Waves in Contract and Liability Law in Three Decades of Ius Commune
Waves in Contract and Liability Law in Three Decades of Ius Commune
Waves in Contract and Liability Law in Three Decades of Ius Commune  
© The editors and contributors severally 2017

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Cover image: Artistdesign29 – Shutterstock

ISBN 978-1-78068-602-8  
D/2017/7849/127  
NUR 822

CONTENTS

Introduction: The Waves of Contractual and Tortuous Liability
Anne L.M. Keirse, Rudolf M. Renting and Marco B.M. Loos ..................  1

1. 35 years of European private law in Europe ........................................... 1
2. Development through waves ............................................................... 2
   2.1. Legal development (not) as a linear progress ................................. 2
   2.2. Waves in contract law ............................................................... 4
   2.3. Waves in tort law .................................................................. 6
3. On the contents of this book ................................................................. 8

Concurrence of Claims in Damages and EU Law
Katarzyna Królikowska ................................................................. 11

1. Introduction .............................................................................. 11
2. National approaches to concurrence of claims in damages .......... 13
3. Analysis of EU law ................................................................... 17
   3.1. Neutrality of EU-based consumer law directives ......................... 17
      3.1.1. Consumer Rights Directive ............................................. 18
      3.1.2. Consumer Sales Directive ........................................... 19
      3.1.3. Services Directive ...................................................... 20
      3.1.4. The Travel Package Directive of 1990 ............................ 22
      3.1.5. The Travel Package Directive of 2015 ............................. 24
      3.1.6. Digital Directives of 2016 ............................................. 26
      3.1.7. Unfair Consumer Terms Directive ................................. 27
      3.1.8. Conclusion .................................................................. 29
   3.2. The proposal for the common European sales law regulation .... 32
   3.3. General approach in the Draft Common Frame of Reference ....... 34
4. Conclusions and recommendations ................................................. 38

The Procedural Position of a ‘Weaker Party’ in the Regulation Brussels Ibis
Vesna Lazić .......................................................... 41

1. Introduction .............................................................................. 41
2. Rules on jurisdiction in the Brussels I Regulation ............................... 42
   2.1. Brussels Ibis Regulation – Consequences for weaker party disputes ...... 45
       2.1.1. Scope of application ............................................. 45
       2.1.2. Revised provision on tacit prorogation .......................... 47
       2.1.3. Limited binding nature of choice of court agreements under
              the Brussels Ibis Regulation ........................................ 49
             2.1.3.1. Choice of court agreements under the Brussels I
                      Regulation ...................................................... 49
             2.1.3.2. Choice of court agreements in the Brussels Ibis
                      Regulation ...................................................... 52
             2.1.3.3. Relevance of other EU legal sources and the case law
                      of the CJEU for the limited binding nature of choice
                      of court agreements ............................................ 54
   3. Procedural position of a weaker party – Rules on the recognition and
      enforcement of judgments .................................................. 55
   4. Concluding remarks .................................................................. 56

References .................................................................................... 58

The Principle of Equality as a Catalyst: The Increasing Influence of the Principle
of Equality on the Belgian Law of Obligations
Sanne Jansen and Stefan Somers ..................................................... 61

1. Introduction .............................................................................. 61
2. Principle of equality and horizontal relationships (citizen to citizen) .... 62
   2.1. Antidiscrimination laws in the law of obligations: from 1981 until
        present ........................................................................... 63
      2.1.1. Historical background of the antidiscrimination laws ............ 63
      2.1.2. Federal antidiscrimination laws of 2007 and
             antidiscrimination decree of 2008 .................................. 68
                2.1.2.1. General ......................................................... 68
                2.1.2.2. Applications in lower courts ............................... 73
                     2.1.2.2.1. Discriminatory refusal to contract .............. 74
                     2.1.2.2.2. Discriminatory cancellation of the
                                 contract ....................................................... 80
                     2.1.2.2.3. Discriminatory content of contractual
                                 terms ............................................................. 81
      2.2. Horizontal effect of Articles 10 and 11 of the Constitution in the law
           of obligations ................................................................ 81
   3. Principle of equality and vertical relationships (government to citizen): the
      jurisprudence of the Belgian Constitutional Court ......................... 85
      3.1. The assessment scheme .................................................... 88
            3.1.1. Comparability of the situation .................................... 88
            3.1.2. Legitimate aim ....................................................... 90
            3.1.3. The presence and relevance of an objective criterion of
                   differentiation ......................................................... 91
## Contents

3.1.4. Proportionality ................................................. 93  
3.1.4.1. The presence of a grave or intentional error ............ 95  
3.1.4.2. The impossibility to receive compensation ............... 96  
3.2. The limits of constitutional review ................................. 98  
3.2.1. The presence of other constitutional rights ................... 98  
3.2.2. The need to find a different regulation that applies in a similar situation ....................................................... 100  
3.2.3. The principle of equality as an interpretative instrument . ... 101  
Conclusion ................................................................. 103  

‘Where the Wild Things Are’ – Reflections on the State and Future of European Collective Redress  
Stefaan Voet ................................................................. 105  

1. Introduction ........................................................................ 105  
2. Common law class actions ................................................. 106  
3. European guarded interest .................................................. 109  
3.1. Three leagues .............................................................. 109  
3.1.1. European frontrunners .............................................. 109  
3.1.2. Jurisdictions with recent class action procedures ............ 110  
3.1.3. Jurisdictions with complex litigation tools .................... 112  
3.2. European policy .......................................................... 113  
3.2.1. Piecemeal legislation ............................................... 113  
3.2.2. EC Recommendation on common principles for injunctive and compensatory collective redress mechanisms ................. 115  
3.2.2.1. Ratio legis ......................................................... 115  
3.2.2.2. (Procedural) principles ........................................ 117  
3.2.2.3. Reception ......................................................... 119  

4. Limited success .................................................................... 120  
4.1. (Limited) data .............................................................. 120  
4.2. Scope and standing ....................................................... 122  
4.3. Procedural design flaws ............................................... 124  
4.4. Lack of appropriate funding and financing rules ................. 126  

5. Context .............................................................................. 128  
5.1. Public vs private enforcement ......................................... 128  
5.2. Transnational context .................................................... 129  

6. Alternative and new approaches of enforcement .................... 131  
6.1. Consumer dispute resolution .......................................... 131  
6.2. Regulatory redress ....................................................... 133  

7. Conclusion: connecting the dots ......................................... 135  
7.1. End of the traditional public vs private model ................... 135  
7.2. Re-orienting collective redress mechanisms ....................... 136  
7.3. Alternative and new approaches ...................................... 137  
7.4. Connecting the dots: a multilayered framework of regulation, lawmaking and law application ................................................. 138
Should Autonomous Agents be Liable for What They Do?
Jaap Hage ................................................................. 141
1. Introduction .......................................................... 141
2. The mental and the physical aspects of acts ..................... 143
3. The attribution of agency and responsibility ...................... 144
   3.1. Experience of agency ....................................... 144
   3.2. The realist and the attributivist view of agency .......... 145
   3.3. Expansion of the attributivist view ........................ 146
   3.4. The reality and relativity of what is attributed .......... 147
   3.5. Attribution to autonomous agents ........................ 148
4. The desirability of attribution ................................... 148
   4.1. Intuitive and reflected attribution .......................... 148
   4.2. When attribution of intention is desirable ................ 149
   4.3. When attribution of agency is desirable ................... 150
5. The attribution of liability ....................................... 151
6. Deserved liability .................................................. 152
   6.1. Justification within a practice and justification of a practice 152
   6.2. The hermeneutic fallacy ................................... 153
   6.3. Capacity and desert ........................................ 154
   6.4. What is a capacity? ......................................... 155
   6.5. Possible worlds and constraints ............................ 156
   6.6. The relativity of capacity ................................... 157
   6.7. Conclusion on deserved liability ............................ 159
7. Purposive attribution of liability ................................ 159
   7.1. Determinism and fatalism ................................... 159
   7.2. Three grounds for attributing responsibility to human agents 160
   7.3. Should autonomous agents be held responsible? .......... 161
   7.4. How to implement the responsibility of autonomous agents? 163
8. Conclusion .......................................................... 163

Private Law Analogies and the Evolution of International State Responsibility
for Acts of Non-Governmental Entities Exercising Decentralized/Privatized
Governmental Functions
Nwamaka Rosemary Okany ............................................... 165
1. Introduction .......................................................... 166
2. Factual background: the decentralization of public interest functions
   by governments ....................................................... 167
3. State responsibility in public international law .................. 171
   3.1. The meaning of state responsibility in public international law 171
   3.2. Two basic conditions for state responsibility: attribution and breach 172
   3.3. State responsibility as objective responsibility (responsibility without
       ‘fault’) ............................................................ 176
   3.4. The relationship between domestic private and international law on
       state responsibility ............................................. 180
4. State responsibility for wrongs by non-governmental entities exercising governmental functions ......................................................... 182
   4.1. Early writings of international law jurists .................................................. 182
   4.2. Codification outside and under the auspices of the United Nations International Law Commission (UNILC) ........................................ 186
   4.3. Critiques of the UNILC's reliance on the concept of the governmental function ................................................................. 189
   4.4. Domestic tort law analogies and evolution in international case law .... 193
      4.4.1. State responsibility for non-governmental entities exercising governmental functions as vicarious responsibility .............. 193
      4.4.2. The non-delegable duty analogy ..................................................... 200
      4.4.3. Strict liability ................................................................. 202
5. Revisiting the governmental functions concept: a valuable tool for delimiting liabilities and competences in the 21st century? .............. 204
6. Conclusion ................................................................. 206