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978-1-107-68206-1 - Modernising Civil Liability Law in Europe, China, Brazil and Russia:

Texts and Commentaries

Gert Brüggemeier

Excerpt

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## PART 1

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### Draft Bill on Civil Liability Law

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## A

Draft Bill on Civil Liability Law – text<sup>1</sup>

## Title I Basic rules

**Article 1:101 Basic norm** One who in a legally attributable way injures the legally protected interests of another is bound to compensate the injured for the loss resulting therefrom.

**Article 1:102 Legally protected interests of a human being**

- (1) Legally protected interests are, in particular, the life, bodily and health integrity, as well as the free movement of a human being. In respect of the compensation of fatal injuries, special rules apply (Arts. 6:201/202).
- (2) The legally protected interests of an individual person also include intangible legal interests such as dignity, self-determination, privacy, as well as the ‘right’ to personal identity, to one’s own image, name, voice and personal data.
- (3) The protection of personality interests, according to paragraph 2, also extends to groups of individuals and to legal persons of private and public law, to the extent that they are applicable to these legal addressees.

**Article 1:103 Other legally protected interests**

- (1) Legally protected interests further include property rights on movable and immovable things, as well as on intangible objects, especially ownership and intellectual property. Lawful possession of things is also protected. Animals are treated as corporeal objects for the purposes of liability law.
- (2) Property itself is treated as a protected interest in legally recognised cases within the meaning of this Article. It is generally protected against intentional damage (Art. 2:201). Moreover, instances of

<sup>1</sup> French and German versions of the text of the Draft Bill can be found in G. Brüggemeier and Z. Yan, *Entwurf für ein chinesisches Haftungsgesetz*, (Tübingen: Mohr Siebeck, 2009), p. 1, p. 132.

property protection admitted by statute (Art. 3:207) or by case law are deemed to be legally recognised.

**Article 1:104 Natural environment/ecological damage**

- (1) The natural environment is also regarded as a legally protected interest, in which no ownership rights or rights of use exist: earth, air, water, flora and fauna. Infringement leads to ecological damage.
- (2) The authority for the enforcement of ecological damages will be provided for in an Environmental Damage Act.

**Article 1:105 Causation**

- (1) Causation is an essential requirement for liability.
- (2) A ground of attribution (Art. 1:106) is considered to be causal in respect of an injury to an interest or loss if, but for it, the concrete injury or the loss at the respective point in time would not have occurred.
- (3) In established, exceptional cases a presumption of causation or hypothetical causation can also form grounds for liability.
- (4) The liability in cases of multiple actors will be governed by Articles 5:101–103.

**Article 1:106 Grounds for attribution** Injuries to legally protected interests are attributable and lead to liability when they result from wrongful conduct (Title II), from inadequate professional, enterprise or State activity (Title III) or from *mise en danger* (Title IV).

**Article 1:107 Indirect injuries/remoteness**

- (1) Indirect injury to the legally protected interests of another leads to liability where the loss is not too remote from the ground of attribution.
- (2) In assessing remoteness, all relevant aspects of the respective case are to be taken into account. After a weighing of these circumstances, it must be established whether it is ‘just, fair and reasonable’ to attribute the injury or whether it is too remote to be considered.

**Article 1:108 Burden of proof and standard of proof**

- (1) As a rule, the claimant must show injury to a legally protected interest, the ground for attribution and the causation between the two, as well as the resulting loss.

- (2) Less strict rules on burden of proof may be applicable.
- (3) The burden is met by proving a preponderance of evidence.

## Title II Personal liability for wrongful conduct

### *Chapter 1 Injurious human behaviour*

#### **Article 2:101 Conduct**

- (1) Injury to a legally protected interest can result from an act or omission. An omission can only lead to liability if a corresponding duty to act exists.
- (2) Legally relevant conduct is present in respect of reason-informed acts or omissions. This is presumed in respect of persons with delictual capacity (Art. 2:301).

**Article 2:102 Duty to procure safety** The duty to procure safety in respect of the public at large is a legal duty to act. The responsibility for movable or immovable things, the exercise of activities, as well as the creation or occurrence of emergency situations can lead to a duty to take care and to prevent resulting hazards to the protected interests of others.

### *Chapter 2 Wrongfulness*

#### **Article 2:201 Intention**

- (1) A person who knowingly and wilfully injures the legally protected interest of another acts intentionally.
- (2) An intentional injury must be unlawful in order to assume liability. Unlawfulness is not applicable when a recognised justification is present such as self-defence, an emergency situation, effective consent or the exercise of legitimate sovereign power.
- (3) Liability for an intentional wrongdoing requires knowledge of unlawfulness. Knowledge of unlawfulness may be absent where there is an error of judgment or an error as to the prohibited nature of the act on the part of the wrongdoer. Avoidable mistakes lead to liability for negligent injury.

**Article 2:202 Negligence** A negligent injury to a legally protected interest occurs when the injurious behaviour does not meet the required conduct. The standard of required conduct will be determined objectively for concrete situations.

**Article 2:203 Breach of duty/breach of statutory duty**

- (1) A legal duty to protect certain interests (Art. 2:102) can be breached intentionally or negligently. A negligent breach of duty is present if an infringement of a legally protected interest occurs through the avoidable omission of taking care or through taking inadequate care.
- (2) At the introduction of a new duty of care, or at the extension of its scope, liability in negligence can be avoided if this was not objectively recognisable to the addressees of the duty.
- (3) Paragraph 1 is correspondingly applicable to a breach of statutory duties. Objective recognisability of the statutory duty is a precondition of liability.

*Chapter 3 Delictual capacity and liability for persons without delictual capacity***Article 2:301 Delictual capacity**

- (1) The liability of a person, according to this section, requires the legal capacity to commit a wrong (delictual capacity). As a rule, a person who has reached the age of majority has delictual capacity.
- (2) A person who has not reached the end of their 14th year does not have delictual capacity. From the 14th to the end of the 16th year, it depends on the capacity of discernment of the individual. Young persons who have reached the end of their 16th year will be treated as having reached the age of majority.
- (3) 10 to 16-year-olds who have intentionally injured protected interests will be treated as having delictual capacity unless they lack the capacity of discernment.
- (4) Those who have reached the age of majority and who permanently lack a capacity of discernment and controllability do not have the legal capacity to commit a wrong.

**Article 2:302 Liability for supervision of persons without delictual capacity/liability on the grounds of equitable principles**

- (1) One, a person or institution, who according to statute or contract has a duty to supervise individuals without delictual capacity, must compensate the loss arising from an injury, which the individual without capacity has inflicted on a third party. The duty to compensate does not apply, if, in the supervision, the appropriate care was observed or if the injury took place notwithstanding the appropriate care being observed.

- (2) In the event of loss, the one responsible for the duty to supervise must prove that the standard of appropriate care was observed.
- (3) In view of the circumstances, in particular the economic circumstances of the wrongdoer and the injured party, it may be exceptionally justified on equitable grounds that the person who did not have delictual capacity compensates the loss caused. In the assessment of the economic circumstances of the wrongdoer, the existence of liability insurance must be taken into account.

### Title III Enterprise, professional and state liability

#### *Chapter 1 General enterprise liability*

#### **Article 3:101 Basic rule of enterprise liability/‘Reverse Learned Hand’**

- (1) Enterprises are liable for injury to the legally protected interests of others which is caused by inadequate operational activities and processes. Liability for defective products has special rules (Arts. 3:201–204).
- (2) Enterprises are business organisations of whatever legal form which operate in the market and offer commercial performances for remuneration. The practice of a self-employed professional activity is considered equivalent to that of an enterprise.
- (3) The operational activity or the operational process is inadequate if the injury to interests could have been avoided through the observance of organisational and technical possibilities, as well as reasonable economic standards. The enterprise bears the burden of proof for the unavoidability of the injury to interests.
- (4) Article 2:203 (breach of duty/breach of statutory duty) applies accordingly.

**Article 3:102 Owner of a business enterprise** Liability applies to those carrying out a business enterprise. In respect of affiliated enterprises, the holding company will be liable for the operational activity of the subsidiary company in justified cases.

#### **Article 3:103 Employer’s liability**

- (1) Enterprises/employers are liable for injuries to the interests of third parties which occur through the wrongful conduct of their employees, as long as they were acting in the scope of their professional employment.
- (2) Paragraph 1 is also applicable to non-commercial organisations.

**Article 3:104 Employee's liability**

- (1) Employees are liable to third parties for intentional injury to their legally protected interests which is caused in the course of their employment. The further liability of workers can exceptionally be justified on equitable grounds in the individual case.
- (2) In the context of liability, employees are all those involved in an enterprise, from workers to the managing directors and members of the supervisory board.

*Chapter 2 Special cases of enterprise liability*

## Subchapter (a) Product liability

**Article 3:201 Ground for liability** The manufacturer of a product is liable for loss which arises from the injury to another's legally protected interest caused by a defective product.

**Article 3:202 Defective product**

- (1) A product is any industrially or professionally made movable thing for the purpose of commercial exploitation.
- (2) A product is defective if it does not provide the safety that one would normally expect, taking all of the circumstances into account.

**Article 3:203 Producer**

- (1) The producer is any manufacturer of the finished product, a component or raw material.
- (2) A business is also considered a producer if it commercially markets foreign-manufactured products inland under its name.

**Article 3:204 Exclusion of liability** A producer is particularly not liable where he can prove that the product's defect, at the point when it was marketed, did not exist or that the defect was not recognisable through the current state of science and technology at this point.

**Article 3:205 The duty to monitor one's product and post-sale duty to inform**

- (1) The producer has a duty to monitor his products after they are marketed, and if they exhibit a defect to take appropriate steps to remedy the danger. These measures can encompass retroactive warnings and product recall.



- (2) The injured party must prove the facts from which a duty to retrospectively remedy the danger arose; the producer must prove the inevitability of the injury.

#### Subchapter (b) Environmental liability

##### **Article 3:206 Environmental impairments and individual loss**

- (1) Enterprises are liable for injury to the legally protected interests of a party through environmental pollution according to the principles of the general enterprise liability law (Arts. 3:101/102) and general strict liability (Art. 4:101).
- (2) According to the same principles, enterprises are liable for interference with the natural environment to the extent that there are no property rights or rights of use. The enforceability of this type of ecological damage will be regulated in an Environmental Damage Act.

#### Subchapter (c) Pure economic loss in the course of business

##### **Article 3:207 Liability for pure economic loss caused through business or professional activities**

- (1) Enterprises and the self-employed are liable for non-intentionally caused pure economic loss in the course of business, to the extent that this is legally recognised.
- (2) Liability for pure economic loss is deemed to be legally recognised, especially where the loss is caused by:
- (a) false information which is provided as expert advice or is otherwise understood to be particularly trustworthy information;
  - (b) a breach of confidence;
  - (c) serious interference with the infrastructure of traffic, electricity and telecommunications networks;
  - (d) infringement of a competition law provision for the protection of competitors or consumers;
  - (e) infringement of a cartel law provision; or
  - (f) especially serious infringement of another rule of good business management.
- (3) Incidentally, enterprises and self-employed professionals are liable, where the business or professional activities are aimed at the protection of the injured party's property, for any grossly negligent or intentionally caused pure economic loss within the scope of that protective duty.

*Chapter 3 State liability*

**Article 3:301 Defective and dangerous technical facilities** The State or the public body is liable for the loss which results from injury to legally protected private interests through defective or dangerous technical installations, which are conducted by public authority. Article 3:206 (environmental liability) has corresponding application.

**Article 3:302 Injuries to fundamental rights** The State or the competent body is liable for the loss which results from the unlawful injury to fundamental rights by public power.

**Article 3:303 Organisational liability** The State or the competent body is liable for the loss which results from injury to legally protected interests of private parties through inadequate public activities, according to the principles of general enterprise liability (Art. 3:101).

**Article 3:304 Liability of state employer** The State or the competent body is liable for the loss from the injury to interests of third parties which civil servants cause through their wrongful conduct, as long as this was exercised in the course of their official functions.

**Article 3:305 Liability of civil servants** The liability of civil servants for their wrongful conduct against private parties is judged according to the general principles of liability for employees (Art. 3:104).

**Article 3:306 Monetary compensation** The State or the competent public body must compensate the loss only in money.

**Article 3:307 Lawful state interference** The compensation for lawful State interferences into the legally protected interests of private parties is not subject to this legislation.

**Title IV General and special rules of strict liability***Chapter 1 General norm*

**Article 4:101 Particularly dangerous industrial activity**

(1) The operator of a particularly dangerous industrial activity will be liable in respect of an injury to the legally protected interests of