

**B Winiger, H Koziol,  
BA Koch, R Zimmermann (eds)**

# **Digest of European Tort Law**

**Volume 2:  
Essential Cases on Damage**



**DE GRUYTER**

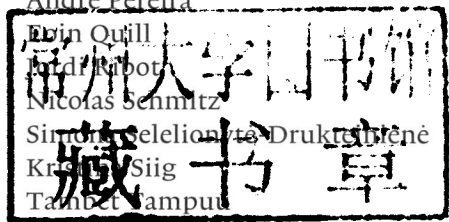
Bénédict Winiger, Helmut Koziol,  
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## Volume 2: Essential Cases on Damage

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This work is published with the financial support of the  
Austrian Science Fund (FWF)  
Gedruckt mit Unterstützung des  
Fonds zur Förderung der wissenschaftlichen Forschung (FWF)

ISBN 978-3-11-024848-7  
e-ISBN 978-3-11-024849-4  
ISSN 1869-6570

*Bibliografische Information der Deutschen Nationalbibliothek*

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der  
Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet  
über <http://dnb.d-nb.de> abrufbar.

© 2011 Walter de Gruyter GmbH & Co. KG, Berlin/Boston

Druck: Hubert & Co. GmbH & Co. KG, Göttingen

Gedruckt auf säurefreiem Papier

Printed in Germany

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Digest of European Tort Law  
Volume 2

# **Digest of European Tort Law**

## **Vol 2: Essential Cases on Damage**

Edited by the  
Institute for European Tort Law  
of the Austrian Academy of Sciences

**De Gruyter**

## Preface

As already noted in 2007 in the first volume of the ‘Digest of European Tort Law’, European jurists are increasingly interested in decisions from foreign courts. Access to these decisions being often difficult, we decided to continue our undertaking and to publish a new survey of cases in another field of tort law. As with the first volume on ‘natural causation’, our group aims to contribute to a better understanding of tort law in Europe with the present Digest. The first volume has proved a useful source of material for both scholars and practitioners and has even been cited by Supreme Courts. We hope that this second volume will play a similar role and make available to the reader, the legal solutions and the state of discussion abroad.

The current volume focuses on the notion of ‘damage’ in Europe. On the basis of a Questionnaire composed by members stemming from different European legal families, study groups from 26 jurisdictions investigated their national jurisprudence and selected topical cases. The reporters have summarised the facts and the decision of each case and added a short comment concerning their national doctrine. On the supranational level, a specific report presents and analyses important decisions of the Courts of Justice of the European Union. Another report offers a comparative analysis of particular cases resolved according to the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR). This may prove to be a test for strong and weak points in these two propositions of European norms. Furthermore, a separate historical report examines the notion of damage in ancient times. Finally, at the end of each category, a comparative report, written by one of the editors, highlights the conceptual similarities and differences between the national jurisprudences under analysis.

Moreover, various groups working on private law continue to submit propositions for a unified European law. If one day the unification of legal texts is achieved, judges will require a source of jurisprudence to elaborate upon. The present collection could be used as a series of casebooks in which a judge can find arguments to support his decisions.

We hope that the second volume will be followed by others examining further concepts central to tort law, such as fault or remedies. We still encourage other groups to undertake similar research in order to create a complete framework of concepts in private law.

The collection is mainly dedicated to tort law. However, as the concept of damage also plays an essential role in contract law, the reporters have also integrated some decisions in that field.

The present book is divided into 27 fundamental categories of damage. Within each category, the selected facts, decisions and comments are presented in the following manner: each category begins with a historical introduction

(1), followed by the 26 country reports (almost all European Union Member States, Switzerland and Norway) (2–27), the decisions of the EU courts (28), the solutions of the hypothetical cases according to the PETL and the DCFR (29) and finally a comparative report (30).

This user-friendly structure allows individual readers who are interested in a specific problem, such as ‘objective damage’, to seek the relevant information for all countries in chapter 2, for example. Readers looking for the cases and solutions of a specific country, eg Sweden, will find all the Swedish cases under the same number (17) within all chapters across the book. The comparative reports (30) provide a summary of our main findings for the more hurried reader.

The references to the texts in our book are thus composed of three numbers. The first two are cited at the top of each page, and they indicate the basic category and the specific (usually: country) report within each category. The third figure is the marginal number into which each individual report has been sub-divided. For example, 7/14 no 1 indicates Illicit Profits (category 7) in Irish law (the country) and refers to the facts of the case *Downing v O’Flynn* (which are to be found in marginal number 1).

We owe our profound thanks to the staff of the Institute for European Tort Law of the Austrian Academy of Sciences, especially to Vanessa Wilcox, Petra Pipkova, Donna Stockenhuber and Kathrin Karner-Strobach for coordinating the project in Vienna and for preparing the manuscript for publication, preparation of which Joya Raha at the Law Faculty of the University of Geneva and Helen Morrison, Cambridge and BPP Law School graduate, were also involved. Further, we would like to express our gratitude to the Austrian Science Fund (*Fond zur Förderung der wissenschaftlichen Forschung*) and the Swiss National Science Foundation (*Fonds National Suisse de la Recherche Scientifique*) for their auspices as well as the *Société genevois de droit et de législation* for its financial support of the publication. Last, but not least, we would like to thank the publishing house Walter de Gruyter for supporting this project.

The Editors

# Overview

1. General Overview
2. Objective Value
3. Subjective Value
4. Loss of Working Capacity
5. Primary and Consequential Damage
6. Positive Damage and Loss of Profit
7. Loss of Illicit Profits
8. Damage without any Material Alteration
9. Reliance and Expectation Loss
10. Alteration of a Good or Diminution of its Value
11. Non-Pecuniary Damage in General
12. Non-Pecuniary Consequential Damage
13. Non-Pecuniary Damage without Harm
14. Value of Affection
15. Loss of Enjoyment
16. Frustration
17. Loss of Use
18. 'Grey Area' between Pecuniary and Non-Pecuniary Damage
19. Additional Categories Apart from Pecuniary and Non-Pecuniary Loss
20. Wrongful Conception
21. Wrongful Birth
22. Wrongful Life
23. Environmental Damage
24. Collective Damage
25. Mere Exposure to a Danger
26. Loss of a Chance as Damage
27. Further Categories
28. Others

# Abbreviations

## A

|                      |                                                                                     |
|----------------------|-------------------------------------------------------------------------------------|
| A & M                | Auteurs et Médias                                                                   |
| ABGB                 | Allgemeines Bürgerliches Gesetzbuch                                                 |
| AC                   | Actualidad Civil                                                                    |
| AC                   | Law Reports, Appeal Cases                                                           |
| AcP                  | Archiv für die civilistische Praxis                                                 |
| AD                   | Anno Domini                                                                         |
| ADC                  | Anuario de Derecho Civil                                                            |
| Affd                 | affirmed                                                                            |
| AFT (BGE)            | Arrêts du Tribunal fédéral suisse/Entscheidungen des Schweizerischen Bundesgerichts |
| AG                   | Advocate General                                                                    |
| AG                   | Amtsgericht                                                                         |
| AIDS                 | Acquired Immune Deficiency Syndrome                                                 |
| AJDA                 | Actualité juridique: Droit administratif                                            |
| AJP                  | Aktuelle Juristische Praxis                                                         |
| AJT                  | Algemeen Juridisch Tijdschrift                                                      |
| All ER               | All England Law Reports                                                             |
| ALR                  | Allgemeines Landrecht für die Preußischen Staaten                                   |
| Amén                 | Aménagement, environnement, urbanisme et droit foncier                              |
| Am J Leg Hist        | American Journal of Legal History                                                   |
| ANF                  | Ankenævnet for Forsikring                                                           |
| Ann Dr Liège         | Annales de droit de Liège                                                           |
| AnwBl                | Anwaltsblatt                                                                        |
| AP                   | Areios Pagos                                                                        |
| AP                   | Avant-Projet de loi fédérale                                                        |
| App Cas              | Appeal Cases                                                                        |
| Arch Giur Circ e Sin | Archivio giuridico della circolazione e dei sinistri stradali                       |
| Arch N               | Archeio Nomologhias                                                                 |
| Arm                  | Armenopoulos                                                                        |
| Arr Cass             | Arresten van het Hof van Cassatie                                                   |

|          |                                                           |
|----------|-----------------------------------------------------------|
| art      | Article                                                   |
| ARV      | Zeitschrift für Arbeitsrecht und Arbeitslosenversicherung |
| ass plén | assemblée plénière                                        |
| ATF      | Arrêt du Tribunal fédéral                                 |
| AV&S     | Aansprakelijkheid Verzekering & Schade                    |

**B**

|                  |                                                                   |
|------------------|-------------------------------------------------------------------|
| Bank LR          | Banking Law Reports                                               |
| Bar Rev          | Bar Review                                                        |
| BC               | Ante Christum natum                                               |
| BGB              | Bürgerliches Gesetzbuch                                           |
| BGH              | Bundesgerichtshof                                                 |
| BGHSt            | Entscheidungen des Bundesgerichtshofes in Strafsachen             |
| BGHZ             | Entscheidungen des Bundesgerichtshofes in Zivilsachen             |
| BH               | Bírósági Határozatok (Budapest)                                   |
| BJM              | Bundesjustizministerium                                           |
| BOE              | Boletín Oficial del Estado                                        |
| Bull arr         | Bulletin des arrêts de la Cour de cassation                       |
| Bull ass/De Verz | Bulletin des assurances/De Verzekering                            |
| Bull civ         | Bulletin des arrêts de la Cour de cassation, chambres civiles     |
| Bull crim        | Bulletin des arrêts de la Cour de cassation, chambres criminelles |
| BVerfGE          | Entscheidungen des Bundesverfassungsgerichts                      |
| BW               | Burgerlijk Wetboek                                                |

**C**

|              |                                           |
|--------------|-------------------------------------------|
| c            | considérant                               |
| CA           | Cour d'Appel                              |
| Cass         | Corte di Cassazione                       |
| Cass         | Cour de cassation/Hof van Cassatie        |
| Cass ch réun | Cour de cassation, chambres réunies       |
| Cass civ     | Cour de cassation, chambre civile         |
| Cass Pen     | Cassazione Penale                         |
| Cass req     | Cour de cassation, chambre des requêtes   |
| CC           | Civil Code                                |
| CCC          | Contrats, concurrence, consommation       |
| CCJC         | Cuadernos Civitas de Jurisprudencia Civil |

## Abbreviations

|              |                                                                        |
|--------------|------------------------------------------------------------------------|
| CCP          | Code of Civil Procedure                                                |
| CD           | Culegere de Decizii                                                    |
| CdS          | Consiglio di Stato                                                     |
| CE           | Spanish Constitution 1978                                              |
| CFI          | Court of First Instance                                                |
| CFREU        | Charter of Fundamental Rights of the European Union                    |
| ch           | chambre                                                                |
| ch           | chapter                                                                |
| ChrID        | Chronika Idiotikou Dikaiou                                             |
| Civ          | Tribunal de première instance (chambre civile)                         |
| CJ           | Colectânea de Jurisprudência                                           |
| CJ-STJ       | Colectânea de Jurisprudência – Acórdãos do Supremo Tribunal de Justiça |
| CLJ          | Cambridge Law Journal                                                  |
| CLL          | Civil Law of Latvia                                                    |
| CLR          | Commonwealth Law Reports                                               |
| CLY          | Current Law Year Book                                                  |
| Cmt          | Comment(s), commented                                                  |
| CO           | Code des Obligations                                                   |
| Col Leg      | Colección Legislativa                                                  |
| comm         | commentaire                                                            |
| concl        | conclusions                                                            |
| cons         | Considérant                                                            |
| Cons Stato   | Consiglio di Stato                                                     |
| Contr e impr | Contratto e impresa                                                    |
| Corr         | Tribunal correctionnel                                                 |
| Corr giur    | Corriere giuridico                                                     |
| Corte Cost   | Corte Costituzionale                                                   |
| CP           | Código Penal                                                           |
| CRA          | Circulation, Responsabilité, Assurance                                 |
| CRvB         | Centrale Raad van Beroep                                               |
| CSIH         | Scotland Court of Session, Inner House                                 |
| CSJ          | Curtea Supremă de Justiție                                             |
| CSK          | Czechoslovak koruna                                                    |
| CSOH         | Scotland Court of Session, Outer House                                 |
| CT           | Code du travail                                                        |
| CZK          | Czech koruna                                                           |

## D

|                |                                                     |
|----------------|-----------------------------------------------------|
| D              | Dalloz                                              |
| D              | (Justinian) Digest                                  |
| D&G            | Diritto & Giustizia                                 |
| DAOR           | Droit des affaires Ondernemingsrecht                |
| DCCR           | Droit de la consommation Consumentenrecht           |
| DCFR           | Draft Common Frame of Reference                     |
| DCJ            | Droit de la circulation Jurisprudence               |
| DEE            | Dikaio Etaireion kai Epicheirisseon                 |
| Dir Ass        | Diritto delle assicurazioni                         |
| Dir e Prat Soc | Diritto e Pratica delle Società                     |
| Dir giust      | Diritto e giustizia                                 |
| Dir mar        | Diritto marittimo                                   |
| Dir Tur        | Diritto del Turismo                                 |
| DKK            | Danish Krone                                        |
| DL             | Decreto Legislativo                                 |
| DLA            | Erstatningsansvarsloven                             |
| Dlgs           | Decreto legislativo                                 |
| DLR            | Dominion Law Reports                                |
| DNBC           | Directorate National Building Control               |
| DP             | Recueil periodique et critique Dalloz               |
| DR             | Danno e responsabilità                              |
| Dr Circ/Vr     | Droit de la circulation/Verkeersrecht               |
| DRdA           | Das Recht der Arbeit                                |
| DTA            | Revue du droit du travail et de l'assurance-chômage |
| Dz U           | Dziennik Ustaw                                      |

## E

|         |                                                          |
|---------|----------------------------------------------------------|
| EAEC    | European Atomic Energy Community                         |
| EBH     | Legfelsőbb Bíróság Határozatainak Hivatalos Gyu-jteménye |
| ECHR    | European Convention on Human Rights                      |
| ECJ     | European Court of Justice                                |
| ECR     | European Court Reports                                   |
| ECtHR   | European Court of Human Rights                           |
| Edin LR | Edinburgh Law Review                                     |
| edn     | edition                                                  |
| ed(s)   | editor(s)                                                |
| EEC     | European Economic Community                              |

## Abbreviations

|                 |                                                    |
|-----------------|----------------------------------------------------|
| EEK             | Estonian Kroon                                     |
| EEN             | Efimeris Ellinon Nomikon                           |
| EErgD           | Epitheorissi Ergatikou Dikaiou                     |
| EFSlg           | Ehe- und familienrechtliche Entscheidungen         |
| eg              | exempli gratia (for example)                       |
| EHRR            | European Human Rights Reports                      |
| Ell Dni         | Elliniki Dikaiossini                               |
| EPC             | Evaluation du préjudice corporel                   |
| EPL             | Environmental Protection Law                       |
| ER              | English Reports                                    |
| ERPL            | European Review of Private Law                     |
| ESygkD          | Epitheorissis Sygkoinoniakou Dikaiou               |
| etc             | et cetera                                          |
| EU              | European Union                                     |
| Europa dir priv | Europa e diritto privato                           |
| EvBl            | Evidenzblatt der Rechtsmittelentscheidungen        |
| EWCA Civ        | England and Wales Court of Appeal, Civil Division  |
| EWHC            | England and Wales High Court                       |
| Ex              | Exchequer Cases                                    |
| <b>F</b>        |                                                    |
| f               | and the following page                             |
| FamZ            | Zeitschrift für Familienrecht                      |
| FED             | Forsikringsretlig og Erstatningsretlig Domssamling |
| ff              | and the following pages                            |
| FF              | French Franc                                       |
| FFR             | Försäkringsjuridiska föreningens rättsfallssamling |
| FGA             | Fonds de Garantie Automobile                       |
| FL              | Dutch Guilder                                      |
| fn              | footnote                                           |
| Foro amm        | Foro amministrativo                                |
| Foro It         | Foro italiano                                      |
| forurl          | Forurensningsloven                                 |
| FSR             | Fleet Street Reports                               |
| <b>G</b>        |                                                    |
| Gaz Pal         | Gazette du Palais                                  |
| GCC             | Greek Civil Code                                   |
| GDR             | Greek drachmas                                     |

|                |                                                                                                      |
|----------------|------------------------------------------------------------------------------------------------------|
| GG             | Grundgesetz                                                                                          |
| Giur Comm      | Giurisprudenza commentata                                                                            |
| Giur It        | Giurisprudenza Italiana                                                                              |
| Giur mer       | Giurisprudenza di merito                                                                             |
| Giust Civ      | Giustizia civile                                                                                     |
| Giust Civ Mass | Giustizia civile massimario                                                                          |
| Giust dir      | Giustizia e diritto                                                                                  |
| GKA            | Główna Komisja Arbitrażowa                                                                           |
| GIUNF          | Glaser-Unger, Sammlung von zivilrechtlichen Entscheidungen des KK Obersten Gerichtshofes, Neue Folge |
| GMOs           | Genetically Modified Organisms                                                                       |
| GPCCA          | General Part of the Civil Code Act                                                                   |
| <b>H</b>       |                                                                                                      |
| H              | Højesteret                                                                                           |
| HAVE           | Haftung und Versicherung                                                                             |
| HC             | High Court                                                                                           |
| HCA            | High Court of Australia                                                                              |
| HGB            | Handelgesetzbuch                                                                                     |
| HIV            | Human Immunodeficiency Virus                                                                         |
| HL             | House of Lords                                                                                       |
| HR             | Hoge Raad                                                                                            |
| Hr             | Høyesterett                                                                                          |
| HUF            | Hungarian Forint                                                                                     |
| HWBEuP         | Handwörterbuch des Europäischen Privatrechts                                                         |
| <b>I</b>       |                                                                                                      |
| ÎCCJ           | Înalta Curte de Casație și Justiție                                                                  |
| ICR            | Industrial Cases Reports                                                                             |
| IEHC           | High Court of Ireland                                                                                |
| IESC           | Supreme Court of Ireland                                                                             |
| ILRM           | Irish Law Reports Monthly                                                                            |
| ILT            | Irish Law Times                                                                                      |
| ILTR           | Irish Law Times Reports                                                                              |
| IR             | Irish Reports                                                                                        |
| Ir Jur (ns)    | Irish Jurist (new series)                                                                            |

## J

|                  |                                                              |
|------------------|--------------------------------------------------------------|
| JA               | Jurisprudentie Aansprakelijkheid                             |
| JAP              | Juristische Ausbildung und Praxisvorbereitung                |
| JAR              | Jurisprudentie Arbeidsrecht                                  |
| JBl              | Juristische Blätter                                          |
| JCP              | Juris Classeur Périodique                                    |
| JCP G            | Juris Classeur Périodique Edition Générale                   |
| JDJ              | Journal du droit des jeunes                                  |
| JdT              | Journal des Tribunaux                                        |
| jernbaneansvarsl | Jernbaneansvarsloven                                         |
| JETL             | Journal of European Tort Law                                 |
| JFT              | Juridiska föreningens tidskrift i Finland                    |
| JherJb           | Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts |
| JJP              | Journal des juges de paix                                    |
| JL               | Jurisprudence de Liège                                       |
| JLMB             | Jurisprudence de Liège, Mons et Bruxelles                    |
| JMBI NRW         | Justizministerialblatt für das Land Nordrhein-Westfalen      |
| Journ Proc       | Journal des Procès                                           |
| JP               | Justice de paix                                              |
| JT               | Journal des tribunaux                                        |
| JT               | Juridisk tidskrift                                           |
| JUR              | Jurisprudencia Aranzadi-Westlaw                              |
| JuS              | Juristische Schulung                                         |
| JZ               | Juristenzeitung                                              |

## K

|       |                                       |
|-------|---------------------------------------|
| KB    | Law Reports, King's Bench             |
| KG    | Kammergericht                         |
| KKO   | Korkein oikeus                        |
| KPA   | Kodeks Postępowania Administracyjnego |
| KritE | Kritiki Epitheorissi                  |
| KSchG | Konsumentenschutzgesetz               |

## L

|             |                                                                                |
|-------------|--------------------------------------------------------------------------------|
| L           | legge                                                                          |
| LAT         | Lietuvos Aukščiausiasis Teismas                                                |
| Law Soc Gaz | Law Society of Ireland Gazette                                                 |
| LChP        | Loi fédérale sur la chasse et la protection des mammifères et oiseaux sauvages |

|             |                                                                                 |
|-------------|---------------------------------------------------------------------------------|
| LEC         | Ley de Enjuiciamiento Civil                                                     |
| Legf Bír    | Legfelsőbb Bíróság                                                              |
| LF          | Frostating lagmannsrett                                                         |
| LG          | Landesgericht                                                                   |
| LG          | Landgericht                                                                     |
| lib         | Liber                                                                           |
| Lloyd's Rep | Lloyd's Law Reports                                                             |
| LOA         | Law of Obligations Act                                                          |
| LQR         | Law Quarterly Review                                                            |
| LR          | Law Reports                                                                     |
| LRCSCVM     | Road Traffic Liability and Insurance Act                                        |
| LRJAP       | Legal Regime of Public Administrations and General Administrative Procedure Act |
| LTL         | Lithuanian Litas                                                                |
| LVL         | Latvian Lat                                                                     |
| <b>M</b>    |                                                                                 |
| MCE         | Ustawa o zakładach opieki zdrowotnej                                            |
| MDR         | Monatsschrift für Deutsches Recht                                               |
| Med L Rev   | Medical Law Review                                                              |
| MR          | Medien und Recht                                                                |
| <b>N</b>    |                                                                                 |
| NGCC        | Nuova giurisprudenza civile commentata                                          |
| NGS         | Notiziario di giurisprudenza del Lavoro                                         |
| NILQ        | Northern Ireland Legal Quarterly                                                |
| NJ          | Nederlandse Jurisprudentie                                                      |
| NJA         | Nytt Juridiskt Arkiv                                                            |
| NJB         | Nederlands Juristenblad                                                         |
| NJW         | Neue Juristische Wochenschrift                                                  |
| NjW         | Nieuw juridisch Weekblad                                                        |
| NJW-RR      | Neue Juristische Wochenschrift-Rechtsprechungsreport: Zivilrecht                |
| NL          | Norske Lov                                                                      |
| no          | number                                                                          |
| NOK         | Norwegian Krone                                                                 |
| NoV         | Nomiko Vima                                                                     |
| NSA         | Naczelny Sąd Administracyjny                                                    |
| NSB         | Norges statsbaner                                                               |
| NTBR        | Nederlands Tijdschrift voor Burgerlijk Recht                                    |

## Abbreviations

|           |                                                                           |
|-----------|---------------------------------------------------------------------------|
| NuR       | Natur und Recht                                                           |
| NVwZ      | Neue Zeitschrift für Verwaltungsrecht                                     |
| <b>O</b>  |                                                                           |
| Ø         | Østre Landsret                                                            |
| ÖAMTC-LSK | ÖAMTC-Leitsatzkartei                                                      |
| ÖBA       | Österreichisches Bank-Archiv                                              |
| ÖBl       | Österreichische Blätter für Gewerblichen<br>Rechtsschutz und Urheberrecht |
| obs       | observations                                                              |
| ObZ       | Obchodný zákonník                                                         |
| OCA       | Obligations and Contracts Act                                             |
| OGH       | Oberster Gerichtshof                                                      |
| OJ        | Official Journal                                                          |
| OJLSt     | Oxford Journal of Legal Studies                                           |
| ÖJT       | Österreichischer Juristentag                                              |
| OLG       | Oberlandesgericht                                                         |
| OLGZ      | Entscheidungssammlung der Oberlandesgerichte<br>in Zivilsachen            |
| OR        | Obligationenrecht                                                         |
| OSA       | Orzecznictwo Sądów Apelacyjnych                                           |
| OSAB      | Orzecznictwo Sądów Apelacji Białostockiej                                 |
| OSN       | Orzecznictwo Sądu Najwyższego                                             |
| OSNC      | Orzecznictwo Sądu Najwyższego Izba Cywilna                                |
| OSNCP     | Orzecznictwo Sądu Najwyższego Cywilnego i Pracy                           |
| OSNC ZD   | Orzecznictwo Sądu Najwyższego Izba Cywilna –<br>Zbiór Dodatkowy           |
| OSP       | Orzecznictwo Sądów Polskich                                               |
| OSPIKA    | Orzecznictwo Sądów Polskich i Komisji Arbitrazo-<br>wych                  |
| OZ        | Občiansky zákonník                                                        |
| <b>P</b>  |                                                                           |
| P         | Law Reports, Probate                                                      |
| P & B     | Tijdschrift voor Procesrecht en Bewijsrecht                               |
| Pas       | Pasicrisie                                                                |
| PCA       | Protection of Competition Act                                             |
| PECL      | Principles of European Contract Law                                       |
| PerDik    | Perivallon kai Dikaio                                                     |
| PETL      | Principles of European Tort Law                                           |
| PiM       | Prawo i Medycyna                                                          |