

Contents

1 Introduction	1
1.1 Problem Discovery	1
1.1.1 What Does the Field Know?	3
1.1.2 Contribution of the Book	5
1.2 Outline of the Argument	7
1.2.1 Damages Claims in General EU Law and Public Procurement Specifically (Part I)	7
1.2.2 Damages Awards in National Courts (Part II)	8
1.2.3 Transversal Issue-Based Discussion of Damages (Part III)	8
1.2.4 Conclusions (Part IV)	9
Bibliography	9
 Part I The EU Perspective on Damages	
2 The EU Public Procurement Policy Field	13
2.1 The Early Development of Public Procurement Regulation	13
2.1.1 Historic Developments	14
2.2 EU Public Procurement Policy	16
2.2.1 Public Procurement Policy: Governance, Competition Law, Budget Law, or Private Law?	17
2.2.2 The Opening Up of Public Procurement Markets: European and Plurilateral Efforts	18
2.3 Enforcing Public Procurement Policy Through Damages	20
2.3.1 Public and Private Enforcement of EU Public Procurement Rules	21
2.3.2 Private Enforcement in the Remedies Directive	22
2.3.3 The Remedies Amendments by Directive 2007/66	25

2.3.4	No Short-Term Legislative Intervention on Damages in Public Procurement	28
2.3.5	What Is the Trouble with Public Procurement Damages?	28
	Bibliography.....	29
3	The CJEU's Approach to Damages	
	Under General EU Law	31
3.1	Damages Under 'Effectiveness' & 'Equivalence' Requirements, Effective Judicial Protection and Procedural Autonomy.....	31
3.1.1	<i>Rewe/Comet</i> Effectiveness	32
3.1.2	Variations of 'Effectiveness'.....	33
3.1.3	The Different Uses of Effectiveness.....	35
3.1.4	Judicial Protection as a Fundamental Right.....	38
3.1.5	'Procedural Autonomy' Results in Considerable Uncertainty for the Court	40
3.2	Damages as a Remedy (Member State Liability).....	42
3.2.1	The Constitutive Criteria of Member State Liability	43
3.3	Conclusion.....	48
	Bibliography.....	49
4	Sources of EU Procurement Law and Damages	51
4.1	Damages as Regulated by the Public Procurement Remedies Directives	51
4.1.1	Damages as Largely Unregulated by the Remedies Directives?	52
4.1.2	Judicial Interpretation in Case Law.....	54
4.2	Legal Reasoning of the CJEU.....	55
4.2.1	Interpreting Damages Claims Under the 'Effectiveness' Paradigm.....	55
4.2.2	Member State Liability and Effectiveness in <i>Combinatie Spijker Infrabouw</i>	59
4.2.3	The Role of Institutional Liability in Interpreting Member State Liability	62
4.3	Member State Liability and Effectiveness Damages: The Separation Thesis	65
4.3.1	An Implementation Duty Based View of Member State Liability	65
4.3.2	A 'Separation Thesis' of Member State liability and Effectiveness Damages	66
4.3.3	Effectiveness of EU Law and Member State Liability Ought to Operate in Sequence.....	70
4.4	Conclusion	71
	Bibliography	72

Part II The National Perspectives

5 Case Study: The Netherlands	75
5.1 Systemic Features of Procurement Claims	75
5.1.1 The Implementation of the Amendments Made by Directive 2007/66.....	75
5.1.2 Jurisdictional Questions	76
5.2 Causes of Action	77
5.2.1 Pre-contractual Liability and <i>Redelijkheid en Billijkheid</i>	78
5.2.2 Tort Law	81
5.3 Justiciability of Claims	84
5.3.1 Standing.....	84
5.3.2 Time Limits	85
5.3.3 Duration.....	85
5.4 The Quantification of Damages	86
5.4.1 Definition of Recoverable Losses	86
5.4.2 Methods of Quantification.....	91
5.5 Conclusion	92
Bibliography	93
6 Case Study: The United Kingdom	95
6.1 Systemic Features of Procurement Claims	95
6.1.1 Sources of Law and Implementation of Directive 2007/66 ...	96
6.1.2 Jurisdiction	97
6.2 Causes of Action for Damages Claims	98
6.2.1 Breach of Statutory Duty	98
6.2.2 Implied Contract.....	99
6.2.3 Misfeasance in Public Office	101
6.2.4 The Lost Chance in the UK as a Causality Criterion	101
6.2.5 Adequacy of Damages in Interlocutory Proceedings	103
6.3 Justiciability of Damages Claims.....	104
6.3.1 Informing the Contracting Authority Prior to Damages Claim Is No Longer Necessary	104
6.3.2 <i>De minimis</i> /Threshold	105
6.3.3 Standing.....	105
6.3.4 Time Limits	106
6.3.5 Access to Documents	107
6.4 Quantification.....	109
6.4.1 Available Heads of Damages	109
6.4.2 Valuation	112
6.5 Conclusions.....	115
Bibliography	115

7 Case Study: Germany	117
7.1 Systemic Features	117
7.1.1 Characteristics: The Cascaded System of Sources of Law	117
7.1.2 Implementation of Directive 2007/66	118
7.1.3 Jurisdiction	119
7.2 The Constitutive Criteria for Various Actions.....	119
7.2.1 Damages Claims Based on §126 GWB	120
7.2.2 Non-contractual Obligations: The <i>culpa</i> <i>in contrahendo</i> Under §§280, 311(2), and 241(2) BGB	124
7.2.3 Liability Based on Non-contractual Obligations.....	127
7.2.4 Alternative Causes of Action for Liability	128
7.3 Justiciability	129
7.3.1 Statutory Norms with Protective Character	129
7.3.2 Time Limits	129
7.3.3 Access to Documents	129
7.4 Quantification.....	130
7.4.1 Recoverable Losses	130
7.4.2 Valuation of Damages	133
7.5 Conclusions.....	134
Bibliography	135
8 Case Study: France	137
8.1 Systemic Features	137
8.1.1 Sources of Law.....	137
8.1.2 Jurisdiction: Administrative and Civil.....	138
8.2 Causes of Action	138
8.2.1 Justiciability	139
8.2.2 Time Limits	141
8.2.3 The Constitutive Criteria.....	141
8.2.4 The Classification of Chances.....	142
8.3 Quantification of Damages	146
8.3.1 Recoverable Losses	146
8.3.2 The Burden of Proof.....	148
8.3.3 Valuation Methods	149
8.4 Conclusion	151
Bibliography	152
 Part III Transversal Discussion of Damages	
9 Issue Based Analysis of Public Procurement Damages	155
9.1 National Public Procurement Policy Space	155
9.1.1 Public Agenda	155
9.1.2 Structural Implementation.....	156

9.2	Institutional Framework.....	158
9.2.1	Arbitration as Extra-Judicial Proceedings.....	159
9.2.2	Summary Proceedings Versus Procedures on Merit	163
9.3	The Applicable Law.....	166
9.3.1	Applicability of the Rome II Regulation.....	166
9.3.2	Application of the Rome II Regulation.....	168
9.4	Causes of Action	169
9.4.1	Member State Liability as a Cause of Action.....	170
9.4.2	Relevance of Having Different Causes of Action	171
9.5	Justiciability: Terms of Material (Normtype), Personal (Standing) and Temporal (Prescription) Scope.....	172
9.5.1	Invocability.....	172
9.5.2	Time Limits	176
9.6	Fault Requirements	178
9.6.1	EU Case Law.....	178
9.6.2	Fault at National Level	181
9.7	Conclusion	181
	Bibliography	182
10	Quantification of Claimable Losses.....	183
10.1	Quantification of Damages	183
10.1.1	Theoretical Perspectives.....	183
10.2	Heads of Damages: Bid Preparation, Lost Profit and Interest Rates.....	186
10.2.1	Preparation of Bid Costs	186
10.2.2	Lost Profits	191
10.2.3	Interest Rates.....	193
10.3	Provisions Regulating the Quantification of Damages.....	197
10.3.1	The Separation Between Constitutive and Quantification Criteria.....	197
10.3.2	Discretion of the Judge.....	198
10.4	Valuation Methods for Damages	199
10.4.1	Valuation in EU Law	200
10.4.2	Valuation in Public Procurement.....	201
10.5	Conclusion	202
	Bibliography	203
11	The Iridescence of the Lost Chance Doctrine in Damages Claims	205
11.1	The Different Understandings of the Lost Chance Theory.....	205
11.1.1	Different Understandings of the Lost Chance.....	206
11.2	Country Overview in General.....	207
11.2.1	France.....	208
11.2.2	The Netherlands	209

11.2.3	Germany	210
11.2.4	England	211
11.2.5	Evaluation.....	211
11.3	The Lost Chance in Public Procurement	
	Damages Claims	212
11.3.1	France.....	212
11.3.2	The Netherlands	213
11.3.3	Germany	214
11.3.4	England	215
11.3.5	Evaluation.....	215
11.4	Using the Loss of Chance Doctrine Fruitfully in Public Procurement?.....	216
11.4.1	Causation in the Face of Uncertainty	217
11.4.2	How to Establish Criteria in an ‘ <i>a priori</i> ’ Account	218
11.5	Conclusions from an EU Perspective	219
11.5.1	Procurement Damages	220
	Bibliography	223

Part IV Conclusions and the Way Forward

12	Conclusions	227
12.1	Summary	227
12.2	Main Findings.....	227
12.3	Proposal for a Revision of the Damages Article in the Procurement Remedies Directive	232