

## EU PRIVATE LAW



# EU PRIVATE LAW

Anatomy of a Growing Legal Order

Jürgen BASEDOW



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Cambridge – Antwerp – Chicago

Intersentia Ltd  
8 Wellington Mews  
Wellington Street | Cambridge  
CB1 1HW | United Kingdom  
Tel: +44 1223 736 170  
Email: mail@intersentia.co.uk  
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NBN International  
1 Deltic Avenue, Rooksley  
Milton Keynes MK13 8LD  
United Kingdom  
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## PREFACE

This book delves into the private law of the European Union, not into European private law in a wider sense. It focuses on the impact EU law has on private law. The main motivation for the author's study is the firm belief that there is a world of horizontal relations outside, though not independent from, the vertical relations steered by the legal institutions of the Member States and the Union. That world of societal interchange is governed by private initiative and the pursuit of private interests; it has since antiquity been subject to rules designated as private law. At all times, rulers have had to provide their peoples with the legal framework and services needed to enable that network of private relations. In exchange for this service to society and in order to achieve the justice expected, they have tried to instil the rules of private law with basic orientations of the respective polity. A similar trend is clearly perceptible in the European Union, which increasingly competes with Member States in this regard.

It is therefore not sufficient or appropriate to deal in an isolated way with areas of private law that are determined by traditional systematic structures, e.g. the law of obligations, the law of property or tort law. All areas of private law, and even specific issues such as the seller's warranties for hidden defects of a product or the causal link between human conduct and damage arising in the context of liability, are now progressively regulated by a mix of national law and EU law. The embeddedness of the resulting rules in the constitutional and policy context of the Union tends to be neglected if private law is treated in books based on traditional systematic structures. The policy context of private law is especially complex in the case of the European Union, and it is still subject to changes.

That is why this book does not focus on any special area of private law and is not structured in accordance with traditional concepts such as contract, liability in tort or private international law. It rather looks into the foundations of EU private law (including its emergence and relationships with neighbouring disciplines, its forms and its sources), into the general principles reflected by the Union's legislation and by the jurisprudence of the Court of Justice, into the relevant procedural and methodological framework, and into the external appearance of EU private law as a growing legal order. A large number of specific examples demonstrate that these general aspects affect multiple particular areas. The generalist approach is also intended to counterbalance the increasing specialisation of law and lawyers which is reflected by many publications

on EU private law, but which appears detrimental to the consistency of the legal system.

A further characteristic of EU private law is its continuous evolution. Its development requires a scholarly treatment that highlights the historical dimension. As can be observed in many areas, the first steps were often taken against the backdrop of general principles that were ascertained in legal history, in international law or in comparative law. At later stages, the connection with those external determinants loosened, and the further development in subsequent legal acts and in the case law became more self-sufficient. However, the links with the legal environment subsists in the minds of lawyers. The book tries to draw the connecting lines in several parts, hinting at the background of EU rules in neighbouring districts of the law.

The book summarises, updates and completes numerous studies which I have published since the late 1980s. Throughout those decades, the development of EU private law has made considerable progress, and my conclusions have consequently matured. This has engendered a certain change of perspective. In the early years, a predominantly descriptive treatment of the private law of the Union prevailed; for many scholars, EU private law was a tool used for the critical analysis of one's own national law, but it was not in itself targeted by critical considerations. Where the Court of Justice had decided an issue, the debate would stop. Yet over time the private law of the Union has increasingly developed an idiosyncratic nature, up to the point where it can and must be the object of critical comments itself. The criteria for such an assessment cannot be inferred from national law and are instead those standards and tests that are generally recognised by lawyers of many countries: the clarity of concepts, the consistency of rules and principles among each other, the practicability of legal precepts, the efficiency of solutions, the contribution to justice, the balancing of the interests of the parties involved, the ability to promote the rule of law.

The research for this book was essentially carried out at the Max Planck Institute for Comparative and International Private Law in Hamburg. I am particularly grateful to the Max Planck Society for allowing me to continue my scholarly work at that Institute after my retirement in 2017. The unique library and its helpful staff have enabled me to access a great variety of resources. I am also deeply indebted to Michael Friedman, Esq., for his thoughtful comments and careful language editing. And I wish to thank Eva Wirth for typing and formatting the manuscript, and Jannis Gries for compiling the bibliography, the table of cases and the list of statutory materials.

Hamburg, December 2020  
Jürgen Basedow

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1990	<b>Bierverordnung of 2 July 1990</b> , BGBl. I, 1332	
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2000	<b>Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Teilzeit- und Befristungsgesetz – TzBfG) of 21 December 2000</b> , BGBl. I, 1966	
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## ABBREVIATIONS

AA	Association Agreement
ABGB	Allgemeines Bürgerliches Gesetzbuch
A.C.	Appeal Cases
AcP	Archiv für die civilistische Praxis
AEC	as efficient competitor
AG	Advocate General
AG	Aktiengesellschaft
All ER	The All-England Law Reports
Am.Econ.Rev.	American Economic Review
Am.J.Comp.L.	American Journal of Comparative Law
B2B	Business to Business
B2C	Business to Consumer
BB	Betriebs-Berater
BGB	Bürgerliches Gesetzbuch
BGBL.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIMCO	The Baltic and International Maritime Council
BIT	Bilateral Investment Treaty
BOE	Boletín oficial del Estado
Brooklyn J.Int'l L.	Brooklyn Journal of International Law
BT-Drs.	Deutscher Bundestag – Drucksachen
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BW	Burgerlijk Wetboek
c.	Chapter
C2C	Consumer to Consumer
Cah.dr.	Les cahiers de droit
Cah.dr.eur.	Cahiers de droit européen
Cam.L.J.	Cambridge Law Journal
Cam.Yb.Eur.Leg.Stud.	Cambridge Yearbook of European Legal Studies

Cass.	Cour de cassation / Corte di cassazione
Cc (3x)	Code civil, Codice civile, Código civil
CEN	Comité européen de normalisation
CESL	Common European Sales Law
CFI	Court of First Instance
Ch.	Chancery, Chambre
ChFR	Charter of Fundamental Rights
CIV	Règles uniformes concernant le contrat de transport international ferroviaire des voyageurs (Appendice A à la COTIF)
CJEU	Court of Justice of the European Union
Col.J.Eur.L.	Columbia Journal of European Law
Col.L.Rev.	Columbia Law Review
COM	European Commission
COMI	Center of the debtor's main interest
Com.Mkt.L.Rev.	Common Market Law Review
Corte cost.	Corte costituzionale
COTIF	Convention sur les transports internationaux ferroviaires
D.	Recueil Dalloz
DCFR	Draft Common Frame of Reference
DCFTA	Deep and Comprehensive Free Trade Agreement
DG	Directorate General
Dig.	Digest
disp.prel.	Disposizioni sulla legge in generale (or Disposizioni preliminari al Codice civile – preleggi)
EBA	European Banking Authority
EBOR	European Business Organization Law Review
EC	European Communities
e-CFR	Electronic Code of Federal Regulations
ECHR (2x)	(European) Convention for the Protection of Human Rights and Fundamental Freedoms / European Court of Human Rights
ECN	European Competition Network
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EEA	European Economic Area
EEC	European Economic Community

EFTA	European Free Trade Association
EIOPA	European Insurance and Occupational Pensions Authority
EJCL	European Journal of Comparative Law and Governance
EMSA	European Maritime Safety Agency
ENP	European Neighbourhood Policy
Eng.Rep.	English Reports
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
EuCML	Journal of European Consumer and Market Law
EuGRZ	Europäische Grundrechte-Zeitschrift
EUIPO	European Union Intellectual Property Office
EuR	Europarecht
Eur.Compet.L.Rev.	European Competition Law Review
Eur.L.J.	European Law Journal
Eur.L.Rev.	European Law Review
Eur.Prop.L.J.	European Property Law Journal
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Germany)
Fed.Reg.	Federal Register
FIDIC	<i>Fédération internationale des ingénieurs conseils /</i> International Federation of Consulting Engineers
fn.	footnote
Gazz.uff.	Gazzetta ufficiale della Repubblica Italiana
GC	General Court
GEDIP	Groupe européen de droit international privé
Germ.YB Int.L.	German Yearbook of International Law
Giur.it.	Giurisprudenza italiana
GRUR Int.	GRUR International – Journal of European and International IP Law
GWB	Gesetz gegen Wettbewerbsbeschränkungen
H.L.	House of Lords
HNS	Hazardous and Noxious Substances

IA	International Affairs
ICAO	International Civil Aviation Organisation
ICLQ	International and Comparative Law Quarterly
ICJ Rep.	Reports of the International Court of Justice
IIC	International Review of Intellectual Property and Competition Law
ILO	International Labour Organisation
IMO	International Maritime Organisation
Int.Enc.Comp.L.	International Encyclopedia of Comparative Law
Int'l J. Lab. L. & Indus. Rel.	The International Journal of Labour Law and Industrial Relations
Integration	Integration – Vierteljahreszeitschrift des Instituts für Europäische Politik
IOSCO	International Organisation of Securities Commissions
IP	Intellectual Property, internet protocol
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JAE	Journal of Antitrust Enforcement
JBl.	Juristische Blätter
J.Bus.L.	Journal of Business Law
JCP éd.gén.	La semaine juridique – Juris-classeur périodique. Édition générale
JCP éd. E	La semaine juridique – Juris-classeur périodique. Édition Entreprise
J.Fin.Reg.	Journal of Financial Regulation
JOIA	Journal of International Arbitration
JZ	Juristenzeitung
Kh.	Rechtbank van Koophandel
KritJ	Kritische Justiz
LG	Landgericht (District Court, Germany)
LIEI	Legal Issues of Economic Integration
LJZ	Liechtensteinische Juristen-Zeitung
LLMC	Convention on Limitation of Liability for Maritime Claims
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Loyola L.Rev.	Loyola Law Review
LQR	Law Quarterly Review
Minn.L.Rev.	Minnesota Law Review

MJ	Maastricht Journal of European and Comparative Law
MMR	Multimedia und Recht
Mod.L.Rev.	The Modern Law Review
Mon.	Moniteur belge
NGCC	La nuova giurisprudenza civile commentata
NIPR	Nederlands internationaal privaatrecht
NJW	Neue Juristische Wochenschrift
NYU J. L. & Bus.	New York University Journal of Law & Business
NZKart	Neue Zeitschrift für Kartellrecht
NZV	Neue Zeitschrift für Verkehrsrecht
OGH	Oberster Gerichtshof (Austria)
OHIM	Office for Harmonisation in the Internal Market
OJ	Official Journal of the European Union
ORDO	Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft
OTIF	Organisation intergouvernementale pour les transports internationaux ferroviaires
p.	page(s)
P2B	Platform to business
Pace Int'l L.Rev.	Pace International Law Review
para.	paragraph(s)
PECL	Principles of European Contract Law
PEICL	Principles of European Insurance Contract Law
Penn St.J.L.& Int'l Aff.	Penn State Journal of Law & International Affairs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RdA	Recht der Arbeit
RDIPP	Rivista di diritto internazionale privato e processuale
RdW	Österreichisches Recht der Wirtschaft
Rec. des cours	Recueil des cours de l'Académie de droit international de La Haye
Rev.crit.	Revue critique de droit international privé
Rev.Der.Com.Eur.	Revista de Derecho Comunitario Europeo
RIDC	Revue internationale de droit comparé
RIW	Recht der Internationalen Wirtschaft
RMC	Revue du Marché commun et de l'Union européenne
RS	Recueil systématique du droit fédéral

RTD eur.	Revue trimestrielle de droit européen
R.W.	Rechtskundig Weekblad
Scand.Stud.L.	Scandinavian Studies in Law
SEW	Sociaal Economische Wetgeving
SFS	Svensk Förfatningssamling
SEW	Sociaal Economische Wetgeving
SZ	Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen
TBHR	Tijdschrift voor Belgisch Handelsrecht
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
ULR	Uniform Law Review
UN	United Nations
Uncitral	United Nations Commission on International Trade Law
Unidroit	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
U.S.	United States Supreme Court Reports
USA	United States of America
USSR	Union of Socialist Soviet Republics
VCLT	Vienna Convention on the Law of Treaties
VersR	Versicherungsrecht – Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WIPO	World Intellectual Property Organisation
WM	Wertpapier-Mitteilungen. Zeitschrift für Wirtschafts- und Bankrecht
YB.Eur.L.	Yearbook of European Law
YB PIL	Yearbook of Private International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für europarechtliche Studien

ZFA	Zeitschrift für Arbeitsrecht
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZvglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

