Waves in Contract and Liability Law in Three Decades of Ius Commune

Editors:
Anne Keirse

Waves in Contract and Liability Law in Three Decades of Ius Commune





Ius Commune Europaeum

Intersentia Ltd Sheraton House | Castle Park Cambridge | CB3 0AX | United Kingdom Tel.: +44 1223 370 170 | Fax: +44 1223 370 169 Email: mail@intersentia.co.uk

www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries: Intersentia Publishing nv Groenstraat 31 2640 Mortsel Belgium Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21 Email: mail@intersentia.be

Distribution for the USA and Canada: International Specialized Book Services 920 NE 58th Ave. Suite 300 Portland, OR 97213

Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832

Email: info@isbs.com

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

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

| Int | troduction: The Waves of Contractual and Tortuous Liability |
|-----|---|
| | Anne L.M. Keirse, Rudolf M. Renting and Marco B.M. Loos |
| 1. | 35 years of European private law in Europe |
| 2. | Development through waves |
| | 2.1. Legal development (not) as a linear progress |
| | 2.2. Waves in contract law |
| | 2.3. Waves in tort law |
| 3. | On the contents of this book |
| Co | oncurrence of Claims in Damages and EU Law |
| | Katarzyna Królikowska |
| 1. | Introduction |
| 2. | National approaches to concurrence of claims in damages |
| 3. | Analysis of EU law |
| | 3.1. Neutrality of EU-based consumer law directives |
| | 3.1.1. Consumer Rights Directive |
| | 3.1.2. Consumer Sales Directive |
| | 3.1.3. Services Directive |
| | 3.1.4. The Travel Package Directive of 1990 |
| | 3.1.5. The Travel Package Directive of 2015 |
| | 3.1.6. Digital Directives of 2016 |
| | 3.1.7. Unfair Consumer Terms Directive |
| | 3.1.8. Conclusion |
| | 3.2. The proposal for the common European sales law regulation |
| | 3.3. General approach in the Draft Common Frame of Reference 34 |
| 4. | Conclusions and recommendations |
| Th | e Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis |
| | Vesna Lazić |
| 1. | Introduction |

| 2. | Rules | on juri | sdiction in | n the Brussel | s I Regulation | 42 |
|------|---------|-----------|-------------|----------------|---|----|
| | 2.1. | Brusse | ls Ibis Reg | gulation – Co | onsequences for weaker party disputes | 45 |
| | | 2.1.1. | | | | |
| | | 2.1.2. | | | tacit prorogation | |
| | | 2.1.3. | | | re of choice of court agreements under | |
| | | | | | ulation | 49 |
| | | | 2.1.3.1. | | ourt agreements under the Brussels I | 1) |
| | | | 2.1.3.1. | | | 10 |
| | | | 2.1.3.2. | | ourt agreements in the Brussels Ibis | 47 |
| | | | 2.1.3.2. | | | E2 |
| | | | 2.1.3.3. | Relevance o | of other EU legal sources and the case law I for the limited binding nature of choice | 32 |
| | | | | | reements | 54 |
| 3. | Proce | edural p | osition of | | rty - Rules on the recognition and | |
| | | | | | | 55 |
| 4. | | | | | | |
| | | _ | | | | |
| 1101 | 0101100 | | | | | 00 |
| The | Princ | riple of | Equality a | as a Catalyst | The Increasing Influence of the Principle | |
| | | | | Law of Obli | | |
| 011 | | | | | | 61 |
| | Janne | jansen | and otera | 11 30111613 | | 01 |
| 1. | Intro | duction | | | | 61 |
| 2. | Princ | iple of e | equality ar | nd horizonta | l relationships (citizen to citizen) | 62 |
| | 2.1. | Antidi | scriminat | ion laws in th | he law of obligations: from 1981 until | |
| | | presen | t | | | 63 |
| | | | | | d of the antidiscrimination laws | |
| | | 2.1.2. | | | nation laws of 2007 and | |
| | | | | | ecree of 2008 | 68 |
| | | | | | ••••• | |
| | | | 2.1.2.2. | | as in lower courts | |
| | | | 2.1.2.2. | | Discriminatory refusal to contract | |
| | | | | | Discriminatory cancellation of the | 71 |
| | | | | | contract | 90 |
| | | | | | | 00 |
| | | | | | Discriminatory content of contractual | 01 |
| | | | . 1 ~ | | terms. | 81 |
| | 2.2. | | | | 10 and 11 of the Constitution in the law | |
| | | | | | | 81 |
| 3. | | | | | lationships (government to citizen): the | |
| | jurisp | | | U | | 85 |
| | 3.1. | The as | sessment s | scheme | | 88 |
| | | 3.1.1. | Compar | ability of the | situation | 88 |
| | | 3.1.2. | Legitima | ıte aim | | 90 |
| | | 3.1.3. | | | evance of an objective criterion of | |
| | | | | | · · · · · · · · · · · · · · · · · · · | 91 |
| | | | | | | |

| | | 3.1.4. | Proportionality | |
|-----|---------|----------|--|-----|
| | | | 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 lin | nits 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 |
| Con | nclusio | on | | |
| | | | | |
| 'W | here tl | he Wild | Things Are' – Reflections on the State and Future of European | |
| Col | lectiv | e Redre | ss | |
| | Stefaa | n Voet | | 105 |
| , | т. | 1 | | 105 |
| 1. | | | 1 - 0 | |
| 2. | | | v class actions | |
| 3. | | | arded interest | |
| | 3.1. | | leagues | |
| | | 3.1.1. | 1 | |
| | | 3.1.2. | * | |
| | | 3.1.3. | , 1 0 | |
| | 3.2. | Europ | ean 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 | |
| 4. | Limit | ted succ | ess | |
| | 4.1. | | ed) data | |
| | 4.2. | | and standing | |
| | 4.3. | • | lural design flaws | |
| | 4.4. | | f appropriate funding and financing rules | |
| 5. | | | - wff-ofme - manage | |
| ٠. | 5.1. | | vs private enforcement | |
| | 5.2. | | national context. | |
| 6. | | | nd new approaches of enforcement | |
| 0. | 6.1. | | mer dispute resolution | |
| | 6.2. | | | |
| 7 | | | • | 133 |
| 7. | | | | 135 |
| | 7.1. | | 1 1 | 135 |
| | 7.2. | | e | 136 |
| | 7.3. | | 11 | 137 |
| | 7.4. | | cting the dots: a multilayered framework of regulation, | |
| | | lawma | king and law application | 138 |

| Sho | ould Au | tonomous Agents be Liable for What They Do? | |
|-----|----------|--|-----|
| | Jaap Ha | ige | 141 |
| 1. | Introdi | uction | 141 |
| 2. | | ental and the physical aspects of acts | |
| 3. | | ribution of agency and responsibility | |
| ٠. | | Experience of agency | |
| | | The realist and the attributivist view of agency | |
| | | Expansion of the attributivist view | |
| | | The reality and relativity of what is attributed | |
| | | Attribution to autonomous agents | |
| 4. | | sirability of attribution | |
| | | Intuitive and reflected attribution | |
| | | When attribution of intention is desirable | |
| | | When attribution of agency is desirable | |
| 5. | | ribution of liability | |
| 6. | | red liability | |
| | | Sustification within a practice and justification of a practice | |
| | | The hermeneutic fallacy | |
| | | Capacity and desert | |
| | | What is a capacity? | |
| | | Possible worlds and constraints | |
| | | The relativity of capacity | |
| | | Conclusion on deserved liability | |
| 7. | | sive attribution of liability | |
| | | Determinism and fatalism | |
| | | Three grounds for attributing responsibility to human agents | |
| | | Should autonomous agents be held responsible? | |
| | 7.4. I | How to implement the responsibility of autonomous agents? | 163 |
| 8. | Conclu | ısion | 163 |
| | | | |
| Pri | vate Lav | w Analogies and the Evolution of International State Responsibility | |
| | | Non-Governmental Entities Exercising Decentralized/Privatized | |
| | | ntal Functions | |
| | Nwama | ıka Rosemary Okany | 165 |
| 1. | Introd | uction | 166 |
| 2. | Factua | l background: the decentralization of public interest functions | |
| | | ernments | 167 |
| 3. | | esponsibility in public international law | |
| | | The meaning of state responsibility in public international law | |
| | | Two basic conditions for state responsibility: attribution and breach | |
| | | State responsibility as objective responsibility (responsibility without | |
| | | fault') | 176 |
| | | The relationship between domestic private and international law on | |
| | | state responsibility | 180 |

| 4. | State | respons | ibility for wrongs by non-governmental entities exercising | | |
|----|--|---|---|-----|--|
| | governmental functions | | | | |
| | 4.1. | Early writings of international law jurists | | | |
| | 4.2. Codification outside and under the auspices of the United Nations | | | | |
| | | Intern | ational Law Commission (UNILC) | 186 | |
| | 4.3. | Critiqu | ies of the UNILC's reliance on the concept of the governmental | | |
| | | function | on | 189 | |
| | 4.4. | Domes | stic 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. | Revis | siting th | e governmental functions concept: a valuable tool for | | |
| | delin | niting lia | abilities and competences in the 21st century? | 204 | |
| 6. | Conc | lusion. | | 206 | |