Precontractual Liability in European Private Law

This volume analyses thirteen cases, from the perspective of sixteen national European legal systems, in order to explore the legal nature of the precontractual phase and the liability which may follow a break-off of precontractual negotiations. The precontractual phase is difficult to characterise and analyse in either legal or practical terms. The negotiating parties have begun their journey together, but they are not yet in the relationship – the contract – which is their aim. The negotiations may fail after a lengthy period in which either party may have incurred significant expenses and invested time and effort. The break-off of the negotiations may come as a shock to one party where the negotiations were far advanced, or at least where there was nothing to suggest that they were not likely to lead to their fruition in the contract. The disappointed party is therefore likely to seek a remedy.

John Cartwright is Reader in the Law of Contract at the University of Oxford, and Professor of Anglo-American Private Law at the University of Leiden. He is also a Solicitor.

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The Common Core of European Private Law

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For the transnational lawyer, the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality, the Common Core of European Private Law Project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union Member States. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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Precontractual Liability in European Private Law

Edited by
John Cartwright and Martijn Hesselink
Contents

General editors’ preface page xi
Preface xiii
List of contributors xv
Abbreviations xvii
Note on translations of foreign language statutory provisions xxvi

1 Introduction
JOHN CARTWRIGHT AND MARTIJN HESSELINK 1

2 Case studies

Case 1 Negotiations for premises for a bookshop 21
Discussions 21
Editors’ comparative observations 60
Case 2 Negotiations for renewal of a lease 64
Discussions 65
Editors’ comparative observations 90
Case 3 Mistake about ownership of land to be sold 93
Discussions 93
Editors’ comparative observations 113
Case 4 An architect’s preparatory work for a contract which does not materialise; parallel negotiations 117
Discussions 117
Editors’ comparative observations 136
<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>A broken engagement</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>160</td>
</tr>
<tr>
<td>6</td>
<td>An express lock-out agreement</td>
<td>162</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>162</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>188</td>
</tr>
<tr>
<td>7</td>
<td>Breakdown of merger negotiations</td>
<td>192</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>193</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>229</td>
</tr>
<tr>
<td>8</td>
<td>A shopping centre without a tenant</td>
<td>233</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>233</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>251</td>
</tr>
<tr>
<td>9</td>
<td>Breakdown of negotiations to build a house for a friend</td>
<td>254</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>254</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>273</td>
</tr>
<tr>
<td>10</td>
<td>Public bidding</td>
<td>275</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>275</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>308</td>
</tr>
<tr>
<td>11</td>
<td>A contract for the sale of a house which fails for lack of formality</td>
<td>311</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>311</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>333</td>
</tr>
<tr>
<td>12</td>
<td>Confidential design information given during negotiations</td>
<td>336</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>336</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>360</td>
</tr>
<tr>
<td>13</td>
<td>Misrepresentation or silence about a harvester’s capacity</td>
<td>362</td>
</tr>
<tr>
<td></td>
<td>Discussions</td>
<td>362</td>
</tr>
<tr>
<td></td>
<td>Editors’ comparative observations</td>
<td>395</td>
</tr>
<tr>
<td>3</td>
<td>From the common law to the civil law: the experience of Israel</td>
<td>398</td>
</tr>
<tr>
<td></td>
<td>Nili Cohen</td>
<td></td>
</tr>
</tbody>
</table>
CONTENTS

4 A law and economics perspective on precontractual liability
   ELEONORA MELATO AND FRANCESCO PARISI 431

5 Conclusions
   JOHN CARTWRIGHT AND MARTIJN HESSELINK 449

Bibliography 489
Index 499
This is the ninth book in the series *The Common Core of European Private Law* published within the *Cambridge Studies in International and Comparative Law*. The Project was launched in 1993 under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the project is still unparalleled. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for a fully-fledged and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to the already published volumes, and those who are working hard to achieve future results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the scholarly outputs of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The Italian Ministry of Scientific Research is funding the project, having
recognised it as a ‘research of national interest’. The International University College of Turin with the Compagnia di San Paolo and the Consiglio Nazionale del Notariato allow us to organise the General Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Programme. The University of Torino, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, the Centro Studi di Diritto Comparato of Trieste, have all contributed to the funding, and/or the success of this Project.

Our home webpage is at www.iuctorino.it. There you can follow our progress in mapping the common core of European private law.

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MAURO BUSSANI (University of Trieste)
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Late Honorary Editor
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Preface

This volume is designed to form another piece in the jigsaw of the map of private law in Europe – a map which is being drawn, piece by piece, through the results of the various projects undertaken by the Common Core group.

This project was first conceived at the meeting of the Contracts subgroup of the Common Core group in Trento in 1996, although it took a number of years for the project to take shape. The work of our national reporters and other contributors, and our own editorial work to produce this volume, have therefore been carried out over a number of years. We describe the Common Core method, and the particular approach which we have taken to our own project, in the Introduction.

It seemed particularly appropriate for this project to be undertaken under the joint editorship of a Dutch lawyer and an English lawyer; not simply because this ensures that both the ‘civil law’ and the ‘common law’ are represented in the editorial team (this does not mean that we wish to reinforce the caricature of the so-called civil law/common law divide, on which we comment in the Conclusions) but because, of all the legal systems represented within our project, Dutch law and English law represent the extremes of principle. Amongst the ‘civil law’ systems, Dutch law is known for having a particularly strong view of the liability which one negotiating party may incur towards the other once the negotiations have reached an advanced stage, accepting that in principle this might even extend to remedies designed to compensate the innocent party for her failure to obtain the contract under negotiation. By contrast, amongst the ‘common law’ systems, English law is known for having a particularly strong view of the absence of liability which the negotiating parties may incur towards each other, even where negotiations have reached a very
advanced stage. We have been able to use these extremes of principle as (we believe) useful reference points for our discussion and analysis of all the jurisdictions, and have commented on them in particular in the Conclusions.

We should like to thank those who have contributed to our project, both by offering their advice and comments in the early days when the project was in its conception, and by their active participation in the writing of the project itself. The members of the Contracts sub-group gave very helpful advice at the meetings in 1996 (when the project was first proposed) and 1997 (when we had prepared a first draft of what became the final questionnaire); and our national reporters have of course provided the core material for our project. We thank them for their hard work in preparing their reports, both their original reports and revisions to the reports which became necessary during the further discussion on the scope of the project once we collected together the results of the questionnaires. We also thank them for their understanding in allowing us a wide editorial discretion in finalising their reports for publication, and their patience – and particularly the patience of our more assiduous reporters who worked very quickly in preparing their reports and in answering all our questions and requests for revision – in waiting for the final publication of this volume. The editing of the reports was finally completed towards the end of 2007, although some of our contributors’ national reports were finalised some time before that.

We are also particularly grateful to Nili Cohen for having agreed to write a chapter which gives a most interesting alternative perspective on our topic from the point of view of Israeli law, and to Eleonora Melato and Francesco Parisi for having agreed to write a stimulating chapter giving a view of our topic, and of some of our particular cases, from the perspective of law and economics scholars.

We must also thank Ugo Mattei and Mauro Bussani for their support in relation to our project and, through their organisation of the Trento Common Core group, for having given us the opportunity to undertake the project at all.

Finally, Martijn Hesselink would like to thank John Cartwright for having undertaken much of the work involved in editing the national reports for this volume.

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MARTIJN HESSELINK
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Introduction, Comparative observations and Conclusions by John Cartwright, University of Oxford and University of Leiden, and Martijn Hesselink, University of Amsterdam
Abbreviations

General abbreviations

art(s). article(s)
cf. compare
ch. chapter
ed(s). editor(s)
edn edition
ff. and following page(s)
m million
n(n). note(s)
no. number
p(p). page(s)
PECL Principles of European Contract Law
reg(s). regulation(s)
s(s). section(s)
vol(s). volume

Introduction and Conclusions

AJCL American Journal of Comparative Law
DCFR Draft Common Frame of Reference, Interim Outline Edition
ECR European Court Reports
ELJ European Law Journal
MLR Modern Law Review
OJ Official Journal of the European Communities
Case studies: abbreviations by country

Austria

ABGB Allgemeines bürgerliches Gesetzbuch (General Civil Code of Austria)
BGBL Bundesgesetzblatt (Government Gazette)
JBI Juristische Blätter (law journal)
LJZ Liechtensteinische Juristen-Zeitung
OGH Oberster Gerichtshof (Austrian Supreme Court)
ÖJZ Österreichische Juristen-Zeitung (law journal)
RdW Recht der Wirtschaft (law journal)
SZ Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen (decisions of the OGH in private law and administration of justice)

England

AC Law Reports, Appeal Cases
All ER All England Law Reports
All ER (Com) All England Law Reports, Commercial Cases
All ER (D) All England Direct Law Reports
B Baron
Ch Law Reports, Chancery Division
CLR Commonwealth Law Reports (Australia)
CP Law Reports, Common Pleas
DLR Dominion Law Reports (Canada)
EGLR Estates Gazette Law Reports
Ex Exchequer Reports, Welsby Hurlstone & Gordon
EWCA Civ Court of Appeal (Civil Division)
FSR Fleet Street Reports
J Justice
KB Law Reports, King’s Bench Division
LJ Lord Justice
LR Law Reports
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>MR</td>
<td>Master of the Rolls</td>
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<tr>
<td>QB</td>
<td>Law Reports, Queen’s Bench Division</td>
</tr>
<tr>
<td>P &amp; CR</td>
<td>Property, Planning and Compensation Reports</td>
</tr>
<tr>
<td>RPC</td>
<td>Reports of Patent, Design and Trade Mark Cases</td>
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<tr>
<td>SI</td>
<td>Statutory Instrument</td>
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<td>WLR</td>
<td>Weekly Law Reports</td>
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**Finland**

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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>KKO</td>
<td>Korkein oikeus (Yearbook of the Finnish Supreme Court)</td>
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<tr>
<td>VahL</td>
<td>Vahingonkorvauslaki (Damages Act, 1974)</td>
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**France**

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>al.</td>
<td>alinéa (paragraph within a provision of the Code)</td>
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<tr>
<td>Bull Civ</td>
<td>Bulletin civil de la Cour de cassation (reports of the civil chambers of the Cour de cassation)</td>
</tr>
<tr>
<td>CA</td>
<td>Cour d’appel</td>
</tr>
<tr>
<td>CCC</td>
<td>Contrats, concurrence, consommation (legal periodical)</td>
</tr>
<tr>
<td>C.civ.</td>
<td>Code civil (French Civil Code)</td>
</tr>
<tr>
<td>Civ (1, 2, 3)</td>
<td>Cour de cassation, Chambre civile (first, second, third chamber)</td>
</tr>
<tr>
<td>Com</td>
<td>Cour de cassation, Chambre commerciale</td>
</tr>
<tr>
<td>D</td>
<td>Recueil Dalloz or Dalloz Sirey (legal periodical, in three sections: ‘chron.’ is chronique, ‘som.’ is sommaires, ‘IR’ is informations rapides)</td>
</tr>
<tr>
<td>DH</td>
<td>Dalloz, Recueil hebdomadaire de jurisprudence (legal periodical)</td>
</tr>
<tr>
<td>Gaz Pal</td>
<td>Gazette du Palais (legal periodical)</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>J-Cl</td>
<td>Juris-classeur (legal encyclopaedia, 1950, updated annually)</td>
</tr>
<tr>
<td>JCP</td>
<td>Jurisclasseur périodique, édition générale (legal periodical, also known as La Semaine Juridique)</td>
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<tr>
<td>JCP éd E</td>
<td>Jurisclasseur périodique, édition entreprise et affaires (legal periodical)</td>
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<tr>
<td>obs</td>
<td>observations</td>
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<tr>
<td>PA</td>
<td>Les Petites Affiches (legal periodical)</td>
</tr>
</tbody>
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## Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Req</td>
<td>Chambre de requêtes of the Cour de cassation</td>
</tr>
<tr>
<td>Rev.</td>
<td>Revue</td>
</tr>
<tr>
<td>RJDA</td>
<td>Revue de jurisprudence de droit des affaires (legal periodical)</td>
</tr>
<tr>
<td>RRJ</td>
<td>Revue de la Recherche Juridique (legal periodical)</td>
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<tr>
<td>RTDCiv</td>
<td>Revue Trimestrielle de Droit Civil (legal periodical)</td>
</tr>
<tr>
<td>RTDCom</td>
<td>Revue Trimestrielle de Droit Commercial (legal periodical)</td>
</tr>
<tr>
<td>AcP</td>
<td>Archiv für die civilistische Praxis (law journal)</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (Federal Supreme Court)</td>
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<tr>
<td>BGHZ</td>
<td>Entscheidungen des Bundesgerichtshofs in Zivilsachen (official report of the Bundesgerichtshof)</td>
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<tr>
<td>DB</td>
<td>Der Betrieb (law journal, Düsseldorf)</td>
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<td>DTZ</td>
<td>Deutsch-Deutsche Rechts-Zeitschrift (law journal, Munich)</td>
</tr>
<tr>
<td>GWB</td>
<td>Gesetz gegen Wettbewerbsbeschränkungen (Act Against the Restraint of Competition)</td>
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<tr>
<td>JuS</td>
<td>Juristische Schulung (law journal, Munich)</td>
</tr>
<tr>
<td>JZ</td>
<td>Juristenzeitung (law journal, Tübingen)</td>
</tr>
<tr>
<td>LM</td>
<td>Lindenmaier and Möhring, Nachschlagwerk des Bundesgerichtshofs in Zivilsachen (decisions of the BGH)</td>
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<tr>
<td>MünchKomm</td>
<td>Münchener Kommentar zum Bürgerlichen Gesetzbuch (4th edn, München, 2001) (with name of author of article appended)</td>
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<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift (law journal)</td>
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<tr>
<td>NJW-RR</td>
<td>Neue Juristische Wochenschrift – Rechtsprechungsreport (supplement to law journal with case reports in private law)</td>
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<tr>
<td>RG</td>
<td>Reichsgericht</td>
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<tr>
<td>Rn.</td>
<td>Randnummer (paragraph)</td>
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<td>sent.</td>
<td>sentence</td>
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<tr>
<td>Soergel</td>
<td>T. Soergel, Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen (12th edn, Stuttgart, 1988) (with name of author of article appended)</td>
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## Abbreviations

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<td>QB</td>
<td>Law Reports, Queen’s Bench Division</td>
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<tr>
<td>QC</td>
<td>Queen’s Counsel</td>
</tr>
<tr>
<td>RPC</td>
<td>Reports of Patent, Design and Trade Mark Cases</td>
</tr>
<tr>
<td>VR</td>
<td>Victorian Reports (Australia)</td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Reports</td>
</tr>
</tbody>
</table>

### Italy

- **App.** Corto d’Appello (Appeal Court)
- **Cass.** Corte di cassation
- **c.c.** Codice civile (Italian Civil Code)
- **CI** *Contratto e Impresa* (legal periodical)
- **Cons. Stato** Consiglio di Stato
- **Corte Cost.** Corte Costituzionale (Constitutional Court)
- **Cost.** La Costituzione della Repubblica Italiana (Italian Constitution)
- **c.p.** Codice penale (Criminal Code)
- **c.p.c.** Codice di procedura civile (Code of Civil Procedure)
- **DL** *Diritto del Lavoro* (legal periodical)
- **D.Lgs.** Decreto legislativo (legislative decree)
- **Enc. Dir.** *Enciclopedia del diritto* (legal encyclopaedia)
- **Enc. Giur.** *Enciclopedia giuridica* (legal encyclopaedia)
- **Foro it** *Il foro italiano* (legal periodical)
- **GC** Giustizia civile (legal periodical)
- **Giur com** Giurisprudenza commerciale (legal periodical)
- **GI** Giurisprudenza italiana (legal periodical)
- **L** Legge (law)
- **lav.** lavoro (employment)
- **Novissimo Dig** Novissimo Digesto Italiano (legal encyclopaedia)
- **pen.** penale (criminal)
- **PRET** Pretura (District Court)
- **RCDP** Rivista critica di diretto privato (legal periodical)
- **RCP** Responsabilità civile et previdenza (legal periodical)
- **r.d.** Royal Decree
- **RDC** Rivista di diritto civile (legal periodical)
- **RDCo** Rivista di diritto commerciale (legal periodical)
- **Riv. Giur. Sarda** Rivista giuridica Sarda (legal periodical)
- **RTDPC** Rivista trimestrale di diretto e procedura civile (legal periodical)
- **sez.** Sezione (Section of the Corte di cassation)
### Abbreviations

<table>
<thead>
<tr>
<th>S.U.</th>
<th>Sezione Unite (United Sections of the Corte di cassation)</th>
</tr>
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<tbody>
<tr>
<td>TAR-T</td>
<td>Tribunale amministrativo regionale (regional administrative court)</td>
</tr>
<tr>
<td>TRIB-T</td>
<td>Tribunale (Court of first instance)</td>
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</tbody>
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**Netherlands**

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<thead>
<tr>
<th>AA</th>
<th>Ars Aequi (legal periodical)</th>
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<tr>
<td>BW</td>
<td>Burgerlijk Wetboek (Dutch Civil Code)</td>
</tr>
<tr>
<td>ERPL</td>
<td>European Review of Private Law</td>
</tr>
<tr>
<td>HR</td>
<td>Hoge Raad des Nederlanden (Supreme Court)</td>
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<tr>
<td>NJ</td>
<td>Nederlandse Jurisprudentie (law journal)</td>
</tr>
<tr>
<td>NJB</td>
<td>Nederlands Juristenblad (law journal)</td>
</tr>
<tr>
<td>WPNR</td>
<td>Weekblad voor Privaatrecht, Notariaat en Registratie (law journal)</td>
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**Norway**

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<tr>
<th>JT</th>
<th>Juridisk Tidsskrift (law journal, Sweden)</th>
</tr>
</thead>
<tbody>
<tr>
<td>JV</td>
<td>Jussens Venner (law journal)</td>
</tr>
<tr>
<td>NIR</td>
<td>Nordiskt Immateriellt Rättsskydd (Nordic Intellectual Property Law Review)</td>
</tr>
<tr>
<td>NJA</td>
<td>Nytt Juridisk Arkiv (Swedish Supreme Court Reports)</td>
</tr>
<tr>
<td>RG</td>
<td>Rettens Gang (law reports of lower courts)</td>
</tr>
<tr>
<td>Rt</td>
<td>Norsk Retstidende (Norwegian Supreme Court Reports)</td>
</tr>
<tr>
<td>TfR</td>
<td>Tidsskrift for Rettsvidenskap (law journal)</td>
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</tbody>
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**Portugal**

<table>
<thead>
<tr>
<th>BMJ</th>
<th>Boletim do Ministerio da Justiça (law reports)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CC</td>
<td>Código Civil (Portuguese Civil Code)</td>
</tr>
<tr>
<td>CJ</td>
<td>Colectânea de Jurisprudência (law journal)</td>
</tr>
<tr>
<td>RC</td>
<td>Relação de Coimbra (Appeal Court of Coimbra)</td>
</tr>
<tr>
<td>RL</td>
<td>Relação de Lisboa (Appeal Court of Lisboa)</td>
</tr>
<tr>
<td>ROA</td>
<td>Revista da Ordem dos Advogados (law journal)</td>
</tr>
<tr>
<td>STJ</td>
<td>Supremo Tribunal de Justiça (Supreme Court)</td>
</tr>
</tbody>
</table>

**Scotland**

<table>
<thead>
<tr>
<th>AC</th>
<th>Law Reports, Appeal Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>affd.</td>
<td>affirmed</td>
</tr>
</tbody>
</table>
Abbreviations

CSOH
D
Edin LR
F
FC
GWD
HL
M
R
S
SC
Sh Ct Rep
SLT

Court of Session, Outer House
Dunlop’s Session Cases
Edinburgh Law Review
Fraser’s Session Cases
Faculty of Advocates, Collection of Decisions (law reports)
Greens Weekly Digest (case summaries)
House of Lords
Macpherson’s Session Cases
Rettie’s Session Cases
Shaw's Session Cases
Session Cases
Sheriff Court Reports
Scots Law Times

Spain
BOE
CC
RCL
RJ
STS

Boletín Oficial del Estado (law reports)
Código Civil (Spanish Civil Code)
Repertorio cronológico de legislación (legislation)
Repertorio de jurisprudencia (law reports)
Sentencias del Tribunal Supremo de Justicia en Materia Civil (decisions of the Supreme Court)

Sweden
CA
JB
JT
NJA
PA
prop.
SGA
SOU
TSA

Avtalslagen (1915:218) (Contract Act)
Jordabalken av den 17 december 1970 (Real Estate Code)
Juridisk Tidskrift (law journal)
Nytt Juridisk Arkiv (Swedish Supreme Court Reports)
Lag om offentlig upphandling (1992:1528) (Procurement Act)
Regeringens proposition (approximates to a Government Bill)
Köplagen (1990:931) (Sale of Goods Act)
Statens Offentliga Utredningar (official reports of legislative and investigation commissions)
Lag om skydd för företagshemligheter (1990:409) (Trade Secrets Act)
ABBREVIATIONS

Switzerland
BernerKommentar  Berner Kommentar, Kommentar zum schweizerischen Privatrecht (Bern) (with name of author of article appended)
BGE  Entscheidungen des Schweizerischen Bundesgerichtes (reports of the Federal Court)
E.  Erwägung (consideration)
Intro.  Introduction
OR  Schweizerisches Zivilgesetzbuch mit Obligationenrecht (Swiss Code of Obligations)
SemJud  La Semaine Judiciare (legal periodical)
UWG  Bundesgesetz gegen den unlauteren Wettbewerb (Unfair Competition Act)
ZBGR  Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht (legal journal)
ZBJV  Zeitschrift des Bernischen Juristenvereins (legal periodical)
ZGB  Schweizerisches Zivilgesetzbuch (Swiss Civil Code)
ZSR  Zeitschrift für Schweizerisches Recht (legal periodical)
ZürcherKommentar  Zürcher Kommentar, Kommentar zum Schweizerischen Zivilgesetzbuch (Zürich)

From the common law to the civil law: the experience of Israel

LSI  Laws of the State of Israel
CA  Civil Appeal
PD  Piskei Din (Israeli Supreme Court reports in Hebrew)
Note on translations of foreign language statutory provisions

Some reporters have used published English translations of statutory texts:


In the Finnish reports, quotations in English from the Sale of Goods Act are taken from an official translation made in the Finnish Ministry of Justice.

In the German reports, translation of the reformed provisions (§§241, 280, 311, 437 BGB) are by Werner Lorenz. Other translated BGB provisions are taken from S.L. Goren, *The German Civil Code* (Littleton, 1994).