Linked Contracts
Linked Contracts
CONTENTS

List of authors ........................................................................................................ xi

Introduction
Ilse Samoy and Marco B.M. Loos ............................................................... 1

I. Groups of contracts. An exploration of types and the archetype from a Dutch legal perspective
Sanne van Dongen ....................................................................................... 9

Introduction .............................................................. 9
Chapter I. Groups of contracts ................................................................. 10
Chapter II. Judgments of the Hoge Raad ....................................................... 11
Section 1. Jans/FCN ........................................................................... 11
Section 2. Von Hohenmeiss/Arenda ......................................................... 12
Chapter III. The archetype group of contracts ........................................... 13
Section 1. German law ................................................................. 13
§1. The (moderated) "Trennungslehre" ..................................................... 14
A. Case law Bundesgerichtshof ......................................................... 14
B. Paragraphs 358–359a BGB ............................................................. 17
§2. The "Einheitslehre" ........................................................................ 19
Section 2. European consumer directives ............................................... 21
Chapter IV. Extensive interpretation of the archetype ................................ 23
Chapter V. Other distinguishable types ................................................... 25
Section 1. Mooijman/Netjes: clear demand and supply side .................. 25
Section 2. Institutionalised groups of contracts ........................................ 27
Conclusion ................................................................................. 28

II. The impact of voidness for infringement of Article 101 TFEU on linked contracts
Caroline Cauffman .............................................................................. 29

Introduction ............................................................................. 29
Chapter I. The impact of an infringement of Article 101 TFEU on linked agreements under EU law ........................................ 30

Chapter II. A specific rule of national competition law extends the voidness of an agreement infringing the cartel prohibition to linked agreements ......................................................... 32
Section 1. Legal provisions .................................................. 32
Section 2. Theories developed by case law and legal scholarship 34

Chapter III. A rule of general contract law extends the consequences of the voidness of an agreement infringing the cartel prohibition to linked agreements ............................................. 36
Section 1. Legal provisions .................................................. 36
Section 2. Theories developed by case law and legal scholarship 38

Chapter IV. The linked agreement itself is affected by a ground of voidness or voidability ...................................................... 39
Section 1. Illegality, immorality and infringement of the public order ........................................................ 39
Section 2. Defects of consent ................................................. 44
§1. Fraud ................................................................. 44
§2. Mistake ............................................................. 48
§3. Duress .............................................................. 50
§4. Abuse of circumstances .............................................. 50

Conclusion .................................................................. 52

III. Linked contracts and the construction sector: A builder’s contractual obligation to warn the client about a risk that might emerge from a contract between the client and the designer
Joasia A. Luzak .......................................................... 55

Chapter I. Contractual relations in the construction sector. Relevance of the ‘link’ ......................................................... 55

Chapter II. Concept of the obligation to warn in construction contracts regulated by Dutch law and the DCFR ........................................ 56

Chapter III. Consequences of the designer’s default for the builder ........................................................ 61
Section 1. When should a builder have noticed a default? ........................................................ 61
Section 2. What happens if the builder does not perform his obligation to warn? ................................. 69
§1. Causality ............................................................. 69
§2. Solidary liability .................................................... 73
§3. Contributory negligence ........................................... 75

Conclusion .................................................................. 77
IV. Chains of Sales Contracts: Towards a European system of direct producers’ liability?
Mathias Hostens ................................................. 79

Introduction ....................................................... 79
Chapter I. Need for a European system of direct producers’ liability? .......... 81
Section 1. Arguments in favour of a system of direct producers’ liability ............. 81
§1. Direct producers’ liability as a reflection of economic reality ...................... 81
A. Producer at the origin of most product defects . 81
B. Producers’ liability through chain of redress? . 82
§2. Direct producers’ liability to achieve procedural economy ....................... 90
Section 2. Arguments in favour of a European system of direct producers’ liability .......... 90
§1. Increasing consumer confidence in cross-border shopping ....................... 91
§2. Avoiding distortions of competition between businesses ......................... 92
Section 3. Evaluation of the arguments .................................. 93

Chapter II. Model of a European system of direct producers’ liability ............... 95
Section 1. Basic structure of a European direct producers’ liability system .......... 95
§1. Derivative liability along the contractual chain .................................... 95
§2. Objective extra-contractual liability ........................................... 97
Section 2. Grounds for European liability of the producer ......................... 98
Section 3. Beneficiary of the European direct claim ................................ 101
Section 4. Addressee of the European direct claim ................................ 102
Section 5. Relation of European direct producers’ liability with final seller’s liability ........................................... 104
Section 6. Remedies associated with the European direct claim .................... 105
Section 7. Time limits applicable to the European direct claim ................…… 106

Chapter III. Harmonising strategies for direct producers’ liability .................... 108
Conclusion .......................................................... 112

V. Linked contracts in the DCFR, the Consumer Rights Directive and the Draft Optional Instrument
Tâm Dang Vu ......................................................... 115

Introduction ......................................................... 115
Chapter I. Linked contracts in the EU Directives before the Consumer Rights Directive ......................................................... 117
Section 1. The right of withdrawal and linked contracts ......................... 117
### Contents

- **Section 2.** Doorstep Selling Directive 85/577/EEC and the *Schulte* and *Crailsheimer* cases ............................... 119
- **Section 3.** Linked contracts in the Timesharing Directive 94/47/EC ................................................................. 121
- **Section 4.** Linked contracts in the Distance Selling Directive 97/7/EC ................................................................. 122
- **Section 5.** Linked contracts in the Distance Marketing of Financial Services Directive 2002/65/EC .......................... 123
- **Section 6.** Linked contracts in the Consumer Credit Directive 2008/48/EC ................................................................. 125
  - §1. History ............................................................................. 125
  - B. The implementation of the Consumer Credit Directive 87/102/EEC by the Member States .... 126
  - C. The revision of the Consumer Credit Directive 87/102/EEC ................................................................. 128
  - §2. Linked credit agreements in the new Consumer Credit Directive 2008/48/EC .................................................. 129
  - A. Definition of linked credit agreement ...................... 129
  - B. Effects ........................................................................... 130
  - §3. Ancillary services contracts in the Consumer Credit Directive ................................................................. 131
  - A. (No) Definition of ancillary contract ....................... 131
  - B. Effects ........................................................................... 131
- **Section 7.** Timesharing Directive 2008/122/EC ...................... 131
- **Section 8.** The need for harmonisation .................................................... 133

**Chapter II.** Linked contracts in the DCFR ................................................................. 134
- **Section 1.** Scope ........................................................................ 134
- **Section 2.** Definition of linked contract ............................. 136
- **Section 3.** Effects ..................................................................... 138
- **Section 4.** Conclusion ................................................................. 138

**Chapter III.** Ancillary contracts in the Consumer Rights Directive ........................................................................ 139
- **Section 1.** Background and scope ........................................ 139
- **Section 2.** Definition of ancillary contracts in the Consumer Rights Directive ................................................................. 140
- **Section 3.** Effects ..................................................................... 140

**Chapter IV.** Ancillary contracts in the Proposal for a Regulation on a Common European Sales Law ................................................................. 141
- **Section 1.** Background ......................................................... 141
- **Section 2.** Ancillary contracts in the Common European Sales Law ................................................................. 142
- **Section 3.** Related service contracts in the Common European Sales Law ................................................................. 143

**Conclusion** ................................................................. 144
**Addendum** ................................................................. 145

viii
VI. Linked contracts: Elements for a general regulation
Rodrigo Momberg Uribe............................................................ 153

Introduction ................................................................. 153
Chapter I. The necessity for a general regulation ................. 153
Chapter II. The state of the art: The present legal recognition of linked contracts ................................................................. 157
Section 1. European legislation ......................................... 157
Section 2. Non-legislative codifications or restatements ........ 158
Chapter III. Towards a general concept of linked contracts ........ 158
Section 1. Plurality of contracts ........................................ 159
Section 2. Common purpose ............................................. 159
Chapter IV. The effects of linked contracts ......................... 160
Section 1. Internal effects .............................................. 161
Section 2. External effects .............................................. 162
Chapter V. A (preliminary) proposal ................................... 162
Section 1. A practical concept? ....................................... 162
Section 2. The revision of the principle of privity and the concept of contract parties ................................. 163
Section 3. Linked contracts as an interpretative standard ....... 163
Section 4. Linked contracts as an operative standard .......... 163
LIST OF AUTHORS

Caroline Cauffman, Assistant Professor, Universities of Maastricht and Antwerp, Attorney-at-law

Tâm Dang Vu, Junior researcher, Institute of the Law of Obligations, University of Leuven and Hasselt

Mathias Hostens, Junior researcher, University of Leuven, Campus Kortrijk Lawyer, Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels

Marco B.M. Loos, Coordinating programme leader Contract and Law of Obligations in general, Ius Commune Research School Professor of private law, in particular of European Consumer Law, University of Amsterdam

Joasia A. Luzak, Assistant Professor, Centre for the Study of European Contract Law, University of Amsterdam

Rodrigo Momberg Uribe, Assistant Professor, Faculty of Law, Austral University of Chile Honorary lecturer, Molengraaff Institute of Private Law, University of Utrecht

Ilse Samoy, Coordinating programme leader Contract and Law of Obligations in general, Ius Commune Research School Assistant Professor, Institute of the Law of Obligations, University of Leuven and Hasselt

Sanne van Dongen, LL.M., Junior researcher, Business and Law Research Centre, Radboud University Nijmegen