Book Review

Civil Liability in Europe for Terrorism-Related Risk
Lukas Bergkamp, Michael Faure, Monika Hinteregger and Niels Philipsen
Cambridge: Cambridge University Press, 2015, 337 pp.

Today terrorism has become a worldwide phenomenon and, sadly, hardly a few months go by without yet another terrorist attack in Europe. This gives rise to concerns about potential liability exposure for terrorism-related damages. Damaged persons will think about whom to sue. Evidently, it will not be the terrorists themselves. But to what extent are other parties exposed to liability for terrorism-related damages in Europe? The authors identify as potentially liable parties the operators of facilities, such as airports and train stations, non-security service providers operating at such facilities, such as airlines and train operators, and security providers, including both service providers (eg guarding services) and suppliers of equipment (eg suppliers of detection equipment). The authors concentrate on the civil liability of these parties.

Apart from filling a scientific gap, the book's special virtue is its appeal to readers on several levels. It covers a large issue in an integrated fashion and in depth, analysing the existing compensation for terrorism-related damages from international, European and national law perspectives as well as from an economic perspective. It addresses theoretical issues sufficiently to satisfy seasoned academics without forgetting the pragmatic problems (in five case studies) that are in the minds of enterprises and government officials. Although largely a law book, it will be understandable and useful to policymakers, consultants, academics, insurers and corporate executives. Having thoroughly analysed the existing international, European and seven national laws, the book concludes with some enlightening policy recommendations for the EU.

The book has a very clear structure and contains three different parts. Whereas Part I provides a comprehensive analysis of terrorism-related risk under international and EU law, Part II analyses and compares concepts of liability in selected national tort law systems of seven representative EU Member States, and Part III assesses several aspects of terrorism-related risks.

Part I: At the beginning of Part I, the authors provide a comprehensive overview of various international treaties and analyse their concepts of liability. The international treaties deal with fields that the authors consider relevant to operators and the security industry confronted with terrorism-related risk: civil aviation, nuclear liability, marine oil pollution, and other relevant treaties. The criteria for the selection of these treaties are not explained in detail. It is not immediately obvious to the reader why some of these treaties are relevant for terrorism-related risk. Terrorism nowadays does not necessarily

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hit typical vulnerable targets, eg nuclear facilities or chemical plants, but rather public common areas, such as streets.

None of these legal treaty regimes provide a specific liability for the examined industries. Similarly, they often channel liability to particular operators, to the exclusion of other parties involved, such as security firms. Liability under these conventions is strict, but typically subject to a financial cap. We agree with the authors that this tends to reduce or eliminate prevention incentives for parties other than operators and for operators above the financial limit. Also, financial caps on liability de facto allow operators to externalise harm to society which constitutes – from an economic perspective – a subsidy.

The second half of Part I examines the liability for terrorism-related risk under EU law. The *Francovich* doctrine of the ECJ case *Francovich v Italy* is of great importance for the EU liability regime because, under this doctrine, Member States are liable for reparations to private individuals whose Community law rights have been infringed due to the State's failure to take all necessary measures to achieve the results prescribed by a directive. This includes Member States' liability for increasing the risk of terrorism. Moreover, the authors present Directive 2004/80EC relating to compensation to crime victims as well as two different directives related to liability for terrorism-related risks, namely the Environmental Liability Directive (ELD) and the Product Liability Directive (PLD). Where a non-security product is implicated in a terrorist attack, the PLD may provide liability if the non-security product should have incorporated a certain specific feature.

Part II: The authors examine liability regimes in seven selected Member States: England and Wales, France, Germany, the Netherlands, Poland, Spain and Sweden. The five case studies look at different scenarios relating to different terrorism situations, such as a defective emergency stop button or aeroplane crash. Since civil liability does not specifically deal with terrorism-related risk, the analysis and the case studies give a very long and very broad overview of each Member State's tort system, followed by a comparative analysis. The findings offer the unique opportunity for a clear understanding of the similarities and differences within various Member States of the European Union. And even though Part II is very general, it still constitutes a necessary step in order to find evidence of an impending liability crisis in the security industry and to find out whether assertions of enterprise-threatening liability exposure are consistent with the liability standards under the laws of the seven Member States covered in the book. The analysis shows that there are no signs of a liability crisis or an impending liability crisis.

Part III: This part of the book critically assesses the current liability regimes from legal and economic perspectives. We find Part III particularly interesting and valuable, as it tackles different compensation schemes from a law and economics perspective, e.g., insurance and government-provided compensation. Such alternative systems for redressing terrorism-related risks are necessary in order to deal with terrorism-related risks and damages.

This is all the more so as, in our opinion, tort law in itself does not fully compensate the damaged person, at least in most European Member States. We do not agree that "the main instrument to control man-made risk, also when it is catastrophic, is tort law" (p 216).

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Operators of chemicals plants, for example, are mostly not liable for intentional acts of third persons, such as terrorist attacks. Catastrophes, including terrorist acts, go beyond the scope of tort law's options. The possibilities of tort law compensation for terror-related risk are deficient, procedurally and substantively.[1]

This is why insurance plays a central role. It is desirable because it spreads risks. The authors discuss insurance in detail and with great knowledge, beginning with the conditions of insurability and making the case for compulsory liability insurance. Since insurance for terrorist-related risk may be difficult to obtain, governments may intervene with a facilitative strategy to support the functioning of the private insurance market. Governments intervene into the insurance market by acting as an insurer or reinsurer, or by determining financial caps or mandatory insurances. In our opinion, government compensation plays an increasing role when it comes to dealing with catastrophe risks, in particular terrorism-related risk. State intervention makes sense as long as it does not generate insurance demand where there would be no demand with a risk-adapted premium, and as long as it does not lopsidedly subsidise certain industry branches. The authors list particular conditions that must be met for this type of government intervention to be efficient. Apart from enlarging insurance protection, governments may also establish compensation funds. As the authors rightly conclude, however, government-based compensation is not an ideal solution since it creates the wrong incentives. Insurance solutions are preferable. The Swiss example of a compulsory flood insurance supports the argument that a well-functioning insurance system will make a compensation fund superfluous.[2]

For the purpose of developing an alternative system for redressing terrorism-related risks, the authors introduce the US Safety Act. It provides a mechanism for limiting the liability of the security industry and certain high-risk operators. The US Safety Act was specifically intended to stimulate innovation in security technology by mitigating the threat of civil liability. However, the US Safety Act should not serve as a model for the European system due to its specific characteristics developed for the liability environment in the US. The authors further discuss the need to limit liability for terrorism-related risk in the EU. They find no persuasive arguments to support the proposition that unlimited liability for terrorism-related risk has an enterprise-threatening effect within the EU. Liability exposure must therefore not be directly limited.

Damaged persons could also sue governments for expropriation and state liability. This would be another pillar of compensation in the context of terrorism-related risk. However, the book does not expressly address the full potential scope of State and government liability.[3] It concentrates on civil liability. After having thoroughly enjoyed this book, we hope for a second volume on "State Liability in Europe for Terrorism-Related Risk" by Bergkamp, Faure, Hinteregger and Philipsen.

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[1] Wildhaber, "Wer ersetzt Katastrophenschäden?" Zeitschrift für Schweizerisches Recht (2013) I *ZSR* 381 et sqq.

[2] Wildhaber, supra, note 1, 399 et sqq.

[3] See, for example, in the context of Critical Infrastructures, van Aaken/Wildhaber, "State Liability and Critical Infrastructure: A Comparative and Functional Analysis"(2015) *EJRR* 244 et sqq.

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