

## **ECONOMIC ANALYSIS OF PRIVATE LAW SYLLABUS – EMLE 2022/2023 (Rotterdam, 1<sup>st</sup> term)**

This double course aims at giving students an overview of the most important insights from the economic analysis of private law. It combines economic analysis of tort law, contract law and property law. As far as tort law is concerned, the course offers a comparative analysis of the legal principles from an economic perspective, particularly regarding the structure of liability, damage compensation, and insurance. As far as contract law is concerned, the course illustrates its goals and functions from an economic perspective. Moreover, it aims to provide a functional understanding of the spectrum of feasible contracts and of their use in legal practice. As far as property law is concerned, the course integrates the legal and the economic approach to ownership and illustrates costs and benefits of different ways to protect entitlements.

Many of the concepts of Law and Economics, which are discussed in the course Concepts and Methods of Law and Economics, return in this course on Private Law. For example, the distinction between property rules and liability rules as ways to protect and/or transfer entitlements is relevant in tort law, contract law and property law (for example, damages can be regarded as liability rule protection in tort law and contract law, whereas injunctions (tort law) and specific performance (contract law) are examples of property rule protection. Another example is the concept of transaction costs: tort law is (generally said) relevant in settings of high transaction costs, whereas contract law deals with situations of low transaction costs (and contract law also tries to further reduce transaction costs). Of course, contract law deals with voluntarily transferring property (in situations of low transaction costs) whereas in tort law infringement of property rights can form the basis of a tort claim (in settings of high transaction costs). A third example is the concept of externalities: tort law is studied as a way to internalize negative externalities via the threat of liability. In contract law the issue whether the agreement only works between contracting parties or also has (external) effect on third parties is relevant. And in property law, negative externalities can form a reason to limit what owners can do with their property.

This course introduces the students in the most important insights in the economic analysis of tort law, contract law and property law. It also spends attention to the interconnections between these three fields of law when studied from an economic perspective.

The final grade for the course Economic Analysis of Private Law will be determined as follows:

- 70% of the final grade is determined by the grade for the written closed book exam.
- 30% of the final grade is determined by various assignments, which are intended to stimulate active learning. There are preparatory assignments for the lectures of Contracts, as well as an individual take-home assignment on a Torts-topic. The assignments will be handed out during the lectures and/or be made available via Canvas or email.

## Literature

### Introduction and Torts (Visscher)

G. Calabresi and A.D. Melamed (1972), 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', (85) <i>Harvard Law Review</i> , p. 1089-1128. <a href="https://openyls.law.yale.edu/handle/20.500.13051/1262">https://openyls.law.yale.edu/handle/20.500.13051/1262</a>
R. Cooter (1985), 'Unity in Tort, Contract, and Property: The Model of Precaution', (73) <i>California Law Review</i> , p. 1-51. <a href="https://works.bepress.com/robert_cooter/14/">https://works.bepress.com/robert_cooter/14/</a>
M.F. Grady (1989), 'Untaken Precautions', (18) <i>Journal of Legal Studies</i> , p. 139-156. <a href="https://www.jstor.org/stable/3085645">https://www.jstor.org/stable/3085645</a>
M. Kahan (1989), 'Causation and the Incentives to Take Care Under the Negligence Rule', (18) <i>Journal of Legal Studies</i> , p. 427-447. <a href="https://www.jstor.org/stable/3085628">https://www.jstor.org/stable/3085628</a>
C. Ott and H.-B. Schäfer (1997), 'Negligence as Untaken Precaution, Limited Information, and Efficient Standard Formation in the Civil Liability System', (17) <i>International Review of Law and Economics</i> , p. 15-29. <a href="https://www.sciencedirect.com/science/article/pii/S0144818896000658">https://www.sciencedirect.com/science/article/pii/S0144818896000658</a>
G.L. Priest (1987), 'The Current Insurance Crisis and Modern Tort Law', (96) <i>Yale Law Journal</i> , p. 1521-1590. <a href="https://digitalcommons.law.yale.edu/fss_papers/578/">https://digitalcommons.law.yale.edu/fss_papers/578/</a>
S. Shavell (1984), 'Liability for Harm versus Regulation of Safety', (13) <i>Journal of Legal Studies</i> , p. 357-374. <a href="https://www.jstor.org/stable/724240">https://www.jstor.org/stable/724240</a>
S. Shavell (2003b), 'Economic Analysis of Accident Law', <a href="http://www.nber.org/papers/w9694">www.nber.org/papers/w9694</a> . Online version of Chapter 7 of <i>Foundations of Economic Analysis of Law</i> , Cambridge, Massachusetts: Harvard University Press 2004. <a href="http://www.nber.org/papers/w9694">www.nber.org/papers/w9694</a>
L.T. Visscher (2009), 'Tort Damages', in: M. Faure (ed.), <i>Tort Law and Economics. Encyclopedia of Law and Economics. Vol. 1</i> , Cheltenham: Edward Elgar, p. 153-200. <a href="https://www.researchgate.net/publication/228208376_Tort_Damages">https://www.researchgate.net/publication/228208376_Tort_Damages</a>
L.T. Visscher and V. Karapanou (2015), 'Non-pecuniary Losses in the Economic Analysis of Torts: a Plea for Ex Ante Determined Damages', <i>Chinese Journal of Comparative Law</i> , p. 1-22. <a href="http://dx.doi.org/10.1093/cjcl/cxv010">http://dx.doi.org/10.1093/cjcl/cxv010</a>

### Contracts (Vandenberghe)

G. De Geest and M. Kovac (2009), 'The Formation of Contracts in the Draft Common Frame of Reference', (17) <i>European Review of Private Law</i> , p. 113-132. <a href="https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/17.2/ERPL2009009">https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/17.2/ERPL2009009</a>
G. De Geest (2013), 'N Problems Require N Instruments', (35) <i>International Review of Law and Economics</i> , p. 42-57. Washington University in St. Louis Legal Studies Research Paper No. 12-05-20. <a href="https://ssrn.com/abstract=2079747">https://ssrn.com/abstract=2079747</a>
G. De Geest (2015), 'Signing Without Reading', in: A. Marciano and G.B. Ramello (eds.), <i>Encyclopedia of Law and Economics: Basic Areas of Law</i> , Springer Washington University in St. Louis Legal Studies Research Paper No. 16-09-01. <a href="https://ssrn.com/abstract=2834314">https://ssrn.com/abstract=2834314</a>
D.D. Friedman (2000), <i>Law's Order: What economics has to do with law and why it matters</i> , Princeton University Press, chapters 12 and 13. <a href="https://portalconservador.com/livros/David-Friedman-Laws-Order.pdf">https://portalconservador.com/livros/David-Friedman-Laws-Order.pdf</a>
A.M.I.B. Vandenberghe, course material Contract Law and Economics 2022-2023.

**Property (Bouckaert) - Mandatory readings, available on Canvas**

B. Bouckaert, Chapter I. Definition and Extent of Property Rights
B. Bouckaert, Chapter I(a). Emergence of Property Rights
B. Bouckaert, Chapter II. Common Property
B. Bouckaert, Chapter III. The Tragedy of the Anti-commons. Fragmentation and Transaction Costs
B. Bouckaert, Chapter III. Nuisance
B. Bouckaert, Chapter V. Takings
B. Bouckaert, Chapter VI. Verification of Property Rights: Possession and Registration

**Property (Bouckaert) - Background literature (not mandatory)**

L.J. Alston, E. Harris and B. Mueller (2012), 'The Development of Property Rights on Frontiers: Endowments, Norms, and Politics', (72) <i>The Journal of Economic History</i> , p. 1-30. <a href="https://www.jstor.org/stable/23254942">https://www.jstor.org/stable/23254942</a>
B. Bouckaert (2000), 'Original Assignment of Private Property', in: B. Bouckaert and G. De Geest Gerrit (ed.), <i>Encyclopedia of Law and Economics, Vol. II, Civil Law and Economics</i> , Cheltenham: Edward Elgar, Chapter 1100, p. 1-17. <a href="https://reference.findlaw.com/lawandeconomics/1100-original-assignment-of-private-property.pdf">https://reference.findlaw.com/lawandeconomics/1100-original-assignment-of-private-property.pdf</a>
B. Bouckaert, 'Fragmentation of Property Rights. Easements', Chapter IV from <i>Property Law and Economics: A Casebook</i> . Available on Canvas.
B. Bouckaert, 'From property rights to property order. Towards a more complete framework for the economic analysis of property rights' (forthcoming in <i>Encyclopedia of Law and Economics</i> ) Available on Canvas.
W.A. Fishel (2000), 'Zoning and Land Use Regulation', in: B. Bouckaert and G. De Geest Gerrit (ed.), <i>Encyclopedia of Law and Economics, Vol. II, Civil Law and Economics</i> , Cheltenham: Edward Elgar, Chapter 2200, p. 403-442. <a href="https://reference.findlaw.com/lawandeconomics/2200-zoning-and-land-use-regulation.pdf">https://reference.findlaw.com/lawandeconomics/2200-zoning-and-land-use-regulation.pdf</a>
D. Fitzpatrick (2006), 'Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Areas', (115) <i>The Yale Law Journal</i> , p. 996-1048. <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007662##">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007662##</a>
D. Fitzpatrick (2016), 'Fragmented Property Systems', (38) <i>University of Pennsylvania Journal of International Law</i> , p. 137-193. <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773387">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773387</a>
H. Hansmann and R. Kraakman (2002), 'Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights', (31) <i>Journal of Legal Studies</i> , p. 373-420. <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=323301">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=323301</a>
P.J. Hill (2014), 'Are All Commons Tragedies? The Case of Bison in the Nineteenth Century', (18) <i>The Independent Review</i> , p. 485-502. <a href="http://www.independent.org/pdf/tir/tir_18_04_01_hill.pdf">http://www.independent.org/pdf/tir/tir_18_04_01_hill.pdf</a>
G.D. Libecap (2007), 'The Assignment of Property Rights on the Western Frontier: Lessons for contemporary environmental and resource policy', (67) <i>The Journal of Economic History</i> , p. 257-291. <a href="https://www.jstor.org/stable/4501153">https://www.jstor.org/stable/4501153</a>
T.W. Merrill and H.E. Smith (2001), 'What Happened to Property in Law and Economics?', (11) <i>The Yale Law Journal</i> , p. 357-398. <a href="https://www.yalelawjournal.org/pdf/402_q8yv98v.pdf">https://www.yalelawjournal.org/pdf/402_q8yv98v.pdf</a>

T.I. Miceli and K. Segerson (2000), 'Takings', in: B. Bouckaert and G. De Geest Gerrit (ed.), *Encyclopedia of Law and Economics*, Volume IV, *The Economics of Public and Tax Law*, Cheltenham: Edward Elgar, Chapter 6200, p. 328-357.

<https://reference.findlaw.com/lawandeconomics/6200-takings.pdf>

E. Ostrom and C. Hess (2007), 'Private and Common Property Rights', Indiana University, Bloomington: School of Public & Environmental Affairs Research Paper No. 2008-11-01, p. 1-33.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1936062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936062)

A. Stoyanovic, 'Large Scale land acquisitions in Nigeria: To what extent do property rights matter for economic development' (unpublished); 'Effects of registration on land tenure in developing countries: a game theoretical perspective' (unpublished); 'Difficulties of reattachment: why is property law still a challenge for economic analysis of property rights?', in: P. Cserne and M. Malecka, *Law and Economics as Interdisciplinary Exchange: Philosophical, Methodological and Historical Perspectives*, London: Routledge 2019, p. 95-112.

Available on Canvas.

## **Lecture Schedule**

### **Lecture 1+2 (Visscher) - Introduction to the Course**

- Organization of the Course
- How do property, contract and torts relate?
- Relevance of Calabresi and Melamed
- Unity in Tort, Contract, and Property: The Model of Precaution

*Literature: Calabresi and Melamed 1972; Cooter 1985*

### **Lecture 3 (Bouckaert) - Property 1**

- Concept of Property
- Definition and extent of property rights
- Economic theory of emergence of property rights

*Literature: Mandatory: Bouckaert Chapter I; Bouckaert Chapter I(a)  
Background: Alston, Harris & Mueller 2012; Bouckaert (forthcoming);  
Fitzpatrick 2006; Fitzpatrick 2016; Libecap 2007; Merrill and Smith  
2001; Stoyanovic ('Large Scale...'); Stoyanovic ('Difficulties...')*

### **Lecture 4 (Bouckaert) - Property 2**

- The Tragedy of Open Access-goods
- The Economics of Common Property
- The optimal commons

*Literature: Mandatory: Bouckaert Chapter II and Chapter III Anticommons  
Background: Bouckaert Chapter IV; Hill 2014; Ostrom and Hess 2010*

### **Lecture 5 (Visscher) - Torts 1**

- Focus: negligence and strict liability. Negative externalities
- Hand formula and comparable cases

*Literature: Shavell 2003b chapter 1 + 2*

### **Lecture 6 (Visscher) - Torts 2**

- Strict Liability and negligence
- Bilateral model (care level), comparative/contributory negligence, comparison of liability rules

*Literature: Shavell 2003b chapter 1 + 2*

### **Lecture 7 (Vandenberghe) - Contracts 1**

- What are the costs and benefits of contractual cooperation?
- Why do parties need a contract?

*Literature: Friedman 2000, chapter 12; Vandenberghe, course material Contract  
Law and Economics 2022-2023.*

### **Lecture 8 (Vandenberghe) - Contracts 2**

- Informal strategies: how to solve incentive problems in the absence of a binding contract?
- Long-term, relational contracts

*Literature: Friedman 2000, chapter 13; Vandenberghe, course material Contract  
Law and Economics 2022-2023.*

**Lecture 9 (Visscher) – Torts 3**

- Unilateral and bilateral model: care and activity level
- Why do we find negligence in reality?

*Literature: Shavell 2003b chapter 1 + 2 + 4, p. 1-9*

**Lecture 10 (Visscher) – Torts 4**

- Untaken Precaution; differences with traditional model; addition Ott & Schäfer
- Property Rules and Liability Rules in Tort Law

*Literature: Calabresi/Melamed 1972; Grady 1989; Ott/Schäfer 1997*

**Lecture 11 (Vandenberghe) – Contracts 3**

- Optimal sanctions for contract breach: how much pressure should be put on obligations?
- Contractual risk allocation.

*Literature: De Geest 2013; Vandenberghe, course material Contract Law and Economics 2022-2023.*

**Lecture 12 (Vandenberghe) – Contracts 4**

- Restrictions on freedom to contract: duress, necessity and related doctrines

*Literature: Friedman 2000, chapter 12; Vandenberghe, course material Contract Law and Economics 2022-2023.*

*Prepare assignment 1*

**Lecture 13 (Bouckaert) – Property 3**

- Tragedy of the Anti-Commons
- Protection of Property Rights: Trespass, Nuisance, Torts

*Literature: Mandatory: Bouckaert Chapter III Anticommons and Chapter III. Nuisance*

**Lecture 14 (Bouckaert) – Property 4**

- The Enforcement of Property Rights

*Literature: Mandatory: Bouckaert Chapter III. Nuisance*

**Lecture 15 (Visscher) – Torts 5**

- Causation: but-for cause; adequate cause; impact on care and activity level; coincidental accidents

- Correction of Marcel Kahan

*Literature: Kahan 1989; Shavell 2003b chapter 4, p. 18-23*

**Lecture 16 (Visscher) – Torts 6**

- Uncertainty over causation

- Damages: starting point of full compensation; Pure Economic Loss

*Literature: Shavell 2003b chapter 4, p. 9-23; Visscher 2009*

**Lecture 17 (Visscher) – Torts 7**

- Damages: pecuniary versus non-pecuniary losses; selected (short) topics

- Optimal enforcement: Liability versus other approaches

*Literature: Shavell 1984; Visscher 2009; Visscher/Karapanou 2015*

**Lecture 18 (Vandenberghe) – Contracts 5**

- Pre-contractual information exchange: doctrines of fraud and mistake  
*Literature: De Geest and Kovac 2009; Vandenberghe, course material Contract Law and Economics 2022-2023.*

**Lecture 19 (Vandenberghe) – Contracts 6**

- Regulation of contract content; signing-without-reading problem  
*Literature: De Geest 2015; Vandenberghe, course material Contract Law and Economics 2022-2023.*  
*Prepare assignments 2 & 3*

**Lecture 20 (Bouckaert) – Property 5**

- Verification of Property Rights
- Possession
- Registration  
*Literature: Mandatory: Bouckaert Chapter VI*  
*Background: Bouckaert 2000; Hansman and Kraakman 2002; Stoyanovic ('Effects...')*

**Lecture 21 (Bouckaert) – Property 6**

- Zoning
- Taking  
*Literature: Mandatory: Bouckaert Chapter V*  
*Background: Fishel 2000; Miceli and Segerson 2000*

**Lecture 22 (Visscher) – Torts 8**

- Insurance: risk attitudes and information problems;
- Priest: tort law and insurance crisis
- Torts and insurance combined  
*Literature: Shavell 2003b chapter 5; Priest 1987*

**Lecture 23 (Vandenberghe) – Contracts 7**

- To bring law & economics closer to the empirical reality of modern markets  
*Prepare assignments 4 & 5*