Comparative foundations of a European law of set-off and prescription

Reinhard Zimmermann.

COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION

The emergence of a European private law is one of the great issues on the legal agenda of our time. Among the most prominent initiatives furthering this process is the work of the Commission on European Contract Law ('Lando Commission'). The essays collected in this volume have their origin within this context. They explore two practically very important topics which have hitherto been largely neglected in comparative legal literature: set-off and 'extinctive' prescription (or limitation of actions). Professor Zimmermann lays the comparative foundations for a common approach which may provide the basis for a set of European principles.

At the same time, the essays provide practical examples of the arguments that can be employed in the process of harmonizing European private law on a rational basis: they consider the comparative experiences in the various modern legal systems, they explore the extent to which there is a common core of values, rules and concepts, they explain existing differences and they analyse the direction in which the international development is heading.

The introduction to the present volume discusses the terms of reference of the Lando Commission that has set itself the task of elaborating a 'restatement' of European contract law and places its work within the wider context of the Europeanization of private law.

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PREFACE

Comparative legal scholarship in the twentieth century has been dominated by private law; within private law by the law of obligations; within the law of obligations by tort/delict and contract; and within contract by a standard range of topics including conclusion of contract, validity, breach of contract and third-party rights. The magisterial treatise by Zweigert and Kötz both reflected and largely determined that agenda. That treatise has prepared the ground for intense scholarly discussions on offer and acceptance, causa and consideration, specific performance, frustration and privity, to mention some examples. At the same time, however, even within the law of obligations a number of topics not discussed by Zweigert and Kötz have received only scant attention. Set-off and (negative) prescription/limitation of claims are among those topics. Conditions, substitution of debtors and plurality of debtors or creditors might also be mentioned. Even the great *International Encyclopedia of Comparative Law* neglects these topics. One can only speculate about the reasons. Is it because they offer 'fearsome technicalities but few issues that really stir the blood' (Rory Derham, *Set-off*, 2nd edn, 1996, VII)?

The three essays collected in this booklet attempt to explore two of these hitherto comparatively neglected areas. They originated within the context of the Commission on European Contract Law ('Lando Commission'). First drafts of all three papers were submitted as 'position papers' for

that commission. The approach adopted towards the two topics covered by them is slightly different. The chapter on set-off is based on as many legal systems of the European Union as were accessible to me. The framework for the two prescription papers is both wider and narrower. Fewer legal systems of the European Union have been taken into consideration. But an attempt has been made to integrate the wider international trends and developments. For the private law of the European Union cannot be looked at in isolation. Thus, obviously, the Uncitral Convention had to be considered. But even legal systems as far away as Québec or South Africa can offer interesting perspectives, not only because both legal systems once inherited their private laws from Europe but also particularly in view of the fact that in reforming their prescription laws they have taken account of the experiences gathered in Europe (and elsewhere). I have benefited very much from the critical discussion of my papers in the commission, from advice on matters of content and style by Hugh Beale and Roy Goode, and from a very intensive discussion on the law of prescription at a meeting of a small working party consisting of Ole Lando, Ulrich Drobnig, Hugh Beale and Ewoud Hondius at Goodhart Lodge in Cambridge. I am very grateful to all my colleagues on the commission and in that working party. At the same time, it must be emphasized that the views expressed in these papers in no way commit or prejudice the commission. Earlier versions of two of the three chapters have appeared in Germany.

At the same time, these chapters constitute practical exercises in the Europeanization of private law. The emergence of a European private law is one of the great issues on the legal agenda of our time. Much has been written about it. In particular, there has been considerable discussion as to the approach to be adopted. I do not think that there is only one approach. As in early nineteenth-century Germany this

is the hour of legal scholarship; and legal scholarship both requires and encourages a stimulating diversity of outlook and approach. Many different paths will be, and will have to be, explored. The same method may not prove fruitful for all problems. In many instances we will find a common core of values, rules and concepts. In others we can discern, by looking beyond our national borders, a European or even international development clearly heading in a particular direction. It may be helpful to demonstrate that differences between two or more legal systems are not as great as is commonly presumed; or that an approach prevailing in another country has also once prevailed in ours. It may be necessary, occasionally, to remove ideological preconceptions that have become firmly entrenched in more than one hundred years of national legal scholarship. Often we will be able to learn from past experiences, equally often from the experiences in other countries. Such experiences will provide arguments for making a rational choice between conflicting solutions. Sometimes we will also find that for a long time we have been caught up in thinking patterns of the past. Any enlargement of the lawyer's horizon, as Ernst Rabel has said, will bear reward. The three essays collected in this volume attempt to prove the truth of this statement. They neither follow nor develop a master-method. But they provide practical examples for the arguments sketched in the previous sentences.

I had the great privilege of spending the academic year 1998/9 as A. L. Goodhart Professor of Legal Science in the University of Cambridge and as a Fellow of St John's College, Cambridge. I am very grateful to my friends and colleagues both in the Faculty of Law and at St John's for having invited me and for making my time in Cambridge so memorable and enjoyable. I first learnt about the Goodhart Chair when I read the preface of Raoul van Caenegem's famous book on *Judges, Legislators and Professors: Chapters in European*

Legal History. It is based on a course of lectures given as Goodhart Professor in 1984/5. A few years later John Fleming also published his Goodhart Lectures for 1987/8 under the title *The American Tort Process*. The modest and preliminary reflections in this volume are quite different in scope and ambition from these predecessor volumes. Like them, however, the present collection of essays is inspired by the desire to establish a small token of my gratitude. It can only claim the title of 'Goodhart Lectures' in a very liberal sense of the word; for while the course I taught in 1998/9 in Cambridge did cover the work of the Contract Law Commission as well as my thoughts on set-off and prescription, it extended far beyond these topics in that it dealt with the development of European private law in general. But much of my time in Cambridge in the course of spring and summer 1999 was devoted to the preparation of the material presented in this volume.

Among my friends in Cambridge I am particularly grateful to David Johnston and Neil Andrews for sharing their thoughts on prescription with me. I also wish to record my thanks to Catherine Maxwell (Cape Town/Regensburg) and Oliver Radley-Gardner (Oxford/Regensburg) for their help in preparing this volume.

GOODHART LODGE
Summer 1999

ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch
AC	Appeal Cases
Amb.	Ambler's Chancery Reports
AO	Abgabenordnung
AtomG	Atomgesetz
B & S	Best & Smith's Queen's Bench Reports
BGB	Bürgerliches Gesetzbuch
BGB-KE	Bürgerliches Gesetzbuch, Kommissionsentwurf (draft of the German law of prescription submitted by the commission charged with the reform of the law of obligations)
BGB-PZ	Bürgerliches Gesetzbuch, Peters and Zimmermann (draft of the German law of prescription submitted by Frank Peters and Reinhard Zimmermann at the request of the German minister of justice)
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Burr.	Burrow's King's Bench Reports
BW	Burgerlijk Wetboek
CISG	Convention for the International Sale of Goods
DLR	Dominion Law Reports
ECJ	European Court of Justice
ER	English Reports
HaftpflG	Haftpflichtgesetz
Hare	Hare's Chancery Reports
HGB	Handelsgesetzbuch
HL	House of Lords

HR	Hoge Raad
Jac & W	Jacob & Walker's Chancery Reports
Lev	Levinz's King's Bench and Common Pleas Reports
LuftVG	Luftverkehrsgesetz
OJEC	Official Journal of the European Communities
OR	Bundesgesetz über das Obligationenrecht
PECL	Principles of European Contract Law
PflVersG	Pflichtversicherungsgesetz
PIQR	Personal Injuries and Quantum Reports
PrALR	Preußisches Allgemeines Landrecht
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
SC	Session Cases
SCR	Supreme Court Reports
StVG	Straßenverkehrsgesetz
Willes	Willes Common Pleas Reports, ed. Dunford
WLR	Weekly Law Reports
ZGB	Schweizerisches Zivilgesetzbuch
ZGB (GDR)	Zivilgesetzbuch (German Democratic Republic)
ZPO	Zivilprozeßordnung

INTRODUCTION: TOWARDS A RESTATEMENT OF THE EUROPEAN LAW OF OBLIGATIONS

I THE EUROPEANIZATION OF PRIVATE LAW AND LEGAL SCHOLARSHIP

One of the most significant legal developments of our time has been the gradual emergence of a European private law.[1] This process was driven, initially, by the regulations and directives issued by the competent bodies of the European Union[2] and by the decisions of the European Court of Justice.[3] Our general frame of mind, however, has long

[1] See, e.g., the contributions to Nicolò Lipari (ed.), *Diritto Privato Europeo* (1997); Arthur Hartkamp, Martijn Hesselink et al., *Towards a European Civil Code* (2nd edn, 1998); Thomas G. Watkin (ed.), *The Europeanisation of Law* (1998) (also covering other areas of the law); Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in der europäischen Gemeinschaft* (2nd edn, 1999); Martin Gebauer, *Grundfragen der Europäisierung des Privatrechts* (1998); Jan Smits, *Europees Privaatrecht in wording* (1999); Arthur Hartkamp, 'Perspectives for the Development of a European Civil Law', in Mauro Bussani and Ugo Mattei (eds.), *Making European Law: Essays on the 'Common Core' Project* (2000), pp. 39ff.; on contract law, see Jürgen Basedow, 'The Renascence of Uniform Law: European Contract Law and Its Components', (1998) 18 *Legal Studies* 121ff.

[2] For a collection of all directives (and other relevant texts) affecting the law of obligations, see Reiner Schulze and Reinhard Zimmermann (eds.), *Basistexte zum europäischen Privatrecht* (2000); see also Stefan Grundmann, *Europäisches Schuldvertragsrecht* (1999).

[3] On the importance of which see, for instance, the contributions by David A. O. Edward and Lord Mackenzie Stuart, both in David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law* (1997), pp. 307ff., 351ff.; W. van Gerven, 'ECJ Case-Law as a Means of Unification

remained untouched by these developments; it is still predominantly moulded by the national systems of private law. Only comparatively recently has the perception been gaining ground that considerable efforts are required to overcome this somewhat anachronistic discrepancy; and that a new European legal culture can emerge, organically, only by an interaction of several, hitherto largely separate, disciplines: European community law and modern private law doctrine, comparative law[4] and legal history.[5] Also to be taken into account is the uniform private law based on international conventions and covering important areas of commercial law.[6] In a programmatic article published in 1990, Helmut Coing called for a 'Europeanization of Legal Scholarship',[7] and he drew attention to the *ius commune* as a historical, and to the private law of the United States as a modern, model. In the meantime, some measure of progress has been made. Legal periodicals have been established that pursue the objective of promoting the development of a European private law;[8] textbooks have been written that analyse particular areas of private law under a genuinely

of Private Law?', (1997) 5 *European Review of Private Law* 293ff.; most recently, see the analysis by Martin Franzen, *Privatrechtsangleichung durch die europäische Gemeinschaft* (1999), pp. 291ff.

[4] See, e.g., Hein Kötz, 'Rechtsvergleichung und gemeineuropäisches Privatrecht', in Müller-Graff (n. 1) 149ff.; Abbo Junker, 'Rechtsvergleichung als Grundlagenfach', (1994) *Juristenzeitung* 921ff.

[5] See, e.g., Reinhard Zimmermann, 'Das römisch-kanonische *ius commune* als Grundlage europäischer Rechtseinheit', (1992) *Juristenzeitung* 8ff.

[6] See, e.g., Jan Ramberg, *International Commercial Transactions* (1997), and the contributions in Franco Ferrari (ed.), *The Unification of International Commercial Law* (1998).

[7] Helmut Coing, 'Europäisierung der Privatrechtswissenschaft', (1990) *Neue Juristische Wochenschrift* 937ff.

[8] The first ones were *Zeitschrift für Europäisches Privatrecht* and *European Review of Private Law*; both started to appear in 1993.

European perspective and deal with the rules of German, French or English law as local variations of a general theme;[9] ambitious research projects have been launched that attempt to find a 'common core' of the systems of private law prevailing in Europe;[10] more and more law faculties in Europe attempt to attain a 'Euro'-profile by establishing integrated courses and programmes with European partner faculties, or by setting up chairs in European private law or European legal history; bold schemes like the establishment of a European law school[11] or even of a European Law Institute are being discussed;[12] and so forth. Twenty years ago, all this was hardly imaginable.

[9] See the programme sketched by Hein Kötz, 'Gemeineuropäisches Zivilrecht', in *Festschrift für Konrad Zweigert* (1981), p. 498, and now implemented in Hein Kötz, *European Private Law*, vol. 1 (1997, transl. T. Weir); see also Christian von Bar, *The Common European Law of Torts*, vol. 1 (1998), vol. II (2000); Filippo Ranieri, *Europäisches Obligationenrecht* (1999). For the historical background, see Helmut Coing, *Europäisches Privatrecht*, vol. I (1985), vol. II (1989); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, paperback edn 1996).

[10] On the Trento 'common core' project, see the contributions in Bussani and Mattei (n. 1). The first volume to have appeared is Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000).

[11] For proposals for a Europeanization of legal education, see Axel Flessner, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', (1992) 56 *RabelsZ* 243ff.; Gerard-René de Groot, 'European Legal Education in the Twenty-First Century', in Bruno de Witte and Caroline Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (1992), pp. 7ff.; Hein Kötz, 'Europäische Juristenausbildung', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 268ff.; Roy Goode, 'The European Law School', (1994) 13 *Legal Studies* 1ff.

[12] Werner Ebke, 'Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute?', in *Festschrift für Bernhard Großfeld* (1999), pp. 189ff.

II THE COMMISSION ON EUROPEAN CONTRACT LAW

1 *First commission*

A particularly interesting initiative that has been taken, in this context, was the establishment of a Commission on European Contract Law. It came into being as a result of a private initiative but its work has been financially supported, for many years, by the Commission of the European Communities. The Contract Law Commission (which consisted initially of about fifteen lawyers drawn from all member states of the European Union) has set itself the task of working out Principles of European Contract Law and laying them down in a code-like form. For it was realized, at the outset, that the Rome Convention on the Law Applicable to Contractual Obligations was inadequate to ensure the smooth functioning of an internal market as envisaged by Art. 8 a of the EEC Treaty. Thus, already in 1976, Ole Lando called for a European Uniform Commercial Code.[13] In the course of two subsequent symposia in Brussels in 1980 and 1981 the commission constituted itself and decided on its schedule of work. By 1990, it had met twelve times in various European cities. It was chaired by Ole Lando of the Copenhagen Business School. England was represented by Roy Goode and, since 1987, Hugh Beale, Scotland by Bill Wilson. As the European Community increased, so did the Commission on European Contract Law: members for Spain, Portugal and Greece were co-opted. In 1995, after more than fourteen years of work, the first

[13] Ole Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code', in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (1978), pp. 267ff.

volume of the *Principles of European Contract Law* was published.[14] The preface lists all members of the commission and describes the working method that was adopted. The volume consists of an introductory overview which sets out the objectives pursued by the Principles and outlines their main content. This is followed by the text of the fifty-nine articles in which these Principles are laid down. The main part is made up of comments which have been drafted for every article; in addition, in most cases short comparative notes have been included. The volume is written in English; the provisions themselves, however, have also been translated into French. The Principles were subdivided into four chapters: the first containing 'general provisions', the second dealing with 'terms and performance of the contract' and the third and fourth being devoted to 'non-performance'.[15]

[14] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Part I (1995). A French translation of the entire volume appeared in 1997: Isabelle de Lamberterie, Georges Rouhette and Denis Tallon (eds.), *Les principes du droit européen du contrat*. A German translation of the articles was published in (1995) 3 *Zeitschrift für Europäisches Privatrecht* 864ff.

[15] For comment, see Ole Lando, 'Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?', (1992) 56 *RabelsZ* 261ff.; Lando, 'Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law', (1993) 1 *European Review of Private Law* 157ff.; Ulrich Drobnig, 'Ein Vertragsrecht für Europa', in *Festschrift für Ernst Steindorff* (1990), pp. 1141ff.; Hugh Beale, 'Towards a Law of Contract for Europe: The Work of the Commission on European Contract Law', in Günter Weick (ed.), *National and European Law on the Threshold to the Single Market* (1993), pp. 177ff.; Oliver Remien, 'Möglichkeiten und Grenzen eines europäischen Vertragsrechts', in (1991) *Jahrbuch Junger Zivilrechtswissenschaftler* 103ff.; Reinhard Zimmermann, 'Konturen eines Europäischen Vertragsrechts', (1995) *Juristenzeitung* 477ff.; and see the contributions to Hans-Leo Weyers (ed.), *Europäisches Vertragsrecht* (1997) and to the *Festskrift til Ole Lando* (1997).

2 Second and third commissions

By the time Part I of the Principles was published, a second commission had constituted itself and had started work on formation of contracts, validity, interpretation and agency. Since its inaugural meeting in 1992 the second commission has met eight times; it concluded its deliberations in 1996. Over the course of time, it has been joined by members for Austria, Sweden and Finland. Once again, the task of editing the work produced by the commission was undertaken by Ole Lando and Hugh Beale.[16] At the same time, Part I was slightly revised and amended. The volume published early in 2000, therefore, contains a consolidated version of Parts I and II. As a result, the numbering of the articles contained in volume I has changed, a fact which has occasionally caused slight irritation. In view of the way in which the Principles have originated this was, however, unavoidable. In its new version the Principles contain 131 articles organized into nine chapters; for the rest the structure of the volume corresponds to that of its forerunner.[17]

In the course of the final meeting of the second commission, a third commission was created which started its work in December 1997 in Regensburg. The topics under consideration are plurality of debtors and creditors, assignment of claims, substitution of debtor and transfer of contract, set-off, prescription, illegality, conditions and capitalization of interests. The third commission thus moves into a number

[16] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (2000). French and German translations of the entire volume are in preparation. For a German translation of the text of the articles, see Schulze and Zimmermann (n. 2) 111.10.

[17] For comment, see Reinhard Zimmermann, 'Die "Principles of European Contract Law", Teile I und II', (2000) 8 *Zeitschrift für Europäisches Privatrecht* 391ff. and the contributions to (2000) *Nederlands Tijdschrift voor Burgerlijk Recht* 428ff.

of fields which have largely been neglected in comparative legal literature. In addition, some of the topics mentioned go beyond the area of contract law; they would be classified as belonging to the general law of obligations, or even the general part of private law, in Germany. The third commission is partly identical with the second (as was the second with the first); it numbers twenty-three members (plus observers from Norway and Switzerland). It is hoped that the results of the work of the third commission will be published in 2002 or 2003. The studies contained in the present volume have their origin in the context of that third commission.

III OBJECTIVES OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW

The structure of what is now the consolidated version of Parts I and II shows that the Principles have been inspired by the idea of the American Restatements.[18] Like the Restatements, the Principles of European Contract Law are not aimed at becoming law that is directly applicable. Rather, according to the statement of their authors,[19] the Principles are intended (i) to facilitate cross-border trade within Europe by providing contracting parties with a set of rules which are independent of the peculiarities of the different national legal systems and on which they can agree to subject their transaction; (ii) to offer a general conceptual and systematic basis for the further harmonization of contract law within

[18] On which see, e.g., Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, 1998, transl. Tony Weir), pp. 251f.; W. Gray, 'E pluribus unum? A Bicentennial Report on Unification of Law in the United States', (1986) 50 *RabelsZ* 119ff.; James Gordley, 'European Codes and American Restatements: Some Difficulties', (1981) 81 *Columbia Law Review* 140ff.

[19] Lando and Beale (n. 16) xxi ff.

the European Union (the editors refer to an 'infrastructure for community laws governing contracts'); (iii) to mediate between the traditions of the civil law and the common law; (iv) to give shape to and to specify a modern European *lex mercatoria*; (v) to be a source of inspiration for national courts and legislatures in developing their respective contract laws; and finally (vi) to constitute a first step towards the codification of European contract law. Several of these objectives have also been pursued and have, at least partly, been achieved by the American Restatements. However, the Principles differ from the American Restatements in at least one important point. For while the Restatements were designed to lay down the law as it was currently applied, by means of a set of concise, clearly structured and easily comprehensible rules, the Principles, to a much greater extent, aim at harmonization of the law, i.e., from the point of view of the national legal systems, at reform and development of the law. But it is easy to exaggerate this contrast. For in spite of their common roots in the English common law, the legal systems of the various American states are nowadays probably less uniform than is often thought;[20] and thus the Restatements do not merely have a declaratory function, solely 'identifying' the common American private law. On the other hand, of course, the European systems of contract law have been characteristically moulded by a common tradition and, as a result, are based on common systematic, conceptual, doctrinal and ideological foundations which may be hidden behind, but have not been obliterated by, the scree material piled up in the course of the nationalization of legal development over the

[20] See Gray, (1986) 50 *RabelsZ* 111ff.; Mathias Reimann, 'Amerikanisches Privatrecht und europäische Rechtseinheit: Können die USA als Vorbild dienen?', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht: Impressionen aus der Neuen Welt* (1995), pp. 132ff.

past two hundred years.[21] Thus, the editors of Parts I and II of the Principles expressly refer to a common core of contract law of all the member states of the European Union which has to be uncovered and which may still provide the basis for a modern set of rules. All in all, however, they concede that this is a somewhat more 'creative' task than that tackled by the draftsmen of the American Restatements.[22] The three essays collected in this volume will provide examples of uncovering a common core, of attempting to reconcile different approaches and of situations where a rational choice between conflicting solutions has to be made.

IV THE IDEA OF CODIFICATION TODAY

Parts I and II of the Principles were drafted at a time when the notion of codification has, once again, been gaining considerable attention.[23] Contrary to a view that used to be widely held, it has become increasingly clear that the idea of

[21] See Reinhard Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter ...": Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die Civilistische Praxis* 122ff., 166ff.; Zimmermann, 'Roman Law and European Legal Unification', in Hartkamp, Hesselink et al. (n. 1) 21ff.; Rolf Knütel, 'Rechtseinheit in Europa und römisches Recht', (1994) 2 *Zeitschrift für Europäisches Privatrecht* 244ff.; Eugen Bucher, 'Recht – Geschichtlichkeit – Europa', in Bruno Schmidlin (ed.), *Vers un droit privé commun? Skizzen zum gemeineuropäischen Privatrecht* (1994), pp. 7ff.

[22] Lando and Beale (n. 16) xxvi.

[23] Rodolfo Sacco, 'Codificare: modo superato di legiferare?', (1983) *Rivista di diritto civile* 117ff.; Karsten Schmidt, *Die Zukunft der Kodifikationsidee: Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts* (1985); Franz Bydlinski, Theo Mayer-Maly and Johannes W. Pichler (eds.), *Renaissance der Idee der Kodifikation* (1992); Shael Herman, 'Schicksal und Zukunft der Kodifikationsidee in Amerika', in Zimmermann (n. 20) 45ff.; Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', (1995) 3 *European Review of Private Law* 95ff.; and see the symposium 'Codification in the Twenty-First Century', (1998) 31 *University of California at Davis Law Review* 655ff.

codifying the law is not at all outdated. In view of the growing particularization of modern legal scholarship,[24] and the hectic activity of the modern legislature, legal systems require this kind of intellectual focus today more than ever before. This realization, for example, has prompted the Dutch legislature to recodify the entire system of Dutch private law. After a long period of deliberation and comparative studies, central parts of the new Burgerlijk Wetboek came into force in 1992. Thus, the Netherlands possesses, at least in the field of the law of obligations, the most modern European codification and one which has benefited from the experiences gathered in other countries.[25] Of even more recent date is the civil code of Québec which entered into force in 1994. Another interesting mixed legal system at the intersection between common law and civil law is just about to modernize its codification substantially.[26] In Germany, ambitious schemes to reform the entire law of obligations have been aborted, but a draft commissioned by the minister of justice and limited to the two most notorious problem areas[27] was published in 1992[28] and appears to have a chance of being implemented in due course.[29] The English Law

[24] On which see Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *Law Quarterly Review* 582ff.; Albrecht Zeuner, 'Rechtskultur und Spezialisierung', (1997) *Juristenzeitung* 480ff.

[25] See Arthur Hartkamp, 'International Unification and National Codification and Recodification of Civil Law', in Attila Harmathy and Agnes Nemeth (eds.), *Questions of Civil Law Codification* (1990), pp. 67ff.

[26] See Joachim Zekoll, 'Zwischen den Welten: Das Privatrecht von Louisiana als europäisch–amerikanische Mischrechtsordnung', in Zimmermann (n. 20) 11ff.

[27] These are breach of contract and (liberative) prescription.

[28] Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[29] Possibly in the context of implementation of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (25 May 1999) which has to occur by 1 January 2002. See Jürgen Schmidt-Räntsch, 'Gedanken zur Umsetzung der kommenden Kaufrechtsrichtlinie', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 294ff.

Commission asked for the preparation of a Contract Code in 1966. The draft code, produced by Harvey McGregor, became known outside England in 1990 on the occasion of a conference in Pavia; and even though the project has been dropped in England, it was published jointly by Giuffré and Sweet and Maxwell in 1993.[30] In many states of Central and Eastern Europe, endeavours to replace the socialist civil codes by modern codifications have made remarkable progress.[31] The significance attached to this issue was reflected by the great interest displayed by the governments of these states in the Colloquium on Codification that was organized by the Council of Europe, in co-operation with the Czech secretary of justice, in September 1994 in Kroměříž.[32] In the area of international commerce, the success story of the (Vienna) Convention on Contracts for the International Sale of Goods of 1980 springs to mind; it has been adopted by close to fifty states (among them ten of the member states of the European Union[33]) and is

[30] Harvey McGregor, *Contract Code: Drawn up on Behalf of the English Law Commission* (1993). Professor Gandolfi, in his foreword, compares the significance of this draft with man's landing in the moon and with the fall of the Iron Curtain.

[31] Thus, for example, Part I of the new Russian Civil Code entered into force on 1 January 1995, Part II on 1 March 1996. See Oleg Sadikov, 'Das neue Zivilgesetzbuch Rußlands', (1996) 4 *Zeitschrift für Europäisches Privatrecht* 258ff.; Sadikov, 'Das zweite Buch des neuen Zivilgesetzbuches Russlands', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 903ff. For an English translation, see Peter B. Maggs and A. N. Zhiltsov, *The Civil Code of the Russian Federation*, Parts I and II (1997).

[32] See the report by Miroslav Liberda in (1995) 3 *Zeitschrift für Europäisches Privatrecht* 672ff.

[33] It has not been implemented by Greece, Portugal, Belgium, the United Kingdom and Luxembourg; concerning Great Britain, see the comments by Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* (1993).

starting to give rise to a considerable amount of case law in the Convention's member states.[34]

Of particular significance for the private law of the European Union has been a resolution of 26 May 1989 by the European Parliament calling upon the member states to begin with the necessary preparations for the drafting of a uniform European code of contract law.[35] This was reemphasized in another resolution of 6 May 1994 which specifically endorsed and supported the work of the Commission on European Contract Law.[36] The Principles of European Contract Law were also warmly welcomed at the symposium 'Towards a European Civil Code' that was organized by the Dutch government early in 1997, at a time when the Netherlands chaired the Council of the European Union.[37]

V OTHER PROJECTS

Another initiative that has to be mentioned in the present context are the Principles of International Commercial Contracts, prepared by the International Institute for the Unification of Private Law in Rome (Unidroit) and published

[34] See Michael R. Will, *International Sales Law Under CISG: The First 284 or so Decisions* (1996); for Germany, see Ulrich Magnus, 'Stand und Entwicklung des UN-Kaufrechts', (1995) 3 *Zeitschrift für Europäisches Privatrecht* 202ff.; Magnus, 'Das UN-Kaufrecht: Fragen und Probleme seiner praktischen Bewährung', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 823ff.; Magnus, 'Wesentliche Fragen des UN-Kaufrechts', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 642ff.

[35] See (1993) 1 *Zeitschrift für Europäisches Privatrecht* 613ff.

[36] See (1995) 3 *Zeitschrift für Europäisches Privatrecht* 669 and the comments by Winfried Tilmann, 'Zweiter Kodifikationsbeschluß des europäischen Parlaments', (1995) 3 *Zeitschrift für Europäisches Privatrecht* 534ff.

[37] See, e.g., the report by Winfried Tilmann, 'Towards a European Civil Code', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 595ff., and the contributions collected in (1997) 5 *European Review of Private Law* 455ff.

late in 1994.[38] Their structure is similar to that of the Principles: each provision is followed by corresponding comments and illustrations. Comparative notes have, however, been deliberately excluded. It is unclear how this is supposed to emphasize the international character of the rules.[39] The Unidroit project[40] differs from that of the Commission on European Contract Law mainly in the fact that its objective is global, rather than merely European. As early as 1971, a group of three prominent comparative lawyers representing the civil law, common law and socialist legal families were entrusted with the preparation of the project, until, almost simultaneously with the Commission on European Contract Law, a working group of almost twenty members started with the preparation of a set of Principles. That group included, among others, members from the United States,

[38] Unidroit (ed.), *Principles of International Commercial Contracts* (1994). See also Michael Joachim Bonell, *An International Restatement of Contract Law* (2nd edn, 1997). A German translation of the entire book has appeared under the title *Grundregeln der internationalen Handelsverträge ('Unidroit-Prinzipien')*; for the text of the articles, see also Schulze and Zimmermann (n. 2) III.15.

[39] Unidroit, *Principles* (n. 38) viii.

[40] On which see, e.g., Jürgen Basedow, 'Die Unidroit-Prinzipien der internationalen Handelsverträge und das deutsche Recht', in *Gedächtnisschrift für Alexander Lüderitz* (2000), pp. 1ff.; Klaus-Peter Berger, 'Die Unidroit-Prinzipien für internationale Handelsverträge: Indiz für ein autonomes Wirtschaftsrecht?', (1995) *Zeitschrift für Vergleichende Rechtswissenschaft* 217ff.; Michael Joachim Bonell, 'Die Unidroit-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?', (1996) 37 *Zeitschrift für Rechtsvergleichung* 152ff.; Arthur Hartkamp, 'The Unidroit Principles for International Commercial Contracts and the Principles of European Contract Law', (1994) 2 *European Review of Private Law* 341ff.; Johann Christian Wichard, 'Die Anwendung der Unidroit-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte', (1996) 60 *RabelsZ* 269ff.; and the contributions by various authors published in (1992) 40 *American Journal of Comparative Law* 617ff. and in (1995) 69 *Tulane Law Review* 1121ff.

Japan, China, Australia, Québec and Ghana. Like the Commission on European Contract Law the Unidroit working group consists predominantly of professors, though some of them simultaneously pursue careers in practice. A certain degree of co-ordination between the two groups was (and continues to be) achieved as a result of the fact that several members belonged (and continue to belong) to both of them. In most areas both sets of Principles follow a very similar approach and come to similar, or even identical, solutions. By the time when Part I of the Principles of European Contract Law was published, the Unidroit Principles were ahead insofar as they already contained rules on formation, validity and interpretation. With the publication of the consolidated version of Parts I and II the Commission on European Contract Law has taken the lead in that it includes rules on the authority of agents. Unidroit is currently dealing with this topic; apart from that, it has an agenda which very largely corresponds to that of the European Contract Law Commission.[41]

Other projects aiming at providing sets of Principles of European Private Law are under way. In Pavia an 'Academy of European Private Lawyers' established itself in 1990 and

[41] For further discussion of the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts, of their legal nature and their relationship with the national legal systems, and of other means of unifying international commercial law, see Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999); Berger, 'Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung', (1999) *Juristenzeitung* 369ff.; Franco Ferrari, 'Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen', (1998) *Juristenzeitung* 9ff.; Ralf Michaels, 'Privatautonomie und Privatkodifikation: Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien', (1998) 67 *RabelsZ* 580ff.; Paul-A. Crépeau and Elise M. Charpentier, *Les Principes d'Unidroit et le Code civil du Québec: valeurs partagées?* (1998); and the contributions to Jürgen Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000).

is busy, under the direction of Giuseppe Gandolfi, drafting a European Contract Code.[42] The approach and methodology adopted by the Academy appear to be quite different from that of both the Commission on European Contract Law and Unidroit. In particular, the Academy has decided to adopt as models for its work Book IV of the Italian *codice civile* (as taking an intermediate position between the two principal strands which form the continental civil law, i.e., the French and the German) and the McGregor Code.[43] In 1999 an International Working Group on European Trust Law produced a volume entitled *Principles of European Trust Law*, containing a set of principles, a commentary and national reports for Scotland, Germany, Switzerland, Italy, France, Spain, Denmark and the Netherlands.[44] Since 1992 a group of scholars in the area of delict/tort has met on a regular basis to discuss fundamental issues of delictual liability and the future structure and direction of a European law of tort/delict. Several volumes dealing with individual issues of central importance have been published;[45] on this basis a set of European Principles will be elaborated. The most ambitious project, so far, is the Study Group on a European Civil Code which was established in 1998 by Christian von Bar and which aims at identifying fundamental rules covering the law relating to economic assets (or the patrimony)

[42] See, e.g., Giuseppe Gandolfi, 'Pour un code européen des contrats', (1992) *Revue internationale de droit comparé* 707ff.

[43] See n. 30.

[44] D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen, *Principles of European Trust Law* (1999).

[45] Jaap Spier (ed.), *The Limits of Liability* (1996); Spier (ed.), *The Limits of Expanding Liability* (1998); Helmut Koziol, *Unification of Tort Law: Wrongfulness* (1998); for general background, see Ulrich Magnus, 'Elemente eines europäischen Deliktsrechts', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 602ff.; Spier and Olav A. Haazen, 'The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 469ff.

at large.[46] Three working groups have been established, one in Osnabrück dealing with non-contractual obligations, one in Hamburg dealing with secured transactions and financial services and one in Tilburg/Utrecht dealing with sales and services. These rules will be presented, eventually, in the form of a Restatement with commentary. The Principles of European Contract Law will form an integral part of this overarching structure.

I should perhaps add that personally I have regarded my work in the (third) Commission on European Contract Law as a particularly stimulating opportunity for furthering the development of a European legal scholarship in the field of private law. This, I think, is of far greater importance today than the implementation of a European code of contract law.[47] Even if such a code should, one day, be implemented,[48]

[46] Christian von Bar, 'Die Study Group on a European Civil Code', in *Festschrift für Dieter Henrich* (2000), pp. 1ff.

[47] I have expressed my views, in that regard, in 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *Law Quarterly Review* 576ff. and in the Clarendon Lectures for 1999 which will by published by Oxford University Press in 2001 under the title *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*. See also, e.g., the discussion in Reiner Schulze, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 442ff.; Christoph Schmid, 'Anfänge einer transnationalen Privatrechtswissenschaft in Europa', (1999) 40 *Zeitschrift für Rechtsvergleichung* 213ff.; Jürgen Basedow, 'Anforderungen an eine europäische Zivilrechtsdogmatik', in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (2000), pp. 79ff.

[48] For forceful arguments in favour of a code on the law of obligations, see Winfried Tilmann, 'Artikel 100 a EGV als Grundlage für ein Europäisches Zivilgesetzbuch', in *Festskrift* (n. 15) 351ff.; Jürgen Basedow, 'Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex', (2000) 200 *Archiv für die Civilistische Praxis* 445ff.; see also Ole Lando, 'The Principles of European Contract Law After Year 2000', in Franz Werro (ed.), *New Perspectives on European Private Law* (1998), pp. 59ff. and the contributions to Dieter Martiny and Norman Witzleb (eds.), *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (1999). For a contrary view, e.g., Pierre Legrand, 'Against a European Civil Code', (1997) 60 *Modern Law Review* 44ff.

it will benefit much from the kind of intensive scholarly endeavour that preceded the drafting of the German Civil Code at the end of the nineteenth century. Primarily, therefore, I see the Principles of European Contract Law as an attempt to provide a starting point and conceptual focus for a discussion of problems in contract law transcending the borders of the individual legal systems; and also as a yardstick against which the solutions in the national legal systems may be evaluated. The Principles, in other words, might serve a similar function as did Roman law in those parts of nineteenth-century Germany where a codification of private law (the Prussian code, the Austrian code, the *code civil*, the Saxonian Civil Code, etc.) prevailed: they may constitute a conceptual basis for the comprehension of all particular laws prevailing in Europe.[49]

[49] See, for nineteenth-century Germany, Paul Koschaker, *Europa und das römische Recht* (4th edn, 1966), p. 292; see also Reiner Schulze, 'Vergleichende Gesetzesauslegung und Rechtsangleichung', (1997) *Zeitschrift für Rechtsvergleichung* 193. For first steps in that direction concerning Québec and German law, see Crépeau and Charpentier and the contributions in Basedow (both n. 41).

1

CONTOURS OF A EUROPEAN LAW OF SET-OFF

I SIX PRELIMINARY POINTS

For the purposes of this chapter, the following legal systems have been taken into account: Austrian law, Dutch law, English law, French law, German law, Greek law, Italian law, Scots law, Spanish law and Swedish law. Belgian, Danish, Finnish, Irish and Portuguese law have been insufficiently accessible to me.[1] Following the approach adopted, for instance, by Zweigert and Kötz,[2] French, English and German law are regarded as the prime exponents of the three major 'legal families' traditionally recognized within Europe.[3] Specific attention will also be paid to Dutch and Italian law in view of the fact that both countries, in the process of recodifying their private law, have drawn on the (continental) comparative experience and can no longer simply be regarded as

[1] Danish law, in this area, largely corresponds to Swedish law: see B. Gomard, *Obligationsret*, 3rd part (1993), pp. 177ff. and the overview by Inger Dübeck, *Einführung in das dänische Recht* (1996), pp. 199f.; Belgian law is very similar to French law: see H. de Page, *Traité élémentaire de droit civil Belge*, vol. III (3rd edn, 1967), pp. 613ff. and the overview by J. Herbots, *Contract Law in Belgium* (1995), n. 387.

[2] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, 1998, transl. Tony Weir), pp. 323ff.

[3] On the notion of 'legal families' and its usefulness for comparative studies, see Hein Kötz, 'Abschied von der Rechtskreislehre?', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 493ff.

members of the 'Romanistic' legal family.[4] But, as will become apparent, other legal systems (such as, in the present context, the Nordic ones) are also able to contribute valuable experiences.[5]

The first two propositions are straightforward. (i) All legal systems under consideration recognize that a debtor may, under certain circumstances, defeat his creditor's claim in view of a cross-claim against that creditor. All legal systems, in other words, recognize the institution of set-off (compensation/Aufrechnung/verrekening/kvittning).[6] (ii) The most important effect of set-off in all legal systems consists in a discharge of the obligations of the debtor

[4] As far as the *codice civile* is concerned see, e.g., Giorgio Cian, 'Fünfzig Jahre italienischer Codice civile', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 120ff.; concerning the Burgerlijk Wetboek, see Ulrich Drobnig, 'Das neue niederländische Gesetzbuch aus rechtsvergleichender Sicht', (1993) 1 *European Review of Private Law* 171ff. Generally on the idea of codification in contemporary Europe, see above pp. 9ff.

[5] On the fundamental unity of private law in the Nordic countries, see Zweigert and Kötz (n. 2) 276ff.; Gebhard Carsten, 'Europäische Integration und nordische Zusammenarbeit auf dem Gebiet des Zivilrechts', (1993) *Zeitschrift für Europäisches Privatrecht* 335ff.; see also the observations in Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape', in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), pp. 55ff.

[6] It should, however, be noted that set-off tends to be recognized only at a fairly mature stage within the development of a legal system. For Roman law, see Heinrich Dernburg, *Geschichte und Theorie der Kompensation* (2nd edn, 1868), pp. 15ff.; W. W. Buckland and Peter Stein, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, 1963), p. 703; Michael E. Tigar, 'Automatic Extinction of Cross-Demands: Compensatio from Rome to California', (1965) 53 *California Law Review* 226ff. For medieval Germanic law, see Werner Ogris, 'Aufrechnung', in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. I (1971), cols. 254ff. For France, see Dernburg 272ff. For English law, see Roy Goode, *Legal Problems of Credit and Security* (2nd edn, 1988), pp. 132ff.; Rory Derham, *Set-Off* (2nd edn, 1996), pp. 7ff.