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THE LAW APPLICABLE TO CROSS-BORDER DAMAGE TO THE ENVIRONMENT

A COMMENTARY ON ARTICLE 7 OF THE ROME II REGULATION

Thomas KADNER GRAZIANO*

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Under the Rome II Regulation, several connecting factors come into play for determining the law applicable to cases of cross-border damage to the environment.¹ The following contribution presents these connecting factors and undertakes to provide some guidelines for their interpretation and application (I-IV). The contribution further addresses some highly topical issues, such as the effects that administrative authorisations permitting polluting activities under foreign administrative law may have on claims for cross-border environmental damage (V), and the question of whether claims for the recovery of clean-up costs incurred by public authorities fall under the Brussels I and Rome II Regulations (VI).

Under many domestic liability systems, cases of environmental liability are governed by strict liability. Recital 11 of the Rome II Regulation makes sure that

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¹ For the solutions in force in Europe prior to the entry into force of the Rome II-Regulation, see KADNER GRAZIANO TH., *Gemeineuropäisches Internationales Privatrecht*, Tübingen 2002, p. 236 *et seq.* and 194 *et seq.*; KADNER GRAZIANO TH., *Europäisches Internationales Deliktsrecht*, Tübingen 2003, p. 62 *et seq.* and p. 50 *et seq.*; KADNER GRAZIANO TH., *La responsabilité délictuelle en droit international privé européen*, Bâle 2004, p. 60 *et seq.* and p. 50 *et seq.*

‘for the purposes of this Regulation non-contractual obligations’ are to be ‘understood as an autonomous concept’ and that the ‘conflict-of-law rules set out in this Regulation [...] also cover non-contractual obligations arising out of strict liability’.

I. Freedom of Choice (Art. 14)

According to Art. 14 of the Rome II Regulation, the parties may agree to submit their non-contractual obligations to the law of their choice. Parties in cross-border environmental disputes may therefore firstly consider reaching an agreement as to the law applicable to their relationship. The first task for the Courts will therefore be to examine if a choice of law has been made under Art. 14.

In what is probably the most famous precedent in cross-border environmental case-law in Europe, the case *Bier v. Mines de Potasse d'Alsace*, the Dutch claimant and the French defendant chose Dutch law to govern their relationship before the courts in the Netherlands.² They hereby made sure that the Dutch court of appeal and the Dutch supreme court (*Hoge Raad*) would have the capacity to review the application of the law, which under Dutch law is possible where Dutch law is applied but not where a case is governed by foreign law (i.e. French law).³

II. Law of the Country in which the Damage Occurs (Art. 7, First Part)

If the parties do not reach an agreement on the applicable law, the objective connecting factors of the Rome II Regulation apply. Under the first part of Art. 7, which refers to the general rule for complex torts in Art. 4(1), a claim ‘arising out of environmental damage or damage sustained by persons or property as a result of such damage’ is governed by ‘the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur’.

There are many arguments in favour of applying the law of the country in which the damage occurs. Victims will usually expect to be compensated according to the standards of the law of the place where their rights and interests are damaged and consider this solution to be just and equitable. Under this solution, all

² ECJ Case 21/76 *Bier v. Mines de Potasse d'Alsace* [1976] ECR 1735.

³ See Rechtbank Rotterdam 8. 1. 1979, *Nederlandse Jurisprudentie* 1979, n° 113 at 15.

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victims that suffer damage in the same country are treated equally. Persons who cause damage in the same country are also treated equally, regardless of the place from which they are acting⁴.

Under this rule, if, for example, an Italian company spills poisonous chemicals into the Mediterranean that later cause damage to the natural environment and, e.g., to the fishing and the tourism industries in Corsica⁵, damage claims will be governed by the law of the place where the damage occurred, i.e. by French law. If a British ferry, a Swedish vessel or a Romanian oil-tanker lose containers with toxic chemicals or other polluting substances and hereby cause damage to the beaches in the Netherlands, or if a ship sinks in a storm in the North Sea and blocks Dutch waterways, the claims for clean-up or removal costs will be governed by Dutch law.⁶

Under the Rome II Regulation, the application of the law of the country in which the damage occurred does *not* depend on whether the damaging effect in this country was foreseeable for the defendant, and rightly so. Even though obligations arising out of nuclear damage are not covered by the Rome II Regulation⁷, the accident in Chernobyl in 1986 has made it perfectly clear that emissions can have very far-reaching damaging effects on the environment; effects can cross numerous national boundaries. In a period in which we are becoming increasingly aware of the effects of global warming, foreseeability is no longer an issue in environmental damage claims.⁸

⁴ See, with further references, KADNER GRAZIANO TH., *Europäisches Internationales Privatrecht* (note 1), p. 255 and 213 *et seq.*; LEIBLE S./ENGEL A., 'Der Vorschlag der EG-Kommission für eine Rom II-Verordnung', in: *Europäische Zeitschrift für Wirtschaftsrecht* 2004 7-17, p. 10.

⁵ See the case scenario in Tribunal de grande instance de Bastia 8. 12. 1976 (Montedison), *Recueil Dalloz Sirey* 1977, Jur. 427; Cour d'appel de Bastia 28. 2. 1977, *Riv. dir. int. priv. proc.* 1978, 189; Cour de Cassation 3. 4. 1978, *Rev. crit. dr. int. pr.* 1979, 858.

⁶ See the case scenarios in Hof 's-Gravenhage 25. 6. 1996 (*Atlantic Steam Navigation t. Staat*, or: *Gaelic Ferry*), *Nederlands Internationaal Privaatrecht (NIPR)* 1997, n° 211; Rechtbank 's-Gravenhage 7. 3. 1990, *NIPR* 1991, 163 (*Staat t. Gorthon Lines*); Rechtbank Rotterdam 15. 3. 1991, *Nederlandse Jurisprudentie* 1992, n° 91.

⁷ Art. 1(2)(f) of the Rome II-Regulation.

⁸ For a critical view on the element of foreseeability, see also VON HOFFMANN B., in: STAUDINGER J., *Kommentar zum BGB, Art. 38-42 EGBGB*, Neubearbeitung 2001 by VON HOFFMANN B., Berlin 2001, Art. 40 n° 7. For more details and arguments, see KADNER GRAZIANO TH., *Europäisches Internationales Privatrecht* (note 1), p. 255 *et seq.*

III. Option to Choose the Law of the Country in which the Event Giving Rise to the Damage Occurred (Art. 7, Second Part)

According to the first part of Art. 7 of the Rome II Regulation together with Art. 4(1) to which it refers, the law of the country in which the damage occurred applies. The second part of Art. 7, however, offers the person seeking compensation a unilateral option 'to base his or her claim on the law of the country in which the event giving rise to the damage occurred'. The European legislator has thus, in derogation from the general rule of Art. 4(1) of the Rome II Regulation, and contrary to the rules governing all other complex torts, provided to apply a rule of *ubiquity* for cross-border environmental damage. According to the second part of Art. 7, the harmful event is supposed to occur both at the place where it originated from (the place of acting of the tortfeasor) and the place where the protected interest was damaged. The person seeking compensation can opt for the application of the law of the place of acting. This law will then apply instead of the law of the place where the damaging result occurred.

In *Bier v. Mines de Potasse d'Alsace*, the ECJ adopted the rule of ubiquity for the purpose of international jurisdiction under Art. 5.3 of the Brussels I Convention⁹ and in order to determine the 'place where the harmful event occurred'. Since the court's decision in *Bier*, the rule of ubiquity has been well known throughout Europe. Insofar as it is used to determine the applicable law, the rule is, however, a novelty for many European States.¹⁰

The rule of ubiquity has the effect of discriminating against actors who cause damage across borders. Actors who have their place of business in the country in which the damage occurs are submitted to the tort law of this country and this country alone. However, under the rule of ubiquity in the second part of Art. 7, actors causing exactly the same damage in exactly the same place but acting from abroad, can be submitted to the liability standards of either of the two countries, at the choice of the person seeking compensation.

In the years preceding the adoption of the Rome II Regulation, numerous authors in different European countries argued in favour of the rule of ubiquity for environmental damage despite the fact that they (sometimes fervently) rejected

⁹ The Brussels I Convention is no longer in force except in Denmark. Article 5.3 is now included in the Brussels I Regulation (Regulation 44/2001).

¹⁰ The rule of ubiquity was first introduced by German courts in the late 19th century and was later adopted by the German legislator (Art. 40 sect. 1 of the EGBGB) as well as in Italy (Art. 62 sect. 1 of the Italian PIL Act), in the Czech and Slovakian Republics (§ 15 of the respective PIL Acts), in Hungary (§ 32 sect. 1 and 2 of the law-decree on PIL), in Estonia (§ 164 sect. 3 of the Law on the Principles of the Civil Code), in Slovenia (Art. 30 sect. 1 of the PIL Act), in Russia (Art. 1219 sect. 1 of part III of the Civil Code). For environmental torts it was also adopted in Switzerland (Art. 138 of the PIL Act).

rules of ubiquity for other complex torts.¹¹ The European legislator followed these opinions. However, it is clear that the legislator was well aware that the second part of Art. 7 establishes an exception to the general principle governing complex torts under the Rome II Regulation. This explains why, in Recital 25 of the Rome II Regulation, the European legislator expressly provides several arguments for having chosen a rule of ubiquity in Art. 7 including making a reference to Art. 174 of the EC Treaty.¹² In order to justify the rule of ubiquity in Art. 7 of the Rome II Regulation, three different arguments are presented. Firstly, the legislator refers to the importance of the environment as confirmed by the EC Treaty. Secondly, it highlights the precautionary principle and the preventive function of liability laws in cross-border situations which, according to the legislator, is at its most effective if the most severe of the possible liability regimes in a given case is applied. Finally, the legislator invokes the 'polluter pays' principle. According to the European legislator these arguments 'fully justify the use of the principle of discriminating in favour of the person sustaining the damage' in the second part of Art. 7. In doing this, the legislator has openly and transparently balanced these reasons against the principle of equal treatment of potential polluters and has given priority to the former.

Before Rome II, in countries in which rules of ubiquity were in force, the courts more often than not applied the law of the country in which the damage occurred. In claims for environmental damage however, the courts repeatedly applied the law of a country in which the event giving rise to the damage occurred (i.e. the law of the place where the tortfeasor had acted) which was more beneficial for the person seeking compensation. For example, in Germany, the courts have repeatedly decided claims for environmental damage caused in Germany but originating from sources in France, not under German law but under French law which

¹¹ See, e.g., BEAUMONT P., 'Private International Law of the Environment', in: *Judicial Law Review* 1995, p. 35 *et seq.*; BETLEM G./BERNASCONI CH., 'European Private International Law, The Environment And Obstacles for Public Authorities', in: *Law Quarterly Review* 2006, 124 at p. 138 *et seq.*: 'race to the top' and 'levelling up'; DROZ G., 'Regards sur le droit international privé comparé', *Recueil des Cours*, Vol. 229 (1991) 9 at 300; JESSERUN D'OLIVEIRA H.U., 'Le Bassin du Rhin, sa pollution et le droit international privé', in: *La réparation des dommages catastrophiques - les risques technologiques majeurs en droit international et en droit communautaire*, Travaux des XIIIes Journées d'études juridiques, Brussels 1990, p. 165 *et seq.*, 167 *et seq.*; VON BAR CH., *Internationales Privatrecht*, Vol. II, München 1991, n° 668 f.; KROPHOLLER J., *Internationales Privatrecht*, 6th ed., Tübingen 2006, § 53 IV 2. a); WANDT M., 'Deliktsstatut und internationales Umwelt-haftungsrecht', in: *RSDIE* 1997, 147 at 174; VON HEIN J., *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, p. 121 *et seq.* – Contrast with, e.g., KADNER GRAZIANO TH., *Gemeineuropäisches IPR* (note 1), p. 252 *et seq.*; LEIBLE S/ENGEL A. (note 4) p. 10: in favour of the application of the law of the country in which the damage occurred.

¹² Title XIX of the EC Treaty, Environment, Art. 174(2) provides: 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.

was more favourable to the victim.¹³ The second part of Art. 7 of the Rome II Regulation introduces this option, offering this possibility from January 2009 on at a European-wide level.

The ‘question of *when* the person seeking compensation can make the choice of the law applicable’ should, according to Recital 25 of the Rome II Regulation, ‘be determined in accordance with the law of the Member State in which the court is seized’. So, for the time being, the Regulation does not give the ECJ the power to develop common, autonomous criteria relating to the deadline by which a choice must be made when using the option under the second part of Art. 7 but rather refers this issue to the *lex fori*. This choice is understandable given that, except for Art. 40 sect. 1(3) of the German EGBGB¹⁴, no national legislator had explicitly dealt with this issue in any PIL Act prior to the adoption of the Rome II Regulation. Common European standards were therefore difficult to detect. This referral to the *lex fori* may, however, lead to some uncertainty as to when the option must be used. Arguably, it could have been left to the courts and ultimately to the ECJ to develop common European standards as for when the choice of law under the second part of Art. 7 has to be made.¹⁵

IV. Injunctions

Art. 7 of the Rome II Regulation does not make a distinction between claims for damages and claims for other remedies, such as prohibitory or mandatory injunctions. According to Art. 2(2) and Art. 2(3)(a) and (b), the rules of the Rome II Regulation, however, also apply to ‘non-contractual obligations that are likely to arise’, Art. 2(2), and to damage that is likely to occur, Art. 2(3)(a) and (b). In principle, the Regulation therefore governs both compensation and injunctions.

In the past, in the field of environmental damage originating from immovable property, injunctive relief was, in some countries, qualified as an issue of property law rather than as an issue of the law of tort or delict.¹⁶ Should this also be

¹³ OLG Saarbrücken 22. 10. 1957, *Neue Juristische Wochenschrift* 1958, 752; LG Saarbrücken 4. 6. 1961, *IPRspr.* 1960/61 Nr. 38, confirmed in OLG Saarbrücken 5. 3. 1963, *IPRspr.* 1962/63 Nr. 38; OLG Karlsruhe 4. 8. 1977, *IPRspr.* 1977 Nr. 27.

¹⁴ The provision reads: ‘Das Bestimmungsrecht kann nur im ersten Rechtszug bis zum Ende des frühen ersten Termins oder dem Ende des schriftlichen Vorverfahrens ausgeübt werden’ (according to this rule, the choice has to be made at an early stage of the procedure before the court of first instance).

¹⁵ However, in the end, this was not done. Under the current rule, one can well imagine a situation in which the time period in which this choice must be made has expired under one of the legal systems and not under the other. This may, once again, give incentives for forum shopping.

¹⁶ References in KADNER GRAZIANO TH., *Europäisches Internationales Deliktsrecht* (note 1), p. 60 and fn. 308.

the case under the Rome II Regulation, these remedies would not qualify as ‘non-contractual obligations’ and would therefore not fall within the scope of the Rome II Regulation. Several reasons can however be put forward for qualifying injunctions in environmental issues as non-contractual obligations (as opposed to obligations under property law) and thus bringing them within the scope of the Rome II Regulation and in particular within the scope of Art. 7.

Firstly, in the national legal orders of the Member States of the European Union, the right to compensation and the right to injunctive relief are often closely linked and dependent upon each other. This is why in cross-border situations the two issues should not be treated separately and under different laws but rather be governed by the same law.¹⁷ Secondly, taking a comparative look at the existing laws also seems to favour treating both issues under the same law. In those countries in which the issue has been dealt with explicitly, damage claims and injunctions have (finally) been subjected to the laws of the same country. This is true for Germany, where Art. 44 of the EGBGB explicitly submits emissions originating from immovable property to the conflict-of-law rules governing tortious liability¹⁸, and it is also the case in Switzerland, where the dominant opinion in legal writing qualifies such issues as belonging to the law of obligations.¹⁹

Given the close link between rights for compensation and injunctive relief, the option under the second part of Art. 7 of the Rome II Regulation should not be interpreted as allowing the two remedies to be treated separately, i.e. breaking that link. In principle, it should therefore not be possible to opt for different laws to apply for damages and injunctions.

¹⁷ See, e.g., HAGER G., ‘Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen’, in: *RabelsZ* 1989/53, 293 at 297 *et seq.*; KERSCHNER F., ‘Zur Haftung nach § 26 Wasserrechtsgesetz und zum Deliktstatut im IPR’, *Juristische Blätter* 1983, 337 at 349; WANDT M., in: *SZIER* 1997, 147 at 174; WOLF U., *Deliktstatut und internationales Umwelthaftungsrecht*, Berlin 1995, p. 175 *et seq.*

¹⁸ Art. 44 of the EGBGB refers for ‘Ansprüche aus Beeinträchtigungen, die von einem Grundstück ausgehen’ (emissions that emanate from real property) to Art. 40 sect. 1 of the EGBGB, i.e. the general rule governing torts.

¹⁹ BUCHER A./BONOMI A., *Droit international privé*, 2nd ed., Bâle/Frankfurt a. Main 2004, n° 1113; DASSER F., in: HONSELL H./VOGT N. P./SCHNYDER A., *Internationales Privatrecht (Basler Kommentar)*, 2nd ed., Basel 2007, Art. 138, n° 1; HEINI A., in: GIRSBERGER D./HEINI A./KELLER M./KREN KOSTKIEWICZ J./SIEHR K./VISCHER F./VOLKEN P. (eds.), *Zürcher Kommentar zum IPRG, Kommentar zum Bundesgesetz über das internationale Privatrecht (IPRG) vom 18. Dezember 1987*, 2nd ed., Zürich 2004, Art. 138 n° 4; DUTOIT B., *Commentaire de la loi fédérale du 18 décembre 1987*, 4th ed., Bâle/Frankfurt a. Main 2005, Art. 138 n° 4.

V. Effects of Administrative Authorisations Abroad

In some countries, in cases in which an administrative authorisation was granted permitting the polluting activity, compliance with the authorisation and with regulatory standards excludes the application of civil law actions altogether. More frequently however, administrative authorisations exclude the possibility to obtain injunctions but do not lead to immunity from damage claims. Under a third type of regime, administrative licences do not affect claims under private law at all.²⁰ The effects of an administrative licence depend on the specific administrative regime in question and the effects of licences do not only differ from one country to another but also within one given legal system.²¹

Where pollution affects parties across national borders, the polluting activity may be covered by a foreign administrative authorisation or licence. The question then is whether and to what extent the licence should be recognised in other countries and whether it excludes the possibility of obtaining civil law remedies for damages or injunctions in neighbouring countries. Examples in which this issue was raised include the claims brought by German landowners before the German courts against the operator of Zurich airport²² and claims brought before the Austrian courts by Austrian farmers against the construction of a nuclear reprocessing plant in Wackersdorf in Germany.²³

The effect of foreign administrative authorisations has proved to be a very delicate issue²⁴ and the Rome II Regulation does not provide an explicit answer to this question either. Under the Rome II Regulation, different situations need to be distinguished. If according to Art. 14 of the Rome II Regulation, the parties agree to their relationship being governed by the law of the country in which the event giving rise to the damage occurred (the country of the place of acting), or if the person seeking compensation opts for the law of this country under the second part of Art. 7 of the Rome II Regulation, this law will govern all issues, i.e. damage claims, injunctions and the effect of administrative licences, without any major problems of coordination.

If, however, the parties do not reach such an agreement and if the person seeking compensation does not unilaterally opt for the law of the country in which the event giving rise to the damage occurred, the obligations arising out of damage

²⁰ This was the case, e.g., for the French licence in *Bier v. Mines de Potasse d'Alsace*, see *supra* (note 3).

²¹ See, e.g., STALLWORTHY M., 'Environmental Liability and the Impact of Statutory Authority', in: *Journal of Environmental Law* 2003/15, 3 at 16 *et seq.*; DASSER F., in: HONSELL H./VOGT N. P./SCHNYDER A. (note 19), Art. 138, n° 19 with further references.

²² LG Waldshut/Tiengen, 11. 2. 1982, *Umwelt- und Planungsrecht* 1983, 14 (Zürich Kloten airport).

²³ OLG Linz 15. 6. 1987, *Juristische Blätter* 1987, 577, and OGH 20. 12. 1988, *Juristische Blätter* 1989, 239 (nuclear reprocessing plant Wackersdorf).

²⁴ See with further references KADNER GRAZIANO TH., *Gemeineuropäisches IPR* (note 1), p. 250 *et seq.*, 256 *et seq.*

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to the environment will be governed by the law of the country in which the damage occurred and the effects of the foreign licence on these actions will need to be determined.

In such situations, certain courts in Europe adopted the position that, according to the principle of territoriality, administrative licences deploy their effect only within the territory of the state in which they were issued. These courts have consequently completely ignored foreign licences.²⁵ Completely ignoring foreign licences may, however, lead to the judgment not being recognised or enforced in the country in which the licence was issued as such disregard for the licence may be seen as a violation of this country's public order.²⁶ It is true that tort cases in which foreign judgements were held to violate the public order are very rare in Europe.²⁷ However, even under the Brussels I Regulation such a refusal remains an option (see Art. 27.1 of the Brussels I Regulation).²⁸

Courts in the Netherlands and Austria have adopted a different position as to the effect of foreign licences.²⁹ According to these decisions, foreign administrative authorisations are to be taken into consideration if *a)* the emissions are in accordance with public international law, if *b)* the conditions of foreign law to issue such licences are similar to the conditions existing for such licences under the *lex fori*, and if *c)* the party seeking compensation or an injunction has had the chance to participate, to be heard and to raise objections in the administrative procedure that led to the issuing of the licence.³⁰

These decisions of Dutch and Austrian courts should be regarded as sources of inspiration for the solution of the problem under the Rome II Regulation. On the level of the *substantive law* applicable under the Rome II Regulation, licences granted under foreign law should be taken into consideration as local data and a matter of fact if they fulfil the requirements established by the case-law mentioned

²⁵ BGH 10. 3. 1978, *IPRspr.* 1978, n° 40; OLG Saarbrücken 22. 10. 1957, *Neue Juristische Wochenschrift* 1958, 752 at 754.

²⁶ OGH 13. 1. 1988, *Juristische Blätter* 1988, 323 (*Chernobyl*): 'Die aufwendige Schöpfung von Urteilen, die nicht mehr sind, als ein wertloses Stück Papier, gehört nicht in den Aufgabenbereich der inländischen Gerichtsbarkeit' (Translation: It is not the task of the domestic courts to produce judgements that aren't worth more than the paper they are written on.) See for a critical analysis also HAGER G., *RabelsZ* 1989/53, 293 at 302 *et seq.*; WANDT M., *RSDIE* 1997, 147 at 168 *et seq.*

²⁷ For references, see KADNER GRAZIANO TH, *Gemeineuropäisches IPR* (note 1), p. 406 *et seq.*

²⁸ In the case-law of European courts, it seems that no case has ever been reported in which a claim for an injunction against a polluting activity in a foreign country has been successful. On the contrary, there are several cases in which damage claims have been successful.

²⁹ Rechtbank Rotterdam 16. 12. 1983, *Nederlandse Jurisprudentie* 1984, n° 341 at 8.7; OLG Linz 15.6.1987, *Juristische Blätter* 1987, 577, and OGH 20. 12. 1988, *Juristische Blätter* 1989, 239.

³⁰ OLG Linz, *Juristische Blätter* 1987, 577 at 579.

above.³¹ If necessary, the applicable national liability laws would need to be adapted accordingly.

VI. The Qualification of Claims for Compensation by Public Authorities

Another question concerns the qualification of claims for compensation for clean-up costs or the costs of preventive measures incurred by public authorities. This issue has become even more important since the 2004 'Directive on environmental liability with regard to the prevention and remedying of environmental damage'³² gave the right to recover clean-up costs exclusively to public authorities without providing for specific procedures to bring such claims against parties that have caused such damage from abroad.

A. The Problem: Clean-Up Costs Incurred by Public Authorities

If a person sustains damage to his health or property as a result of environmental damage, he or she will, under the tort law systems of practically all Member States of the European Union, be entitled to claim compensation under certain circumstances. For situations in which there has been no damage to private property as such, most Member States of the EU grant public authorities the right to take preventive action and, under certain circumstances, grant the right to claim the cost of the clean-up operation from the person who caused the damage.

The 2004 European Directive on environmental liability also grants public authorities the right to recover such costs from the person who caused them. The Commission first considered giving similar rights to private parties, in particular to environmental associations which would have been particularly competent and apt

³¹ See the groundbreaking ideas put forward by: STOLL H., 'Internationales Sachenrecht', in: STAUDINGER J., *Kommentar zum BGB, Internationales Sachenrecht*, Bearbeitung 1996 von Hans Stoll, Berlin 1996, at n° 231 *et seq.*, 237, 240; STOLL H., 'Diskussionsvotum', *Berichte der Deutschen Gesellschaft für Völkerrecht* 32, 1992, p. 372; see also VON BAR CH., *IPR* (note 11), at n° 717; KREUZER K., *Berichte der Deutschen Gesellschaft für Völkerrecht* 32, 1992, p. 290 *et seq.* (an issue of the substantive law of tort, i.e. of the *lex causae*); the dominant opinion in Switzerland is also in favour of taking foreign licences into consideration at the *lex causae* level (Datums-Theorie), DASSER F., in: HONSELL H./VOGT N P./SCHNYDER A. (eds.), *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, 2nd ed., Basel/Frankfurt a. Main 2007, Art. 138 n° 15; BUCHER A./BONOMI A. (note 19), n° 1115; for the Netherlands, see BETLEM G., *Civil Liability for Transfrontier Pollution*, London/Dordrecht/Boston 1993, p. 178 *et seq.*

³² Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56 of 30. 4. 2004.

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to enforce these rights. The Commission finally decided, however, to rely exclusively on public authorities.

If a person has caused damage to the environment across a national border and if a public authority in the country in which the damage occurred intervenes to remedy the damage and claims compensation for such costs, the question then is whether the international jurisdiction and the applicable law are to be determined according to the Brussels I and Rome II Regulations, or whether the issue is a matter of public law and consequently does not fall within the scope of either Regulation. The fact that the Directive on environmental damage gives recovery rights *exclusively* to public authorities makes the issue of the applicable rules to cross-border actions for the recovery of such costs highly topical today.

B. ‘Civil Matters’ in the Sense of the Brussels I and Rome II Regulations

Whether the Brussels I and Rome II Regulations apply to actions brought by a public authority depends on whether the issue is a ‘civil’ or ‘commercial’ matter in the sense of Art. 1(1) of the Brussels I Regulation and of Art. 1(1) of the Rome II Regulation.

1. Preliminary Observations

In dealing with this question, several preliminary observations must be made.

First of all, the fact that a claim is brought by a public authority does not in itself exclude it from falling into the scope of application of the Brussels I and Rome II Regulations.³³

Secondly, the ECJ has, in a well-established line of precedents, ruled that the concept of ‘civil and commercial matters’ in Art. 1(1) of the Brussels I Regulation ‘must be regarded as an independent concept which must be construed with reference first to the objectives and scheme of the [Regulation] and secondly to the general principles which stem from the corpus of the national legal systems’.³⁴ Cases in which ‘the public authority acts in the exercise of its powers’ are excluded from the scope of the Regulation(s).³⁵

Thirdly, according to Recital 7 of the Rome II Regulation, the ‘substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.’ The Brussels I, Rome I, and Rome II Regulations should therefore be construed in accordance with one another. What is more, in environmental liability issues the

³³ See, e.g., ECJ Case 29/76 *LTU v. Eurocontrol*, ECR 1976 p. 01541, at n° 4.

³⁴ Since ECJ Case 29/76 *LTU v. Eurocontrol*, ECR 1976 p. 01541, at n° 3, 5; quote from: ECJ Case 814/79, *Netherlands v. Rüffer*, ECR 1980 p. 03807, Summary at n° 1.

³⁵ ECJ Case 29/76 *LTU v. Eurocontrol*, ECR 1976 p. 01541, at n° 4, 5.

interpretation of these regulations should also be in accordance with the 2004 Directive on environmental liability.

A fourth aspect to be taken into consideration is that Art. 2 of the EC Treaty counts the protection of the environment among the fundamental principles of the EU³⁶ and Art. 174(2) of the EC Treaty expressly adopts the ‘polluter pays’ principle.³⁷

2. *Proposal for a Solution*

According to a well-established line of precedents of the ECJ, cases ‘where the public authority acts in the exercise of its powers’ are excluded from the scope of the Regulation(s).³⁸ In several decisions, the ECJ has given guidelines as to when a public authority is to be regarded as acting in the exercise of its powers.

In the case *Netherlands v. Ruffer*³⁹ a German boat had collided with a Dutch motor vessel and had sunk in a public waterway. An international treaty between Germany and the Netherlands provided that the Netherlands were to be responsible for the ‘removal of wrecks’ in the waterway. The Dutch authorities had the wreck removed by a Dutch company and claimed compensation for the removal costs from the German owner of the sunken vessel. The Dutch *Hoge Raad* (Supreme Court) referred the issue to the ECJ in order to clarify whether the claim for redress was a ‘civil and commercial matter’ under Art. 1 of the Brussels I Convention (now: the Brussels I Regulation). The ECJ held that if a State removes ‘a wreck in a public waterway, administered by the State responsible in performance of an international obligation and on the basis of provisions of the national law which, in the administration of that waterway, confer [the State] the status of public authority in regard to private persons’, the State claiming recovery of such costs acts ‘in the exercise of its public authority powers’.⁴⁰ The fact that the State brought a claim for

³⁶ Part One, Principles, Art. 2 of the EC Treaty reads: ‘The Community shall have as its task [...] to promote throughout the Community [...] a high level of protection and improvement of the quality of the Environment [...]’.

³⁷ Title XIX, Environment, Article 174(2) reads: ‘Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.’ In the arguments for the rule of ubiquity in of Art. 7 of the Rome II Regulation, the European legislator expressly refers to Art. 174 of the EC Treaty, see Recital 25 of the Rome II Regulation and the text *supra*. See also BETLEM G./ BERNASCONI CH., ‘European Private International Law, the Environment and Obstacles for Public Authorities’, in: *Law Quarterly Review* 2006, 124 at 136.

³⁸ See *supra* (notes 34 and 35).

³⁹ ECJ Case 814/79, ECR 1980 p. 03807.

⁴⁰ *Supra* (note 39), n° 8, 9. For a critical analysis of this case-law, see BETLEM G./ BERNASCONI CH. (note 37), at 132 *et seq.*

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damages once the removal had been effected did not, according to the ECJ, change the character of the measure taken and did not have the effect that it was to be qualified as a civil matter.

In later cases, the ECJ took a broader view as to the notion of 'civil or commercial' matters in the sense of Art. 1(1) of the Brussels I Regulation. In 1993, the ECJ had to decide on a damage claim brought by the parents of a pupil against a German state-school teacher for having caused the death of their son on a school trip to Italy. The teacher was supposed to have been supervising the pupils, had breached this duty and as a result caused the death of the claimants' son. In this case, the ECJ held that the claim was a 'civil matter' even though the teacher was acting in the capacity of civil servant and even though the case was covered by a scheme of social insurance under public law that, according to German law, excluded a direct damage claim against a teacher.⁴¹ The court argued that 'a teacher in a State school assumes the same functions vis-à-vis his pupils [...] as those assumed by a teacher in a private school' and held that 'the right to obtain compensation for injury suffered as a result of conduct regarded as culpable in criminal law is generally recognized as being a civil law right'.⁴²

In recent judgements the ECJ held that actions against individuals for the recovery of expenses made by public authorities may well fall within the scope of the Brussels I Convention/Regulation.⁴³ In the *Baten* case, a community in the Netherlands had paid monthly contributions to a woman under Dutch social assistance laws. These laws provided a right to recovery for the amounts paid 'from persons who do not, or do not fully, meet their maintenance obligations following a divorce' and, accordingly, the Dutch community claimed recovery from the woman's ex-husband, living in Belgium. The ECJ held that such an action for recovery of sums paid by public authorities, as long as exercised in accordance with the rules and principles governing actions for recovery between private parties, is well within the scope of application of the Brussels I Regulation.⁴⁴ If this principle is applied to the field of environmental law, an action for recovery of expenses incurred for cleaning up the environment or for preventing harm should be regarded as a 'civil matter' as long as the recovery is in accordance with the principles governing the right of recovery between private parties.

Moreover, in the field of environmental law, the European legislator has created important new landmarks that today have to be taken into consideration when constructing the concept of 'civil and commercial matters' in the European conflict of laws.

A first landmark is the 2004 Directive on environmental liability. On the one hand, Art. 3(3) of the Directive provides that '[w]ithout prejudice to relevant

⁴¹ ECJ Case C-172/91 *Volker Sonntag*, ECR 1993 I-01963 at n° 20-22.

⁴² *Supra* (note 41), at n° 19.

⁴³ ECJ Case C-271/00 *Baten*, ECR 2002 I-10489.

⁴⁴ *Supra* (note 43), at n° 34-37. See also BETLEM G./BERNASCONI CH. (note 37), at 134: 'The parallel with the Rüffer scenario where a right of recourse for cost recovery of removal of a wreck was at issue is striking'.

national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage.’ On the other hand, Art. 15(3) of the Directive is based on the idea that a State can also recover costs incurred under the Directive against parties having caused the damage from abroad and being domiciled in a foreign country. Art. 15(3) provides that ‘[w]here a Member State identifies damage within its borders which has not been caused within them [...] it may seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures’.⁴⁵

The Directive does not establish a specific procedure for the recovery of such costs but states in its Recital 10(2) that ‘[t]his Directive, which does not provide for additional rules of conflict of laws when it specifies the powers of the competent authorities, is without prejudice to the rules on international jurisdiction of courts as provided, inter alia, in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’, i.e. the Brussels I Regulation. Consequently, according to the European legislator, the right to claim for the recovery of clean-up costs or the cost of preventive measures granted to public authorities under the 2004 Directive on environmental liability need, as far as cross-border claims are concerned, to be constructed as matters falling within the scope of the Brussels I Regulation. Since there is no special regime to enforce cross-border compensation of public authorities, such rights under the Directive would otherwise simply not be enforceable and would risk being a dead letter.⁴⁶

There are further arguments in support of this view: In certain cases, preventive measures and damage claims following harm to the environment can be brought by individuals or, in some countries, by environmental associations. Such claims are, without any doubt, civil claims in the sense of the Brussels I and Rome II Regulations. The European legislator could very well have extended such remedies when drafting the 2004 Directive on environmental liability. The European legislator considered this option but finally decided to rely exclusively on public authorities. In the 2004 Directive however, the legislator, combined elements of public law with those of private law which has led to the Directive having a somewhat hybrid character.⁴⁷ The fact that the rights for compensation and to recovery

⁴⁵ Art. 15(3) of the Directive reads: ‘Where a Member State identifies damage within its borders which has not been caused within them it may report the issue to the Commission and any other Member State concerned; it may make recommendations for the adoption of preventive or remedial measures and it may seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures’.

⁴⁶ See BETLEM G./BERNASCONI CH. (note 37), at 128.

⁴⁷ See, e.g., DE SADELEER N., ‘La directive 2004/35/CE relative à la responsabilité environnementale: avance ou recul pour le droit de l’environnement des Etats Membres?’, in: VINEY G./DUBUISSON B. (eds.), *Les responsabilités environnementales dans l’espace européen*, Bruxelles/Zürich/Paris 2006, n° 59: ‘Il ressort de notre analyse que la directive 2004/35/CE s’inscrit davantage dans la perspective d’une redéfinition des mesures de police

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of clean-up costs could very well have also been granted to individuals and to environmental associations but were not shown that such measures and claims do not necessarily belong to the sphere where the public authority acts 'in the exercise of its public powers' vis-à-vis the polluter and that they are well beyond the sphere of '*acta iure imperii*'. The task of cleaning up the environment (and claiming compensation for the clean-up costs) can be handed over to private parties, just as teaching pupils can be left to private schools.⁴⁸

Moreover, since the adoption of the Rome II Regulation, several arguments following from this Regulation support this view. Recital 9 as well as Art. 1(1) of the Rome II Regulation exclude 'administrative matters or [...] the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)' from the scope of the Regulation. As we have just seen, compensation for environmental harm in cross-border cases is neither an administrative matter nor does it follow from *acta iure imperii*.

Probably the strongest argument in favour of applying the Brussels I and Rome II Regulations to claims brought by public authorities in the field of environmental damage follows from Recital 24 and the first part of Art. 7 of the Rome II Regulation. Recital 24 defines 'environmental damage' as an 'adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms'. The Rome II Regulation thus defines 'environmental damage' independently of any damage to rights of the individual such as life, health or, in particular, of property. The first part of Art. 7 of the Rome II Regulation confirms that the Regulation applies independent of any damage to property rights of the individual: Art. 7 clearly draws a distinction between 'a non-contractual obligation arising out of environmental damage' and a non-contractual obligation arising out of 'damage sustained by persons or property as a result of such damage' – and it expressly covers both scenarios. Consequently, the Rome II Regulation covers not only damage to private property rights sustained via the environment, but covers also damage to the environment itself. Currently, individuals can bring claims for pure environmental damage only in certain cases and, on a European-wide level, only to a limited extent.⁴⁹ The recovery of compensation for damage to the environment through remedies available to private parties is currently only patchy at best. As we have seen, the 2004 Directive on environmental liability in its Art. 11 grants the right to recover damages for pure

administrative et, plus particulièrement, de la prise en charge de leur coût par les exploitants. Pour arriver à cette fin, le législateur communautaire a manifestement emprunté largement aux concepts de la responsabilité civile, ce qui a parfois conduit à un étonnant mélange des genres'.

⁴⁸ See the ECJ's argument in the Case C-172/91 *Volker Sonntag*, *supra* (note 41).

⁴⁹ For details and different proposal for solutions, see GODT CH., *Haftung für ökologische Schäden*, Berlin 1997; LEONHARD M., *Der ökologische Schaden. Eine rechtsvergleichende Untersuchung*, Baden-Baden 1996; KADNER TH., *Der Ersatz ökologischer Schäden – Ansprüche von Umweltverbänden*, Berlin 1995; SEIBT CH., *Zivilrechtlicher Ausgleich ökologischer Schäden*, Tübingen 1994.

environmental harm exclusively to public authorities. As the Rome II Regulation will also cover pure environmental harm, the intention of the legislator of the Rome II Regulation must clearly have been that these claims shall be regarded as ‘civil matters’ that fall within the scope of application of both the Rome II and Brussels I Regulations.

Therefore, damage claims brought by public authorities against private parties for cross-border damage to the environment are to be regarded as ‘civil matters’ under both the Rome II Regulation and the Brussels I Regulation. The ECJ will have to take these recent groundbreaking legislative decisions into account when interpreting the notion of ‘civil matters’ in the Brussels I and Rome II Regulations in future cases.⁵⁰

VII. Conclusion

Prior to the entry into force of the Rome II Regulation, several fundamentally different rules were applied to determine the law applicable to cross-border environmental torts. Art. 7 of the Rome II Regulation achieves legal certainty as to the applicable law in cases of damage to the environment for actions for damages and actions for injunctive relief on a European-wide level.

Given the fact that the Brussels I and Rome II Regulations have to be constructed in accordance with one another and with the Directive on environmental liability, Rome II does not only contribute to legal certainty as to the applicable law but also leads to important clarifications in matters of international jurisdiction and the recognition and enforcement of judgements in Europe.

⁵⁰ See also BETLEM G./BERNASCONI CH. (note 37), at 150: ‘we call upon courts to interpret the notion of ‘civil and commercial matters’ so as to include civil law claims by public authorities for the protection of the environment’.