

Overview

Table of Contents	9
Abbreviations	19
I. Introduction	23
A. Private International Liability for Greenhouse Gas Emissions	29
B. Question of Private International Law in Climate Crisis Litigation	38
C. Case Studies of Private International Liability for Greenhouse Gas Emissions	44
D. Outline	50
II. Climate Crisis and Climate Action	53
A. Urgent Need for Climate Action	53
B. Challenges to Climate Action	64
C. Existing Climate Action	77
D. Filling the Gap in Climate Action	93
E. Result	105

Overview

III. The Law Applicable to Liability for Greenhouse Gas Emissions	107
A. Liability for Greenhouse Gas Emissions	109
B. Interests	118
C. Existing Choice-of-Law Rules	142
D. Connecting Factors	167
E. Combinations of Connections	218
F. Proposed Choice-of-Law Rule	238
IV. The International Effect of Emissions Regulation	243
A. Regulation of Greenhouse Gas Emissions	244
B. Interests	251
C. Public (International) Law Framework	255
D. Private International Law Methods to Take Regulation Into Account	281
E. Taking Regulation Into Account in Private International Liability for Greenhouse Gas Emissions	325
F. Proposed Method	337
V. Conclusion	341
VI. Summary	345
A. Introduction	345
B. Climate Crisis and Climate Action	345
C. The Law Applicable to Liability for Greenhouse Gas Emissions	347
D. The International Effect of Emissions Regulation	352
Bibliography	357

Table of Contents

Abbreviations	19
I. Introduction	23
A. Private International Liability for Greenhouse Gas Emissions	29
1. Concerning Greenhouse Gas Emissions	31
2. Private Liability	32
a. Private Parties	32
(1) Claimants	33
(2) Defendants	34
(3) Result	36
b. Private Liability Law	37
3. Transnational Liability	38
4. Result	38
B. Question of Private International Law in Climate Crisis Litigation	38
1. International Jurisdiction	39
2. Private International Law	40
3. Substantive Law	41
4. Recognition and Enforcement	42
5. Result	43
C. Case Studies of Private International Liability for Greenhouse Gas Emissions	44
1. Case 1: Melting Glacier	44
2. Case 2: Rising Sea	46
3. Case 3: Climate Migration	47
4. Case 4: Livestock Farming	49
5. Case 5: Cleaner Cars	49
D. Outline	50

Table of Contents

II. Climate Crisis and Climate Action	53
A. Urgent Need for Climate Action	53
1. Causes of the Climate Crisis	54
a. Greenhouse Effect	54
b. Greenhouse Gases	55
c. Anthropogenic Emissions of Greenhouse Gases	56
d. Result	58
2. Effects of the Climate Crisis	58
a. Increasing Temperature	58
b. Slow Onsetting Impacts	59
c. Extreme Weather Events	61
d. Result	61
3. Climate Action: Mitigation, Adaptation and Loss and Damage	62
B. Challenges to Climate Action	64
1. Climate Crisis as a Complex Challenge	64
a. Global	65
b. Unequal	65
c. Uncertain	67
d. Transformative	67
e. Result	68
2. Challenges for Individuals	68
3. Challenges for Cooperation	70
a. Tragedy of the Commons	70
b. Prisoner's Dilemma	72
c. Market Failure, Carbon Leakage & Race to the Bottom	73
d. Institutions and Climate Clubs	75
e. Result	76
4. Result	77
C. Existing Climate Action	77
1. International Framework	77
a. United Nations Framework Convention on Climate Change (1992)	78
b. Kyoto Protocol (1997)	80
c. Paris Agreement (2015)	81
d. Result	83
2. Regulatory Instruments	84
a. Emissions Standards	84

Table of Contents

b. Carbon Pricing	86
(1) Carbon Taxes	87
(2) Emissions Trading Systems	88
(3) Result	90
c. Result	90
3. Climate Action Gaps	91
a. Mitigation Gaps	91
b. Adaptation & Climate Finance Gaps	92
c. Result	92
D. Filling the Gap in Climate Action	93
1. Characteristics	93
a. Diversity of Aims	93
b. Focus on Private Parties	95
c. Potential for Transnational Climate Action	97
d. Effects Beyond the Individual Court Case	98
2. Criticism	99
a. Too Political	99
b. Ineffective and Inefficient	102
c. Undesired Impact	104
3. Result	105
E. Result	105
III. The Law Applicable to Liability for Greenhouse Gas Emissions	107
A. Liability for Greenhouse Gas Emissions	109
1. <i>Lliuya v RWE</i>	110
2. <i>Milieudefensie v Shell</i>	112
3. <i>Smith v Fonterra</i>	114
4. Legal Bases and Common Issues	116
B. Interests	118
1. Party Interests	119
a. Claimants	119
(1) Mitigation, Adaptation, Compensation	119
(2) Practical Issues, including Legal Aid	120
(3) Non-Governmental Organizations as Claimants	122
(4) Climate Migrants	123
(5) Result	124

Table of Contents

b. Defendants	125
c. Third Parties	126
(6) Non-Governmental Organizations as Supporters	127
(7) Insurers and Re-Insurers	128
(8) Result	129
2. Court Interests	129
3. Climate Interests	131
a. Climate Interests in Private International Law?	131
b. Framings of Additional Interests	132
(1) State Interests	132
(a) Climate Action Ambition and Regulation	133
(b) Protection of Citizens and Territory	134
(c) Result	136
(2) Public Interests	136
c. Result	138
4. Conflicts of Interests	138
a. Conflicts between Climate Interests	138
b. Conflicts between Human Rights and Climate Interests	139
c. Conflicts between Claimant's and Climate Interests	140
d. Result	141
5. Result	141
C. Existing Choice-of-Law Rules	142
1. General Delictual Liability	142
2. Environmental Damage	145
a. Rome II Regulation	145
(1) Applicability	146
(a) Environmental Damage <i>per se</i>	146
(b) Personal or Property Damage as a Result of Environmental Damage	148
(2) Application	149
(a) Case 1: Melting Glacier	150
(b) Cases 2 and 4: Rising Sea and Livestock Farming	150
(c) Case 3: Climate Migration	151
(d) Case 5: Cleaner Cars	152
(e) Foreseeability Clause	153
(f) Result	154
b. Nordic Environmental Protection Convention	154
(1) Applicability	155

Table of Contents

(2) Application	156
c. Result	158
3. Product Liability	158
b. Application	159
c. Result	160
4. Emissions from Immovable Property	161
5. Contract and Corporate Law	164
a. Applicability	165
6. Culpa in contrahendo, negotiorum gestio and Unjust Enrichment	166
7. Result	167
D. Connecting Factors	167
1. Territorial Connection	168
a. Place of Conduct	170
(1) Immovable Emission Sources	171
(2) Movable Emission Sources	172
(3) Conduct or Omission other than Emissions	175
(4) Result	179
b. Place of Damage	179
(1) Immovable Rights	181
(2) Moveable Rights	181
(3) Ecological Damage	182
(4) Result	183
c. Several Places of Tort	184
d. Result	185
2. Personal Connection	185
a. Forms of the Personal Connection	186
b. Claimants	187
(1) Legal Status of Climate Migrants	188
(2) Factual vs Legal Connection	190
(3) Practical Issues	191
(4) Relevant Time	192
(5) Result	193
c. Defendants	193
d. Common Personal Connection	195
e. Result	198
3. Other Objective Connections	199
a. Regulation Connection	199

Table of Contents

b. Prior Relationship of the Parties (Accessory Connection)	201
c. Forum Connection	204
d. Result	207
4. Subjective Connection	207
a. Foundations	208
(1) Development	208
(2) Arguments for Party Autonomy	210
(3) Practical Irrelevance?	211
(4) Result	212
b. Protection of Third Parties	212
c. Time of the Choice-of-Law Agreement	213
d. Restrictions on the Laws which can be chosen	214
e. Result	216
5. Result: Elements of Choice-Of-Law Rule	217
E. Combinations of Connections	218
1. Determination of the Relevant Connecting Factors	218
a. Concordance of Connecting Factors	219
b. Cumulative and Distributive Application	219
c. Abstract Choice between Connecting Factors	221
(1) Place of Conduct or Place of Damage	222
(2) Personal Connection of the Claimant or the Defendant	224
(3) Territorial or Personal Connection	225
d. Concrete Choice between Connecting Factors	227
(1) Criteria for the Decision	227
(2) Decision-Maker	231
e. Result	233
2. Additional Elements of the Choice-of-Law Rule	234
a. Foreseeability Clause	234
b. Party Autonomy	236
c. Escape Clause	237
3. Result	237
F. Proposed Choice-of-Law Rule	238
1. Discussion of the Proposed Rule	239
2. Differences to Existing Rules	240
3. Application of the Proposed Rule to Case Studies	240

Table of Contents

IV. The International Effect of Emissions Regulation	243
A. Regulation of Greenhouse Gas Emissions	244
1. Levels of Ambition	245
2. Forms of Regulation	246
3. Effects on Liability	247
a. Legal Nature of the Regulation	248
b. Substantive Law	248
4. Result	250
B. Interests	251
1. Party Interests	251
2. Court Interests	252
3. Climate Interests	253
4. Result	254
C. Public (International) Law Framework	255
1. Prohibition to Take Into Account	255
a. Breach of Public International Law	256
b. Territoriality Principle	257
c. Result	259
2. Duty to Take Into Account	259
a. Coherence of a Legal System	260
(1) Domestic Regulation	260
(2) Transnational Regulation	261
(3) Connected Regulatory Systems	262
(a) Linking Agreements for Emissions Trading Systems	263
(b) Climate Clubs and Carbon Duties	265
(4) Result	266
b. Individual Rights	267
(1) Property Rights	267
(a) Personal Scope of Application	268
(b) Subject-Matter Scope of Application	269
(c) Infringements	271
(d) Justification	273
(e) Result	274
(2) Equality, Non-Discrimination or National Treatment	274
(a) Scope of Application	275
(b) Differential Treatment	276
(c) Justification	277

Table of Contents

(d) Result	277
(3) Fundamental Freedoms of EU Law	278
(a) Modified Case 5: Cleaner Cars in the EU	278
(b) Implications on the Internal Market	279
(c) Quantitative Restriction or Measure having Equivalent Effect	279
(d) Justification	279
(e) Result	280
c. Result	280
3. Result	281
D. Private International Law Methods to Take Regulation Into Account	281
1. Public Law Taboo	282
a. Application	282
b. Discussion	284
c. Result	286
2. Choice-of-Law Rule	287
a. <i>Lex causae</i>	287
(1) Scope of the <i>lex causae</i>	287
(2) Application to Private International Liability for Greenhouse Gas Emissions	288
(3) Variations of the <i>lex causae</i>	289
(4) Result	290
b. Choice-of-Law Rule for Regulation	290
(1) Territorial and Personal Connections	291
(2) Regulation Connection	291
(3) Forum Connection	292
(4) Subjective Connection	293
(5) Result	293
c. Result	294
3. Overriding Mandatory Provisions	294
a. Definition	294
b. Additional Requirements for Foreign Overriding Mandatory Provisions	297
c. Effect	299
d. Result	299
4. Recognition	300
a. Recognition of Administrative Acts	300

Table of Contents

b. Recognition of Foreign Judgments	301
c. Recognition of Situations	302
d. Procedural Recognition	303
e. Result	304
5. Substitution	305
a. Substitutability	306
b. Equivalence	306
c. Result	307
6. Modification (Data Theory)	307
a. Development	308
b. Definition	309
c. Requirements	311
d. Effect	311
e. Result	313
7. Comparison of the Methods	313
a. Connecting Factor for Regulation	314
(1) General Observations	314
(2) The Role of the Place of Conduct	315
(3) Result	316
b. Requirements for Regulation	316
(1) General Requirements for Regulation	317
(a) Scope of the Regulation	317
(b) Validity of the Regulation under its Law of Origin	318
(c) Result	318
(2) Types of Requirements	318
(3) Procedural Requirements	320
(4) Substantive Requirements	322
(5) Result	323
c. Effect of Regulation	323
d. Result	324
E. Taking Regulation Into Account in Private International Liability for Greenhouse Gas Emissions	325
1. Favorability Principle	325
a. Available Methods	326
(1) <i>Lex causae</i>	326
(2) Other Choice-of-Law Rules and Modification	327
b. Application to Regulation of Greenhouse Gas Emissions	328
(1) Differentiation between Types of Regulations	328

Table of Contents

(2) Effect of Regulation as Part of the <i>lex causae</i>	329
c. Result	330
2. Requirements for Regulation	330
a. Available Methods	331
(1) Objective Requirements for Regulation	331
(2) Relative Requirements for Regulation (Substitution)	332
b. Application to Regulation of Greenhouse Gas Emissions	333
c. Result	335
3. Combination of Methods & Conflicts of Regulation	335
4. Result	336
F. Proposed Method	337
1. Discussion of the Proposed Method	337
2. Differences to Existing Method	338
3. Application of the Proposed Method to Case Studies	338
V. Conclusion	341
VI. Summary	345
A. Introduction	345
B. Climate Crisis and Climate Action	345
C. The Law Applicable to Liability for Greenhouse Gas Emissions	347
D. The International Effect of Emissions Regulation	352
Bibliography	357