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

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

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

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

REINHARD ZIMMERMANN is Professor of Law at the University of Regensburg. Among his many publications are *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990/1996) and *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001). Co-edited volumes include *Good Faith in European Contract Law* (2000) and *A History of Private Law in Scotland* (2000).

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PREFACE

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

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

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

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

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

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

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

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

GOODHART LODGE
Summer 1999

ABBREVIATIONS

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

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List of abbreviations

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