

European Private Law

A Handbook

VOLUME II

Edited by
Mauro Bussani
and
Franz Werro



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Contents

Table of Abbreviations	xiii
Foreword	xxiii
<i>Mauro Bussani & Franz Werro</i>	
1 Trusts: The Rise of a Global Legal Concept	3
<i>Luc Thévenoz</i>	
Outline	3
1. Introduction	3
2. Trusts in the Narrow Sense: The “Common Law” Trust	5
2.1. Notion	7
2.2. Creating an Express Trust	9
2.3. Legal Analysis of the “Common Law” Trust	10
2.4. The Many Uses of Trusts	13
2.5. Non-Express Trusts	15
3. Trusts in a Broader View	17
3.1. Mixed Legal Systems: Trusts by Percolation	18
3.2. Trusts by Enactment	21
4. The International Recognition of Trusts	24
5. A Global Legal Concept	30
Bibliography	33
2 Sales Law in Europe	41
<i>Christiana Fountoulakis</i>	
Contents	41
Introduction	42
1. History of the Unification of Sales Laws	42
2. The United Nations Convention on Contracts for the International Sale of Goods (1980)	44
3. Developments since 1980	45
3.1. Ratification of the CISG in Europe	45

3.2. The Influence of the Convention on National Sales Law Legislation	46
3.3. International Unification Projects Inspired by the CISG	47
4. Sales Law Harmonisation in the EU	49
4.1. Harmonisation of EU Sales Law with Regard to Consumer-specific Issues	50
4.2. The Directive on Consumer Sales and Guarantees	57
5. Developments since 2002	66
5.1. Effects of the Consumer Sales Directive on Domestic Sales Law	65
5.2. The Action Plan for a More Coherent European Contract Law	68
6. The Proposal for a Common European Sales Law (CESL)	70
6.1. The Optional Nature of the Proposed CESL	70
6.2. An Overview of the Content of the CESL	72
7. The Relationship Between the CESL and Existing EU Law	75
7.1. Co-existence of the Optional Instrument and the Consumer Directives	75
7.2. Influences of EU Law on the Optional Instrument	76
7.3. Influences of the Optional Instrument on Existing EU Law	76
8. Conclusion	78
Bibliography	79
3 Commercial Contracts and Services	85
<i>Guido Alpa</i>	
1. Introductory Remarks	85
2. A Comparison of Experiences	89
3. From General Classifications and Categories to the Identification of Regulatory Techniques	92
4. Legislative Sources: Control of Actions and Behaviour	94
5. The Case of “Services”	98
6. Regulations and Moral Suasion	100
7. Moral Suasion: The Issue of Corporate Concentration	101
8. New Scenarios of Contract Law	105
9. New Scenarios for EU Law: Services and Professional Activities	108
10. Services as a Subject of the Draft Common Frame of Reference	111
Bibliography	113

4 Compensation for Personal Injury and Death	115
<i>Pedro del Olmo</i>	
1. Introduction	115
2. Some Points in Common	117
3. Personal Injury	121
3.1. Pecuniary Losses	124
3.2. Non-Pecuniary Losses	129
3.3. Methods of Payment	137
4. Damages in the Event of Death	138
5. Conclusion	141
Bibliography	142
5 Products Liability in the European Union: A Story of Unity or Plurality?	145
<i>Franz Werro & Eric Mittereder</i>	
Table of Contents	145
1. Directive 85/374/EEC on Products Liability: Background and Goals	146
2. Implementing the Directive into National Law	147
3. Prerequisites for Liability	150
3.1. Product	150
3.2. Defectiveness	153
3.3. Compensable Damage	159
3.4. Causation	163
3.5. Producer	165
4. Producer's Defenses	167
4.1. Putting a Product into Circulation	167
4.2. Development Risk Defense	168
5. Damages	172
6. The Directive in the Context of National Law	173
7. Conclusion	175
Bibliography	176
6 Environmental Liability	179
<i>Monika Hinteregger</i>	
Summary	179
1. Introduction	179
2. Environmental Damage and Tort Law	180
2.1. Choice of Jurisdiction and Conflict of Laws	180
2.2. Substantive Law	181

3. International Environmental Liability Conventions	185
4. Directive 2004/35/CE on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage	187
4.1. Genesis and General Features	187
4.2. Contents of the Directive	190
5. Critical Analysis and Conclusions	203
Bibliography	206
7 European Corporate Law	209
<i>Diego Corapi & Barbara De Donno</i>	
Summary	209
1. Introduction	210
2. General Aspects of Company Law	210
2.1. Origins and Definition	210
2.2. The Contractual Dimension of Companies in Civil Law Jurisdictions	211
2.3. The Non-contractual Approach of Corporate Law in Common Law Jurisdictions	213
2.4. The Trend Towards Reducing the Number of Mandatory Rules	215
3. Classification of Companies	216
3.1. Companies and Sources of Company Law in European Jurisdictions	216
3.2. Companies Organized on a Personal Basis	217
3.3. Capital Stock Companies	219
3.4. Public and Closely-held, Listed and Non-listed Companies	221
3.5. The Limited Liability Company	222
4. European Company Law	224
5. Incorporation	226
5.1. Statutory Provisions on Company Formation	226
5.2. Direct Incorporation and Incorporation by Public Subscription	227
5.3. The Capital Stock	228
5.4. One-Member Companies	229
5.5. Registered Office and Head Office	230
5.6. Articles of Association and By-laws	231
5.7. Company's Object	231

6. The Shareholders' Meeting	232
6.1. Definition and Powers	232
6.2. Convening and Holding of the General Meeting	233
6.3. Invalidity of Resolutions	234
7. Management and Control Systems	235
7.1. Corporate Governance	235
7.2. One-tier and Two-tier Systems	237
7.3. Main Features of National Systems of Administration and Control	239
8. Financial Control and Accounting	242
9. Stocks and Bonds	243
9.1. Shares	243
9.2. Bonds	245
10. The Financial Statements	246
11. Groups of Companies	248
12. Transformation, Merger and Division	251
12.1. Transformation	251
12.2. Mergers and Divisions	251
13. Winding up of Companies	253
Bibliography	254
8 Competition Law	261
<i>Andreas Heinemann</i>	
Table of Contents	261
1. Introduction	261
1.1. EU Law and National Law	262
1.2. Public and Private Enforcement	263
1.3. Overview	264
2. Legal Fundamentals	264
2.1. European Union Law	264
2.2. Competition Law in the Member States	266
3. Perspectives to Strengthen Private Enforcement of Competition Law	272
3.1. Standing	272
3.2. Coexistence of Public and Private Procedures	275
3.3. Leniency Policy	278
4. Outlook	280
Bibliography	281

9 Unfair Competition Law	285
<i>Prof. Dr. Thomas M.J. Möllers</i>	
Summary	285
1. Introduction	285
2. Substantive Unfair Competition Law	286
3. Codification of Unfair Competition in the Member States	287
3.1. The Law of Unfair Competition as an Independent Area of Law	287
3.2. Fragmentation of the Substantive Provisions	289
4. International Sources of Unfair Competition Law	289
4.1. The Paris Convention	289
4.2. European Law Regulating the Law of Unfair Competition	290
5. Plaintiffs	292
5.1. Competitors	292
5.2. Consumers	294
5.3. Business Associations	295
5.4. Consumer Associations	297
5.5. State Authorities Like Consumer Ombudsman, OFT etc.	302
5.6. Public Prosecutor	304
6. Objects of Claims	306
6.1. Injunction or Prohibition	306
6.2. Elimination	309
6.3. Preventative Injunction Order	310
6.4. Damages	311
7. Out-of-Court Settlement	316
7.1 Out-of-Court Settlement of Disputes Between the Parties	316
7.2. Out-of-Court Dispute Resolution Through Third Parties (Arbitration, Mediation, etc.)	317
7.3. Dispute Resolution Through Self Organization—ASA, CAP, etc.	319
8. Conclusion	321
Bibliography	322
10 Limitation Periods	325
<i>Ewoud Hondius</i>	
1. Introduction	325
2. Terminology	327
3. History	328
4. National Legal Systems	328

5. International Instruments	330
6. Aims of Limitation Period Reforms	332
6.1. Clarity	332
6.2. Law and Economics	332
7. Length of Limitation Periods	333
8. Accrual or Commencement	333
9. Suspension, Postponement, Renewal	334
10. Judicial Discretion	334
11. Concurrence of Liability in Contract and in Tort	335
12. Concurrence of Civil and Criminal Liability	335
13. Effects of Prescription	336
14. Contractual Limitation Periods	336
15. Private International Law	337
16. Constitutional Control; Principles of European Law	337
Bibliography	338
11 Private Law Justice in the European Legal System	341
<i>Christoph U. Schmid</i>	
1. The Instrumentalisation of National Private Law	342
2. Effects of Europeanisation on the Concept of Private Law	346
3. Examples of the Excessive Instrumentalisation of Private Law by the EU	349
3.1. An Incoherent Consumer Model	349
3.2. The Instrumentalisation of Uninformed Consumers to Open Up National Insurance Markets	350
3.3. Difficulties with the Enforcement of Law in Other Member States Treated as an Ambivalent Argument	352
3.4. The Abolition of Minimum Harmonisation and Its Consequences: The Example of the Product Liability Cases of April 2002	354
4. Conclusions	357
Bibliography	358
12 Harmonization of European Private Law: an Economics Analysis	363
<i>Francesco Parisi</i>	
Summary	363
1. The Costs and Benefits of Legal Harmonization	364
1.1. Multijuralism and Legal Diversity	364
1.2. Multijuralism and the Market for Legal Rules	368
1.3. Parties' Choice of Law and Externality-Based Limitations	368

2. European Codifications and the Optimal Design of Legal Rules	369
2.1. Codifications and Legal Obsolescence	372
3. Codifications and Evolving Structure of European Civil Codes	374
4. Conclusions	378
Bibliography	379

Table of Abbreviations

A.	Corte di Appello
a.o.	among others
AAV	Allgemeine Arbeitnehmer Schutzverordnung
AAVV	Autores Vários
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
AC	Appeal Case
Ac.RL	Acórdão da Relação de Lisboa
Ac.STJ	Acórdão do Supremo Tribunal de Justiça
AcP	Archiv für die civilistische Praxis
AdminL	Administrative Law
ADSchV	Allgemeine Dienstnehmer Schutzverordnung
AED	Supreme Court of Conflicts
AHG	Amtshaftungsgesetz Archivio civile
AK	Astikos Kodikas
All ER	All England Reports
Am. J.	American Journal of Comparative Law
Comp. L.	
AMG	Arzneimittelgesetz
AP	Areios Pagos
Arch. giur. circol. e sinistri	Archivio giuridico di circolazione e sinistri stradale
ArcN	Archeion Nomologicas
Arm	Armenopoulos miniaia epitheorisis
Art./ art.	Article
ASchG	Arbeitnehmerschutzgesetz
Ass. Plén.	Cour de Cassation, Assemblée Plénière
ASVG	Allgemeines Sozialversicherungsgesetz BGBl
AtomHG	Atomhaftungsgesetz (Atomic Liability Act)
Autorità Garante	Autorità Garante della Concorrenza e del Mercato (Italian Antitrust authority)

BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBI	Bundesgesetzblatt (Federal Law Gazette)
BGE	Entscheidungen des Schweizerischen Bundesgerichts
BGH	Bundesgerichtshof (Federal Supreme Court)
BGH, JZ	Bundesgerichtshof, Juristenzeitung
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the Federal Supreme Court in Private Law Matters)
BImSchG	Bundes-Immissionsschutzgesetz (Federal Immission Control Act)
BMJ	Boletim do Ministério da Justiça
BMLR	Butterworths Medico-Legal Reports
BR DS (BR Drucks)	Bundesrat Drucksache
Bull. Civ. civiles	Bulletin des arrêts de la Cour de Cassation, chambres civiles
Bull. Crim. criminelle	Bulletin des arrêts de la Cour de Cassation, chambre criminelle
BVerfG	Bundesverfassungsgericht
BVP	Bureau de Vérification de la publicité (French Bureau of Verification of Advertising)
BW	Burgerlijk Wetboek (Dutch Civil Code)
c. / C.C.	Codice Civile / Code civil / Civil Code / Código Civil
Calif. L. Rev.	California Law Review
Cass. civ.	Cassazione civile
Cass. D.	<i>Dalloz</i> : Décisions de la Cour de Cassation
Cass. pen.	Cassazione penale
CCbe	Code civil belge
CCfr	Code civil français
CCons.	Code de la Consommation (French Consumer Code)
CCP	Code of Civil Procedure
CCPr	Code of Civil Procedure
cf.	Compare further
chron.	chronique
CJ	Colectânea de Jurisprudência
CJ-ASTJ	Colectânea de Jurisprudência. Acórdãos do Supremo Tribunal de Justiça
CJ-STJ	Colectânea de Jurisprudência. Supremo Tribunal de Justiça
CLJ	Cambridge Law Journal

CML Rev.	Common Market Law Review
Cmd.	Command Papers, 5th series
COD	Crown Office Digest
Columbia J. Eur. L.	Columbia Journal of European Law
COM	Document of the European Commission
Com.	Arrêt de la chambre commerciale de la Cour de Cassation
Cons.	Consultation
Cons. Stato	Consiglio Stato
Corr. giur.	Corriere giuridico
CPub	Código da Publicidade (Spanish Advertising Code)
CRTD	Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels
CSC	1997 Convention on Supplementary Compensation
D	Dike / Diki, Recueil Dalloz et Sirey
D.kr.	Danske kroner / Danish kroner
D.L.	Dalloz: Législation
d.P.R. / d.p.r.	Decreto Presidente della Repubblica
Danno e resp.	Danno e Responsabilità
DD	Diokitiki Dike
DGCC	Direcção Geral do Comércio e da Concorrência (Portugal)
DGCCRF	Direction Générale de la Concurrence, de la Consommation et de la Répression de Fraudes (France)
Dig	Digest of Justinian
Dir. comm. internaz.	Diritto commerciale internazionale
Dir. famiglia	Diritto di famiglia e delle persone
DL	Danske Lov
DP	Recueil Dalloz périodique
DR	Danno e Responsabilità Deutsches Recht Diário da República (off. Gazette Portugal)
DrdA	Das Recht der Arbeit
e.g.	For example
EC	European Community
ECJ	European Court of Justice
ECR	European Courts Reports (Official Journal of the ECJ)
ECU	European Currency Unit
ed.	editor

EEC	European Economic Community
EEN	Egimeris Elinon (Hellinon) Nomikon
EfAth	Efeteio Athinon
EFSlg	Ehe- und familienrechtliche Entscheidungen
EfThes	Efeteio Thesalonikis
EJC	European Court of Justice
EKHG	Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz
ELD	Environmental Liability Directive
ELM	Environmental Law and Management
Encicl. giur.	Treccani Enciclopedia giuridica Treccani
Env.	Environmental
EnvirP	Environmental Protection
EnvL	Environmental Law
EO	Exekutionsordnung (Austrian Rules on Execution)
EpSD	Episkopisi Emporikou Dikaiou (Commercial Law Review)
ERCL	European Review of Contract Law (Law Journal)
Erle CJ	Erle Court of Justice
ERPL	European Review of Private Law
et seq.	and the following
EuGH	Europäischer Gerichtshof
EvBl	Evidenzblatt der Rechtsmittelentscheidungen
Exch	Court of Exchequer
f. / ff	and following
fasc.	fascicolo
FED	Forsikrings- og Erstatningsretlig Domssamling
Foro it.	Foro Italiano
Giur. bollettino	La Giurisprudenza del bollettino di legislazione tecnica legisl. tecnica
Giur. it.	Giurisprudenza Italiana
Giur. merito	Giurisprudenza di merito
Giur. Toscana	Giurisprudenza toscana
Giust. civ.	Giustizia civile
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Law Journal)
G-S	Georgiadis-Stathopoulos
Harv. L. Rev.	Harvard Law Review
HCC	Hungarian Civil Code: Act IV of 1959
HellD	Helliniki Dikaioisyni
HL	House of Lords

HSN	International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
IAEA	International Atomic Energy Agency
ICLQ	International and Comparative Law Quarterly
I.K.A.	Social Insurance Organization
INAIL	Instituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro
IntCC	Introductory Law of the Civil Code
iS	im Sinne von; in Sachen
J. Legal Stud.	Journal of Legal Studies
J.O.	Journal Officiel de la République Française
JBl	Juristische Blätter (law journal)
JCP	Semaine Juridique or Juris-classeur périodique, Edition générale
JSev	Joint and Several obligation
JuS	Juristische Schulung
JZ	JuristenZeitung (Law Journal)
KB	King's Bench Koninklijk Besluit
Kfz	Kraftfahrzeug
KJ	Kritische Justiz
KOK	Code of Traffic
KSL	Kuluttajansuojlaki (Finnish Consumer Protection Act)
Law and Contemp. Prob.	Law Contemporary Problems
l.c.	loco citato
L.G.S.S.	Ley General de la Seguridad Social
LDC	Lei de Defesa da Concorrência (Spanish Antitrust Code)
LDCons	Lei de Defesa do Consumido (Spanish Consumer Protection Act)
LG	Landgericht (deutsch); Landesgericht (austrian)
lit.	litera
Lloyd RL	Lloyd's Reports: Law
Lloyd's Rep. Med.	Lloyd's Reports: Medical
LPC	Loi sur les pratiques du commerce et sur l'information et la protection du Consommateur (France)
LQRev	Law Quarterly Review

LR	Law Reports
Med. L. Rev.	Medical Law Review
MedL	Medical Law
MedR	Medizinrecht
MFL	lov om Markedsføring / Markedsføringslov (Danish Marketing Practices Act)
Mich. L. Rev.	Michigan Law Review
MietSlg	Mietrechtliche Entscheidungen
Miss. L.J.	Mississippi Law Journal
MJ	Maastricht Journal of European and Comparative Law
Mod. L. Rev.	Modern Law Review
MPrThes	Monomeles Protdikeio Thesalonikis
NJW	Neue Juristische Wochenschrift (Law Journal)
NJW-RR	Neue juristische Wochenschrift—Rechtsprechungsreport Zivilrecht
NoB	Nomiko Vima
Notiziario giur. lav.	Notiziario giuridico del lavoro
Nuova giur. civ. comm.	Nuova Giurisprudenza Civile Commentata
Nuove leggi civ.	Nuove leggi civili
NuR	Natur und Recht
NZ	Notariatszeitungtl
NZV	Neue Zeitschrift für Verkehrsrecht
Ob	Oberster
ObL	Law of Obligations
obs.	observation
OFT	Office of Fair Trading
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OJ C	Official Journal of European Communities (Issue C [Communication]: Information and Notices)
OJ L	Official Journal of the European Union L Series (Legislation)
OJLS	Oxford Journal of Legal Studies
ÖJZ	Österreichische Juristen-Zeitung
OLG	Oberlandesgericht
op. cit.	option citée opere citato
ÖRZ	Österreichische Richterzeitung

Oxford U Comparative L Forum	Oxford University Comparative Law Forum
p.	page
Para./para.	Paragraph
PC	Paris Convention for the Protection of Industrial Property of 1883/1984
PIQR	Personal Injuries and Quantum Reports
PirJ	Piraiki Nomologia (Piraeus Cases)
pp.	pages
ProdHaftG	Produkthaftungsgesetz
PropL	Property Law
QB	Law Reports, Queen's Bench Division
QBD	Law Reports, Queen's Bench Division of the High Court
rapp.	rapport
Rass. giur. Enel	Rassegna giuridica Enel
Rass. giur. umbra	Rassegna giuridica umbra
RC	Relação (Court of Appeal) of Coimbra (Portugal)
RDS	Reichsdienststrafhof
RdW	Recht der Wirtschaft (Law Journal)
Rec. Dalloz	Recueil Dalloz
Resp. civ.	Responsabilità civile
Resp. civ. prev.	Responsabilità civile e previdenza
RGZ	Entscheidungen des Reichsgerichtes in Zivilsachen
RIDC	Revue internationale de droit comparé
Riv. dir. civ.	Rivista di Diritto Civile
Riv. giur. amb.	Rivista giuridica dell'ambiente
Riv. giur. cicol. trasp.	Rivista giuridica della circolazione e dei trasporti
Riv. giur. edilizia	Rivista giuridica dell'edilizia
Riv. giur. polizia locale	Rivista giuridica di polizia locale
Riv. giur. Sarda	Rivista giuridica Sarda
Riv. it., dir. lav.	Rivista italiana di diritto del lavoro

Riv. it. medicina legale	Rivista italiana di medicina legale
RIW	Recht der Internationalen Wirtschaft
RJUM	Revista Jurídica da Universidade Moderna
RL	Relação de Lisboa (Portugal)
RLJ	Revista de Legislação e Jurisprudência
ROA	Revista da Ordem dos Advogados
RP	Relação (Court of Appeal) do Porto (Portugal)
RSI	repetitive strain injury
RTD civ.	Revue trimestrielle de droit civil
Rz / RZ	Richterzeitung
SC	Scots Session Cases
SE	Symvoulío Epikratias (Supreme Administrative Court)
seq.	sequentes
sez.	sezione
Sez. Civile	Sezione Civile
SGB	Sozialgesetzbuch
SLT	Scottish Law Times Reports
So. Cal. L. Rev.	Southern California Law Review
SopMenL	Laki sopimatoomasta menettelystä elinkeinotoiminnassa (Finnish Unfair Trade Practises Act)
Stan. L. Rev.	Stanford Law Review
StGB	Strafgesetzbuch (German Criminal Code)
StHG	Staatsgerichtshof
STJ	Supremo Tribunal de Justiça (Portugal)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
STS	Sentencia Tribunal Constitucional
StVG	Straßenverkehrsgesetz
StVO	Straßenverkehrsordnung
SZ	Entscheidungen des österreichischen Obersten Gericht shofes in Zivil (und Justizver waltungs) sachen
Tenn. L. Rev.	Tennessee Law Review
Tex. L. Rev.	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
TfR	Tidsskift for Rettsvitenskap
Tul. L. Rev.	Tulane Law Review
u.z.n.k.	Ustawa o zwalczaniu nieuczciwej konkurencji (Polish Act on Fighting Unfair Competition of 1993)

UDAP	Unfair and Deceptive Acts or Practices (abbreviation for State Unfair Trade Act)
UmweltHG	Umwelthaftungsgesetz (Environmental Liability Act)
UN	United Nations
UWG	Gesetz gegen den unlauteren Wettbewerb (German/Austrian Act against Unfair Competition)
VerkG	BW: Verkündigungsgesetz
VersR	Versicherungsrecht
VfGH	Verfassungsgerichtshof
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüßes des Verfassungsgerichtshofes
Vol.	Volume
VP	Die Versicherungs-Praxis
Wayne L. Rev.	Wayne Law Review
WHG	Wasserhaushaltsgesetz
WLR	Weekly Law Reports
WRP	Wettbewerb in Recht und Praxis (Law Journal)
ZBl	Zentralblatt für die juristische Praxis
ZEuP	Zeitschrift für Europäisches Privatrecht (Law Journal)
ZEuPZ	Zeitschrift für Europäisches Privatrecht
ZfRV	Zeitschrift für Rechtsvergleichung
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZSR	Zeitschrift für Sozialreform
	Zeitschrift für Schweizerisches Recht
ZUR	Zeitschrift für Umweltrecht
ZVR	Zeitschrift für Verkehrsrecht

Foreword

MAURO BUSSANI & FRANZ WERRO

In Europe, especially on its continental side, the contribution of legal scholars to the drafting of private law is a long consolidated tradition. It is a way of asserting the status of the scholars and avoiding long-lasting stand-offs for the private law legislation. Preparation and implementation of any law need scholars working as technical simulators to anticipate possible problems and solutions. But this is also what provides scholarship with social prestige and indispensability. Hence, it comes to no surprise that in the scholarly arenas the process of harmonizing, or proposing harmonization for European private law have been proceeding at full swing for the last thirty years.

To be sure, this process has attracted from many quarters lots of reservations and caveats—under both the cultural and political points of view.¹ This is not the place to address again these cautions and perplexities. Rather, it is worth mentioning, first, that overcoming the national dimension of the law is the focus of an array of scholarly initiatives, meetings, seminars and books, inside and outside the Western world, not only in Europe. Secondly, what usually underpins these efforts is the idea that the law has to be harmonized/uniformed in order to match social and economic needs. Besides being controversial, these ideas bear different meanings and are often bred by a variety of perspectives on the future of the law. At the outset, we do want to stress that ‘changing the law’ is not the primary goal of the present enterprise. This two-volume book is simply devoted to producing reliable information on private law in an increasingly integrated Europe.

With few exceptions, such as the publications of “The Common Core of European Private Law” Project, there is little literature available for any lawyer,

1. See e.g. M. Bussani, *Streetcar*; F. Werro, in *Companion*.

scholar or student interested in understanding a law in Europe different from her/his own. Often, indigenous presentations consist of contributions, which due to open or hidden assumptions of municipal lawyers contain misleading information. At times, articles and monographs are grounded on deep comparative knowledge, but often limited to models considered paradigmatic (i.e. the ones provided by German, French and English law). Thus, even this learned scholarship ends up leaving an important part of European law in a penumbra and contributes to a parochial attitude, often claimed by the Europeans to be that of their American colleagues. The aim of this handbook is to help to correct culturally misleading and/or biased information.

We certainly do not claim that each European legal culture is an absolute unique cultural product that is incommensurable and untranslatable. We believe, however, that one can understand another country's law only through an accurate comprehension of its context, a 'context' that lies beyond the positive law in which lawyers are trained. To avoid ethnocentricity and superficiality, the researcher is always bound to delve beyond judicial decisions, doctrinal writings and the black-letter law of code and statute and reach into the region of 'deeper structures' where law meets cultural, political, and socio-economic factors and actors. This is the overall approach this handbook should provide the reader with.

As far as method is concerned, this handbook does not aim to promote the merits of one technique of comparing laws over the others. In particular, the goal is not to dredge up an opposition between the 'functionalist' (à la Zweigert & Kötz) vs. the 'structuralist' (à la Sacco) comparative law methods. In our opinion, this opposition, at least as currently perceived, might at most convey the idea of an integrative comparativism (emphasizing analogies) as opposed to a contrastive comparativism (emphasizing differences)—with all the possible limits already underlined by a great number of comparativists. Furthermore, the functionalism vs. structuralism debate has presently assumed a very intense normative flavour, linked, as it is, with the idea of comparative law research as ultimately conducive to an 'ought to be' catalogue of changes. This is not what this handbook is looking for. What appears much more important to understand, indeed, is not which side should prevail but how these distinctions are presently and actually used in approaching the legal issues.

On these premises, the overall rationale and goals of the book can be described in the following terms: the handbook is a collection of specially commissioned essays with a set of references to further readings. In 2009, the first volume was published, with entries on: Fundamental Rights and European Private Law, Western Property Law, Western Law of Obligations, Western and Eastern Law(s) of Contract, European Consumer Law, Western and East-

ern Tort Law(s), Law of Restitution, Security Rights in Western and Eastern Countries, Family Law, and Law of Succession. In this volume, the reader finds contributions on: Corporation Law, Trusts, Law of Sales, (fair and unfair) Competition Law, Liability for Services, Environmental Liability, Personal Injuries Law, Products Liability, Limitation Periods, European Constitutional Order and Private Law, and the Economic Analysis of the Harmonization of European Private Law.

The essays are original and not previously published elsewhere. They are designed not only to offer a comprehensive overview of the different topics, but also to display and provoke lively and controversial debate. The handbook aims to meet some needs that appear to be both of great momentum and largely overlooked by contemporary literature, namely a) the need to examine current and possible future developments in European private law institutions and issues affecting legal life of private, business and public actors; b) the opportunity to fill a gap in the comparative literature through a concise two-volume reference book, which should offer a quick and easy access to the most relevant legal issues; and c) to mark a point in the cultural debate through the presentation of what the European private law is and could be, rather than what it 'ought to' be. It follows that the handbook is not meant to simply describe substantive law, but instead to 'compare' private law institutions and cultures.

Ideally, there are two types of books: Those that provide a 'definitive' word in a widely researched area, and those that open new areas and raise more questions than they provide answers. This handbook is intended to be much more of the second than of the first type. Our goal is to show how legal comparativism can be used to study the evolution of European supranational rules as well as national ones. The actual dynamics of rule implementation and living life is complex and it may involve several interactions of variables and effects—due to technical and cultural traditions, as well as mentalities and access barrier to knowledge—that are difficult or even impossible to capture in a simplified framework such as a handbook. This doesn't preclude, however, finding driving forces behind the transformation of national and supranational rules.

Rules matter and rules change. At critical junctures of history, the redrafting of rules has involved political issues. For instance, in the 19th century, the combined movements of nationalism and liberalism fixed their sight on building nation states and redrawing the legal map of Europe. The colonial empires did the same out of context and many think that inefficient rules superimposed on local communities heavily contributed to the social and economic failures of the former colonies. The collapse of the Soviet Union in the

late 1980s led to the rebirth of a number of nations in Eastern and central Europe, but also to the enfeeblement first, and then to a re-design of legal relationships between individuals, grounded such as they were on a set of formal and informal assumptions that disappeared nearly at once. The long tail of dramatic consequences engendered by the worldwide financial crisis (born in the U.S. at the end of 2000s) boosted European-wide regulatory reforms aimed to change the balance between financial markets' autonomy and national/regional political check-powers. These reforms strengthened national/regional supervisory powers over financial actors, yet left unaltered the overall design of incentives and restraints that make global financial markets work, and impact on European financial economy. All the above calls into question the role and function of national rules that municipal lawyers keep instrumentalizing as protective shields, competitive factors, offspring of tradition, as well as actual grounds for future developments.

We hope the contributions presented in the two volumes of this book can shed some light on these important issues relating to those complex events, while keeping the reading as simple as possible. We are certain that all the contributors deserve heartfelt thanks for the passion, and patience with which they participated in this enterprise.

As sometimes happens in collective initiatives such as this one, not each and every participant has perfectly abided by the guidelines that we established at the outset of the project. Nevertheless there is, we believe, broad enough compliance in most cases to produce the advantages that we had wished for.

Trieste & Fribourg, October 2012