fordham ILJ	Fordham International Law Journal
Fordham L Rev	Fordham Law Review
FTC	Federal Trade Commission
FTT	Financial Transaction Tax

GLJ	German Law Journal
GPO	United States Government Printing Office
GPR	Zeitschrift für Gemeinschaftsprivatrecht/European Community Private Law Review/Revue de droit privé communautaire
Hamline L Rev	Hamline Law Review
Hanse L Rev	Hanse Law Review
Harv ILJ	Harvard International Law Journal
Harv L Rev	Harvard Law Review
Harv L & Pol'y Rev	Harvard Law and Policy Review
Hastings LJ	Hastings Law Journal
Hofstra L Rev	Hofstra Law Review
ICLQ	International and Comparative Law Quarterly
IEE	Institut d'études européennes
IGC	Intergovernmental Conference
Ind L Rev	Indiana Law Review
Intl Rev L & Econ	International Review of Law and Economics
Iowa L Rev	Iowa Law Review
JCL	Journal of Comparative Law
JCMS	Journal of Common Market Studies
JCP	Journal of Consumer Policy
JDI	Journal du droit international
JHA	Justice and Home Affairs
JI	Juridica International
J Mar L & Comm	Journal of Maritime Law and Commerce
JPIL	Journal of Private International Law
J Soc Comp Legis	Journal of the Society of Comparative Legislation
KCLJ	The King's College Law Journal
La L Rev	Louisiana Law Review
L & Contemp Probs	Law and Contemporary Problems
L & Hist Rev	Law and History Review
L & Soc Inquiry	Law and Social Inquiry
Lewis & Clark L Rev	Lewis and Clark Law Review
LIEI	Legal Issues of Economic Integration
Loy L Rev	Loyola Law Review
Loy LAL Rev	Loyola of Los Angeles Law Review
LQ Rev	Law Quarterly Review
Mercer L Rev	Mercer Law Review
MEP	Member of the European Parliament
METRO	Maastricht University Institute for Transnational Legal Research/Maastrichts Europees Instituut voor Transnationaal Rechtswetenschappelijk Onderzoek
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MMWA	Magnuson-Moss Warranty Act
NCCUSL	National Conference of Commissioners on Uniform State Laws
NCL Rev	North Carolina Law Review
NIL	Negotiable Instruments Law
Notre Dame L Rev	Notre Dame Law Review
NTIR	Nederlands Tijdschrift voor Internationaal Recht/Netherlands International Law Review
Nw UL Rev	Northwestern University Law Review

NY	New York
NYLF	New York Law Forum
NYSBJ	New York State Bar Journal
NYULQR	New York University Law Quarterly Review
NYUL Rev	New York University Law Review
Ohio St LJ	Ohio State Law Journal
OJ	Official Journal of the European Union
OJLS	Oxford Journal of Legal Studies
Okla L Rev	Oklahoma Law Review
OMC	Open Method of Coordination
Pace IL Rev	Pace International Law Review
Pace L Rev	Pace Law Review
PEB	Permanent Editorial Board
PECL	Principles of European Contract Law
PEICL	Principles of European Insurance Contract Law
PEL	Principles of European Law
Penn St IL Rev	Pennsylvania State International Law Review
Pepp L Rev	Pepperdine Law Review
PJCCM	Police and Judicial Cooperation in Criminal Matters
Rabels Z	Rabels Zeitschrift für ausländisches und internationales Privatrecht/ The Rabel Journal of Comparative and International Private Law (Rabels Z)
RAE	Revue des affaires européennes/Law & European Affairs
RCDIP	Revue critique de droit international privé/French publication on Private International Law
RDUE	Revue du droit de l'Union Européenne
REDC	Revue européenne de droit de la consommation/European Journal of Consumer Law
RIDC	Revue internationale de droit comparé
RTDC	Revue trimestrielle de droit civil
RTDE	Revue trimestrielle de droit européen
Rutgers-Cam LJ	Rutgers Camden Law Journal
San Diego L Rev	San Diego Law Review
SCE	Société coopérative européenne/Statute for a European Cooperative Society
SEA	Single European Act
S Ill ULJ	Southern Illinois University Law Journal
SME	Small and Medium-sized Enterprise
SPE	European Private Company
Stan L Rev	Stanford Law Review
St John's L Rev	St John's Law Review
St Louis ULJ	St Louis University Law Journal
Sw JIL	Southwestern Journal of International Law
TED	Tenders Electronic Daily
Temp L Rev	Temple Law Review
TEU	Treaty on European Union after the entry into force of the Lisbon Treaty
Tex L Rev	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
TFL Rev	Tilburg Foreign Law Review
The Harv Rev	The Harvard Review
Tul Eur & Civ LF	Tulane European and Civil Law Forum
Tul L Rev	Tulane Law Review

UCC	Uniform Commercial Code
UCCC	Uniform Consumer Credit Code
UC Davis L Rev	UC Davis Law Review
U Chi L Rev	University of Chicago Law Review
UCITA	Uniform Computer Information Transactions Act
U Colo L Rev	University of Colorado Law Review
U Ill L F	University of Illinois Law Form
U Kan L Rev	University of Kansas Law Review
ULC	Uniform Law Commission
UK	United Kingdom
U Miami L Rev	University of Miami Law Review
UN	United Nations
UNIDROIT	Institut international pour l'unification du droit privé/ International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review/Revue du droit uniforme
U Pa JIL	University of Pennsylvania Journal of International Law
U Pa L Rev	University of Pennsylvania Law Review
US	United States
Utah L Rev	Utah Law Review
Utrecht L Rev	Utrecht Law Review
TILEC	Tilburg Law and Economics Center
Va L Rev	Virginia Law Review
Vand L Rev	Vanderbilt Law Review
Vill L Rev	Villanova Law Review
Vt L Rev	Vermont Law Review
Wash ULQ	Washington University Law Quarterly
Willamette JIL & Disp Resol	Willamette Journal of International Law and Dispute Resolution
Wm & Mary L Rev	William & Mary Law Review
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal
YEL	Yearbook of European Law
YPIL	Yearbook of Private International Law
Z Eu P	Zeitschrift für Europäisches Privatrecht/Journal of European Private Law



# Table of Cases

## COURT OF JUSTICE

<i>Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms</i> (Opinion 2/94) [1996] ECR I-1759 . . . . .	362, 363
<i>AGM-COS.MET</i> (Case C-470/03) [2007] ECR I-2749 . . . . .	33
<i>Agreement establishing the World Trade Organization</i> (Opinion 1/94) [1994] ECR I-5267 . . . . .	29, 365
<i>Alliance for Natural Health and Others</i> (Joined Cases C-154/04 and C-155/04) [2005] ECR I-6451 . . . . .	323, 333, 334, 340, 351, 352
<i>Alsthom Atlantique</i> (Case C-339/89) [1991] ECR I-107 . . . . .	341
<i>Arnold André</i> (Case C-434/02) [2004] ECR I-11825 . . . . .	323, 332, 351, 352
<i>Asbeek Bruse and de Man Garabito</i> (Case C-488/11), Judgment of 30 May 2013, not reported . . . . .	70
<i>Asturcom Telecomunicaciones</i> (Case C-40/08) [2009] ECR I-9579 . . . . .	70
<i>Aziz</i> (Case C-415/11), Judgment of 14 March 2013, not reported . . . . .	70, 74, 75
<i>Banco Español de Crédito</i> (Case C-618/10), Judgment of 14 June 2012, not reported . . . . .	70, 80
<i>BanifPlus Bank</i> (Case C-472/11), Judgment of 21 Feb 2013, not reported . . . . .	70
<i>Bejan</i> (Case C-102/10) [2010] ECR I-139*, Summ pub. . . . .	394
<i>Benincasa</i> (Case C-269/95) [1997] ECR I-3767 . . . . .	394
<i>Berliner</i> (Case C-208/98) [2000] ECR I-1741 . . . . .	65, 67, 68, 69
<i>Bonn Fleisch</i> (Case C-1/06) [2007] ECR I-5609 . . . . .	85
<i>British American Tobacco (Investments) and Imperial Tobacco ('BAT')</i> (Case C-491/01) [2002] ECR I-11453 . . . . .	324, 329, 331, 332, 335, 337, 339, 345, 351, 352
<i>C</i> (Case C-435/06) [2007] ECR I-10141 . . . . .	426, 438
<i>Caffaro</i> (Case C-265/07) [2008] ECR I-7085 . . . . .	35, 444
<i>Caja de Ahorros y Monte de Piedad de Madrid</i> (Case C-484/08) [2010] ECR I-4785 . . . . .	35, 74
<i>Clinique La Ramée and Winterthur Europe Assurance</i> (Case C-397/02) [2004] ECR I-7947 . . . . .	80
<i>CMC Motorradcenter</i> (Case C-93/92) [1993] ECR I-5009 . . . . .	341
<i>Cofidis</i> (Case C-473/00) [2002] ECR I-10875 . . . . .	70
<i>Color Drack</i> (Case C-386/05) [2007] ECR I-3699 . . . . .	29
<i>Commerzbank Frankfurt</i> (Case C-24/93), withdrawn . . . . .	66
<i>Commission v Belgium</i> (Case C-312/03) [2004] ECR I-1975 . . . . .	85
<i>Commission v Council ('Titanium Dioxide')</i> (Case C-300/89) [1991] ECR I-2867 . . . . .	288, 290, 291, 321, 322, 327, 329, 346, 348, 364
<i>Commission v Council</i> (Case C-271/94) [2004] ECR I-4829 . . . . .	315
<i>Commission v Council ('CIS')</i> (Case C-209/97) [1999] ECR I-8067 . . . . .	323
<i>Commission v Council</i> (Case C-338/01) [2004] ECR I-4829 . . . . .	315, 318
<i>Commission v Council</i> (Case C-94/03) [2006] ECR I-1 . . . . .	288
<i>Commission v Council</i> (Case C-533/03) [2006] ECR I-1025 . . . . .	315
<i>Commission v Council</i> (Case C-370/07) [2009] ECR I-8917 . . . . .	287, 289
<i>Commission v European Parliament and Council</i> (Case C-178/03) [2006] ECR I-107 . . . . .	288, 289
<i>Commission v European Parliament and Council</i> (Case C-411/06) [2009] ECR I-7585 . . . . .	289
<i>Commission v France</i> (Case C-52/00) [2002] ECR I-3827 . . . . .	394, 395
<i>Commission v France</i> (Case C-311/03), Judgment of 1 July 2004, not reported . . . . .	85
<i>Commission v France</i> (Case C-177/04) [2006] ECR I-2461 . . . . .	395
<i>Commission v Germany</i> (Case C-539/09) [2011] ECR I-11235 . . . . .	298
<i>Commission v Greece</i> (Case C-154/00) [2002] ECR I-3879 . . . . .	394, 395
<i>Commission v Italy</i> (Case C-91/79) [1980] ECR 1099 . . . . .	329
<i>Commission v Italy</i> (Case C-193/80) [1981] ECR 3019 . . . . .	340