INTRODUCTION: TOWARDS A RESTATEMENT OF THE EUROPEAN LAW OF OBLIGATIONS

I THE EUROPEANIZATION OF PRIVATE LAW AND LEGAL SCHOLARSHIP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II THE COMMISSION ON EUROPEAN CONTRACT LAW

1 *First commission*

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

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

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

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

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

2 *Second and third commissions*

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

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

[16] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (2000). French and German translations of the entire volume are in preparation. For a German translation of the text of the articles, see Schulze and Zimmermann (n. 2) III.10.

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

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

III OBJECTIVES OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW

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

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

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

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

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

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

IV THE IDEA OF CODIFICATION TODAY

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

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

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

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

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

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

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

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

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

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

[29] Possibly in the context of implementation of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (25 May 1999) which has to occur by 1 January 2002. See Jürgen Schmidt-Räntsch,