

## Contents

| Preface                                   | page xviii |
|---|------------|
| Foreword by Shiyuan Han                   | XX         |
| Foreword by Reinhard Zimmermann           | xxiii      |
| Foreword by André Tunc                    | xxvi       |
| Foreword by Roscoe Pound                  | xxviii     |
| Table of Abbreviations                    | xxxi       |
| Table of Cases                            | XXXV       |
| Table of Legislation                      | 1          |
| Table of Restatements and Kindred Sources | s lvii     |
| Table of EU Legislation                   | lix        |
| Table of Roman, Canon Law and Ancient     |            |
| Chinese Sources                           | lx         |

## INTRODUCTORY READINGS 1

|    | I. TRADITIONS                               | 3  |
|----|---|----|
| A. | The West                                    | 3  |
|    | 1. The Civil Law Tradition                  | 3  |
|    | a. Roman Law                                | 3  |
|    | i. The Roman Jurists                        | 3  |
|    | ii. The Medieval Jurists                    | 9  |
|    | b. The Natural Law Schools                  | 15 |
|    | i. The Late Scholastics                     | 15 |
|    | ii. The Northern Natural Law School         | 18 |
|    | c. Codification and the Rise of Positivism  | 19 |
|    | i. France                                   | 19 |
|    | ii. Germany                                 | 23 |
|    | iii. Conceptualism in France and Germany    | 26 |
|    | 2. The Common Law Tradition                 | 28 |
|    | a. The Writ System                          | 28 |
|    | b. Transformation in the Nineteenth Century | 30 |
|    |   |    |



| vi | CONTENTS   |     |
|----|--|-----|
|    | i. The Rationalization of the Common Law:          |     |
|    | From Writs to Legal Doctrines                      | 30  |
|    | ii. Positivism and Conceptualism                   | 31  |
|    | 3. Since the Nineteenth Century                    | 34  |
|    | a. The Revolt against Positivism and Conceptualism | 34  |
|    | b. The Emergence of Comparative Law                | 35  |
| В. | China  | 36  |
|    | 1. Law in Imperial China                           | 36  |
|    | a. Law versus $Li$                                 | 37  |
|    | b. Distributive Justice versus Commutative Justice | 38  |
|    | c. The Responsibility of the Family versus that    |     |
|    | of the Individual                                  | 41  |
|    | d. A Law of Punishments                            | 42  |
|    | 2. Law in Modern China                             | 48  |
|    | a. The Early Twentieth Century                     | 48  |
|    | b. The Republic of China (1911–1949)               | 50  |
|    | c. The People's Republic of China                  | 51  |
|    | i. Some Persistent Problems                        | 51  |
|    | ii. The Socialist Experience                       | 54  |
|    | iii. The Reform                                    | 60  |
|    | II. INSTITUTIONS                                   | 65  |
| A. | The West   | 65  |
|    | 1. Germany and the United States                   | 65  |
|    | 2. France  | 99  |
|    | 3. England   | 110 |
| В. | China  | 122 |
|    | 1. The Structure of the Court System               | 122 |
|    | 2. The Role of Judges                              | 123 |
|    | a. Managerial Judging                              | 123 |
|    | b. Service-Oriented Judging                        | 123 |
|    | 3. Judicial Independence                           | 124 |
|    | a. Collective Independence of the                  |     |
|    | Courts   | 124 |
|    | b. The Influence of a Higher Court                 | 125 |
|    | c. The Political-Legal Committee                   | 125 |
|    | 4. The Emerging Case Law System                    | 126 |
|    | 5. Professionalism                                 | 127 |



|    | CONTENTS  | vii |
|----|---|-----|
|    | COMPARATIVE PRIVATE LAW 131                                   |     |
|    | PART ONE: THE LAW OF OBLIGATIONS                              |     |
|    | CONTRACT LAW  | 133 |
|    | I. THE STRUCTURE OF CONTRACT LAW                              | 133 |
| 1. | Civil Law   | 133 |
| 2. | Common Law  | 141 |
| 3. | Chinese Law   | 146 |
|    | II. VOLUNTARY COMMITMENT                                      | 152 |
| 1. | The Moment at which a Commitment Is Binding                   | 152 |
|    | Common Law  | 152 |
|    | German Law  | 155 |
|    | French Law  | 156 |
|    | Chinese Law   | 156 |
|    | The Draft Common Frame of Reference                           | 157 |
| _  | The Unidroit Principles of International Commercial Contracts | 158 |
| 2. | Liability before a Final Commitment Is Made                   | 160 |
|    | English Law   | 160 |
|    | Law in the United States                                      | 163 |
|    | French Law  | 168 |
|    | German Law  | 171 |
|    | Chinese Law   | 175 |
|    | The Draft Common Frame of Reference                           | 177 |
|    | The Unidroit Principles of International Commercial           | 178 |
| 2  | Contracts Mistake   | 178 |
| ა. | a. The Search for a Rule                                      | 180 |
|    | b. When Relief Is Granted                                     | 184 |
|    | i. Mistakes in Authenticity                                   | 184 |
|    | ii. Mistakes in Suitability for a Purpose                     | 188 |
|    | iii. Mistakes in Value  | 191 |
|    |   |     |
|    | III. FAIRNESS   | 193 |
| 1. | Fairness of the Price Term                                    | 193 |
|    | a. Origins  | 193 |
|    | b. Modern Law   | 201 |
|    | English Law   | 201 |



| vi | ii CONTENTS   |      |
|----|---|------|
|    | Law in the United States                            | 202  |
|    | German Law  | 205  |
|    | French Law  | 212  |
|    | Chinese Law   | 218  |
|    | The Draft Common Frame of Reference                 | 220  |
|    | The Unidroit Principles of International Commercial |      |
|    | Contracts   | 221  |
|    | c. Chinese Law and the State-Owned Enterprise       | 221  |
| 2. | Fairness of the Auxiliary Terms                     | 227  |
|    | English Law   | 227  |
|    | Law in the United States                            | 228  |
|    | French Law  | 229  |
|    | German Law  | 231  |
|    | Chinese Law   | 233  |
|    | The Law of the European Union                       | 233  |
|    | The Draft Common Frame of Reference                 | 238  |
|    | The Unidroit Principles of International Commercial |      |
|    | Contracts   | 240  |
|    |   |      |
|    | IV. EXCUSES FOR NON-PERFORMANCE                     | 240  |
| 1  | In a subtility and Flore Marines                    | 0.40 |
| 1. | Impossibility and Force Majeure                     | 240  |
|    | Common Law  | 242  |
|    | French Law  | 244  |
|    | German Law  | 245  |
|    | Chinese Law   | 247  |
|    | The Draft Common Frame of Reference                 | 248  |
|    | The Unidroit Principles of International Commercial | 0.40 |
| 0  | Contracts   | 248  |
| 2. | Changed Circumstances                               | 249  |
|    | a. Origins  | 249  |
|    | b. Modern Law                                       | 251  |
|    | English Law   | 251  |
|    | Law in the United States                            | 253  |
|    | French Law  | 255  |
|    | German Law  | 256  |
|    | Chinese Law   | 263  |
|    | The Draft Common Frame of Reference                 | 266  |
|    | The Unidroit Principles of International Commercial |      |
|    | Contracts   | 267  |



|    | CONTENTS                           | ix  |
|----|------------------------------------|-----|
|    | V. REMEDIES                        | 267 |
| 1. | Specific Performance               | 267 |
|    | a. Origins                         | 267 |
|    | b. Modern Law                      | 269 |
|    | English Law                        | 269 |
|    | Law in the United States           | 272 |
|    | French Law                         | 272 |
|    | German Law                         | 273 |
|    | Chinese Law                        | 275 |
| 2. | Damages                            | 276 |
|    | a. The General Principle           | 276 |
|    | English Law                        | 276 |
|    | Law in the United States           | 276 |
|    | French Law                         | 276 |
|    | German Law                         | 276 |
|    | Chinese Law                        | 277 |
|    | b. Excessive Cost of Performance   | 277 |
|    | English Law                        | 277 |
|    | Law in the United States           | 279 |
|    | French Law                         | 280 |
|    | German Law                         | 281 |
|    | Chinese Law                        | 281 |
|    | c. Liquidated Damages              | 282 |
|    | English Law                        | 282 |
|    | Law in the United States           | 283 |
|    | French Law                         | 283 |
|    | German Law                         | 283 |
|    | Chinese Law                        | 283 |
|    | d. Recovery for Non-Economic Harm  | 284 |
|    | English Law                        | 284 |
|    | Law in the United States           | 286 |
|    | French Law                         | 286 |
|    | German Law                         | 287 |
|    | Chinese Law                        | 290 |
|    | e. Recovery for Unforeseeable Harm | 290 |
|    | i. Origins                         | 290 |
|    | ii. Modern Law                     | 291 |
|    | French Law                         | 291 |
|    | English Law                        | 293 |
|    | Law in the United States           | 296 |
|    | Chinese Law                        | 297 |



| X  | CONTENTS  |     |
|----|---|-----|
|    | The Draft Common Frame of Reference                 | 297 |
|    | The Unidroit Principles of International Commercial |     |
|    | Contracts   | 297 |
|    | German Law  | 298 |
|    |   |     |
|    | TORT LAW  | 301 |
|    | I. THE SCOPE OF THE RIGHTS PROTECTED                | 301 |
| 1. | Introduction: The Structure of Tort Law             | 301 |
|    | a. Civil Law  | 301 |
|    | i. The Civil Codes                                  | 301 |
|    | ii. From Roman Law to Modern Code Provisions        | 302 |
|    | b. Common Law                                       | 307 |
|    | i. A List of Torts                                  | 307 |
|    | ii. From the Forms of Action to the Modern Torts    | 309 |
|    | c. Chinese Law                                      | 313 |
|    | i. The Absence of Private Law                       | 313 |
|    | ii. The Sources of Contemporary Chinese Tort Law    | 314 |
|    | iii. The Scope of Rights Protected                  | 315 |
| 2. | Harm to Dignity                                     | 316 |
|    | a. Insult in General                                | 316 |
|    | Traditional Common Law                              | 316 |
|    | Modern English Law                                  | 317 |
|    | Modern Law in the United States                     | 320 |
|    | French Law  | 322 |
|    | German Law  | 323 |
|    | Chinese Law   | 328 |
|    | b. Problems of Free Speech, Group Insult, and       |     |
|    | Minority Rights                                     | 328 |
|    | Law in the United States                            | 328 |
|    | French Law  | 332 |
|    | German Law  | 336 |
|    | The European Convention on Human Rights             | 342 |
| 3. | Invasion of Privacy                                 | 350 |
|    | a. Dissemination of Pictures                        | 350 |
|    | English Law   | 350 |
|    | Law in the United States                            | 351 |
|    | French Law  | 353 |
|    | German Law  | 354 |
|    | Chinese Law   | 364 |



|    | CONTENTS  | xi  |
|----|---|-----|
|    | b. Dissemination of True Information                      | 366 |
|    | i. About Current Events                                   | 366 |
|    | English Law   | 366 |
|    | Law in the United States                                  | 372 |
|    | French Law  | 376 |
|    | German Law  | 377 |
|    | Chinese Law   | 378 |
|    | ii. About Historical Events                               | 379 |
|    | Law in the United States                                  | 379 |
|    | French Law  | 380 |
|    | German Law  | 381 |
|    | Chinese Law   | 382 |
|    | c. Electronic Collection and Dissemination of Information | 383 |
| 4. | Purely Economic Harm                                      | 408 |
|    | a. Liability in Principle for Purely Economic Harm        | 408 |
|    | French Law  | 408 |
|    | b. No Liability in Principle for Purely Economic Harm     | 410 |
|    | i. Origins  | 410 |
|    | ii. Note on Chinese Law                                   | 415 |
|    | iii. Physical Harm to a Third Party's Property            | 416 |
|    | Anglo-American Law  | 416 |
|    | German Law  | 418 |
|    | Chinese Law   | 419 |
|    | iv. Plaintiff's Property Made Unusable                    | 420 |
|    | Law in the United States                                  | 420 |
|    | German Law  | 421 |
|    | Chinese Law   | 422 |
|    | v. False Information                                      | 422 |
|    | English Law   | 423 |
|    | Law in the United States                                  | 424 |
|    | German Law  | 426 |
| 5. | Harm Suffered Because Another Is Harmed                   | 428 |
|    | Traditional Anglo-American Law                            | 428 |
|    | Modern Law in the United States                           | 430 |
|    | Modern English Law  | 432 |
|    | French Law  | 435 |
|    | German Law  | 439 |
|    | II. THE CONDUCT FOR WHICH ONE IS LIABLE                   | 441 |
| 1. | Introduction  | 441 |



xii

Cambridge University Press 978-1-108-83584-8 — An Introduction to the Comparative Study of Private Law 2nd Edition Table of Contents More Information

> 2. Intent 446 a. The Intention to Do Harm or to Do Wrong 446 Civil Law 446 Chinese Law 446 Common Law 446 b. The Intent to Cause a Different Harm or Commit a Different Tort 450 Law in the United States 450 English Law 451 German Law 453 French Law 453 c. Intent and Knowledge 457 **English Law** 457 Law in the United States 457 French Law 458 German Law 459 Chinese Law 459 3. Negligence 459 a. The Meaning of Negligence 459 b. The Weighing of Consequences i. An English Description ii. Some American Descriptions iii. Some French Descriptions iv. Some German Descriptions v. A Chinese Description

**CONTENTS** 



|    | CONTENTS   | xiii |
|----|--|------|
| 4. | Strict Liability   | 482  |
|    | a. Liability for Dangerous or "Non-Natural" Activities   | 482  |
|    | English Law  | 482  |
|    | Law in the United States                                 | 488  |
|    | German Law   | 489  |
|    | Chinese Law  | 496  |
|    | b. Liability for Harm Caused by Objects in One's Custody |      |
|    | in French Law  | 497  |
|    | i. Introduction  | 497  |
|    | ii. The Rise of Strict Liability                         | 498  |
|    | iii. The Requirement of an "Act of an Object"            | 503  |
|    | iv. Cas Fortuit and Force Majeure                        | 506  |
|    | v. "Guard"   | 507  |
|    | vi. The Extent of Liability                              | 510  |
|    | c. Liability for Defective Products                      | 511  |
|    | Law in the United States                                 | 511  |
|    | Law in Europe  | 516  |
|    | Chinese Law  | 519  |
| 5. | "Liability in Equity" in Chinese Law                     | 520  |
|    | UNJUST ENRICHMENT  | 526  |
|    | I. THE PRINCIPLE   | 526  |
| 1. | Origins  | 526  |
|    | Modern Law   | 528  |
|    | English Law  | 528  |
|    | Law in the United States                                 | 532  |
|    | German Law   | 534  |
|    | French Law   | 538  |
|    | Chinese Law  | 539  |
|    | II. MUST ONE PARTY GAIN AT THE OTHER'S                   |      |
|    | EXPENSE?   | 542  |
| 1. | Recovery When the Plaintiff Did Not Lose                 | 542  |
|    | a. The Use or Violation of Another's Property Rights     | 542  |
|    | English Law  | 542  |
|    | Law in the United States                                 | 543  |
|    | French Law   | 544  |
|    | German Law   | 544  |
|    | b. The Question of What the Defendant Should Pay         | 545  |



| X1 | V CONTENTS   |            |
|----|--|------------|
| 2. | Recovery When It Is Doubtful What the Defendant Gained | 547        |
|    | Anglo-American Law                                     | 547        |
|    | German Law   | 549        |
|    | Chinese Law  | 552        |
| 3. | Denial of Recovery When the Plaintiff Lost and the     |            |
|    | Defendant Gained: Chinese Law                          | 553        |
|    | PART TWO: THE LAW OF PROPERTY 555                      |            |
|    | I. POSSESSION  | 557        |
| 1. | Possession as a Means of Acquiring Rights              | 557        |
|    | a. Wild Animals  | 557        |
|    | Roman Law  | 557        |
|    | Anglo-American Law                                     | 557        |
|    | French Law   | 558        |
|    | German Law   | 559        |
|    | Chinese Law  | 560        |
|    | b. Found Objects                                       | 560        |
|    | Roman Law  | 560        |
|    | Anglo-American Law                                     | 560        |
|    | French Law   | 561        |
|    | German Law   | 562        |
|    | Chinese Law  | 563        |
|    | c. Treasure  | 564        |
|    | Roman Law  | 564        |
|    | Anglo-American Law<br>French Law                       | 564<br>565 |
|    | German Law   | 565        |
|    | Chinese Law  | 565        |
|    | d. Adverse Possession and Prescription                 | 565        |
|    | Roman Law  | 565        |
|    | English Law  | 566        |
|    | Law in the United States                               | 569        |
|    | French Law   | 570        |
|    | German Law   | 571        |
| 2. | 8  |            |
|    | Non-Possessors   | 571        |
|    | a. Legal Remedies                                      | 571        |
|    | Anglo-American Law                                     | 571        |
|    | Continental Law  | 573        |



|    | CONTENTS   | xv  |  |
|----|--|-----|--|
|    | French Law   | 574 |  |
|    | German Law   | 574 |  |
|    | b. The Debate over Why Possession Should Be Protected      | 575 |  |
|    | i. Savigny   | 575 |  |
|    | ii. Ihering  | 576 |  |
|    | iii. Pollock   | 576 |  |
|    | II. OWNERSHIP  | 577 |  |
| 1. | The Boundaries between Private and Public Rights           | 577 |  |
|    | a. Public Ownership of Land in China                       | 577 |  |
|    | i. Exclusive State Ownership of Property                   | 577 |  |
|    | ii. The Socialist Market Economy and the                   |     |  |
|    | Rise of Property Law                                       | 580 |  |
|    | b. Rights to Natural Resources                             | 583 |  |
|    | c. Water Rights  | 584 |  |
|    | Roman Law and the <i>Ius Commune</i>                       | 584 |  |
|    | Anglo-American Law   | 586 |  |
|    | Law in the United States                                   | 591 |  |
|    | English Law  | 592 |  |
|    | French Law   | 592 |  |
|    | German Law   | 594 |  |
|    | Chinese Law  | 595 |  |
| 2. | The Scope of Private Rights: Interference with Neighboring |     |  |
|    | Proprietors  |     |  |
|    | a. Origins   |     |  |
|    | b. Activities that are Intended to Bother Another          | 599 |  |
|    | c. Activities that Happen to Bother Another                | 600 |  |
|    | i. Remedies  | 600 |  |
|    | English Law  | 600 |  |
|    | Law in the United States                                   | 603 |  |
|    | French Law   | 604 |  |
|    | German Law   | 605 |  |
|    | Chinese Law  | 606 |  |
|    | ii. The Character of the Neighborhood                      | 606 |  |
|    | English Law  | 606 |  |
|    | Law in the United States                                   | 608 |  |
|    | German Law   | 609 |  |
|    | French Law   | 610 |  |



| xv | i             | CONTENTS   |     |
|----|---------------|--|-----|
|    | iii.          | Priority in Time   | 611 |
|    |               | English Law  | 611 |
|    |               | Law in the United States                                 | 612 |
|    |               | German Law   | 613 |
|    |               | French Law   | 613 |
|    | iv.           | The Character of the Interference Height                 | 614 |
|    |               | English Law  | 614 |
|    |               | Law in the United States                                 | 615 |
|    |               | German Law   | 616 |
|    |               | French Law   | 617 |
|    | v.            | Ugliness   | 618 |
|    |               | Law in the United States                                 | 618 |
|    |               | German Law   | 619 |
|    |               | French Law   | 620 |
|    | vi.           | Offensive Conduct  | 620 |
|    |               | English Law  | 620 |
|    |               | Law in the United States                                 | 621 |
|    |               | German Law   | 622 |
|    |               | French Law   | 623 |
| 3. | Volur         | ntary Changes in the Scope of Rights: Easements,         |     |
|    | Cove          | nants, and Servitudes                                    | 624 |
|    | a. Ov         | verview  | 624 |
|    | i.            | Anglo-American Law: Easements,                           |     |
|    |               | Covenants, and Equitable Servitudes                      | 624 |
|    | ii.           | Continental Law: Servitudes and Kindred Relationships    | 626 |
|    |               | French Law   | 626 |
|    |               | German Law   | 626 |
|    |               | Chinese Law  | 627 |
|    | b. Bu         | rdens for the Benefit of One Who Does Not Own Land       | 627 |
|    | Ar            | nglo-American Law  | 627 |
|    | $\mathbf{Fr}$ | ench Law   | 630 |
|    | Ge            | erman Law  | 631 |
|    | c. Bu         | rdens That Require a Land Owner to Do an Affirmative Act | 632 |
|    | En            | glish Law  | 632 |
|    | La            | w in the United States                                   | 632 |
|    |               | ench Law   | 634 |
|    | Ge            | rman Law   | 635 |
| 4. | Neces         | ·  | 635 |
|    | a. Or         | _  | 635 |
|    |               | e General Principle                                      | 640 |
|    | La            | w in the United States                                   | 640 |



| CONTENTS                  | xvii |
|---------------------------|------|
| English Law               | 644  |
| German Law                | 646  |
| Chinese Law               | 647  |
| French Law                | 647  |
| c. Necessity and Land Use | 649  |
| English Law               | 649  |
| Law in the United States  | 649  |
| German Law                | 650  |
| Chinese Law               | 651  |
| d. Necessity and Intent   | 652  |
| Law in the United States  | 652  |
| German Law                | 653  |
| Index                     | 658  |