Oxford Handbooks Online

Comparative Law and the Europeanization of Private Law

Reinhard Zimmermann

The Oxford Handbook of Comparative Law
Edited by Mathias Reimann and Reinhard Zimmermann

Print Publication Date: Nov 2006 Subject: Law, Comparative Law
Online Publication Date: Sep 2012 DOI: 10.1093/oxfordhb/9780199296064.013.0017

Abstract and Keywords

The gradual emergence of a European private law is one of the most significant contemporary legal developments. Comparative law scholarship has played an important role in this process and will continue to do so. This article discusses the Europeanization of private law as a new and challenging task for comparative law. The second section considers the Europeanization of private law, describing the creation of the European Union and the role of the European Court of Justice. The third section discusses European legal scholarship. The fourth section cites the contributions of comparative law. The last two sections discuss current and future trends for the European private law.

Keywords: private law, legal unification, Europeanization, legal developments, European legal scholarship, European Union

I. Prologue: Unification of Private Law as a Task for Comparative Legal Studies

THE International Congress for Comparative Law, organized in Paris in 1900, is widely regarded today as having stimulated the emergence of comparative law as a specific branch of legal scholarship. The congress was masterminded by two French scholars, Edouard Lambert and Raymond Saleilles, who were inspired by the idea of a *droit commun de l'humanité civilisée*.[1] Comparative law, in their view, had to resolve the accidental differences which divide the laws of the various modern nation states. The international unification of law was thus, from its inception, taken to be a key task for comparative legal scholarship. This impulse was to lead, if only after the end of the First World War and under the umbrella of the League of Nations, to the creation of the International Institute for the Unification of Private Law (UNIDROIT) in Rome. In the 1960s a second organization devoted to the international unification of law was founded under the name of UNCITRAL (United Nations Commission on International Trade Law). The (p. 541) impact of both bodies on the development of law has remained limited.[2] Their most significant achievement, so far, has been the preparation of the Convention on Contracts for the International Sale of Goods, an instrument covering a key area of private law that has entered into force in more than sixty states—among them twenty-one

of the EU member states—and, as a result, has become increasingly important in legal practice.[3] It has also become highly influential in the field of national and supranational law reform. The driving force behind the unification of international sales law was Ernst Rabel, one of the greatest comparative lawyers of the twentieth century. His two-volume treatise on the law of the sale of goods today still represents a model for comparative scholarship in the field of private law.[4]

Legal unification on a global level presents problems in view of the invariably Eurocentric (including the offshoots of European law in other parts of the world) character of this enterprise. Legal differences between the laws of different nations, or peoples, are not necessarily attributable to historical accident or contingent circumstances; they may be based on fundamental cultural, economic, or political differences. Legal unification, therefore, is a much more promising project if it focuses on the laws of nations at a broadly similar stage of cultural and economic development which, moreover, share the same historical experiences and political philosophy. When such nations embark on the project of creating an economic community, the unification of the legal regime concerning business transactions is bound, sooner or later, to become an issue of considerable political importance.[5] This is what has happened in Europe after the Second World War. The gradual emergence of a European private law is one of the most significant contemporary legal developments. Comparative law scholarship has played an important role in this process and will continue to do so. The Europeanization of private law as a new and challenging task for comparative law: that is the topic of the present chapter.

(p. 542) II. The Europeanization of Private Law

1. From Rome to Laeken: The Creation of the European Union

The devastations of the two world wars were very widely taken to mark the ultimate failure of an era of aggressive nationalism. Thus, the (three) European Communities were designed as a cornerstone for a peaceful and politically unified Europe.[6] This is evident, for instance, from the determination in the preamble of the European Economic Community Treaty of 1957 ‘to lay the foundations for an ever closer union among the peoples of Europe’. The intention of the founding fathers, in this respect, reflected the ideas expressed by Winston Churchill in his famous Zurich speech of September 1946 and, already in the early 1930s, by Aristide Briand.

Actual progress, however, turned out to be slower than originally envisaged. For a long time, the European Economic Community remained, essentially, what its name indicates: an economic community between a number of sovereign European states. It was only in the 1970s that the movement towards integration gained new momentum. It led to the adoption of the Single European Act of 1986, which not only expanded the Community's range of competences, but also contained a commitment to ‘adopt measures with the aim of progressively establishing the internal market’ by the end of 1992. The (Maastricht) Treaty on European Union, which was signed in February 1992, took matters further by laying the foundation for a monetary union (this led to the introduction of a common currency in 1999) and by creating a European Union based on the three established European Communities as well as two new ‘pillars’ of common policy areas: foreign and security affairs on the one hand, and police and judicial cooperation in criminal matters on the other. The Amsterdam Treaty of 1999 brought the third major revision of the legal foundations of the European Union and further advanced the process of integration in the non-economic area. The Treaty of Nice (December 2000) gave rise to a number of institutional reforms. Finally, the Declaration of Laeken on the future of the European Union (December 2001) established a Convention charged with the preparation of a European Constitution. The document drawn up by that Convention was signed by the governments of the member states of the European Union in June 2004. It was subsequently ratified by a number of member states but failed to gain a majority in the referenda held in the Netherlands and France. Whether this is merely a temporary set-back in the process of constitutional (p. 543) consolidation of the European Union (which today numbers twenty-five as opposed to the original six member states) remains to be seen.

2. A Patchwork of Directives

In spite of the fact that Walter Hallstein, the first President of the European Commission, had called attention to the necessity of harmonization in the area of private law as early as 1964,[7] the challenge was only taken up, in earnest, by private law scholarship in the 1990s. Up until then, the European Economic Community was widely perceived to be dealing with agricultural subsidies and import duties, and to be regulating the shape of

tractor seats or the size of cucumbers. European Community law became a specialized field of study and was regarded, very widely, as a branch of public law. Even when European Community legislation did indeed start to affect (or, as it was often perceived: encroach upon) private law, it tended to do so in specialized areas such as competition law or intellectual property law. A particularly ambitious harmonization programme has been undertaken in the area of company law.[8] The first two Directives in the core area of traditional private law date from 1985: the Product Liability and the Doorstep Selling Directives. But it was only the Unfair Terms in Consumer Contracts Directive of 1993 that brought home to every lawyer the clear message that private law in Europe had acquired a new dimension. For some time, the introduction of a fairness control for all provisions contained in consumer contracts had even been considered, no matter whether they were standardized or not. Vociferous protests, particularly from Germany,[9] eventually forced the European Commission to back down in this respect. Another major step in the Europeanization of private law by means of European Community Directives was the enactment of the Consumer Sales Directive in 1999. The contract of sale, after all, has always been the central type of transaction in commercial life; moreover, the Directive was envisaged as a general model for the modernization of the national sales laws as well as a first building block for a European codification of sales law.[10] In Germany it has triggered the most sweeping reform ever to have affected the BGB since it entered into force.

(p. 544) Today we have close to twenty Directives within the area of traditional private law and many others outside it.[11] They constitute a patchwork of individual legislative measures that has been added to the tapestry of private law. However, they are not always well adjusted to that general tapestry or to each other. The confusion surrounding the key concept of ‘consumer’ provides an example.[12] The common denominator of these Directives is that they have, or are supposed to have, some bearing on the proper functioning of the internal market. This gives them a certain policy bias. Yet, the institutions of private law do not derive their significance only from their contribution to the creation or maintenance of free markets; contract law, for example, is more than a mere corollary of, or appendage to, the free movement of goods, persons, services, and capital (ie the four basic economic freedoms enshrined in the EC Treaty). Directives have to be implemented; this means that the member states have to bring into force the laws necessary to comply with the Directive. Whether they do so by way of piecemeal legislation, the drafting of part codifications (such as consumer contract acts), or incorporation into the general Civil Code, the national legal systems thereby inevitably acquire a new dimension of complexity, and often also internal fragmentation. The development of consumer law, in particular, has been dominated over the past twenty-five years by the European Union. Yet, it is still far from clear how consumer law and general contract law are supposed to relate to each other.[13] At the same time, all pertinent Directives have been based on Art 95 EC Treaty; or, more precisely, and in the words of the Directives themselves, ‘in particular’ Art 95. In its decision on the Tobacco Advertising Directive, the European Court of Justice has, however, emphasized that the European Union may only adopt measures for the approximation of the laws prevailing in

the member states if they aim at improving the functioning of the internal market. This can only be the case if the divergence of the respective national rules constitutes an impediment for free trade or leads to noticeable distortions of competition.[14] In view of these strict standards, many provisions of the consumer protection Directives rest on fragile foundations. The (p. 545) real aim pursued by the European Union appears to be the promotion of a certain minimum level of consumer protection across all member states rather than the removal of supposed trade barriers resulting from a diversity of levels of protection in the member states.[15]

3. The Role of the European Court of Justice

If, therefore, the present state of legal harmonization within the European Union by legislative means is unsatisfactory for a number of reasons, the activity of the European Court of Justice does not very much improve the general picture. For while it is true that that Court fashions concepts, rules, and principles which are relevant for the law of the Union and, to an increasing degree, also for the laws of its member states, it also remains true that its opportunities to do so are restricted by the provisions of Arts 220 ff EC Treaty.[16] The European Court of Justice is not a Supreme Court for private law disputes in the European Union. It has jurisdiction in disputes relating to compensation for damage caused by the Community, and, as far as non-contractual liability is concerned, Art 288(2) EC Treaty specifically refers the Court to 'the general principles common to the laws of the Member States'.[17] Apart from that, the main avenue for the European Court of Justice into private law matters is paved by Art 234 EC Treaty on preliminary rulings, the aim of which is to ensure uniformity of interpretation of legal acts of the Community. Thus, for example, the Court has held that the right of revocation concerning doorstep transactions applies to contracts of suretyship, provided that the main obligation which the surety is supposed to secure has also been concluded away from the business premises of the entrepreneur; that a purchaser who has concluded a doorstep transaction must be able to revoke the contract even after the lapse of six months if he has not been duly informed about his right of revocation; or that the term 'damages' in the Package Travel Directive (and possibly beyond?) includes non-pecuniary loss.[18] These are, no doubt, important questions affecting the application of private law in all twenty-five member states of the European Union. Still, however, they only lead to a harmonization of a limited and piecemeal nature.

(p. 546) 4. Improving the Present and Future *Acquis*?

The opposite to piecemeal harmonization is comprehensive and systematic harmonization. This cannot be achieved by the courts but only by way of legislation. A comprehensive and systematic piece of legislation is normally referred to as a code. The codification of European private law has been championed, consistently, by the European Parliament, first in a resolution of May 1989.[19] The Council of the European Union took up this theme at its meeting in Tampere in October 1999 by requesting 'an overall study … on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings'. Contract law, obviously, is of key significance in this respect. The Commission of the European Union has thus issued an action plan for a more coherent European contract law[20] which, *inter alia*, aims at the development of 'a common frame of reference'. This frame of reference is supposed to provide the basis for further deliberations on an optional instrument in the field of European contract law. Essentially, therefore, the Commission endorses the second option put up in its communication of July 2001[21] and evaluated positively by the great majority of the reactions received: the preparation of non-binding common principles of contract law which would be available as a model instrument in business life and for the purposes of dispute settlement and law reform.[22] The Principles of European Contract Law, drawn up by the so-called 'Lando Commission', tie in with this description. They are available as a blueprint for an optional instrument and also serve as the basis for the work of the Study Group on a European Civil Code.

III. European Legal Scholarship

The 'Lando Commission' and the Study Group are private initiatives, without official status and without any form of political legitimation. They constitute specific forms of international academic cooperation and can thus be seen as manifestations of a Europeanization of legal scholarship.[23] But they are not the only (p. 547) such manifestations. Konrad Zweigert had reflected on fundamental questions of European legal harmonization as early as 1963 and had recommended to the European Court of Justice the elaboration of general principles of law on the basis of an evaluative comparison of the legal systems of the EC member states.[24] Hein Kötz, in a contribution in honour of Konrad Zweigert from 1981, had mapped the various ways of how comparative legal scholarship might advance the attainment of a common private law for Europe.[25] And in 1990 Helmut Coing had pointedly called for a Europeanization of legal scholarship as a precondition for a European private law.[26] In that article, he had referred to the Roman-Canon *ius commune* as having been based on a truly European legal scholarship and as having established a European legal culture of which the modern national legal systems were merely specific manifestations. The medieval and early modern *ius commune* did not, therefore, merely constitute an historical example of

European unity on the level of legal scholarship but could still be drawn upon as a point of departure for overcoming the national particularization of private law and private law scholarship. Helmut Coing's *opus magnum* on the historical *ius commune*, which had appeared in two volumes in 1986 and 1989, had been given the title ‘European Private Law’.[27] Others had referred civilian, or Western, legal tradition as being subject to constant change and adaptation but still intellectually related to the same body of sources, values, rules, and concepts.[28] Previously, Paul Koschaker had already drawn attention to Roman law as an essential foundation of European legal culture.[29] This was the intellectual soil for the first textbook on European Contract Law which, freed from any particular national system or systematics, ventured to take account of national legal rules only as local variations of a European theme.[30] In the meantime, a considerable body of academic literature has been published, and a great number of academic projects have been launched which have contributed significantly to the emergence of a European legal scholarship. Which role does comparative law play in this process?

(p. 548) IV. The Contribution of Comparative Law

1. Legal Training

It is widely accepted today that the Europeanization of private law decisively depends on a Europeanization of the legal training provided in the various universities throughout Europe.[31] For if students continue to be taught the niceties of their national legal systems without being made to appreciate the extent to which the relevant doctrines, or case law, constitute idiosyncracies explicable only as a matter of historical accident, or misunderstanding, rather than rational design, and without being made to consider how else a legal problem may be solved, a national particularization of legal scholarship that takes the mysteries of the owner-possessor relationship (§§ 987 ff BGB) or the abracadabra of conditions, warranties, and intermediate terms for granted, threatens to imprint itself also on the next generation of lawyers. Europeanization of the legal training, therefore, requires the strengthening of subjects which are not only of a foundational character but also inherently international in nature: Roman law, the history of private law and constitutional law in Europe, comparative law, and jurisprudence. Sadly, however, in the law curricula of virtually all European countries these common elements tend to be reduced rather then enhanced in importance.[32] A much more positive development has been the introduction of the Erasmus/Socrates programme by the Commission of the European Communities as a result of which the mobility of students across Europe has been very significantly increased. Every year, thousands of law students spend at least one semester at a university in another EU member state;[33] and even if that period is not normally a fully integrated part of their degree programme, it encourages the kind of distance from the respective student's own legal system that is required for an interest in comparative law. Ideally, of course, the comparative approach

should be an integral part of the teaching of private law at the various law faculties in Europe: be it in the normal diet of courses on German, French, or English private law, or by way of special courses on European private law.

(p. 549) 2. Making the Legal Materials Readily Accessible

For courses of this kind, teaching materials are required which make the relevant sources readily accessible. A series of ‘Casebooks on the Common Law of Europe’, initiated by the former Advocate General at the European Court of Justice, Walter van Gerven, has appeared over the past few years. To date, it covers the fields of contract law, tort law, and unjustified enrichment.[34] These casebooks are designed ‘to familiarize future generations of lawyers with each other's legal systems’ and, at the same time, to explore the extent to which, in spite of differences in approach, concepts, and terminology, common principles underlie the European legal systems. They contain the relevant provisions of the national codes, important decisions by the national courts, extracts from textbooks, commentaries and other forms of national legal literature, introductory texts, commentary, and explanation. At the same time, genuinely European texts are integrated, particularly the Principles of European Contract Law (in the casebook on contract law) and the case law of the European Court of Justice (in the casebook on tort law). The casebooks are thus comparative in the sense of making available the most important legal materials from a number of EU member states, so as to provide a basis for a common understanding of the essential features of private law in Europe. The authors of the casebooks do not normally proceed to a critical assessment and comparative evaluation of the materials presented. Nor do they aim at legal harmonization. They merely want to portray the existing situation as accurately as possible.

Very similar, in these respects, is the approach pursued by the author of a casebook covering the European law of obligations.[35] A comparison between the van Gerven series and Ranieri's book also, however, reveals a number of differences. Three of them are particularly interesting, in the broader context of the development of European private law. While van Gerven and his team of authors focus on the laws of England, France, and Germany as main exponents of the three major legal families traditionally distinguished in Europe (the casebook on unjustified enrichment, however, also includes Dutch law as well as the two ‘mixed’ jurisdictions of Scotland and South Africa), Ranieri incorporates materials from across Europe, including Poland, Portugal, and Switzerland. This difference, turning, essentially, on the related questions of practicability and comprehensiveness of coverage, is a recurrent theme in comparative legal literature concerning European private law. Second, while all the materials presented in the van Gerven books have been translated into English, Ranieri cites them in their original language (p. 550) (though he adds German translations in the case of languages not widely known in Germany). Undisputedly, the perception of peculiar legal styles prevailing in Europe today is facilitated by reading all sources in their language of origin. Again, however, it is not always easy to determine how much may realistically be expected of lawyers and law students in Europe. Translation into an easily accessible language (or even the native language of the reader) can advance the process of familiarizing young lawyers with each other's legal systems more effectively than insistence on reading legal texts in foreign languages. The dangers of distortion and misunderstanding, incidentally, appear to be evenly balanced between both approaches.

This leads to the third important difference. It concerns the sensitive question in which language (or languages) European private law presents itself. Do all European languages have the same standing, as far as European private law is concerned, or does English (or possibly: do French and English) enjoy precedence? Not accidentally, the van Gerven casebooks appear to be much better known for they are written in English. The use of Ranieri's book, a German language teaching tool, is confined, essentially, to Germany, Switzerland, and Austria. The rise of English as the primary medium of international communication affects law as much as most of the other academic disciplines; and this has led most contemporary comparative lawyers who wish to contribute to the debates surrounding European private law to resort to English. The alternative of making available important works in several different language versions is, in most cases, practically not feasible. What can sometimes be achieved is the translation into English of a work originally written in another language—which, in turn, reinforces the practical precedence of English.

3. Disregarding the National Boundaries: The Case of Contract Law

A work originally written in German, and shortly thereafter translated into English, is Hein Kötz's European Contract Law.[36] Just like the van Gerven and Ranieri casebooks, it has been written, in the first place, for students. It goes, however, a crucial step further in that it does not merely present the laws, as they actually prevail in different parts of Europe, but provides a (largely) integrated account by adopting a vantage point situated beyond, or above, the national legal systems. Thus, the European private law described by Kotz is not 'in force' anywhere and is not 'applied' as such by any court in Europe: its reality is virtual rather than actual. But it establishes an intellectual framework for discussing, developing, and teaching contract law in Europe. By conceiving European contract law as a (p. 551) subject ready to be treated in its own right, and consisting of rules either corraborated or modified by the rules contained in the national legal systems, Kötz has pioneered a new type of legal literature. This was possible as a result, first, of the fact that the material to be used for writing *European Contract Law* was readily available in Konrad Zweigert's and Hein Kötz's textbook on comparative law:[37] a work which is firmly based on the functional approach and very widely regarded today as the classic restatement of methodological orthodoxy in comparative legal scholarship. Very pointedly, one might say that the textbook on European contract law merely presents the material collected in (the third part of) the textbook on comparative law under different auspices, which is indicative both of the Eurocen-tricity of traditional comparative law discourse and of the potential inherent in the functional approach even for the constitution of a European contract law.

This brings us to a second point. If Kötz in his new work has merely taken further what he had set out to do in his earlier book, his task was facilitated by the fundamental unity of European contract law, based on its long, and largely common, tradition. It is not, therefore, without good reason that most chapters of *European Contract Law* set the scene by giving an overview of the historical developments of the legal problems to be discussed, thereby alerting the reader to the fact that the solutions adopted in the modern codes, or espoused by modern courts, are products of the same historical experience or, so to speak, fruits of the same tree. Modern contract law in Europe is based on the same philosophical origins,[38] and the hypothetical will of reasonable parties to a contract has usually been the focal point in the evolution of its doctrines.[39] The stock of fundamental concepts and common evaluations has not been deeply affected by developments during the age of legal nationalism; and so it is still possible to identify common problems and to strive for reasonable solutions on the basis of a common understanding. Significantly, therefore, Kötz tends to formulate such common problems before discussing legal doctrine. An agreement cannot be contractual unless it is sufficiently definite. But when can it be said to be sufficiently definite? All legal systems subscribe to the principle of *pacta sunt servanda* but still agree that not every informal agreement can be treated as binding. But which is the most appropriate *indicium* of seriousness to distinguish enforceable from non-enforceable agreements? Words are not always understood as they have been intended. Which perspective determines the

interpretation of a contract: that of (p. 552) the person making a promise or of the one receiving it? Contract law in Europe is based on freedom of contract in the sense that the parties are free, in principle, to determine the content of their transaction. Nowhere may a judge treat a contract as invalid merely because he does not regard it as fair. However, certain additional factors can indicate that the contract may not be accepted as an expression of *both* parties' self-determination. How can these additional factors best be formulated? This way of proceeding enables Kötz to embark on the task of critical evaluation wherever he finds divergence in detail. Ultimately, therefore, it is the comparative method[40] which also allows him to create European law where it cannot merely be uncovered.

4. Common Conceptual Structures? The Cases of Delict and Unjustified Enrichment

In a number of places in Kötz's work the presentation reverts to the traditional mode of country reports before it is steered back onto a genuinely European track. Kötz, in fact, himself stresses that his book constitutes but a first attempt to conceive of European contract law as a uniform discipline. None the less, the kind of integration achieved in it has not, so far, been emulated in any other field, not even the two most closely related ones, that is, delict and unjustified enrichment. For both, treatises have been written which, in their own way, are as pioneering in nature as Kötz's *European Contract Law*. Also, like Kötz's work, they are products of the classical tradition of comparative legal scholarship, initiated in Germany by Ernst Rabel. Still, however, they cannot really claim to reveal a fundamental legal unity of which the existing legal systems can be regarded as national manifestations. This is immediately obvious in Peter Schlechtriem's work which is, significantly, entitled 'Restitution and Recovery of Enrichment *in Europe*' (rather than European law of restitution) and which carries the subtitle: a comparative exposition.[41] The discussion of the individual problems arising in this area of the law is conducted, essentially, by way of country reports (which, in turn, are structured according to the well-known 'legal families'). But it is also true of Christian von Bar's ambitious study on the Common European Law of Torts.[42] In its first volume we find chapters on 'Continental Europe's Codified Law of Delict', 'Scandinavian Liability Laws and the Common Law of Torts', or 'Unification and Approximation of the Law of Delict within the European Union', that is, on (p. 553) individual constituents of a European law of torts. Volume II is structured not by countries, or groups of countries, but by requirements for, or typical forms of, delictual liability. A closer look, however, reveals that nearly every important conceptual issue, or policy decision, is heavily disputed, often even within one and the same legal system, or legal family. The notions of wrongfulness and fault provide prominent examples, and so do the issues of pure economic loss, the recoverability of 'immaterial' damage, or the proper scope of fault and no-fault liability. This is why von Bar constantly has either to make choices between the views prevailing in Europe, even on the most fundamental conceptual level, or to construct new devices or solutions. Thus, while he is certainly making true his promise not to portray a single national law in

comparison with other laws, or to fashion a European approach on an individual, national pattern, his system of European tort law is both decidedly less ‘European’ (in the sense of reflecting an existing uniformity of approach) and less concrete than the European contract law we find in Kötz.

This is not, of course, the fault of the author. It follows from the state of development of the discipline itself. For while it is true that the continental law of delict rests on the same historical foundations (in the era of the *ius commune* it constituted an *usus modernus* of Aquilian liability which was reconceptualized under the influence of Natural law theory),[43] and that the ideas prevailing in Continental Europe have also influenced the development of English law,[44] it is equally true that in the eighteenth and nineteenth centuries the modernized version of Roman law was no longer really modern. In its basic structure it was still essentially geared towards the sanctioning of private wrongs rather than the reasonable allocation of losses.[45] This was a problem which European legal systems only started to grapple with in the course of the nineteenth century, by which time the first wave of codifications had contributed to a national isolation of the legal discourse. Particularly, therefore, every national legal system had to devise its own way of dealing with the problem of strict liability. As a result, the European legal landscape became considerably more patchy in this field than in that of contract law. The development was similar only in so far as it was attempted, in England as much as in France or Germany, to supplement, rather than to challenge, the conceptual structure of a law of delict still revolving around the notion of wrongful behaviour. This has led to a situation which is characterized, at least in some respects, by a lack of fundamental concepts which are both common to the various legal systems and teleologically satisfactory.[46] It is highly significant, in this respect, that the (p. 554) draftsmen of the first set of ‘Principles of European Tort Law’[47] to have been published have essentially dodged the thorny issue of ‘wrongfulness’, and that they were unable to reach agreement on the equally difficult problem of strict liability (see Art 5:102 Principles of European Tort Law).

The recovery of enrichment is governed, in all European legal systems, by rules which are based on a common stock of concepts and ideas. Most prominently, this common stock comprises the different types of *condictiones* inherited from Roman law (these, however, were not enrichment actions in the modern sense of the word), Pomponius' famous general precept, based on natural justice, that nobody should be allowed to enrich himself at the expense of another person, and the late scholastic restitution doctrine (which attempted to conceptualize cases of wrongful interference with, and of unjustified retention of, somebody else's property under the auspices of *iustitia commutative*).[48] But the configuration of these elements in the modern national systems varies considerably and, as a result, some basic questions have remained disputed, particularly whether the recipient is liable for enrichment received or enrichment surviving, and whether a claim based on unjustified enrichment requires not only the recipient to have been enriched but also the claimant to have been impoverished. As a result, no unanimity has yet been

reached as to whether this branch of the law ultimately serves to protect a person whose rights or interests have been impaired, or whether it merely looks at the position of the recipient and aims to skim off an enrichment which it regards as unjustified.[49]

In both fields the search for doctrinal structures which are recognizably European has only just started. Methodologically, the concept of a flexible system as well as the theory of legal principles appear to be of key significance.[50] Concerning the substance of the law, it is easier, so far, to state which doctrinal devices are unsuitable on the European level: the German concept of unlawfulness in the law of delict, the English unjust-factor approach in enrichment law, or the two-track model (fault-based liability and no-fault liability) of extra-contractual liability prevalent in many modern legal systems. A positive assessment must remain more tentative. But if account is taken of the way the European legal systems have in fact developed during the twentieth century, it appears reasonable to accept a discrimination, in principle, between financial loss and physical injury.[51] This (p. 555) has been one of the most hotly debated issues in European tort law.[52] As far as unjustified enrichment is concerned, cogent arguments can be advanced for the recognition of a uniform regime governing the restitution of benefits exchanged under a contract that turns out to have failed (no matter whether it is invalid, has been rescinded, or terminated).[53] Apart from that, we witness a growing awareness of the distinction between enrichment by transfer (in a wide and untechnical sense of the word) and enrichment as a result of a wrong, or an encroachment.[54] And the reappearance of the *condictio indebiti* in English law[55] marks the end of a particularly obstructive structural difference (or rather: the perception of such difference) between the common law and the civilian systems. The latter development, in particular, can be seen as a triumph of comparative law scholarship.

It may be remarked in passing that the tendency to look at contract, delict, and unjustified enrichment in isolation has tended to leave a number of important topics common to all three branches of the law (set-off, prescription, plurality of parties, and so on) in the no-man's land of scholarly neglect, at least as far as comparative law and comparative doctrinal history are concerned.[56] The same applies to *negotiorum gestio*.

5. Establishing Networks: The New Law Journals

Comprehensive treatises which aim at compiling and analysing the legal material from as many European jurisdictions as possible can hardly be written today by a single author, working in the solitude of his office. This is apparent from the works by Schlechtriem and von Bar, both of which are based on the successful establishment of, and cooperation with, a team of young scholars. The van Gerven casebooks, too, are based on international cooperative efforts. International cooperation has, in fact, become a key feature of the growing Europeanization of private law. International initiatives, working groups, and networks have shot up like mushrooms over the past fifteen years. Merely by virtue of their composition, (p. 556) the work carried out by these bodies is comparative in nature. Each of the members tends to bring along his own national preconceptions,

and an important aspect of the cooperation consists in an effort to find a common basis for mutual understanding and rational discussion. This, in my own experience, is one of the greatest benefits involved in these exercises: a partial change of frame of mind. It is an educational process which the more widely shared it is among the protagonists of legal development in Europe, will significantly contribute to the Europeanization of private law. Some of the more important of these initiatives will be mentioned in the following section of this chapter.[57]

One of the earliest such international networks was established by the founding editors of the *Zeitschrift für Europäisches Privatrecht*: one of the first two law journals devoted to the newly emerging field of European private law. The editorial of the first issue in 1993 stresses the importance of comparative law (apart from the common basis in the old *ius commune*, European community law, and the law contained in international conventions) for the development of the new *ius commune* and for the editorial policy of the journal. The editors, corresponding editors, and members of the advisory board have, at regular intervals, met for symposia in order to discuss how best to implement this policy. The journal, *inter alia*, makes available, and comments upon, the texts which have come to constitute essential threads within the tapestry of European private law; it looks at important decisions by national courts of law in a comparative and European perspective; it attempts to stimulate interest in the new discipline among students by means of an essay competition; and it has published, over the years, a large number of individual studies putting the comparative method into the service of European private law. The other journal in the field, established at about the same time under the name of *European Review of Private Law*, has introduced comparative case notes as a new type of European legal literature, and it regularly features special issues on subjects like comparative property law, the constitutionalization of private law in Europe, or the comparative implementation of the Consumer Sales Directive. Just as the *Zeitschrift für Europäisches Privatrecht*, the *European Review of Private Law*, has created an international network of editorial and advisory board members. The same is true of other journals which have, in the meantime, been founded (*Europa e diritto privato, Maastricht Journal of European and Comparative Law*, etc; most recently, a *European Review of Contract Law* has been established). A comparison between *Zeitschrift für Europäisches Privatrecht* and *European Review of Private Law* reveals a characteristic difference in language policy: the one journal is published largely in German but also accepts contributions in English and French (and places great emphasis on making available, in its section on annotated (p. 557) case law, extracts of court decisions in their original language of publication), the other is officially trilingual but effectively constitutes an English-medium publication (with abstracts being provided also in French and German). Both alternatives have their specific drawbacks: on the level of the circulation of the journal in the one case, and on that of the linguistic quality of some of the contributions and the abstracts in the other.

6. Finding the Common Core

The biggest existing network in Europe today, as far as the sheer number of participants is concerned, is the one created around the (Trento) Common Core of European Private Law Project.[58] Its origins are fairly humble: they reach back to a meeting of five persons at the University of Trento in the summer of 1993. At that meeting it was decided to make the analysis of specific sets of facts by a number of reporters from various European legal systems the key feature of the project: a manner of proceeding which had previously been used by a team of scholars led by the late Rudolf Schlesinger in relation to the formation of contracts[59] and which, it was hoped, would shed light on the practical significance of specific legal notions and doctrines, place them in their context, and clear away some of the misunderstandings and misinformation which had often, in the past, prevented unbiased comparative evaluation. Apart from that, the case study approach was supposed to provide interesting insights into the different ways in which the analysis of cases is conducted in the various European states. The aim of the Trento project is descriptive: it is designed to establish how much common ground there actually exists among the private laws of the member states of the European Union. The individual volumes appearing under the aegis of Trento thus attempt to provide a map of the private law as it is rather than a blueprint for legal harmonization. The first sub-project to be completed dealt with Good Faith in European Contract Law:[60] a topic of considerable practical significance at a time when every legal system within the European Union had to implement the Directive on Unfair Terms in Consumer Contracts and was thus facing the challenge of coming to terms with a general notion of good faith. All contributors to the good faith sub-project were asked to address the thirty cases chosen for comparative investigation at three different levels. In the first place, they were requested to provide a purely legal, or doctrinal, analysis, (p. 558) pointing out the practical result and explaining the way in which it was reached, some indication as to significant differences of opinion which might exist in the respective legal systems, and a discussion of the underlying policy concerns. Second, this analysis was to be placed in its legal context; and third, account was to be taken of institutional, procedural, or cultural features that might be pertinent to a proper understanding of the approach adopted. Each case study was rounded off by the editors' comparative observations which, in turn, provided the basis for general comparative conclusions. What emerged was a considerable harmony of result, with a great variety of doctrines being applied in cases which, in some systems, are thought of as involving the general notion of good faith. Contrary to a widely held opinion, differences both in result and approach were seen to cut across the civil law/common law line. In the meantime, a number of similar studies have been published in the fields of contract, delict, and property law.[61] The work of many other subgroups established under the umbrella of the Trento project is in progress.

7. Bridging the Channel

The great gulf supposedly existing between the civilian systems on the one hand and the English and Irish common law on the other[62] is taken by many to constitute a major obstacle within the process of harmonization of European private law. This traditional

perception, widely shared on both sides of the Channel, has prompted a significant amount of literature attempting to find common ground and to specify and critically evaluate the existing differences. This literature has been both historical and comparative in nature, it has focused on substantive private law and legal methodology, and it has contributed both to a growing awareness of existing connections between common law and civil law[63] and to the process of a growing convergence.[64] James Gordley has even declared the (p. 559) distinction to be obsolete.[65] And indeed, it must be obvious to anyone who has cooperated in one or more of the projects on the harmonization of European private law that the diversity existing among the civilian systems may be as great, and sometimes greater, than the differences between French and English, or German and English law. Specific attention has been devoted, over the past ten or fifteen years, to the topics often emphasized by those who see the world in terms of a civil law/common law dichotomy; among them good faith, the law of trusts, unjustified enrichment, and statutory interpretation. On the latter topic Stefan Vogenauer's great study has revealed that England was for many centuries a province of the *ius commune*.[66] The trust, on closer historical analysis, appears to be the specifically English variation of a common European theme. Common patterns of the development, similar social conditions, use of the same legal sources, a coincidence of purposes pursued: it can hardly be maintained that a wall of incomprehension separated the English trust from the law of the Continent.[67]

Again, occasionally, new forms of international cooperation have been tested. Thus, for example, civilian and common lawyers got together to identify the twelve key issues arising in the law of unjustified enrichment and to subject them to comparative scrutiny. Each topic was dealt with by two papers, one by a representative of a common-law system, the other by an academic with a civilian legal background.[68] Another example concerns legal systems, which are placed historically at the intersection of common law and civil law, and have, therefore, started to attract the attention both of scholars of comparative law, and of those concerned with the development of a European private law.[69] Pre-eminent among these ‘mixed’ legal systems are the uncodified ones of South Africa and Scotland. A recently concluded project has attempted to establish whether and to what extent Scots and South African law have been able to advance towards coherent and rational solutions of problems on which civil law and common law legal systems take a different view. Teams of leading experts from both jurisdictions have examined, collaboratively and comparatively, key topics within the law of property (p. 560) and obligations.[70] The individual chapters, in a number of fields, reveal an emerging and distinctive jurisprudence of mixed systems, and thus suggest viable answers to some of the great questions which must be answered on the path towards a European private law. Trust law provides a prominent example. Neither Scots law nor South African law knew the institutional separation of law and equity. Both have a law of property based on Roman legal concepts. None the less, both Scots law and South African law have developed a vigorous law of trusts—true trusts, without being English trusts.[71] They have been an important source of inspiration for a set of Principles of European Trust Law.[72]

8. Principles of European Contract Law

The elaboration of such ‘Principles’ has become very much *de rigueur* among lawyers in Europe. The Principles of European Trust Law provide but one example. The trend was set by the Principles of European Contract Law, published in three parts in 1995, 2000, and 2003.[73] They constitute today the most advanced, and internationally most widely noted, project on the way towards the harmonization of a central branch of European private law.

(a) Scope, Approach, Characteristic Features

The Principles of European Contract Law have been prepared by a 'Commission on European Contract Law', a body without any official status which originated in a private initiative of Professor Lando of Copenhagen (hence also: 'Lando Commission'). It consisted of academics from all member states of the European Union. The growth of the Commission paralleled that of the EU. In the end it had twenty-three members; three of them came from Germany, two each from France, Italy, England, and Scotland. All in all, preparation of the Principles took more than twenty years, for the work on them began as early as 1982. Part I contains fifty-nine articles which deal with the modalities of performance, non-performance, remedies for non-performance, and a number of general questions such as (p. 561) application, general duties of behaviour in the course of a contractual relationship, and terminology. The seventy-three articles of Part II cover the formation of contracts, authority of agents, validity (including vices of consent but excluding illegality), interpretation, and contents and effects (including contracts in favour of a third party). The third, and final, part of the Principles comprises sixty-nine articles on plurality of parties, assignment of claims, substitution of new debtor and transfer of contract, set-off, prescription, illegality, conditions, and capitalization of interest. Unlike Part II, Part III has not been integrated with the existing set of Principles but has been published separately, for the time being.

The long gestation period, as well as the fact that the work has been split into three stages, have left their trace on the substance of the Principles. The basic conception (preparation of a set of principles covering the general law of contract) dates back to a time before the EC had embarked on the regulation of an ever wider range of issues concerning consumer contracts. As a result, the *acquis communautaire* has largely been ignored in the Principles. In particular, the Lando Commission never addressed the difficult question of the way in which the mandatory rules on consumer protection can be integrated into a set of principles of general contract law.[74] In another respect the scope of application of the Principles has come to be extended over the course of time. For whereas their first two parts do indeed only deal with the law of contract, the first four chapters of Part III relate to all types of obligations. They thus constitute core components of a general law of obligations for Europe. A certain change of conception also appears to have occurred with regard to the character of the provisions contained in the Principles. Originally, as is apparent from the title chosen for their work, the members of the Lando Commission do not appear to have aimed at drafting a system of specific rules which might immediately be applied by courts of law. Yet, the rules contained in a number of the later chapters (such as those on plurality of parties, assignment, set-off, and prescription) attain a level of specificity emulating that of any of the existing national codes of private law. The term 'Principles' thus appears to be used, very largely, as a convenient smokescreen for a model code of legal rules.[75] And finally, the preparation of the Principles in three different stages has led to certain deficiencies of coordination. Thus, for example, all three parts contain rules dealing with the restitution of benefits. Article 5:114 PECL refers to situations where a contract has been avoided, Arts 9:305 ff PECL deal with the consequences of termination of contract in cases of non-performance,

and Art 15:104 PECL covers the restitution of benefits received under a contract that has turned out to (p. 562) be invalid because of illegality. This triplication of rules as well as the differences between them is not justifiable. It is one of a number of issues on which the Principles still need to be refined and revised.

The Principles of European Contract Law are the product of an international comparative and collaborative effort. Of course, one or two ‘reporters’ were responsible for the individual chapters. They had the task of preparing comparative position papers and draft articles and commentaries. However, a number of different members of the Commission served as reporters. The position papers and successive drafts were presented to the Commission as well as to a ‘Drafting Group’ and were discussed, criticized, refined, and referred back to the reporters several times by both bodies; finally they were passed in two ‘readings’ by the Commission and subsequently checked again by another body, the ‘Editing Group’. All in all, the Commission met twenty-six times; each meeting, as a rule, lasted one week. Great efforts were made to achieve a consensus even if on a number of issues, eventually, a vote had to be taken. Also, every effort was made by the draftsmen of the Principles not to base their work on any individual legal system. Their approach was comparative in nature. They attempted, as far as possible, to identify the common core of the contract law of all the EU member states and to create a workable system on that basis. Thus, in a way, they aimed at a restatement of European contract law. At the same time, however, they realized that they were confronted with a more creative task than the draftsmen of the American Restatements. Divergences had to be resolved on the basis of a comparative evaluation of the experiences gathered in the national legal systems, by assessing and analysing European and international trends of legal development, or by employing other rational criteria.[76]

The Principles are also inspired by the Restatements of American Law, as far as the style and structure of their publication are concerned. Each volume contains the text of the articles which the Commission has agreed upon. In addition, for every article there are a commentary (including illustrations) and comparative notes; the latter inform the reader about the pertinent legal rules applicable in the EU member states but also take account of other sources of law, such as international Conventions. The articles contained in the Principles of European Contract Law have immediately been published in a French and an English version, even though English has otherwise been the language of publication. In the course of the deliberations of the Lando Commission great emphasis was placed on the possibility of expressing every term and concept used in the Principles in both French and English; the Commission was thus constantly aware of the danger of using a terminology indelibly shaped by the peculiarities of individual legal systems.

(p. 563) (b) Purposes and Perspectives

Generally speaking, I think, that the Principles of European Contract Law can be regarded as the product of a long tradition, distinguished by its inherent flexibility and capacity for development,[77] and as a contemporary manifestation of a genuinely European law of contract (even in places where an unconventional solution has been found and adopted).[78] Which contribution are they, in turn, able to render to the Europeanization of contract law? The authors of the Principles themselves mention a number of purposes for which the Principles are designed.[79] They want to facilitate cross-border trade within Europe by making available to the parties a set of neutral rules, detached from the peculiarities of any one national legal system, to which they can subject their transaction. Moreover, the authors of the Principles regard their work as a modern formulation of a *lex mercatoria* which can be referred to, for instance, by arbitrators who have to decide a case according to 'internationally accepted principles of law'. These are very practical purposes. But the Principles are also seen by their authors in a less immediately practical, but rather longer-term perspective. They provide a conceptual and systematic infrastructure for community legislation concerning contract law; at the same time they can be taken to constitute a first step towards a European Civil Code.

Of central significance in the immediate future appears to be yet another aspect: the Principles as a source of inspiration for national legislation, courts of law, and legal doctrine.[80] For the foreseeable future we will still be faced with the coexistence of several national systems of private law in Europe. Much would, however, be gained if these could be assimilated gradually, or organically. The Principles of European Contract Law can play a key role within this process. For they provide a compass, established on the basis of comparative research and international cooperation, which can serve to guide the interpretation and development of the national legal systems. Comparison with the Principles will reveal the quirks and idiosyncrasies of the latter and will lead to their reappraisal. Unfortunately, in Germany, the Principles have not yet worked their way into the general textbooks and commentaries on private law. Dutch writers, on the other hand, refer to the Principles almost as a matter of routine even when they merely deal with a question of Dutch contract law. A recent collection of texts, cases, and materials on English contract law invokes the Principles on a number of occasions even (p. 564) although it specifically does not describe itself as a book on comparative law.[81] Another very interesting initiative has been taken in the Netherlands. Five authors have systematically examined their own legal system from the point of view of the Principles and have thus, by using a supranational frame of reference, made Dutch law more easily accessible to foreign lawyers.[82] As far as national legislation is concerned, the Principles have been taken into consideration in the final stages of the so-called 'modernization' of the German law of obligations; the new law of prescription has been based, in its general outlines, on the model proposed by the Lando Commission.[83] National courts of law, however, have not yet started to use the potential inherent in the Principles for what may be termed a 'harmonizing' method of interpretation.[84]

9. Principles of European Tort Law

The successful cooperation within the Lando Commission has inspired similar initiatives in other fields. One of them is the Group on European Tort Law, originally also referred to as 'Tilburg Group' but now based in the European Centre of Tort and Insurance Law in Vienna. Since its establishment in 1993, this group has endeavoured to survey tort law on a comparative basis and has published individual volumes devoted, *inter alia*, to wrongfulness, causation, damages, strict liability, liability of damage caused by others, contributory negligence, and multiple tortfeasors.[85] In addition, members of the group have been involved in a number of other comparative projects run by the Centre, such as those on medical malpractice, compensation for personal injury, damages for non-pecuniary loss, the impact of social security on tort law, and pure economic loss.[86] All these books contain country reports, based on questionnaires which usually consist of a mixture of abstract questions and cases. The country reports, in turn, provide the basis for a general comparative report by the editors of the respective volumes. In addition, in 2001, the European Centre of Tort and Insurance Law (through (p. 565) Helmut Koziol and Barbara C. Steininger) started to publish a yearbook on the development of European Tort Law. These activities have helped to pave the way towards the achievement of the main aim on the agenda of the Group on European Tort Law: the elaboration of a set of Principles of European Tort Law. These Principles were published in the second half of 2004.[87] In most respects, they resemble the Principles of European Contract Law. Like the Lando Commission the Group on European Tort Law did not choose one or two of the existing codes or draft codes as a model system on which to base its work. The approach adopted was essentially comparative in nature. Like the Lando Commission, the Group on European Tort Law has not drafted 'Principles' in the technical sense of the word but legal rules (even if sometimes extremely broad ones). Both sets of rules are characterized by a considerable amount of built-in flexibility. But whereas the Principles of European Contract Law tend to operate with open-ended standards such as 'reasonable', 'good faith', or 'proportional', the Principles of European Tort Law employ the technique of a flexible system:[88] they provide a basic rule and then attempt to specify the various elements which have to combine in various degrees and configurations in order to found liability. Apart from that, both sets of Principles are drafted in a similar style: an effort has been made to formulate rules which are short, general, and as easily comprehensible as possible. The draftsmen have also endeavoured to avoid concepts which carry a doctrinal connotation specifically related to the one or other national legal system. Unlike the Lando Commission, however, the Group on European Tort Law appears to have operated exclusively in English, which is also the original language of publication. Both groups were working groups; they were originally fairly small and have grown in the course of time. Both attempted to secure a broadly based international membership. But whereas the Lando Commission had at least one member from each member state of the European Union, and none from outside, the Group on European Tort Law also included members from Switzerland, Israel, South Africa, and the United States; on the other hand, it did not have members from all EU member states. The composition of the Tort

Law group appears to be a better reflection of the idea that the members of the two groups were not supposed to be, and were not chosen as, representatives of the state from which they came. Moreover, it takes account of two related facts: private law that can historically be described as ‘European’ also exists (p. 566) outside Europe;[89] and the boundaries of the European Union appear to be somewhat artificial when it comes to assessing the international (even the European!) development of tort law.[90]

10. More Principles

Other initiatives of a similar kind are the Principles of European Trust Law (drafted by an international working group based in Nijmegen and published in 1999),[91] the Principles of European Insolvency Law (drafted by an international working group also based in Nijmegen and published in 2003),[92] and, most recently, the Principles of European Family Law regarding Divorce and Maintenance between Former Spouses (drafted by an international Commission on European Family Law based in Utrecht and published in 2004).[93] The latter Commission had previously published two comparative studies devoted to grounds for divorce and maintenance between former spouses[94] and will in future explore other topics within the field of family law. An international project group Restatement of Insurance Contract Law, founded in 1999 and based in Innsbruck and Hamburg, has yet to publish the results of its deliberations.

The drafting of Principles has even become fashionable in the field of global legal harmonization. Thus, internationally the Principles of European Contract Law compete with the UNIDROIT Principles of International Commercial Contracts (published originally in 1994 and in an extended version in 2004).[95] Both (p. 567) works are comparable in many respects. Thus, in particular, they have been prepared in a similar manner, they pursue similar aims, and they have been drafted in a similar style. The style and structure of the presentation are also very similar (even if the UNIDROIT Principles do not contain comparative notes). There are two major differences in that (i) UNIDROIT pursues the aim of a global rather than European harmonization of contract law and (ii) the UNIDROIT Principles specifically deal with international commercial contracts while the 'Lando' Commission has formulated principles of general contract law. In view of this it may appear surprising that the individual solutions proposed by both sets of Principles do not very much differ from each other; in a number of areas they are virtually identical.[96] The dominance of European legal thinking patterns even outside of Europe may provide an explanation, as far as the first point is concerned. With respect to (ii) it may perhaps be said that what is regarded as fair and reasonable for commercial contracts can very largely also be regarded as fair and reasonable for consumer contracts, and vice versa. This confirms an observation on the development of modern sales law: the provisions in the Consumer Sales Directive 1999/44, particularly those concerning the concept of conformity and the remedies in case of non-conformity, very largely mirror the rules contained in the UN Convention on the International Sale of Goods, even though the latter instrument specifically excludes consumer sales from its range of application.[97] The correspondence between these two international instruments will significantly contribute to the emergence of a common framework of reference for the discussion and development of the law of sale in Europe.[98] The same can be said, on the basis of a comparison between the UNIDROIT and the Lando Principles, for many central areas of the general law of contract.

European and international legal unification often go hand in hand and influence each other. This is one of two reasons why initiatives which aim at legal unification beyond the boundaries of the European Union (such as CISG, the Geneva Agency Convention, the Ottawa Factoring Convention, or the Cape Town Convention on International Interests in Mobile Equipment) have to be kept in mind when analysing the harmonization of private law in Europe.[99] The other is the simple fact that international unification also often, implicitly, brings about legal unification in Europe. Another potentially important document also for (p. 568) Europe are the Principles of Transnational Civil Procedure, a project jointly run by UNIDROIT and the American Law Institute. It was finalized in 2004 and published in 2005.[100] A European working group under the chairmanship of Marcel Storme had presented a report on the Approximation of Judiciary Law in 1994.[101] The recommendations contained in this report have not, however, been acted on by the European Commission.

11. Moving towards a Code? Study Group and Avant-Projet

A growing number of comparative and European lawyers today regard the preparation, and introduction, of a European Civil Code as both feasible and desirable. Two international initiatives have embarked on an attempt to elaborate draft codes. The one is the *Avant-projet* of a European Contract Code, published in the name of an *Accademia dei Giusprivatisti Europei*, with its seat in Pavia.[102] In spite of (or probably rather: in view of) the fact that that Academy consists of close to 100 members, the *Avant-projet* is the work, very largely, of one man: Giuseppe Gandolfi, described on the title of the publication with too much modesty as 'coordinator'. The academy did not have much more than a consultative function: it gave suggestions, commented on preliminary drafts, and met occasionally in plenary sessions as well as national subgroups. Its members do not appear to have been involved in the actual drafting of the rules. Moreover, the *Avant-projet* takes its cue from two models. These are the Italian *Codice civile* (since it combines elements of French and German law) and a Contract Code drawn up on behalf of the English Law Commission at the end of the 1960s (which, however, has neither been implemented nor even been published in England).[103] Another notable difference to just about all the other projects presented thus far is that the *Avant-projet* is published in French. While the *Avant-projet* offers interesting material for reflection and discussion, it is doubtful whether a draft which is neither based on detailed comparative research into the contemporary sources of national law nor the product of genuine international collaboration will commend itself to many objective observers as a model European Code.[104]

(p. 569) The other initiative is the Study Group on a European Civil Code, established in 1998 at the inspiration, and under the chairmanship, of Christian von Bar.[105] The Study Group has become an enormous international network consisting of individual working, advisory, coordinating, steering groups and specialized 'task forces'; it is financed, very largely, by a number of national research organizations. In a way, the Study Group is carrying on the work of the Lando Commission by drafting sets of model rules for adjacent areas of the law: delict, unjustified enrichment, *negotiorum gestio*, sales, services and long-term contracts, insurance contract law, credit securities and the transfer of movable property. The working groups are based in Osnabrück, Hamburg, Salzburg, Utrecht, Tilburg, and Amsterdam. A number of preliminary drafts have been published; and for insurance contracts a comprehensive comparative study in three volumes has been edited by Jürgen Basedow and Till Fock.[106] The first completed results of the work of the Study Group will be published in the course of 2006. These publications will probably be very similar in style and structure to those of the Lando Commission.

V. Where We Stand Today

1. Obligations—and beyond?

If account is also taken of the large number of comparative studies on individual topics of European private law to have appeared since 1990,[107] and of initiatives like the creation of a Society of European Contract Law (Secola) and of a Study Group on Social Justice in European Private Law,[108] it will be apparent that (p. 570) comparative law has eagerly embraced its new task. In fact, one can sometimes gain the impression that hardly any project, or study, in the field of comparative private law in Europe is launched today without at least a reference to its utility within the process of Europeanization of private law or private law scholarship. Thus, the time may have come occasionally to emphasize that comparative law may also legitimately serve other purposes. Originally, Europeanization of private law as a scholarly enterprise was promoted particularly forcefully by German authors. In the meantime it has caught on in many countries across Europe, among them Italy, Spain (particularly Catalonia), Scotland, and, above all, the Netherlands. Other countries, most notably France, have displayed considerable reserve. The movement has been strongly stimulated by a process of legal unification 'from above', that is, by way of central legislation within the European Union, which was widely perceived to be selective, uncoordinated, and detrimental to the integrity of private law. A broadly based Europeanization of private law was seen by some as a strategy to check, by others as the appropriate way to bolster, these developments. Within the traditional core areas of private law, contract law has been at the centre of attention. The internal market provides the most powerful motivation, and driving force, for legal harmonization within the European Union, and contract law, obviously, is particularly closely related to the internal market. This is the reason why a considerable number of Directives have been enacted in this field. Moreover, in spite of two hundred years of legal nationalization, contract law is still more international in substance and character than tort law, property law, or family law. However, in the tradition of European private law (including England), contract is only one component of a larger systematic entity: the law of obligations.[109] The second main pillar of the law of obligations is the law of delict. Other non-contractual obligations can arise from unjustified enrichment and (in the continental legal tradition) *negotiorum gestio*. Contract, delict, unjustified enrichment, and *negotiorum gestio* are, however, interrelated with each other in so many ways that the isolated consideration of merely one of these components is bound to lead to a distorted picture. Thus, it was to be expected that, sooner rather than later, the law of obligations in general would be caught up in the surge of Europeanization. This is what has actually happened, even though contract law has remained the most advanced, and most meticulously scrutinized, subject, by far. Property law, family law, and the law of succession have only marginally been affected. Whatever attention has been given to property law has largely been confined to movable property. This is as true of the comparative study edited by Eva-

Maria Kieninger (p. 571) within the framework of the Common Core Project[110] as it is of the two property law-related working groups of the Study Group (transfer of property and securities on movables), or of Willem Zwalve's pioneering historical and comparative work.[111] Christian von Bar, however, has edited a series of books offering a systematic introduction to the national property laws in Europe at large.[112] In the field of family law the (self-appointed) Commission on European Family Law has been mentioned. In Regensburg, Dieter Henrich and Dieter Schwab started to survey and till the field of European family law in the middle of the 1990s.[113] Considerable attention has been devoted to the comparative study of trust law. Recently a large-scale research project has been launched in Hamburg on the law relating to non-profit organizations in Europe.[114] Hardly more than one or two programmatic articles have, so far, been devoted to the Europeanization of the law of succession.[115]

2. An Educational Process

Europeanization of private law has been on the agenda of comparative law scholarship for about fifteen years. Over that period a number of new approaches have successfully been tried, though hardly any of the work surveyed in this chapter has fundamentally challenged the conventional ‘method’ of comparative law, as set out in standard works like Zweigert and Kötz.[116] The work done, so far, has either been of a descriptive nature in that it attempts to survey the European legal landscape as accurately as possible, or it has also had an evaluative, or normative, component suggesting the best, or most appropriate, solution to a problem on a European level. The arguments advanced in the latter context can be of an economic character, based on past experience, related to systematic concerns, and so on; ultimately, ‘(t)he comparatist uses just the same criteria as any other lawyer who has to (p. 572) decide which of two possible solutions is more suitable and just’.[117] Comparative law scholarship has often been closely associated with historical legal studies.[118] Legal historians have, in fact, been among the first to point out that the national particularization of private law and private law scholarship in Europe is both unnatural and anachronistic; and they have demonstrated that an awareness of the common past can facilitate the path towards a common future. The real hallmark of comparative law scholarship under the auspices of Europeanization has been the astonishing proliferation of international working groups. The interaction engendered by them has led to a significant change of mentality and has therefore been of great value in itself. But it has also led to results. Occasionally, merely the smallest common denominator between divergent traditions and solutions has been established. Sometimes a very considerable amount of common ground has been found. In other cases lawyers from many different countries have, on rational grounds, been able to reach agreement that one approach to a legal problem is superior to the other. From time to time new solutions have even been developed which fit prevailing legal thinking better than the established ones. In some instances the new solutions can be seen as a ‘progressive development’ within the European legal tradition, in others they herald the recovery of ideas prevailing in the past that had subsequently come to be suppressed.[119] It is, in

other words, an educational process which, in addition, sometimes produces excellent results; and these results, in turn, can guide and stimulate the development of national private law.

VI. Looking into the Future

1. The Right Time for a Code?

What is the future going to bring? Some will say (or hope) a codification of European private law. The main proponent of this view is the European Parliament.[120] The Commission of the European Union, more cautiously, envisages the preparation of a 'common frame of reference' for European contract law, with the aim of improving the coherence of the existing and future *acquis*; the frame of (p. 573) reference may then serve as the basis for an 'optional instrument'.[121] It is likely that the Principles of European Contract Law of the Lando Commission will play a key role in this process. That the possibility of codifying European private law, or even of part of it, is seriously discussed today is nothing less than astonishing if account is taken of the lame and incredulous reactions with which the first steps towards a Europeanization of private law were received in the early 1990s. Yet, among academics across Europe the desirability of a European Civil Code is a hotly contested issue.[122]

The discussion today has obvious parallels to the great codification debate in early nineteenth-century Germany when A. F. J. Thibaut argued that a General German Civil Code, modelled on the French *Code civil*, would facilitate the emergence of an undivided German nation. It was to have a symbolic, apart from its practical, value. Thibaut's ideas, however, had been decisively rejected by Friedrich Carl von Savigny, soon to emerge as the patron saint of German legal scholarship, who had insisted on the necessity of establishing an 'organically progressive legal scholarship that may be common to the whole nation'.[123] Savigny's Historical School led to German legal unification on a scholarly level and, eventually, even to the drafting of a Civil Code—a code, however, which, rather than constituting a watershed in German legal development, bore certain characteristics of a restatement; and which was described by one of its principal architects, Bernhard Windscheid, as 'merely a ripple in the stream' within the development of the law by courts and legal scholars.[124] In a similar vein, the establishment of a legal scholarship 'which may be common to the whole of Europe' is widely seen as one of the great challenges of our time:[125] a scholarship which may, eventually, pave the way towards a codification as widely accepted in Europe as the *Code civil* in France or the BGB in Germany. Today we only see the beginnings of such development. For it must not be forgotten that, in spite of the developments analysed in this chapter, national courts, as well as legal literature and legal training regulations

(p. 574) have, so far, predominantly retained their fixation on national codes of private law (or on the national common law).

Apart from that, the scope of an optional (or binding?) 'instrument'[126] is far from clear. Very few would argue that it should immediately include rules on immovable property, family law, or succession upon death. But should it be confined to general contract law? That is what the European Commission appears to envisage. Or will it have to cover closely related subjects such as those already tackled by the Study Group on a European Civil Code? It is equally unclear whether European Community Law provides a legal basis for the enactment of such an instrument.[127] This question, in turn, is closely linked to the issues of the legal form and scope of the instrument. Finally, it is open to doubt whether, apart from political considerations (a European Civil Code as a symbol of European unity), economic arguments can be advanced in favour of legal unification. This is regularly done. Still, however, leading European law and economics scholars have challenged the assumptions on which these arguments rest.[128]

2. Comparative Law and Legal History

Whatever the answers to these questions may be, the process of a Europeanization will continue, and even accelerate. Evidently, also, comparative law scholarship will continue to be crucially important. This is contested only by those who, oddly, equate legal culture essentially with national legal culture and who, equally oddly, wish to focus scholarship in comparative law on the investigation (or as it is sometimes put: the celebration) of *differences* in mentality, style, or approach.[129] Comparative law will continue to derive great benefit from its cooperation with legal history. Historical scholarship helps us to map out, and to become aware of, the common ground which still exists between our national legal systems as a result of a common tradition, of independent but parallel developments, and of (p. 575) instances of intellectual stimulation or the reception of legal rules or concepts. At the same time, it will be able to explain discrepancies on the level of specific result, general approach, and doctrinal nuance. It is this kind of comprehension that paves the way for rational criticism and organic development of the law. The past, of course, does not justify itself; nor does it necessarily contain the solutions for present-day problems. But an understanding of the past is the first and essential prerequisite for devising appropriate solutions for the present day. This is as true within a given legal system as it is for the formation of European law. And just as legal history informs the development of private law doctrine in the one case, so it constitutes the basis for comparative legal scholarship in the other.[130]

3. The Communitarization of Comparative Private Law

One dimension of comparative law scholarship within Europe that will have to be considerably strengthened is the one concerning European Community private law. For just as we witness a growing process of Communitarization of the national private laws,

so the European Community private law will have to play a vital role in the process of developing model rules or principles of private law in Europe. The European Community enactments in the field of private law are too scattered and too ill-coordinated to serve, on their own, as a basis for the elaboration of model rules of general contract law or tort law. But Principles of European Contract Law or Tort Law such as those prepared by the Lando Commission or the Group on European Tort Law can hardly be called 'European' in the true sense of the word, if they fail to take account of pertinent EC Directives (as well as of the relevant case law of the European Court of Justice). The neglect of these genuinely European sources of law is one of their most serious shortcomings. Likewise, other research initiatives will have to further the process of what may be called a Communitarization of comparative private law.[131] At the same time, however, comparative law (p. 576) scholarship has to contribute to what may equally be referred to as a Europeanization of Community law: a process by means of which a firm foundation for Community law is established in the concepts and principles which the legal systems of the EU member states have in common.[132] Even in the past, of course, the Commission of the European Union commissioned comparative studies before it issued a new Directive.[133] It is not always clear, however, what role these studies have played in the actual drafting of the legislation. And while it may not be necessary to bring books to Brussels,[134] there does appear to be room for a supply of comparative information that is both more transparent and more comprehensive. The same can be said about the decisions of the European Court of Justice. In the field of extra-contractual liability of Community institutions the Court has to establish 'the general principles common to the laws of the Member States',[135] and the search for such common principles, or critical comparative evaluation of the rules found in the various national legal systems, is also of considerable importance in other fields. But the use of the comparative method is not readily apparent since it does not normally leave its traces in the reasoning of the Court. Not rarely the Court appears to ask its research service for comparative studies on specific points of law. But since these are never published it is impossible to assess their scope and quality.[136]

Comparative law scholarship in Europe should not, however, even if it is engaged in the great task of Europeanization of private law, confine its attention exclusively to Europe. There is much to be learnt from experiences gathered in other parts of the world.[137] The American Restatements have already been a valuable source of inspiration in the search for 'Principles' of European law. Casebooks are in the process of becoming an established form of European legal literature. The creation of a European Law Institute on the model of the American Law (p. 577) Institute has been proposed.[138] And even in the art of codification European lawyers can learn from their transatlantic colleagues: unification of private law through uniform (model) legislation provides one example, the codiication experience in mixed systems (Louisiana, Québec) another.

4. Beyond Comparative Law?

The traditional ‘comparative method’, based on a functional approach, will probably continue to play a significant role for the further Europeanization of private law. Economic analysis can be useful for the evaluative part of comparative studies; for the more efficient solution will often be the better, or more appropriate, solution to a legal problem. But this type of argument is not specifically related, or conducive, to the Europeanization of private law. The same is true of other non-conventional forms of legal scholarship (critical legal studies, *autopoiesis* theory): as far as they are valid, they are valid for legal discourse in general; and if they have implications for comparative law, these implications have to be considered for comparative law in general. It is impossible to predict whether the new approaches will have an impact on the process of Europeanization of private law by means of comparative law. The application of the traditional comparative method may, however, run into difficulties in areas where we still have to devise adequate conceptual tools which are both common to the national legal systems and teleologically satisfactory (such as the law of delict). This is a constructive enterprise the dimensions of which are only beginning to be explored today.[139]

Bibliography

Reinhard Zimmermann, ‘Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science’, (1996) 112 *LQR* 576 ff

Martin Gebauer, *Grundfragen der Europäisierung des Privatrechts* (1998)

Stefan Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts* (2000)

Mark van Hoecke and Francois Ost (eds), *The Harmonisation of European Private Law* (2000)

Jürgen Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000)

Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001)

(p. 578) Jan Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (2002)

Mauro Bussani and Ugo Mattei (eds), *The Common Core of European Private Law* (2002)

Martijn W. Hesselink, *The New European Private Law: Essays on the Future of Private Law in Europe* (2002)

Hein Kötz, ‘Alte und neue Aufgaben der Rechtsvergleichung’, [2002] *Juristenzeitung* 257 ff

Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’, (2002) 50 *AJCL* 671 ff

Mark van Hoeke (ed), *Epistemology and Methodology of Comparative Law* (2004)

Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, and Muriel Veldman (eds), *Towards a European Civil Code* (3rd edn, 2004)

Nils Jansen, *Binnenmarkt, Privatrecht und europäische Identität* (2004)

Reiner Schulze and Reinhard Zimmermann (eds), *Europäisches Privatrecht: Basistexte* (3rd edn, 2005

; English edn, based on 2nd German edn, by
Oliver Radley-Gardner, Hugh Beale, Reinhard Zimmermann, and Reiner Schulze, *Fundamental Texts on European Private Law*, 2003)

Notes:

(1) See the account by David S. Clark, ‘Nothing New in 2000?: Comparative Law in 1900 and Today’, (2001) 75 *Tulane LR* 871 ff: a paper presented at the Centennial World Congress on Comparative Law in New Orleans.

(2) Herbert Kronke, ‘Ziele—Methoden, Kosten, Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT’, [2001] *Juristenzeitung* 1149 ff. Kronke is presently the secretary general of UNIDROIT.

(3) Kurt Siehr and Reinhard Zimmermann (eds), Symposium: ‘The Convention on the International Sale of Goods and its Application in Comparative Perspective’, (2004) 68 *RabelsZ* 427 ff; Franco Ferrari (ed), *Quo Vadis CISG?* (2005).

(4) Ernst Rabel, *Das Recht des Warenkaufs* (2 vols, 1936 and 1958). See Gerhard Kegel, ‘Ernst Rabel—Werk und Person’, (1990) 54 *RabelsZ* 1 ff.

(5) See generally Arnald J. Kanning, *Unifying Commercial Laws of Nation-States: Coordination of Legal Systems and Economic Growth* (2003).

(6) For details, see the documentation edited by Reiner Schulze and Thomas Hoeren, *Dokumente zum Europäischen Recht* (2 vols, 1999 and 2000).

(7) Walter Hallstein, ‘Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft’, (1964) 28 *RabelsZ* 211 ff.

(8) See today Mathias Habersack, *Europäisches Gesellschaftsrecht* (2nd edn, 2003); Stefan Grundmann, *Europäisches Gesellschaftsrecht* (2004).

(9) See eg Claus-Wilhelm Canaris, 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft', in *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche* (1993), 873 ff.

(10) Stefan Grundmann, in Stefan Grundmann and Cesare Massimo Bianca (eds), *EU-Kaufrechts-Richtlinie: Kommentar* (2002), Einleitung, n 19.

(11) For an overview, see Peter-Christian Müller-Graff 'EC Directives as a Means of Private Law Unification', in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, and Muriel Veldman (eds), *Towards a European Civil Code* (3rd edn, 2004), 77 ff. The Directives in the core areas of private law are conveniently available in Oliver Radley-Gardner, Hugh Beale, Reinhard Zimmermann, and Reiner Schulze (eds), *Fundamental Texts on European Private Law* (2003), 3 ff.

(12) Wolfgang Faber, 'Elemente verschiedener Verbraucherbegriffe in EG-Richtlinien, zwischenstaatlichen Übereinkommen und nationalem Zivil- und Kollisionsrecht', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 854 ff; Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003), 250 ff. Generally, see Thomas M. J. Möllers, 'Europäische Richtlinien zum Bürgerlichen Recht' [2002] *Juristenzeitung* 121 ff.

(13) For an approach based on the self-determination of the consumer, see Josef Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (1998); Reinhard Zimmermann, 'Consumer Contract Law and General Contract Law', in *idem*, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 159 ff.

(14) Case C-376/98 *Germany v European Parliament* [2000] ECR I-8419.

(15) Wulf-Henning Roth, 'Europäischer Verbraucherschutz und BGB' [2001] *Juristenzeitung* 477 ff.

(16) Walter van Gerven, 'The ECJ Case-Law as a Means of Unification of Private Law', in Hartkamp *et al* (n 11), 101 ff.

(17) For a detailed discussion, see Wolfgang Wurmnest, *Grundzüge eines europäischen Haftungsrechts: Eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts* (2003), 13 ff.

(18) Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger* [1998] ECR I-1199; Case C-481/99 *Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945; Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2002] ECR I-2631.

(19) On which see Winfried Tilmann, 'Entschließung des Europäischen Parlaments über die Angleichung des Privatrechts der Mitgliedstaaten vom 26.05.1989', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 613 ff.

(20) COM (2003) 68, [2003] OJ C 63/1.

(21) COM (2001) 398, [2001] OJ 2001 C 255/1.

(22) For further discussion, see Christian von Bar, 'Ein gemeinsamer Referenzrahmen für das marktrelevante Privatrecht in der Europäischen Union', in *Festschrift für Erik Jayme* (vol II, 2004), 1217 ff.

(23) See below, Section IV.8 and 11.

(24) Konrad Zweigert, 'Grundsatzfragen der europäischen Rechtsangleichung, ihrer Schöpfung und Sicherung', in *Vom deutschen zum europäischen Recht: Festschrift für Hans Dölle* (vol II, 1963), 401 ff.

(25) Hein Kötz, 'Gemeineuropäisches Zivilrecht', in *Festschrift für Konrad Zweigert* (1981), 481 ff.

(26) Helmut Coing, *Europäisierung der Rechtswissenschaft*, [1990] *Neue Juristische Wochenschrift* 937 ff.

(27) Helmut Coing, *Europäisches Privatrecht* (vol I, 1985; vol II, 1989).

(28) Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983). Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990).

(29) Paul Koschaker, *Europa und das römische Recht* (1st edn, 1947; 4th edn, 1966).

(30) Hein Kötz, *Europäisches Vertragsrecht* (vol I, 1996, English trans under the title *European Contract Law* by Tony Weir, vol I, 1997).

(31) Hein Kötz, 'Europäische Juristenausbildung', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 268 ff; Michael Faure, Jan Smits, and Hildegard Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (2002).

(32) On the decline of Roman law in Britain, see, by way of example, Peter Birks, 'Roman Law in Twentieth-Century Britain', in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted* (2004), 249 ff.

(33) The mobility of German students has increased from 657 in 1987–8 to 18,482 in 2002–3. Of the 18,482 German 'outgoings' in 2002–3 1,341 were law students: information kindly supplied by the German Academic Exchange Service.

(34) Hugh Beale, Arthur Hartkamp, Hein Kötz, and Denis Tallon (gen eds), *Cases, Materials and Text on Contract Law* (2002); Walter van Gerven, Jeremy Lever, and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (2000); Jack Beatson and Eltjo Schrage (gen eds), *Cases, Materials and Texts on Unjustified Enrichment* (2003).

(35) Filippo Ranieri, *Europäisches Obligationenrecht* (2nd edn, 2003).

(36) Kötz (n 30). vol II, to be written by Axel Flessner, has not yet appeared.

(37) Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (1st edn in two vols, 1971, 3rd edn in one vol, 1996, English trans under the title *An Introduction to Comparative Law* by Tony Weir, 3rd edn, 1998).

(38) James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991).

(39) On the use of the device of implying conditions into the contract, 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* 121 ff.

(40) As restated authoritatively in Zweigert and Kötz (n 37), 31 ff (32 ff of the English edn).

(41) Peter Schlechtriem, *Restitution und Bereicherungsausgleich in Europa: Eine rechtsvergleichende Darstellung* (vol I, 2000; vol II, 2001).

(42) Christian von Bar, *Gemeineuropäisches Deliktsrecht* (vol I, 1996; vol II, 1999; English translation under the title *The Common European Law of Torts*, vol I, 1998; vol II, 2000).

(43) Zimmermann (n 28), 1017 ff; Nils Jansen, *Die Struktur des Haftungsrechts* (2003), 271 ff.

(44) David Ibbetson, 'Harmonisation of the Law of Tort and Delict: A Comparative and Historical Perspective', in Reinhard Zimmermann (ed), *Grundstrukturen des Europäischen Deliktsrechts* (2003), 133 ff.

(45) The point is made, and substantiated, by Jansen (n 43), 181 ff. Jansen's own reconceptualization (389 ft) is predicated on this analysis.

(46) Nils Jansen, *Binnenmarkt, Privatrecht und europäische Identität* (2004), 33 ff.

(47) Below, n 87.

(48) Reinhard Zimmermann, 'Bereicherungsrecht in Europa: Eine Einführung', in *idem* (ed), *Grundstrukturen eines Europäischen Bereicherungsrechts* (2005), 22 ff; Nils Jansen, 'Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny', (2003) 120 *Zeitschrift der Savigny-Stiftung, Romanistische Abteilung* 106 ff.

(49) Jansen (n 46), 40 ff.

(50) Axel Flessner, 'Juristische Methode und europäisches Privatrecht', [2002] *Juristenzeitung* 14 ff.

(51) Gerhard Wagner, ‘Grundstrukturen des Europäischen Deliktsrechts’, in Reinhard Zimmermann (n 44), 229 ff.

(52) See, apart from Wagner (ibid) and Jansen (n 43), 524 ff, Mauro Bussani and Vernon Valentine Palmer (eds), *Pure Economic Loss in Europe* (2003); Willem H. van Boom, Helmut Koziol, and Christian A. Witting, *Pure Economic Loss* (2004).

(53) The point is substantiated in Phillip Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem* (2004); Reinhard Zimmermann, ‘Restitutio in integrum’, in *Privatrecht und Methode: Festschrift für Ernst A. Kramer* (2004), 735 ff.

(54) See Christiane Wendehorst, ‘Die Leistungskondiktion und ihre Binnenstruktur in rechtsvergleichender Perspektive’, and Thomas Krebs, ‘Eingriffskondiktion und Restitution for Wrongs im englischen Recht’, both in Zimmermann, *Grundstrukturen* (n 48), 47 ff, 141 ff.

(55) Sonja Meier, *Irrtum und Zweckverfehlung* (1999); Peter Birks, *Unjust Enrichment* (2nd edn, 2005), 101 ff.

(56) But see now Part III of the Principles of European Contract Law; below, n 73. A comprehensive historical and comparative monograph on set-off has now been published by Pascal Pichonnaz, *La compensation* (2001).

(57) cf also Wolfgang Wurmnest, ‘Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze—Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa’, (2003) 11 *Zeitschrift für Europäisches Privatrecht* 714 ff.

(58) Mauro Bussani, ‘“Integrative” Comparative Law Enterprises and the Inner Stratification of Legal Systems’, (2000) 8 *European Review of Private Law* 85 ff; Mauro Bussani and Ugo Mattei (eds), *The Common Core of European Private Law* (2002).

(59) Rudolf Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (vols I and II, 1968).

(60) Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (2000).

(61) James Gordley (ed), *The Enforceability of Promises in European Contract Law* (2001); Mauro Bussani and Vernon Valentine Palmer (eds), *Pure Economic Loss in Europe* (2003); Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (2004); Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (2005).

(62) It has sometimes even been elevated to the level of a *summa differentia*, or of an irreducible ‘epistemological chasm’; see Pierre Legrand, ‘Legal Traditions in Western

Europe: The Limits of Commonality', in R. Jagtenberg, E. Örücü, and A. J. de Roo (eds), *Transfrontier Mobility in Law* (1995), 63 ff.

(63) Reinhard Zimmermann, Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law und common law, (1993) 1 *Zeitschrift für Europäisches Privatrecht* 4 ff; David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999); Richard H. Helmholz, *The Ius Commune in England: Four Studies* (2001); Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003), 201 ff.

(64) Basil S. Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (1994); *idem*, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (1997); *idem* (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (2000).

(65) James Gordley, 'Common law und civil law: eine überholte Unterscheidung', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 498 ff.

(66) Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2 vols, 2001).

(67) Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998).

(68) David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002).

(69) Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001); Jan Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (2002), 107 ff; *idem* (ed), *The Contribution of Mixed Legal Systems to European Private Law* (2001); Reinhard Zimmermann, *Roman Law, Contemporary Law, European Private Law: The Civilian Tradition Today* (2001), 107 ff; Kenneth G. C. Reid, 'The Idea of Mixed Legal Systems', (2003) *Tulane LR* 5 ff.

(70) Reinhard Zimmermann, Daniel Visser, and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

(71) For details, see M. J. de Waal, 'The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared', (2000) 117 *South African LJ* 548 ff; G. L. Gretton, 'Trusts without Equity', (2000) 49 *ICLQ* 599 ff.

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

(73) Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (Part I, 1995); Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (Parts I and II, 2000); Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann (eds), *Principles of European Contract Law* (Part III, 2003). French, German, Italian, and Spanish versions of these works have been published, or are in preparation.

(74) Hans-W. Micklitz, 'Verbraucherschutz in den Grundregeln des Europäischen Vertragsrechts', (2004) 103 *Zeitschrift für vergleichende Rechtswissenschaft* 88 ff. Generally on the relationship between consumer contract law and general contract law, see Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 159 ff.

(75) On the use of the term 'principles' as opposed to 'rules' in methodological discourse, see Ronald Dworkin, *Taking Rights Seriously* (1977), 22 ff.

(76) For practical examples of the types of arguments to be employed in the process of drafting 'principles' of European contract law, see Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002).

(77) Berman, *Law and Revolution I* (n 28), 1 ff; Reinhard Zimmermann, 'Roman Law and the Harmonisation of Private Law in Europe', in Hartkamp *et al* (n 11), 21 ff.

(78) The point is developed, and substantiated, in Reinhard Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in Hector MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006), 1 ff, 12 ff.

(79) Lando/Beale I and II (n 73), xxi ff.

(80) cf also Jan Smits, 'PECL and the Harmonization of Private Law in Europe', in Antoni Vaquer Aloy (ed), *La Tercera Parte de los Principios de Derecho Contractual Europeo* (2005), 567 ff.

(81) Ewan McKendrick, *Contract Law: Text, Cases and Materials* (2003).

(82) Danny Busch, Ewoud Hondius, Hugo van Kooten, Harriet Schelhaas, and Wendy Schrama, *The Principles of European Contract Law and Dutch Law: A Commentary* (vol. I. 2002; vol. II, 2006). For Germany, see Jürgen Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000).

(83) See Zimmermann (n 74), 122 ff.

(84) Walter Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur', (1994) 2 *Zeitschrift für Europäisches Privatrecht* 1 ff. Odersky is a former president of the German Federal Supreme Court.

(85) The most recent volume is Pierre Widmer (ed), *Unification of Tort Law: Fault* (2005). It is the tenth volume in the series.

(86) The most recent volume is Gerhard Wagner (ed), *Tort Law and Liability Insurance* (2005). This is the sixteenth volume in a series devoted to Tort and Insurance Law.

(87) (2004) 12 *Zeitschrift für Europäisches Privatrecht* 427 ff; and see now Group on European Tort Law, *Principles of European Tort Law: Text and Commentary* (2005). For comment, see Helmut Koziol, 'Die "Principles of European Tort Law" der "European Group on Tort Law"', (2004) 12 *Zeitschrift für Europäisches Privatrecht* 234 ff; Reinhard Zimmermann, 'Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact', in Helmut Koziol and Barbara C. Steininger (eds), *European Tort Law 2003* (2004), 2 ff.

(88) On which see Walter Wilburg, *Entwicklung eines beweglichen Systems im bürgerlichen Recht* (1950); for an overview in English, see Bernhard A. Koch, 'Wilburg's Flexible System in a Nutshell', in Helmut Koziol and Barbara C. Steininger (eds), *European Tort Law 2001* (2002), 545 ff.

(89) Reinhard Zimmermann, 'Europäisches Privatrecht und Europa', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 439 ff; Eugen Bucher, 'Zu Europa gehört auch Lateinamerika!', (2004) 12 *Zeitschrift für Europäisches Privatrecht* 515 ff.

(90) See Pierre Widmer, 'Reform und Vereinheitlichung des Haftpflichtrechts auf schweizerischer und europäischer Ebene', in Zimmermann (n 44), 147 ff.

(91) Above, n 72.

(92) W. W. McBryde, A. Flessner, and S. Kortmann (eds), *Principles of European Insolvency Law* (2003); and see Axel Flessner, 'Grundsätze des europäischen Insolvenzrechts', (2004) 12 *Zeitschrift für Europäisches Privatrecht* 887 ff.

(93) Katharina Boele-Woelki, Frederique Ferrand, Cristina Gonzalez Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, and Walter Pintens (eds), *Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses* (2004).

(94) Katharina Boele-Woelki, Bente Braat, and Ian Sumner (eds), *European Family Law in Action*, vol I: Grounds for Divorce (2003); vol II, Maintenance between Former Spouses (2003). Cf also Katharina Boele-Woelki, 'Comparative Research-Based Drafting of Principles of European Family Law', in Michael Faure, Jan Smits, and Hildegard Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (2002), 171 ff.

(95) UNIDROIT (ed), *Principles of International Commercial Contracts 2004* (2004); for comment, see Michael Joachim Bonell, 'UNIDROIT Principles 2004—The New Edition of the Principles of International Commercial Contracts, adopted by the International

Institute for the Unification of Private Law', (2004) 9 *Uniform LR* 6 ff; Reinhard Zimmermann, 'Die UNIDROIT-Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive', (2005) 13 *Zeitschrift für Europäisches Privatrecht* 268 ff.

(96) Arthur S. Hartkamp, 'Principles of Contract Law', in Hartkamp *et al* (n 11), 125 ff; Michael Joachim Bonell, *An International Restatement of Contract Law* (3rd edn, 2005), 335 ff.

(97) Stefan Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht—warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?', (2002) 202 *Archiv für die civilistische Praxis* 40 ff.

(98) See Viola Heutger, 'Konturen des Kaufrechtskonzeptes der Study Group on a European Civil Code—Ein Werkstattbericht', (2003) 11 *European Review of Private Law* 155 ff; Viola Heutger and Christoph Jeloschek, 'Towards Principles of European Sales Law', in Hartkamp *et al* (n 11), 533 ff.

(99) cf also Harry M. Flechtner, 'The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law', in Franco Ferrari (ed), *The 1980 Uniform Sales Law* (2003), 169 ff; Bonell (n 96), 301 ff.

(100) See Rolf Stürner, 'The Principles of Transnational Civil Procedure: An Introduction to their Basic Conception', (2005) 69 *RabelsZ* 201 ff.

(101) Marcel Storme (ed), *Rapprochement du Droit Judiciare de l'Union Européenne—Approximation of Judiciary Law in the European Union* (1994).

(102) Giuseppe Gandolfi (*coordinateur*), *Code Européen des Contrats: Avant-projet* (2000); for an English translation, see Harvey McGregor, 'European Code of Contract', (2004) 8 *Edinburgh LR*, Special Issue.

(103) Harvey McGregor, *Contract Code drawn up on behalf of the English Law Commission* (1993), published by Giuffré, Milano.

(104) For more detailed criticism, see Reinhard Zimmermann, 'Der "Codice Gandolfi" als Modell eines einheitlichen Vertragsrechts für Europa?', in *Festschrift für Erik Jayme* (vol II, 2004), 1401 ff.

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

(106) Jürgen Basedow and Till Fock, *Europäisches Versicherungsvertragsrecht* (vols I and II, 2002; vol III, 2003).

(107) Many of them have been published in series of monographs specifically devoted to European private law; see, *inter alia*, *Schriften zur Europäischen Rechts- und Verfassungsgeschichte* (Duncker & Humblot, since 1991), *Europäisches Wirtschaftsrecht* (C. H. Beck, since 1992), *Ius CommuneEuropaeum* (Intersentia, since 1993), *Europäisches Privatrecht* (Nomos, since 1996), *Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive* (Nomos, since 1999), *Untersuchungen zum Europäischen Privatrecht* (Duncker & Humblot, since 1999), *Salzburger Studien zum Europäischen Privatrecht* (Peter Lang, since 1999), *Private Law in European Context Series* (Kluwer, since 2002), *Europäisches Privatrecht* (Stämpfli, since 2002); *Schriften zur Europäischen Rechtswissenschaft* (Sellier European Law Publishers, since 2005).

(108) See, for the former, Stefan Grundmann, 'Die Gesellschaft für Europäisches Vertragsrecht (Secola)—und eine Tagung in Leuven zum Europäischen Vertragsgesetzbuch', (2003) 11 *Zeitschrift* für Europäisches Privatrecht 189 ff, and, for the latter, Study Group on Social Justice in European Private Law (ed), 'Social Justice in European Contract Law: A Manifesto', (2004) 10 *European LJ* 653 ff.

(109) Peter Birks (ed), *The Classification of Obligations* (1997); *idem*, 'More Logic and Less Experience: The Difference between Scots and English Law', in David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997), 167 ff.

(110) Above, n 61.

(111) Willem Zwalve, *Hoofdstukken uit de geschiedenis van het Europese privaatrecht*, vol I: *Inleiding en zakenrecht* (2nd edn, 2003).

(112) Christian von Bar (ed), *Sachenrecht in Europa* (vol I, 2000; vol II, 2000; vol III, 1999; vol IV, 2001). Cf also G. E. van Maanen and A. J. van der Walt (eds), *Property Law on the Threshold of the 21st Century* (1996) and the contributions by Ulrich Drobnig, Roy Goode, and Hans G. Wehrens, in Hartkamp *et al* (n 11), 725 ff., 741 ff., 757 ff., 769 ff.

(113) The first volume in the series, *Beiträge zum europäischen Familienrecht*, appeared in 1994 (edited by Dieter Schwab and Dieter Henrich, and containing country reports and comparative conclusions).

(114) Klaus J. Hopt and Dieter Reuter (eds), *Stiftungsrecht in Europa* (2001).

(115) Dieter Leipold, 'Europa und das Erbrecht', in *Festschrift für Alfred Söllner* (2000), 647 ff; Walter Pintens, 'Die Europäisierung des Erbrechts', (2001) 9 *Zeitschrift für Europäisches Privatrecht* 628 ff. Alain Verbeke and Yves-Henri Leleu, 'Harmonisation of the Law of Succession', in Hartkamp *et al* (n 11), 335 ff. But see Murad Ferid, Karl Firsching, Heinrich Dörner, and Rainer Hausmann (eds), *Internationales Erbrecht* (loose-leaf, since 1974); David Hayton (ed), *European Succession Laws* (1998); Rembert Süß and Ulrich Haas, *Erbrecht in Europa* (2004).

(116) This is also the view taken by Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’, (2002) 50 *AJCL* 671 ff.

(117) Zweigert and Kötz (n 37), 46 (47 of the English edn).

(118) Hein Kötz, ‘Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?’ 1992 *Juristenzeitung* 20 ff; Axel Flessner, ‘Die Rechtsvergleichung als Kundin der Rechtsgeschichte’, (1999) 7 *Zeitschrift für Europäisches Privatrecht* 513 ff.

(119) See the illustrations in Zimmermann (n 78), 29 ff.

(120) Above, n 19.

(121) See, most recently, the Communication from the Commission to the European Parliament and the Council on ‘European Contract Law and the revision of the acquis: the way forward’, COM (2004) 651 final.

(122) The parameters for the academic discussion are analysed by Stephen Weatherill, ‘Why Object to the Harmonization of Private Law by the EC?’, (2004) 12 *European Review of Private Law* 633 ff; and see the survey by Ewoud Hondius, ‘Towards a European Civil Code’, in Hartkamp *et al* (n 11), 3 ff.

(123) Friedrich Carl von Savigny, ‘Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft’, easily accessible today, in Hans Hattenhauer (ed), *Thibaut und Savigny: Ihre programmatischen Schriften* (2nd edn, 2002), 126.

(124) Bernhard Windscheid, ‘Die geschichtliche Schule in der Rechtswissenschaft’, in *idem*, *Gesammelte Reden und Abhandlungen* (ed Paul Oertmann) (1904), 76; and see Zimmermann (n 74), 5 ff.

(125) James Gordley, ‘Comparative Legal Research: Its Function in the Development of Harmonized Law’, (1995) 43 *AJCL* 555 ff; Reinhard Zimmermann, ‘Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science’, (1996) 112 *LQR* 576 ff; *idem*, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001).

(126) For a discussion of the options (European Code replacing national laws versus an optional European code supplementing, not replacing, national laws), see the contributions to Stefan Grundmann and Jules Stuyck (eds), *An Academic Green Paper on European Contract Law* (2002), 131 ff; and see the reflections by Jürgen Basedow, ‘Das BGB in künftigen europaischen Privatrecht: Der hybride Kodex’, (2000) 200 *Archiv für die civilistische Praxis* 445 ff.

(127) See, most recently, Ulrich G. Schroeter, ‘Europäischer Verfassungsvertrag und europäisches Vertragsrecht’, (2006) 14 *Zeitschrift für Europäisches Privatrecht* 515 ff.

(128) For contract law, see Claus Ott and Hans-Bernd Schäfer, 'Die Vereinheitlichung des europäischen Vertragsrechts—Ökonomische Notwendigkeit oder akademisches Interesse?', in Claus Ott and Hans-Bernd Schäfer (eds), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen* (2002), 203 ff; for the law of delict: Michael G. Faure, 'How Law and Economics May Contribute to the Harmonization of Tort Law', in Zimmermann (n 44), 31 ff.

(129) Pierre Legrand, *Fragments on Law-as-Culture* (1999); *idem*, 'The Same and the Different', in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 240 ff.

(130) Eugen Bucher, 'Rechtsüberlieferung und heutiges Recht', (2000) 8 *Zeitschrift für Europäisches Privatrecht* 394 ff; James Gordley, 'Why Look Backward?', (2002) 50 *AJCL* 657 ff; Nils Jansen, '"Tief ist der Brunnen der Vergangenheit": Funktion, Methode und Ausgangspunkt historischer Fragestellungen in der Privatrechtsdogmatik', (2005) 27 *Zeitschrift für Neuere Rechtsgeschichte* 202 ff.

(131) Among the research activities focusing, primarily, on European Community private law are: Peter-Christian Müller-Graff (ed), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (2nd edn, 1999), 9 ff; Stefan Grundmann, *Europäisches Schuldvertragsrecht* (1999); Nicolo Lipari, *Trattato di Diritto Privato Europeo* (2nd edn, 4 vols, 2003); Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003); Martin Gebauer and Thomas Wiedmann (eds), *Zivilrecht unter europäischem Einfluss* (2005); the casebook series *Entscheidungen des EuGH* (Nomos, since 1999); the European Research Group on Existing EC Private Law ('Acquis Group') (on which see Wurmnest, (2003) 11 *Zeitschrift für Europäisches Privatrecht* 740 ff); a series of monographs called '*Jus Communitatis*' (gen ed Stefan Grundmann, pub C. F. Müller, since 2004); and a new journal under the title *Zeitschrift für Gemeinschaftsprivatrecht* (Sellier European Law Publishers, since 2004).

(132) Renaud Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis', (1994) 42 *AJCL* 761 ff; Walter van Gerven, 'Comparative Law in a Texture of Communitarization of National Laws and Europeanization of Community Law', in *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000), 433 ff.

(133) By way of example, see Norbert Reich and Hans-W. Micklitz, *Consumer Legislation in the EC Countries: A Comparative Analysis* (8 vols, 1980).

(134) Thomas Hoeren, 'Bringt Bücher nach Brüssel—Überlegungen zur Informationskultur bei den Europäischen Gemeinschaften', [2000] *Neue Juristische Wochenschrift* 3112 f.

(135) Above, n 17 and the text relating to it.

(136) Thijmen Koopmans, 'The Birth of European Law at the Crossroads of Legal Traditions', (1991) 39 *AJCL* 493 ff; C. N. Kakouris, 'L'utilisation de la Méthode Comparative par la Cour de Justice des Communautés Européennes', in Ulrich Drobnig and Sjef van Erp (eds), *The Use of Comparative Law by Courts* (1999), 97 ff; Markku Kiikeri, *Comparative Legal Reasoning and European Law* (2001).

(137) See Richard Hyland, 'The American Experience: Restatement, the UCC, Uniform Laws, and Transnational Coordination', in Hartkamp *et al* (n 11), 59 ff; Mathias Reimann, 'Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues', (1999) 73 *Tulane LR* 1337 ff who accuses European lawyers of a certain parocialism; but cf also Mathias Reimann, 'Amerikanisches Privatrecht und europäische Rechtseinheit—Können die USA als Vorbild dienen?', in Reinhard Zimmermann (ed), *Amerikanische Rechtskultur und europäisches Privatrecht* (1995), 132 ff.

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

(139) Nils Jansen (n 46) 64 ff; *idem*, 'Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht' (2005) 13 *Zeitschrift für Europäisches Privatrecht* 750 ff.

Reinhard Zimmermann

Reinhard Zimmermann is Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, and Professor of Private Law, Roman Law, and Comparative Legal History, University of Regensburg