

European Private Law

Droit privé européen
Europäisches Privatrecht
European private law

Fondé par
Begründet von
Founded by

Andreas Furrer
Thomas Probst
Franz Werro

Edité par
Herausgegeben von
Edited by

Andreas Furrer
Professor an der Universität Luzern

Pascal Pichonnaz
Professeur à l'Université de Fribourg

Thomas Probst
Professor an der Universität Freiburg

Franz Werro
Professeur à l'Université de Fribourg et au
Georgetown University Law Center



Stämpfli Publishers Ltd. Berne · 2009

European Private Law

A Handbook

Edited by
Mauro Bussani
and
Franz Werro



Bruylant Brussels



Carolina Academic Press



Ant. N. Sakkoulas Publishers Athens



Stämpfli Publishers Ltd. Berne · 2009

Copyright © 2009
Stämpfli Publishers Ltd. Berne
All Rights Reserved

Library of Congress Cataloging-in-Publication Data
European private law : a handbook / edited by Mauro Bussani and Franz
Werro.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-555-0 (alk. paper)

1. Civil law--Europe. 2. Contracts--Europe. 3. Liability (Law)--Europe. 4.
Torts--Europe. 5. Commercial law--Europe. I. Bussani, Mauro. II. Werro,
Franz. III. Title.

KJC985.E97 2009

346.4--dc22

2009009020

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nation-
albibliografie; detailed bibliographic data are available on the Internet at
<http://dnb.d-nb.de>.

This publication is protected by international copyright law. All rights reserved.
No part of this publication may be reproduced, stored in a retrieval system or
transmitted in any form or by any means, electronic, mechanical, photocopy-
ing or otherwise, without the prior permission of the publishers, except in cases
permitted by law.

ISBN 978-3-7272-2646-5 (Stämpfli)
ISBN 978-2-8027-2534-3 (Bruylant)
ISBN 978-960-15-1990-6 (Sakkoulas)

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

1 Foreword	
<i>Mauro Bussani & Franz Werro</i>	3
2 Fundamental Rights and European Private Law	
<i>Samantha Besson</i>	7
Summary	7
Introduction	8
1. Some Delimitations	12
1.1. Two Basic Concepts	12
1.2. European Private Law	13
1.3. Fundamental Rights in Europe	15
1.4. Jurisdictional Control in Europe	18
2. The Applicability of Fundamental Rights in Private Law in General	20
2.1. The Problem	20
2.2. Some Justifications	21
2.3. Delimitations	22
3. The Modalities of Application of Fundamental Rights in European Private Law	23
3.1. Individual Negative and Positive Duties	24
3.2. State Positive Duties	30
3.3. Comparative Advantages	34
4. Implications for the Respect of Fundamental Rights in European Private Law	36
4.1. Towards European Constitutional Patriotism	36
4.2. Future Europeanization of Private Law	38
Conclusions	39
References	40
3 Western Property Law	47
<i>Antonio Gambaro</i>	47
Summary	47

1. Discussions of Property and Their Present Meaning	47
2. Property in the Framework of EC Legal System	50
3. Constitutional Protection of Property Rights	51
4. Corporeal and Incorporeal Property: Basic Conceptual Definitions	52
5. The Property System in the Common Law Legal Traditions	54
5.1. Real Property	54
5.2. The Estates	57
5.3. The Leasehold	60
5.4. Personal Property	62
5.5. Ownership	65
6. Historical Background of Property in the Civil Law Traditions	65
7. The German Model of Property	70
7.1. Historical Background	70
7.2. Property in the BGB	72
7.3. The Besitz	75
8. The French Model of Property	77
8.1. The Concept of Property in the Civil Code	77
8.2. The System of Property Rights	78
8.3. The Transfer of Property	80
8.4. Property and Possession	83
9. Property in European Legal Systems Today	84
References	85
4 A Comparative Analysis: The Contractual Transfer of Ownership of Movable Property	
<i>Rodolfo Sacco</i>	89
Summary	89
1. Introduction	90
1.1. Scope of the Chapter	90
1.2. Simplifications	91
2. The Fundamentals	93
2.1. Major Historic Models	93
2.2. Difficulties in Defining the Elements That Transfer Ownership in Different Legal Systems	96
3. Intent (to Transfer) and Delivery	97
3.1. Agreement: An Ambiguous Concept	97
3.2. The Obligation to Transfer versus the Transfer of Ownership (An Uncertain Symmetry)	99

3.3. The Role of Contract (and the Too General Nature of the Notion of Contract)	100
3.4. The Ambiguous Notion of Delivery	101
4. Abstraction and Causality (A Fundamental Rivalry)	103
4.1. The Problem	103
4.2. The Austrian System	103
4.3. The French and Belgian Systems	105
4.4. Remarks on the Italian, Turkish and Hungarian Systems	107
4.5. The German System	108
5. Comparative Remarks	109
5.1. A Graphical Illustration of the Data	109
5.2. Dislocations in the Law	111
5.3. Doctrinal Qualifications	112
6. The Transfer and the Attributions of Ownership	113
6.1. The Problem	113
6.2. The Right to Possession	114
6.3. Action against a Third Party Possessor without Title	115
6.4. The Right to Alienate	116
6.5. The Risks	118
6.6. The Parties' Creditors: Undelivered Property	119
6.7. The Parties' Creditors: Property Delivered but Not Alienated	121
6.8. The Creditors of the Parties and the Default of the Buyer	122
7. Comparative Remarks	123
7.1. The Ownership of an Object Sold but Not-Delivered	123
7.2. Doctrinal Qualifications	124
References	125
5 Western Law of Obligations	
<i>Geoffrey Samuel</i>	129
Summary	129
1. Introduction	130
1.1. Epistemological Considerations	130
1.2. Definitional and Contextual Considerations	131
1.3. Common Law Methods	132
2. Institutional System and the Law of Obligations	134
2.1. Private Law	134
2.2. Classification of Rights	135
2.3. Rights <i>in personam</i> (Obligations)	136

2.4. Classification of Things	137
2.5. Public and Private Law	139
3. Sub-Divisions and Sources of the Civilian Law of Obligations	139
3.1. Contract	140
3.2. Delict	141
3.3. Quasi-Delict (and Liability without Fault)	142
3.4. Quasi-Contract (and Unjust Enrichment)	144
3.5. General Theory of Obligations	146
4. Law of Obligations in the Common Law Tradition	148
4.1. Personal Actions at Common Law	149
4.2. Abolition of the Forms of Action	150
4.3. Contract and Tort	151
4.4. Restitution	153
4.5. Law of Obligations	155
5. Western Law of Obligations: Comparative Conclusions	156
References	158
6 Western Law of Contract	
<i>Carla Sieburgh</i>	161
Summary	161
1. Introduction	161
1.1. Life of Contract	163
2. General Remarks	164
2.1. Contracts and the Public Order of the European Union	164
2.2. Five Principles	168
2.3. The Purpose of Principles	170
2.4. Shift of Emphasis	171
3. Freedom of Contract	172
3.1. Substantive Freedom of Contract	173
3.2. Freedom of Contract and Contractual Altruism	175
3.3. Inequality in Exchange, <i>Iustum Pretium</i> , <i>Causa</i> , Consideration, Unconscionability	177
3.4. Formalities	179
3.5. Enforceability of Promises	179
3.6. Discussion	181
3.7. Freedom of Contract and Other Principles	182
4. Reliance Principle	182
5. <i>Pacta Sunt Servanda</i>	183
6. Societal Justice	184

6.1. Good Faith	185
6.2. Good Faith as a Combination of Principles	187
6.3. Equality in Exchange	187
6.4. Societal Justice and Other Principles	188
7. Social Conformity	188
7.1. Unenforceability, Restitution and Damages	194
7.2. Discussion	195
8. Epilogue	195
References	197
7 “Eastern Contract Law” or Transformation of Contract Law and Civil Justice in New EU Member Countries: The Example of the Baltic States, Hungary and Poland	
<i>Norbert Reich</i>	203
Summary	203
Introduction	204
Functions of European Contract Law as the Theoretical Starting Point	204
The Enlargement Process	206
‘Relative Autonomy’ of Contract Law and Civil Justice	207
1. Contract Law: From Socialism to Market Economy	208
1.1. Overview	208
1.2. The ‘Baltic Revolution’	211
1.3. Hungary and Poland	213
1.4. The Importance of the Europe Agreements	217
2. Autonomy	218
2.1. Recognition of Autonomy in Civil Legislation of New Member States	218
2.2. Good Faith and Pre-Formulated Terms in (Consumer) Contracts	219
3. Regulation	226
3.1. Generalities: The Importance of Directive 99/44 for General Contract Law	226
3.2. The Importance of Directive 99/44 on Contract Law within the Enlargement Process	228
4. Information	234
4.1. Generalities: EC Law as the Starting Point	234
4.2. Information Requirements in Contract Legislation of New Member States	235

5. Contract Law ‘in the Books’ and ‘in Action’: ‘New’ Rules for ‘Old’ Mechanisms of Civil Justice?	239
5.2. A Summary of the ‘New’ Contract Law of ‘New’ Member States	239
5.2. ‘Law in Action’: Deficits in Civil Justice?	240
8 European Consumer Law	
<i>Thomas Wilhelmsson, Geraint Howells & Hans-W. Micklitz</i>	245
Summary	245
1. Introduction	245
2. National and European Consumer Law	248
3. Western Models of Consumer Protection	254
4. The Creation of Consumer Law in Eastern Europe	256
5. The Concept and Image of the Consumer	258
5.1. The Scope of European Consumer Law	258
5.2. The Image of the European Consumer	260
6. Basic Principles of EU Consumer Contract Law	264
6.1. Mandatory Law	264
6.2. The Principle of Legitimate Expectations	266
6.3. Transgressing the Boundaries of Contract	267
7. Information Rules and Substantive Protection	270
8. Withdrawal Rights as a Specific Feature	273
9. General Clauses as an Important Method of Protection	276
10. Judicial Protection of Consumer Rights	280
References	285
Legislation	289
9 Western Tort Law: A Jurisprudence of Injury	
<i>Gert Brüggemeier</i>	293
Summary	293
1. Introduction	293
2. Stock Taking of Problems	297
2.1. Fault Principle	297
2.2. Enterprises	299
2.3. Protected Interests	300
2.4. Differentiation of Tort Law	302
2.5. Damages	303
3. Negligence Liability	305
3.1. General Conditions	305
3.2. Duty of Care	306

3.3. Fault	308
3.4. Learned Hand-Formula	310
4. Liability of Principals and Agents	311
4.1. Alternatives to Negligence Liability	311
4.2. Enterprise Liability	312
4.3. Agent Liability	315
5. Personality Interests	316
6. Damages and Non-Economic Loss	321
6.1. Pain and Suffering	322
6.2. Damage per se/Injury as Such	324
7. Conclusion	327
References	328
10 Eastern Tort Law	
<i>Attila Menyhárd</i>	335
Summary	335
1. Introduction	335
2. The Basis of Liability	340
2.1. Functions of Liability	340
2.2. Liability for Torts and Breach of Contract	343
2.3. Structure of Regulation: Basic Norm and Special Forms of Liability	347
2.4. Basic Norm and Preconditions of Liability	347
3. Special Forms of Liability	350
3.1. Strict Liability	350
3.2. Employers' Vicarious Liability	355
3.3. Product Liability	360
3.4. Public Liability	363
4. Non-Pecuniary Damages	366
5. Pure Economic Loss	371
6. Summary	373
11 The Law of Restitution: A Perspective from Western Europe	
<i>Anne-Catherine Hahn</i>	375
Summary	375
1. Introduction	375
2. The General Structure and Role of Restitutionary Liability	378
2.1. The Civilian Approach	378
2.2. The Common Law Approach	384
3. Core Cases of Restitutionary Liability	386

3.1. Liability for Intentional Transfers	387
3.2. Liability for Encroachments	397
4. Conclusion	406
References	408
12 Proprietary Security Rights in the Western European Countries	
<i>Francesca Fiorentini</i>	415
Summary	415
1. Taxonomy	415
2. Security Rights' Efficiency	417
3. A Panorama of Western European Legal Systems	420
4. Techniques of Regulation	422
5. Assessment of Legal Regimes' Flexibility	424
6. Movable and Immovable: Distinct Paths	425
7. Security Rights over Immovable Assets	426
7.1. The Rule of Accessory	426
7.2. The Rule of Publicity	429
7.3. Enforcement	430
7.4. Security Rights over Immovables and European Legal Integration	432
7.5. The Economic Reasons Behind Legal Integration in the EU Mortgage Market	436
7.6. Mortgage Securitizations in Europe after the <i>Sub-Prime</i> Crisis	437
8. Security Rights over Movable Assets: 'Formal' Security Rights	442
8.1. 'Functional' Security Rights: Ownership and Ownership-Related Contractual Arrangements	446
8.2. Security Rights over Movable Assets and Legal Integration	453
References	457
13 Security Rights in Central and Eastern Europe in the First Decade of the New Millennium: Where Do We Go from Here?	
<i>Tibor Tajti</i>	465
Summary	465
1. Introduction	466
1.1. The Legal and Economic Environment	470
1.2. Real and Personal Property Security: Distinct Paths of Development?	477
2. Real Property Security	478

2.1. Common Legacies from the Socialist Past	479
2.2. Variations on the Theme of <i>the Tragedy of the Commons</i> and Their Impact on the Development of the Security System	481
2.3. Synopsis of the CEE Land Registry Systems	483
2.4. Pathological Phenomena and Predatory Lending	487
3. Personal Property Security	489
3.1. The Socialist Legacies and the Personal Property Security Law Reforms of the Transitory Period	489
3.2. The Focal Points: Retention of Title, Assignment of Intangibles, Floating Security and Efficient Enforcement	491
3.3. Persisting Problems and the Partial Success of the Reforms	496
4. In Lieu of Conclusions: Some Speculations on the Future Course of Events	503
References	506
List of Legislation	510
14 Family Law	
<i>Esin Örüciü</i>	515
Summary	515
1. Introduction	515
1.1. Conceptual Frameworks	517
1.2. Current Directions	519
1.3. The Scope of the Survey	521
1.4. Sources of Family Law	522
1.5. Meaning of Marriage	523
2. Status	525
2.1. Legal Requirements of a Valid Marriage	525
2.2. Legal Consequences of Marriage	528
2.3. Divorce	531
3. Property: During Marriage and after Divorce	541
3.1. Property Regimes	542
3.2. Matrimonial Home	546
4. Concluding Remarks	549
References	551
15 The Law of Successions	
<i>Antoni Vaquer</i>	555
Summary	555

1. Preliminary Remarks	555
2. Freedom of Testation	557
3. Pre-Eminence of Testator's Intention	560
4. The Steady Weakness of Legitim	564
4.1. Two Political Decisions	565
4.2. A Fixed Portion or an Alimony-Based Portion	566
4.3. A Right to the Assets or a Credit Right	571
4.4. Some Conclusions	572
5. Equality of Children	573
6. Strengthening the Spouse's Position	575
7. The Effect of Divorce on Wills	578
8. Concluding Remarks	582
References	582