ARTICLES

The 1968 Brussels Convention and Liability for Nuclear Damage

by Philippe Sands and Paolo Galizzi*

1. Introduction

The legal regime governing civil liability for transboundary nuclear damage is expressly addressed by two instruments adopted in the 1960s: the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy (hereinafter referred to as "the Paris Convention")[1] and the 1963 Vienna Convention on Civil Liability for Nuclear Damage (hereinafter referred to as "the Vienna Convention").[2] These establish particular rules governing the jurisdiction of national courts and other

---

* Phillipe Sands is a barrister and he is also Professor of International Law at the University of London and Global Professor of Law at New York University. Paolo Galizzi is a Lecturer in Law at the University of Nottingham. The facts contained and ideas expressed in this article are the responsibility of the authors alone.

1. The Paris Convention was negotiated and concluded on 29 June 1960 under the auspices of the OECD Nuclear Energy Agency (NEA) with the aim of providing adequate protection to the public from possible damage caused by activities in the field of nuclear energy. The drafters of the Convention wanted also to ensure that the burden of liability would not inhibit the growth of the nuclear industry. It entered into force on 1 April 1968 and was revised by an Additional Protocol of 28 January 1964 to bring it closer to the Vienna Convention and by a Protocol of 16 November 1982 to bring the Convention up-to-date, particularly by replacing the unit of account for compensation with the Special Drawing Rights (SDRs) of the International Monetary Fund (approximately USD 1). The following States are party to the Convention: Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom. The text of the Paris Convention, as amended by the 1964 and 1982 Protocols, can be found in the OECD/NEA brochure entitled *Paris Convention on Third Party Liability in the Field of Nuclear Energy – Brussels Convention Supplementary to the Paris Convention*, Paris, 1989, and in P. SANDS, R. TARASOFSKY AND M. WEISS, (Eds.), *Documents in International Environmental Law*, vol. IIB, (1994), pp. 1385-1401. For a general analysis of this Convention see P. W. BIRNIE AND A. E. BOYLE, *International Law and the Environment*, (1992), pp. 371-386; P. SANDS, *Principles of International Environmental Law I. Frameworks, standards and implementation*, (1995), pp. 653-657.

2. The Vienna Convention was negotiated under the auspices of the International Atomic Energy Agency (IAEA) and was concluded on 21 May 1963. It entered into force on 12 November 1977. The Convention also includes an Optional Protocol providing a dispute settlement mechanism, which has not yet entered into force. As of 13 April 1999, the 32 Contracting Parties to the Vienna Convention are: Argentina, Armenia, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Chile, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Latvia, Lebanon, Lithuania, Mexico, Niger, Peru, Philippines, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Ukraine, Uruguay, Yugoslavia (Serbia and Montenegro). The text of the Convention can be found in IAEA INFCIRC/500 of 20 March 1996 and in P. SANDS, R. TARASOFSKY AND M. WEISS, (Eds.), *Documents in International Environmental Law*, vol. IIB, (1994), pp. 1413-1429.

matters, including channelling of liability to nuclear operators, definitions of nuclear damage, the applicable standard of care, and limitations on liability. Another instrument – the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (hereinafter referred to as "the Brussels Convention")[3] – which is not often mentioned in the nuclear context will nevertheless also be applicable in certain cases. It is premised upon different rules as to forum and applicable law, and presents an alternate vision of the appropriate arrangements governing civil liability for nuclear damage. In this paper we consider the relative merits and demerits of the Brussels Convention from the perspective of non-nuclear states which might suffer damage as a result of a nuclear accident in another state. We conclude that in the context of the applicability of the Brussels Convention the dedicated nuclear liability conventions present few attractions to non-nuclear states in Europe.

We focus in particular on issues relating to jurisdiction and applicable law, and do so by reference to a hypothetical accident in the United Kingdom which has transboundary effects in Ireland. We are principally concerned with two questions: which courts have jurisdiction over private claims for the damage caused in these various countries,[4] and which law will the competent courts apply? These questions may be posed in the broader context of an overarching question, namely whether non-nuclear states (and those within their jurisdiction) have any incentive to abandon the approach of the Brussels Convention and subscribe to the regimes established by the Paris and Vienna conventions. Our conclusion is that non-nuclear states are unlikely to gain much from participating in the Paris and Vienna regime, and their citizens may well be better off relying on the 1968 Brussels Convention where it is applicable.

In this paper we begin by summarising the approach of the Paris and Vienna Conventions (Sections 2 and 3). We will then analyse the jurisdictional rules applicable to accidents and damage occurring in States which are not party to one of the two dedicated international nuclear regimes, concentrating our attention on the rules applicable in the European context, rules which, we will argue, can be found in the 1968 Brussels Convention (Section 4). Finally, we will look at the solutions given to some of the issues analysed in this article, issues addressed by the Irish courts in an ongoing case (Section 5).

---

3. The Brussels Convention entered into force on 1 February 1973 for the six original Member States of the European Community (Belgium, France, Germany, Italy, Luxembourg and the Netherlands). The new Member States of the Community had the obligation to join the Convention, which was amended in 1978 for the accession of Denmark, Ireland and the United Kingdom, in 1982 for the accession of Greece and finally in 1989 for the accession of Spain and Portugal. The three most recent Member States, Austria, Finland and Sweden will have to accede to the Convention and therefore further negotiations will be needed. The text of the amended version of the Convention can be found in the *OJEC* C 189 of 20 July 1990, pp. 1-20. The Report on the 1968 original version of the Convention (*Jenard Report*) is reproduced in *OJEC* C 59 of 5 March 1979, pp. 1-70. The Report on the 1978 Accession Convention (*Schlosser Report*) is reproduced in *OJEC* C 59 of 5 March 1979, pp. 71-151. The bibliography on this Convention is broad. For a general view see, *inter alia*, P. GOTHOT AND D. HOLLEAUX, *La Convention de Bruxelles du 27 septembre 1968*, (1985); P. KAYE, *Civil Jurisdiction and Enforcement of Foreign Judgements*, (1987); J. KROPHOLLER, *Europäisches Zivilprozessrecht: Kommentar zum EuGVÜ*, 3rd ed., (1991); H. GAUDEMET-TALLON, *Les Conventions de Bruxelles et de Lugano*, (1993); A. L. CALVO CARAVACA, (Ed.), *Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil*, (1994).

4. This study will only deal with questions raised by private claims and not with the problem of inter-State actions.

2. The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy

2.1 The provisions on jurisdiction

Where a nuclear accident has occurred in a country which is a Party to the 1960 Paris Convention (the United Kingdom) and damage has been caused in a country which is also a Party to that Convention (for example France), then its provisions will apply. The courts of these States will apply the 1960 Convention as enacted in their legal system. Substantive and procedural matters not directly governed by the Convention will be determined by national legislation, as provided by Article 14 of the Convention.[5] Article 13 of the Paris Convention addresses jurisdiction, providing that:

> "Except as otherwise provided in this Article, jurisdiction over actions under Articles 3, 4, 6(a) and 6(e) shall lie only with the courts of the Contracting Party in whose territory the nuclear incident occurred."

This provision establishes a principle of exclusive jurisdiction: only the courts of the State where the incident occurred will have jurisdiction over actions brought for damage caused by a nuclear accident which occurred in such territory. In 1990 the Steering Committee[6] responsible for the Convention recommended that the Contracting Parties should "provide for a single court to be competent to rule on compensation under the Paris Convention for nuclear damage arising from any one nuclear incident; the criteria for this determination shall be decided by national legislation".[7] This recommendation has not yet been given conventional effect. Of course the rule in Article 13 only applies to actions brought under the Paris Convention and within its territorial scope.[8] By Article 2 the geographical scope of the Convention is limited to accidents which occur in the territory of the Contracting Parties and within which damage is also suffered.[9] The territory includes the territorial sea

---

5. W.D. KRAUSE-ABLASS, "Apportioning Liability for Transborder Damages", in P. CAMERON, L. HANCHER AND W. KÜHN, (Eds.), *Nuclear Energy Law After Chernobyl*, (1988), p. 125.

6. The Steering Committee is the organ responsible for carrying out the tasks of the Nuclear Energy Agency (Article 2 of the Statute of the OECD/NEA). According to Articles 8(b)(i) and 10(b) of the Statute of the OECD/NEA, to which the 1990 Recommendation refers, the Steering Committee shall "submit to the participating countries recommendations or common rules to serve as a basis for harmonizing national laws and regulations" and it may "give its advice, in particular, in the form of recommendations, to participating countries on any question within its competence." For more detailed information on the functions and structure of the Steering Committee, see the Statute of the OECD/NEA reproduced in the OECD/NEA brochure entitled *Statute of the OECD Nuclear Energy Agency*, Paris, 1995, and in M. M. ELBARADEI, E. I. NWOGUGU AND J. M. RAMES, (Eds.), *The International Law of Nuclear Energy: Basic Documents*, (1993), pp. 21-30.

7. Recommendation of 3 October 1990 reproduced in the OECD/NEA brochure entitled *Paris Convention: Decisions, Recommendations, Interpretations*, p. 15, Paris, 1990, and in ELBARADEI, NWOGUGU AND RAMES, (Eds.), *op. cit. supra*, note 6, p. 1366.

8. OECD SECRETARIAT, "The Field of Application of the Nuclear Conventions", (1970), *Nuclear Law Bulletin* No. 5, p. 22; N. PELZER, "On Modernising the Paris Convention. Reasons for Revising the Paris Convention and Objectives", (1973), *Nuclear Law Bulletin* No. 12, p. 52; L. DE LA FAYETTE, "Towards a New Regime of State Responsibility for Nuclear Activities", (1992), *Nuclear Law Bulletin* No. 50, p. 11.

9. According to PELZER, *op. cit. supra* note 8, p. 52, "The Convention thereby enshrines in concrete form the strict principle of territoriality". On the territorial scope of the Convention see also Article 23.

of a State Party. It has also been recognised that the Convention is applicable to incidents which occur and to damage suffered on the high seas, provided that the operator who is liable is subject to the regime of the Convention.[10] The Parties may extend the territorial scope of the Convention by national legislation. Moreover, there are some exceptions to this rule, in particular in the case of carriage of nuclear substances (Article 4).[11] Even in such cases, or those in which it is not possible to establish with certainty the place where the incident occurred, the Convention determines that the courts which will have jurisdiction are those of the State where the nuclear installation of the operator who is liable is situated.[12]

In case of conflicts of jurisdiction, where jurisdiction could lie with the courts of more than one Contracting State, "if the incident occurred partly outside the territory of any Contracting Party and partly in the territory of a single Contracting Party, jurisdiction shall lie with the courts of the Contracting Party."[13] Finally, in any other case, a Contracting Party concerned can request the European Nuclear Energy Tribunal to determine which court is most closely related to the case in question.[14] The Convention also provides that the states against which an action is brought cannot invoke jurisdictional immunities, except in respect of measures of execution.[15]

2.2 The law applicable: the system of the Paris Convention

The Paris Convention also provides the substantive rules to be applied to claims arising out of incidents and damages occurring in its State Parties. By Article 6(a) the person liable for damage caused by a nuclear incident will be the operator of the nuclear installation at which the incident occurred. This rule "channels" liability exclusively onto the operator. This has two important consequences: first, the operator is liable only under the rules of the Convention and therefore no other grounds of liability can be relied upon; second, no other person – such as the supplier of parts – will be liable for the nuclear damage.[16]

---

10. This interpretation has been adopted by the OECD Steering Committee for Nuclear Energy in its Recommendation of 25 April 1968: "The Paris Convention is applicable to nuclear incidents occurring on the high seas or suffered on the high seas". The text of this Recommendation is reproduced in the OECD/NEA brochure entitled *Paris Convention: Decisions, Recommendations, Interpretations*, p. 13, Paris, 1990, and in ELBARADEI, NWOGUGU AND RAMES, (Eds.), *op. cit. supra* note 6, p. 1360.

11. See also Article 6(e).

12. Article 13(b) provides that: "Where a nuclear incident occurs outside the territory of the Contracting Parties, or where the place of the nuclear incident cannot be determined with certainty, jurisdiction over such actions shall lie with the courts of the Contracting Party in whose territory the nuclear installation of the operator liable is situated".

13. Article 13(c)(i).

14. This Tribunal is the judicial body of the OECD Nuclear Energy Agency and was established by the Convention of 20 December 1957 on the Establishment of a Security Control in the Field of Nuclear Energy. According to Article 17 of the Paris Convention the Tribunal is also competent, upon the request of a Contracting Party and in the absence of a friendly settlement, to hear any dispute between two or more Contracting Parties on the interpretation and application of the Convention.

15. Article 13(e).

16. However, national legislation can provide a direct right of action against the insurer or other financial guarantor according to Article 6(a) of the Convention. According to Article 6(f), the operator has a right of recourse against an individual, but only if the incident was intentionally caused and in cases

By Article 3(a) the operator is liable for: "i) damage to or loss of life of any person; and ii) damage to or loss of any property ..., upon proof that such damage or loss was caused by a nuclear accident ...". The Convention expressly excludes the liability of the operator for on-site damage,[17] and provides no further guidance as to the concept of "nuclear damage". It is generally acknowledged that general environmental damage is not included within this concept,[18] but because of the silence of the Convention on this, several other problems arise.[19] Certain questions also arise in connection with the standard of proof as to the causal link between the damage and the incident: according to the Convention the liability of the operator is absolute once this element of causality is established, but there are various difficulties of proof (what methods can be used to ascertain liability, what is the threshold of the damage, etc.).[20] The Convention recognises these limits and provides that national law "shall apply to all matters both substantive and procedural not specifically governed by this Convention".[21] This *renvoi* to the national legislation of the Contracting Parties involves the risk of the Convention being applied differently in the Contracting States. In an attempt to avoid such problems, Article 14 specifies that national law "shall be applied without any discrimination based upon nationality, domicile, or residence".

There are several limitations placed on the operator's liability. There is a time limit on the bringing of actions for compensation, namely ten years from the date of the nuclear accident. It is possible for national legislation to provide for a longer period, but only if there is financial cover (insurance or other guarantees) for such a longer time.[22] This limitation has been strongly criticised, particularly because frequently many of the effects of nuclear damage do not become apparent until after ten years.[23] A second limitation is in the amount of compensation available: by Article 7 the

---

expressly provided by contract. Suppliers to nuclear power plants are also generally exempt from liability. On these problems see N. PELZER, "Concepts of Nuclear Liability Revisited: A Post-Chernobyl Assessment of the Paris and Vienna Convention," in CAMERON, HANCHER AND KÜHN (Eds.), *op. cit. supra* note 5, p. 101 *et seq.*; W. KÜHN, "Liability of Suppliers to Nuclear Power Plants in Western Europe", in CAMERON, HANCHER AND KÜHN (Eds.), *op. cit. supra* note 5, p. 115 *et seq.*; OECD SECRETARIAT, "Potential Liability of Contractors Working on Nuclear Safety Improvement Projects in Central and Eastern Europe", (1994), *Nuclear Law Bulletin* No. 53, p. 36 *et seq.*

17. PELZER, *op. cit. supra* note 8, p. 50.

18. PELZER, *op. cit. supra* note 16, p. 111; DE LA FAYETTE, *op. cit. supra* note 8, p. 12; SANDS, TARASOFSKY, WEISS, (Eds.), *op. cit. supra* note 2, p. 1385.

19. J. M. LOPEZ OLACIREGUI, "Civil Liability and Nuclear Law", (1970), *Nuclear Law Bulletin* No. 5, p. 27; OECD SECRETARIAT, "The Accident at Chernobyl. Economic Damage and its Compensation in Western Europe", (1987), *Nuclear Law Bulletin* No. 39, p. 58 *et seq.*; C. HOLTZ, "The Concept of Property Damage and Related Issues in Liability Law. Possible Implications for the Paris Convention on Third Party Liability in the Field of Nuclear Energy", (1987), *Nuclear Law Bulletin* No. 40, p. 87 *et seq.*; DE LA FAYETTE, *op. cit. supra* note 8, p. 12 *et seq.*

20. J. HÉBERT, "Observations sur l'établissement du lien de causalité entre 'le fait ou la succession de faits de même origine' et les 'dommages' nécessaire à la mise en oeuvre de la Convention de Paris sur la responsabilité civile dans le domaine de l'énergie nucléaire", *Proceedings of the 1984 Munich Symposium on Nuclear Third Party Liability and Insurance*, published by OECD, (1985), p. 241 *et seq.*; B. MOSER, *Proof of Damage from Ionizing Radiation*, (1986), *Nuclear Law Bulletin* No. 38, p. 70 *et seq.*; P. STAHLBERG, "Causation and the Problem of Evidence in Cases of Nuclear Damage", (1994), *Nuclear Law Bulletin* No. 53, p. 22 *et seq.*

21. Article 14(b). In the same sense see also Article 11.

22. Article 8.

23. MOSER, *op. cit. supra* note 20, p. 74 *et seq.*

maximum liability of the operator for a single accident cannot exceed 15 million SDRs,[24] although the Contracting Parties can establish by legislation a greater or lesser amount of compensation,[25] subject to an overall minimum of 5 million SDRs.[26] The operator is also required to have and maintain insurance or other financial security in order to guarantee that the compensation will be paid (Article 10).[27] It is self-evident that the amount of compensation available under the Paris Convention will be insufficient in the case of a major accident. Accordingly the Paris Convention has been supplemented by the Brussels Supplementary Convention, which provides for additional compensation from public funds in the event that compensation under the Paris Convention is insufficient.[28] Finally, the liability of the operator is excluded in the case of a nuclear incident which is caused directly by an act of armed conflict, hostilities, civil war, insurrection or, unless the contrary is established by national legislation, a grave natural disaster of an exceptional character (Article 9).[29]

2.3 Enforcement

A decision of a court which is competent under the Paris Convention, excluding *interim* judgements, will be enforceable in the territory of another Contracting Party once it has become

---

24. Special Drawing Rights as defined by the International Monetary Fund.

25. The OECD Steering Committee recommended that the Contracting Parties should set the maximum liability of the operator at not less than 150 million SDRs.

26. It is interesting to note that Article 7(b)(i) of the Convention allows national legislation to establish a greater amount of compensation "taking into account the possibilities of the operator of obtaining the insurance or other financial security...". In this respect, when Germany recognised unlimited liability, there were doubts as to the compatibility of this regime with the Convention. On this point see PELZER, *op. cit. supra* note 16, p. 108 *et seq.*

27. J. K. PFAFFELHUBER AND B. KUCKUCK, "Standard Rules for Liability and Cover for Nuclear Installations", (1980), *Nuclear Law Bulletin* No. 25, p. 70 *et seq.*; W. BREINING, "Reform of Liability in Nuclear Law. Unlimited Liability does not Automatically Create Unlimited Cover", (1980), *Nuclear Law Bulletin* No. 25, p. 76 *et seq.*; J. DEPRIMOZ, "International Cooperation in Providing Insurance Cover for Nuclear Damage to Third Parties and for Damage to Nuclear Installations", (1983), *Nuclear Law Bulletin* No. 32, p. 33 *et seq.*; J. MARRONE, "Nuclear Liability Insurance. The Price-Anderson Reparations System and the Claims Experience of the Nuclear Industry", (1984), *Nuclear Law Bulletin* No. 33, p. 45 *et seq.*; see also the *Proceedings of the 1984 Munich Symposium on Nuclear Third Party Liability and Insurance*, *op. cit. supra* note 20.

28. The Paris and the Brussels Supplementary Conventions together provide for a maximum level of compensation of 300 million SDRs. This compensation is to be provided according to a three-tier structure: 1) compensation of at least 5 million SDRs which each Party is required to establish by law, which has to be provided from insurance or other financial guarantee; 2) compensation of up to 175 million SDRs to be provided from public funds of the Party in whose territory the nuclear installation is located; 3) compensation of up to 300 million SDRs from public funds jointly contributed by all the Parties to the Convention. The 1963 Brussels Supplementary Convention came into force on 4 December 1974 and was revised by two Protocols in 1964 and in 1982. The second Protocol increased the amount of compensation available. The State Parties must necessarily be Party to the Paris Convention. The Contracting States are: Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Spain, Sweden and United Kingdom. The text of the Convention is reproduced in the OECD/NEA brochure entitled *Paris Convention on Third Party Liability in the Field of Nuclear Energy – Brussels Convention Supplementary to the Paris Convention*, Paris, (1989), and in SANDS, TARASOFSKY AND WEISS, (Eds.), *op. cit. supra* note 2, pp. 1401-1412.

29. PELZER, *op. cit. supra* note 16, p. 102 *et seq.*

enforceable under the law of the court that rendered it.[30] The Convention specifies that the merits of the case cannot be subject to review, but does not lay down any further requirements which will remain a matter for national legislation.

3. The 1963 Vienna Convention on Civil Liability for Nuclear Damage

3.1 The system of the Vienna Convention

An alternative set of rules concerning civil liability for nuclear damage is to be found in the 1963 Vienna Convention on Civil Liability for Nuclear Damage, adopted under the auspices of the IAEA. Its provisions are generally similar to those of the 1960 Paris Convention. The most significant difference between the two regimes is the different geographical application: the Vienna Convention has potentially a worldwide application (and has no provision on territorial scope of application), whereas accession to the Paris Convention is generally only open to Members or Associate countries of the OECD (see Article 21).

On almost all other rules the Vienna and Paris conventions differ only in minor detail.[31] The Vienna Convention provides for the exclusive jurisdiction of the courts of the State where the incident occurred (Article XI); it channels liability to the operator of the nuclear installation (Article II); provides for the absolute liability of the operator (Article IV); imposes a time limit for actions for compensation of 10 years from the date of the nuclear accident (Article VI); requires the operator of a nuclear installation to maintain insurance or other financial security to cover liability (Article VII); and provides for its provisions to be applied without discrimination based on nationality, domicile or residence (Article XIII). Differences between the two conventions are limited. This definition of "nuclear damage" is essentially similar to that of the Paris Convention. Article XII of the Vienna Convention provides for recognition of judgements given by the courts competent under Article XI. One minor difference: while the Paris Convention expressly excludes interim judgements from the application of its provisions on enforcement [Article 13(d)], the Vienna Convention is silent on this point and therefore it seems to be possible that such judgements might be included in its field of application. The amount of liability is established at a lower level than the Paris Convention (USD 5 million), but there is no provision for a maximum limit (Article V). Finally, the Vienna Convention has an Optional Protocol on compulsory settlement of disputes between the Contracting Parties relating to its interpretation or application.[32]

The Vienna Convention has been recently amended by a Protocol adopted on 12 September 1997, which is not yet in force.[33] The Protocol will modify several provisions of the

30. Article 13(d).

31. The Vienna Convention has been often analysed jointly with the Paris Convention by the authors cited *supra* in Section 2, to whom it is possible to refer for a more detailed analysis.

32. The Optional Protocol has not entered into force.

33. Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage adopted on 12 September 1997. As of 29 July 1999, there were 14 Signatories (Argentina, Belarus, Czech Republic, Hungary, Indonesia, Italy, Lebanon, Lithuania, Morocco, Peru, Philippines, Poland, Romania, Ukraine) and 2 Contracting Parties (Morocco and Romania) to the Protocol. Pursuant to Article 21.1, the Protocol "shall enter into force three months after the date of deposit of the fifth instrument of ratification, acceptance or approval". The text of the Protocol can be found, inter alia, on the site of the IAEA «www.iaea.org/worldatom». On the Protocol see V. LAMM, "The Protocol Amending the 1963 Vienna Convention", (1998), *Nuclear Law Bulletin* No. 61, p. 7 *et seq.*

1963 Vienna Convention (for example the time limit for actions for compensation with respect to loss of life and personal injury will be increased to thirty years from the date of the nuclear incident). For present purposes it is appropriate to draw attention to modifications relating to jurisdiction and enforcement of judgements. Article 12 of the Protocol will amend Article XI of the 1963 Vienna Convention by adding a new paragraph 1bis, dealing with incidents occurring in the exclusive economic zone of Contracting Parties.[34] The Protocol will also require Contracting Parties "to ensure that only one of its courts shall have jurisdiction in relation to any one nuclear incident."[35] Article 13 of the Protocol will introduce a new Article XI A to the Vienna Convention, requiring the Contracting Parties whose courts have jurisdiction to ensure that in relation to actions for compensation of nuclear damage:

> "a) any State may bring an action on behalf of persons who have suffered nuclear damage, who are nationals of that State or have their domicile or residence in its territory, and who have consented thereto; and
>
> b) any person may bring an action to enforce rights under this Convention acquired by subrogation or assignment."

The Protocol will also replace the existing version of Article XII of the Vienna Convention which provides rules on recognition and enforcement of judgements, without significantly modifying its content.[36]

The regime of the Vienna Convention will be integrated by the Convention on Supplementary Compensation for Nuclear Damage, also adopted on 12 September 1997.[37] All States

---

34. Article XI.1 bis will provide: "Where a nuclear incident occurs within the area of the exclusive economic zone of a Contracting Party or, if such zone has not been established, in an area not exceeding the limits of an exclusive economic zone, were one to be established, jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party. The preceding sentence shall apply if that Contracting Party has notified the Depositary of such area prior to the nuclear incident. Nothing in this paragraph shall be interpreted as permitting the exercise of jurisdiction in a manner which is contrary to the international law of the sea, including the United Nations Convention on the Law of the Sea." See A. GIOIA, "Maritime Zones and the New Provisions on Jurisdiction in the 1997 Vienna Protocol and in the 1997 Convention on Supplementary Compensation", (1999), *Nuclear Law Bulletin* No. 63, p. 25 *et seq.*

35. Article XI.4 of the Vienna Convention as modified by Article 12 of the Protocol.

36. The new text of Article XII specifies that recognition shall be given to "a judgement that is no longer subject to ordinary forms of review entered by a court of a Contracting Party having jurisdiction", whilst the previous version of Article XII referred only to "a final judgement", without specifying when a judgement had to be considered final. The exceptions to the obligation of recognition of judgements remain the same.

37. Convention on Supplementary Compensation for Nuclear Damage, adopted on 12 September 1997. As of 29 July 1999, there were 13 Signatories (Argentina, Australia, Czech Republic, Indonesia, Italy, Lebanon, Lithuania, Morocco, Peru, Philippines, Romania, Ukraine, United States) and 2 Contracting Parties (Morocco and Romania) to the Convention. The Convention, pursuant to Article XX.1, "shall come into force on the ninetieth day following the date on which at least 5 States with a minimum of 400 000 units of installed nuclear capacity have deposited an instrument referred to in Article XVIII". The text of the Convention can be found on the web site of the IAEA (www.iaea.org/worldatom). On the Supplementary Convention see B. McRAE, "The Compensation Convention: Path to a Global Regime for Dealing with Legal Liability and Compensation for Nuclear Damage", in (1998), *Nuclear Law Bulletin* No. 61, p. 25 *et seq.*

may adhere to the Supplementary Convention regardless of whether they are parties to any existing nuclear liability regime.[38] The Supplementary Convention applies to nuclear damage for which an operator of a nuclear installation situated in a Contracting Party is liable under either the Vienna or the Paris Conventions or under national law. This new instrument aims at supplementing the system of compensation provided by the national legislation implementing either the Vienna or the Paris Convention or by national legislation which complies with the requirements laid down in an Annex to the Convention itself.[39] The Supplementary Convention requires that compensation for nuclear damage shall be ensured by the Installation State for an amount of 300 million SDRs (or a greater amount it may have specified to the Depositary) and beyond such amount provides that the Contracting Parties shall make available public funds[40] (to be provided through contributions by State Parties on the basis of installed nuclear capacity and UN rate assessment).[41]

Article XIII of the Supplementary Convention provides the rules on jurisdiction and specifies that: "Except as otherwise provided in this article, jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs."[42] Jurisdiction for incidents occurring within the exclusive economic zone of a Contracting State shall lie with the courts of such a Party, if such area has been notified to the Depositary prior to the nuclear incident.[43] Where the incident does not occur within the territory of any Contracting Party or where the place of a nuclear incident cannot be precisely determined, jurisdiction shall lie with the courts of the Installation State.[44] In case of concurring jurisdiction of the courts of more than one Contracting Party, an agreement shall determine which Contracting Party's courts shall have jurisdiction.

Articles XIII.5 and XIII.6 specify the requirement for the recognition and enforcement of judgements: a judgement given by a court of a Contracting Party having jurisdiction and no longer subject to ordinary forms of review shall be recognised unless it was obtained by fraud, or the party against which the judgement was given had not a fair opportunity to present his case, or the judgement is contrary to public policy of the recognising State or is not in accord with fundamental standard of justice. Once the judgement has been recognised, it shall be enforced according with the formalities required by the law of the Contracting Party where enforcement is sought. Such judgement will be enforceable as if it were a judgement of a court of such enforcing Party.

---

38. Article XVIII.1 specifies that "This Convention shall be subject to ratification, acceptance or approval by the signatory States. An instrument of ratification, acceptance or approval shall be accepted only from a State which is a Party to either the Vienna Convention or the Paris Convention, or a State which declares that its national law complies with the provisions of the Annex to this Convention, provided that, in the case of a State having on its territory a nuclear installation as defined in the Convention on Nuclear Safety of 17 June 1994, it is a Contracting State to that Convention."

39. Article II.

40. Article III.

41. Article IV.

42. Article XIII.1.

43. Article XIII.2.

44. Article XIII.3.

Finally, according to Article XIV of the Supplementary Convention:

"1. Either the Vienna Convention or the Paris Convention or the Annex to this Convention, as appropriate, shall apply to a nuclear incident to the exclusion of the others.

2. Subject to the provisions of this Convention, the Vienna Convention or the Paris Convention, as appropriate, the applicable law shall be the law of the competent court."

3.2 The relationship between the 1960 Paris Convention and the 1963 Vienna Convention: the 1988 Joint Protocol

The Paris and Vienna Conventions are linked by a 1988 Joint Protocol.[45] In case of an accident in a State Party to one of the two Conventions, the Joint Protocol provides for the extension of the application of that Convention to which the State where the incident occurred is a party to the damage suffered in the States Parties of the other Convention. The Protocol also provides that the application of one of the two Conventions shall exclude the application of the other.[46] For example, a nuclear accident in the Netherlands (a party to the Paris Convention and the 1988 Joint Protocol) causing damage in Hungary (a party to the Vienna Convention and the 1988 Joint Protocol) will be regulated by the provisions of the Paris Convention. In such a case the Dutch courts will have exclusive jurisdiction to hear the actions for compensation of the damage suffered in Hungary.

4. The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters

4.1 The applicability of the Brussels Convention: the concept of "civil and commercial matters" and its interpretation in the case-law of the ECJ

We have analysed so far the jurisdictional rules applicable to accidents and damages occurring in states which are party to one of the two dedicated international nuclear regimes. In the European context, what rules will be applicable for damage occurring in a state which is not a party to either convention? Our hypothetical case considers an accident occurring in a Member State of the European Union (for example the United Kingdom), with consequences in another Member State which is not a party to Paris or Vienna (for example Ireland).

---

45. The Joint Protocol, concluded on 21 September 1988, links the Paris and the Vienna Conventions, with the aim of avoiding conflicts of application. It entered into force on 27 April 1992. The Contracting Parties are: Bulgaria, Cameroon, Chile, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Hungary, Italy, Lithuania, Netherlands, Norway, Poland, Romania, Slovak Republic, Slovenia and Sweden. The text of the Joint Protocol can be found in *Nuclear Law Bulletin* No. 42, p. 61 *et seq.* and in SANDS, TARASOFSKY AND WEISS, (Eds.), *op. cit. supra* note 2, p. 1430-1434. For a detailed analysis of the Joint Protocol see O VON BUSEKIST, "A Bridge Between Two Conventions on Civil Liability for Nuclear Damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention", (1989), *Nuclear Law Bulletin* No. 43, p. 10 *et seq.*

46. Article III.

In such a case an initial question might be: which court will have jurisdiction to receive claims for compensation? With respect to Ireland jurisdiction will be determined by more general common rules on the conflict of laws. Since the United Kingdom and Ireland are parties it is, in principle and subject to the points addressed below, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters ("the Brussels Convention") which will govern, since it provides rules to determine the international jurisdiction of the courts of its Contracting States in its field of application.[47] Does the field of application of the Brussels Convention include actions for compensation for transboundary nuclear damage?

An initial objection which may be raised against the application of the Brussels Convention is that the concept of "civil and commercial matters" – to which matters alone the Convention applies – may not include cases involving public authorities or regulated by public law.[48] Without exception states exercise strong regulatory control in the field of nuclear energy, and very often public authorities will themselves run the nuclear installations. In the United Kingdom some nuclear installations are in private ownership, others are publicly owned. The former are subject to stringent regulation, the latter directly run by entities in which the state has a controlling or even exclusive interest.

Can claims relating to a nuclear accident from either types of plant be characterised as a claim in relation to the "civil and commercial matters" to which Article 1 of the Convention directs its exclusive application?[49] The Convention does not define these words.[50] Early commentators tried to identify more precisely the meaning of this concept, *inter alia* focusing their attention on the possibility of applying it in cases involving public law.[51] The European Court of Justice (ECJ), which is the ultimate arbiter of the Convention's interpretation,[52] has dealt with this issue in three cases. In

47. Preamble of the Brussels Convention.

48. The distinction between private and public law is well known in civil law systems, although there are several differences in the various countries on the precise meaning of the two concepts. For an analysis of this topic see the Schlosser Report cit. *supra* note 3, p. 82 *et seq.*

49. Article 1, paragraph 2 expressly excludes the application of the Convention in matters relating to: "1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; 3. social security; 4. arbitration."

50. According to the Jenard Report the draftsmen of the Convention decided not to give a detailed definition of this notion following the example of other conventions on similar matters. In the Jenard Report, however, it is stressed that the Convention should be interpreted extensively and all matters relating to civil and commercial matters should be included in its field of application, excluding only those expressly indicated by the Convention itself. Jenard Report cit. *supra* note 3, p. 9 *et seq.* The Schlosser Report does not give further helpful indicators for the interpretation of this concept.

51. G. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, (1972); M. WESER, *Convention communautaire sur la compétence judiciaire et l'exécution des décisions*, (1975).

52. The competence of the Court is based on the "Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters" done on 3 June 1971. The Protocol entered into force on 1 September 1975 for the six founding Member States of the Community and was subsequently modified in 1978, 1982 and 1989 to allow the accession of Denmark, Ireland and the United Kingdom, Greece, Spain and Portugal. The text of the Protocol, as amended by the accession Conventions, is reproduced in *OJEC* C 189 of 28 July 1990, pp. 25-30. For an analysis of this Protocol see MOK, "The interpretation by the European Court of Justice of special Conventions concluded between the Member States", (1971), *C.M.L.R.*, p. 486 *et seq.*; ARNOLD, "Das Protokoll über die Auslegung des EWG-Gerichtsstand-und

LTU v. Eurocontrol[53] the plaintiff was seeking the enforcement in West Germany of a judgement given against Eurocontrol, an international organisation, by the Belgian courts. On a reference from the German court the ECJ stated that: "Although certain judgements given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority **acts in the exercise of its powers**" (emphasis added). In this case the Brussels Convention did not apply because Eurocontrol was exercising its public powers. In *Netherlands v. Reinhold Rüffer*[54] the dispute concerned a claim for redress brought by the Netherlands against a "water-man", the owner of a German river motor vessel, which collided with a Dutch motor vessel and sank in the Bight of Watum. The state had the wreck removed and sought to recover the costs from the owner of the boat. The ECJ reaffirmed the principle that the Brussels Convention does not apply in actions between a public authority and a private person when a public authority is acting in the exercise of its public powers.[55] The Court ruled that "such a case is an action for the recovery of the costs involved in the removal of a wreck in a public waterway, administered by the State responsible in performance of an international obligation and on the basis of provisions of national law which, in the administration of that waterway, confer on it the status of public authority in regard to private persons". Moreover, in the present case "the agent responsible for policing public waterways does so in the exercise of public authority".[56] In *Sonntag v. Waidmann*[57] the European Court had to decide whether the Convention was applicable to an action for civil damages brought before a criminal court. It expressed no doubt in giving a positive answer, since Article 1 of the Convention clearly affirms that it applies to actions in civil and commercial matters "whatever the nature of the court or tribunal".[58] A second problem to be addressed concerned the possibility of including within the notion of "civil and commercial matters" an action for damages against a school teacher, considered according to his legal system to be a public official. The Court recalled its jurisprudence concerning the need to interpret the Convention "independently" and confirmed the view expressed in its previous case-law: "It follows from the judgements in the *LTU* and *Rüffer* cases, cited above, that such an action falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers." In this case the publicly appointed teacher was not so acting, and the Convention was deemed to apply.

In light of these cases it might be argued that since a state exercises significant or complete control over the operation of nuclear power plants the Brussels Convention would not apply. In our view this argument is not particularly persuasive. The ECJ has excluded the application of the Brussels

---

Vollstreckungsübereinkommens durch den Gerichtshof in Luxemburg", (1972), *NJW*, p. 977 *et seq.*; CATHALA, "L'interprétation des conventions conclues entre États membres de la CEE en matière de droit privé", (1972), *Recueil D.S.*, p. 31 *et seq.*; F. POCAR, "La Convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze", (1989), p. 33 *et seq.*

53. Case 29/76, 14 October 1976, *LTU v. Eurocontrol*, [1976] *ECR*, p. 1541 *et seq.* On this decision see GEIMER, (1977), *NJW*, p. 489; LINKE, (1977), *RIW*, p. 40; G. DROZ, (1977), *Rev. critique*, p. 772; MARI, "Ambito di applicazione della Convenzione di Bruxelles del 27 settembre 1968 e problemi di qualificazione della nozione di materia civile e commerciale", (1977), *Dir. com. scambi int.*, p. 271 *et seq.*

54. Case 814/79, 16 December 1980, *Netherlands v. Reinhold Rüffer*, [1980] *ECR*, p. 3807 *et seq.* On this decision see SCHLOSSER, (1981), *IPRax*, p. 169; BISCHOFF, (1982), *Clunet*, p. 463.

55. *Idem*, para. 8.

56. *Idem*, paras. 9-16.

57. Case C-172/91, 21 April 1993, *Sonntag v. Waidmann*, [1993] *ECR* I, p. 1963 *et seq.*

58. *Idem*, paras. 15 and 16.

Convention when there is an action between a public authority and a private person, adding that a further condition for the exclusion is that the public authority is acting in the exercise of its public powers. In our hypothetical situation, the operator of the nuclear plant (whether a private company subject to stringent state control or a state-owned company) could hardly qualify as engaging in the exercise of a public power: the production of energy is essentially a commercial matter. As the European Court indicated in the case *Sonntag v. Waidmann*, "a civil servant does not always exercise public powers"; furthermore, in that case the Court underlined 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 decided in favour of the application of the Convention, to avoid a possible unreasonable discrimination between similar situations.[59] In our view the more likely conclusion is that claims relating to nuclear accidents would be governed by the Brussels Convention.

4.2 The relationship between the Paris Convention and the Brussels Convention

Before examining the jurisdictional provisions of the Brussels Convention which are relevant to the hypothetical case, it is appropriate to consider the relationship between the Brussels and Paris Conventions. This matter is addressed by Article 57 of the Brussels Convention, providing that it does not affect the application of other Conventions to which the Contracting Parties may also be parties in particular matters.[60] In the Jenard Report this provision is interpreted as giving precedence to the rules of specific Conventions. Such Conventions containing rules on jurisdiction and enforcement are to be applied regardless of the provisions of the Brussels Convention. This classic solution was adopted in recognition of the fact that specific Conventions are concluded to take account of the particularity of the situations that they regulate and are more appropriate to deal with the questions of jurisdiction that might arise in these contexts. Amongst the Conventions prevailing over the provisions of the Brussels Convention, the Jenard Report expressly refers to the Paris Convention.[61]

Article 57 nevertheless left several problems unanswered, which were the focus of discussion during the negotiations concerning accession to the Brussels Convention by Denmark, Ireland and the United Kingdom in 1978. In particular, questions arose concerning the situation where a specialised Convention dealt only partially with matters also governed by the Brussels Convention.[62] To clarify the meaning of Article 57 a provision on its authentic interpretation was added,[63] although

59. *Idem*, paras. 17-29.

60. Article 57(1) of the Brussels Convention provides: "This Convention shall not affect any conventions to which Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements".

61. Jenard Report cit. *supra* note 3, pp. 59-61.

62. Schlosser Report cit. *supra* note 3, pp. 139-142.

63. Article 57(2) provides: "With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner: a) this Convention shall not prevent a court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Contracting State which is not party to that Convention. The court hearing the action shall, in any event, apply Article 20 of this Convention; b) judgements given in a Contracting State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Contracting State in accordance with this Convention."

doubts about its application persist.[64] The ECJ has addressed the relationship between the Brussels Convention and other international instruments in two cases. In *Netherlands v. Reinhold Rüffer* the Court did not deal with the interpretation of Article 57 because (as noted above) it found that the Brussels Convention was not applicable to the specific case in question.[65] Advocate General Warner did, however, touch briefly upon Article 57, affirming that the application of the Brussels Convention was precluded only when the special Convention governing questions of jurisdiction was intended to be exclusive of the application of any other possible rules on the subject.[66] In *Tatry v. Rataj*[67] the Court was asked by the English Court of Appeal to rule whether the provisions of a special Convention prevailed over the provisions of the Brussels Convention. Advocate General Tesauro recognised that in principle special Conventions prevailed over the Brussels Convention, adding however that this did not mean that the application of all the provisions of the Brussels Convention was excluded: in his opinion, Article 57 had to be read as "a co-ordinating provision, designed to allow the respective provisions to be applied in combination." The Advocate General underlined that in the case of conflict with the rules of the Brussels Convention, precedence had to be given to the jurisdictional rules of special Conventions. But the same Article 57 required the courts of the Contracting States, in any event, to apply Article 20 of the Brussels Convention, in order to guarantee the rights of the defendant.[68] In the opinion of the Advocate General, therefore, "there can be no doubt that the relationship between the various Conventions is to be interpreted, by virtue of this Article [57], as involving the reciprocal incorporation of their respective provisions. As a result, it is entirely legitimate to have recourse to the provisions of the general Convention [*i.e.* the Brussels Convention] in order to fill any lacunae in those of the special Convention."[69] The Court agreed with these views, affirming that:

> "Article 57 […] means that, where a Contracting State is also a contracting party to another Convention on a specific matter containing rules on jurisdiction, that specialised Convention precludes the application of the provisions of the Brussels Convention only in relation to questions governed by the specialised Convention and not in those to which it does not apply."[70]

> "Where a convention on a particular matter to which both the state of origin and the state addressed are parties lays down conditions for the recognition or enforcement of judgements those conditions shall apply. In any event, the provisions of this Convention which concern the procedure for recognition and enforcement of judgements may be applied."

64. According to the Schlosser Report it is obvious that the rules of jurisdiction contained in a specific Convention prevail over the rules of the Brussels Convention. But can, for example, the provisions of the Brussels Convention on execution be applied to judgements given according to rules of jurisdiction contained in other specific Conventions? Should a judgement given in accordance with a special Convention also be recognised and executed in accordance with the Brussels Convention in States which are not party to the special Convention? Schlosser Report cit. *supra* note 3, p. 140.

65. *Netherlands v. Reinhold Rüffer* cit. *supra* note 54.

66. *Idem*, pp. 3836-3837.

67. Case C-406/92, 6 December 1994, *Tatry v. Rataj*, [1994] *ECR* I p. 5439 *et seq.*

68. The guarantee of the rights of the defendant is in fact a fundamental requirement of the Brussels Convention for the recognition and enforcement of the judgements given in another contracting State and the need to respect it has been stressed in various occasions by the ECJ.

69. *Tatry v. Rataj* cit. *supra* note 67, pp. 5446-5449.

70. *Idem*, para. 28.

This meant that in the absence of provisions on *lis pendens* in the special Convention, the rules of the Brussels Convention could be applied.[71]

From this brief survey there can be little doubt that, to the extent that the subject matter of a claim is governed by the Paris Convention, its provisions on the exclusive jurisdiction of the courts of the state where the nuclear incident occurred will prevail over those of the Brussels Convention. The courts of the Contracting States might, nevertheless, apply the provisions of Article 20 of the Brussels Convention to ensure respect for the rights of the defendant. Further, in all matters not covered by the Paris Convention – for example claims relating to pure environmental damage – it may be possible to invoke the provisions of the Brussels Convention. Thus, the provisions of the Brussels Convention on *lis pendens* would regulate aspects of the enforcement of judgements not addressed by the Paris Convention.[72]

4.3 The jurisdictional rules applicable in the case of a nuclear accident: the general forum of jurisdiction (Article 2) and the special forum of jurisdiction [Article 5(3)] as interpreted by the ECJ

Assuming that the Brussels Convention was applicable, we turn now to consider the question of which courts would be competent to hear actions for compensation for the damage caused in our hypothetical case (a nuclear accident in the United Kingdom causing damage in Ireland). As noted above, the Brussels Convention establishes rules on the international jurisdiction of the courts of the Contracting States and on the recognition and enforcement of judgements in civil and commercial matters.[73] In general the Brussels Convention establishes jurisdiction based on the defendant's domicile when the defendant is domiciled in a Contracting State, following the traditional rule *actor sequitur forum rei*.[74] The Convention does not define the concept of domicile and refers to the national law of the court seized for the identification of this concept.[75] National law will also determine which internal court will be competent *ratione materiae* and *ratione loci*.

The Brussels Convention provides for other possible fora of jurisdiction: there are provisions for special jurisdiction in certain specified matters, including tort and quasi-tort.[76] In our hypothetical case a person who suffered damage in Ireland could first of all sue in the courts of the state where the person liable for such damage is domiciled[77] (presumably the United Kingdom). The plaintiff could also avail him – or herself of the forum indicated by Article 5(3) of the Brussels Convention. This provides that:

---

71. *Idem*, pp. 5462-5482.

72. For example the Paris Convention does not provide which internal court will be competent for the enforcement of the judgements. The application for enforcement therefore will be submitted to the internal court indicated by Article 32 of the Brussels Convention.

73. Preamble. Article 1 also specifies the matters to which the Convention does not apply.

74. Article 4 of the Brussels Convention provides that if the defendant is not domiciled in a Contracting State, the law of each Contracting State is then applicable, with the exception of the rules of exclusive jurisdiction laid down by the Brussels Convention itself.

75. Article 52.

76. Articles 5 and 6.

77. All substantive questions will be decided by the competent court according to the applicable law, determined by the rules on conflict of laws of the same court.

"5. A person domiciled in a Contracting State may, in another Contracting State, be sued:

[…]

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred".[78]

The interpretation of this provision raises two issues: first, the meaning of the concept "tort, delict or quasi-delict", and second, the jurisdictional criterion of the "place where the harmful event occurred" should be defined.

The ECJ has interpreted "tort, delict or quasi-delict" in two cases. In *Kalfelis v. Schröder* the Court, in a dispute regarding future transactions which resulted in a total loss for the plaintiff, was asked to decide whether the concept of "matters relating to tort, delict or quasi-delict" in Article 5(3) was to be interpreted according to the *lex causae* (the law applicable in the individual case) or if it had to be interpreted as having a Community meaning.[79] The Court ruled that the concept "must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)".[80] The Court confirmed its view in *Reichert v. Dresdner Bank*.[81] For present purposes there seems to be little doubt that an action in respect of damage caused by a nuclear accident would fall within Article 5(3), since it seeks to establish the liability of the defendant and that is not based on a contract.

It is then necessary to ascertain which court would have jurisdiction over such claims. Article 5(3) provides for the jurisdiction of "the courts for the place where the harmful event occurred". The drafters of the Brussels Convention did not explain whether these words were to be interpreted as meaning the place where the event giving rise to the damage occurred or, alternatively, the place where the damage occurred, or both. The words were broad enough to accommodate the approach of the Contracting States.[82]

The words have been clarified by the ECJ in the landmark decision in *Handelswerkerij G.J. Bier BV v. Mines de Potasse d'Alsace*.[83] The Court decided that Article 5(3) had to be interpreted in the context of the scheme of the Brussels Convention: the special criteria of jurisdiction derogating from the general forum were introduced "having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings".[84] The Court recognised that the meaning of the criterion adopted in Article 5(3) was unclear, especially in cases where the act giving rise to damage and the damage itself were situated in different Contracting States,

---

78. According to the Jenard Report this rule was adopted to ensure consistency with practice in the law of most of the Contracting States, *op. cit. supra* note 3, p. 26.

79. Case 189/87, 27 September 1988, *Kalfelis v. Schröder*, [1988] *ECR*, p. 5565 *et seq*, at 5566-5569.

80. *Idem*, para. 18.

81. Case C-261/90, 26 March 1992, *Reichert v. Dresdner Bank*, [1992] *ECR* I, p. 2149 *et seq.*

82. Jenard Report cit. *supra* note 3, p. 26.

83. Case 21/76, 30 November 1976, *Handelswerkerij G.J. Bier v. Mines de Potasse d'Alsace*, [1976] *ECR*, p. 1735 *et seq.* On this decision see LINKE, (1977), *RIW*, p. 356; BOUREL, (1977), *Rev. critique*, p. 563; HUET, (1977), *Clunet*, p. 728; DROZ (1977), *D.S.*, p. 613.

84. *Idem*, paras. 8-11.

as in the case of atmospheric or water pollution beyond the border of a State.[85] In the opinion of the Court, the words "place where the harmful event occurred" were open to two possible interpretations, namely the place where the damage occurred or the place where the event causing the damage occurred. According to the Court, both criteria, depending on the case, could be a significant connecting factor from the point of view of jurisdiction and could also be helpful from the point of view of the evidence and of the conduct of the proceedings. In the opinion of the Court, it was therefore reasonable to interpret Article 5(3) as giving the plaintiff the option to start proceedings "either at the place where the damage occurred or the place of the event giving rise to it".[86]

To justify its decision the Court invoked several arguments. First, the provisions of Article 5(3) covered a wide diversity of kinds of liability, making it inappropriate to limit its application to one criterion only. Second, if the only jurisdiction available was in the courts of the place where the event giving rise to the damage occurred, this would have coincided in many cases with the domicile of the defendant, making the provisions of Article 5(3) meaningless; on the other hand, choosing only the place where the damage occurred would have meant excluding a helpful connecting factor with the jurisdiction of courts particularly close to the cause of the damage. Third, the choice of offering an option between the two connecting factors was accepted in several Contracting States. In conclusion:

> "… the result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage".[87]

This approach has been confirmed by the Court in a recent decision, *Shevill and Others v. Presse Alliance SA*.[88] However, the Court has modified its approach in relation to "indirect victims". In *Dumez v. Hessische Landesbank*,[89] the Court (disagreeing with the conclusion of the Advocate General)[90] decided that:

> "by virtue of a previous judgement of the Court (*Mines de Potasse d'Alsace*), the expression 'place where the harmful event occurred' contained in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects **upon the person who is the immediate victim of that event**." (emphasis added)

Consequently, "indirect victims" (persons who claimed damage consequent upon the harm suffered by other persons who were direct victims of the harmful act) could not bring proceedings

85. *Idem*, para. 13.

86. *Idem*, paras. 14-19.

87. *Idem*, paras. 20-23 and 25.

88. Case C-68/93, 7 March 1995, *Shevill and Others v. Presse Alliance SA*, [1995] *ECR* I p. 415 *et seq.*

89. Case C-220/88, 11 January 1990, *Dumez v. Hessische Landesbank*, [1990] *ECR* I p. 49 *et seq.* In this case two French companies, Dumez France and Oth Infrastucture, were claiming compensation for the damage suffered by their subsidiaries, because of the cancellation of a loan by German banks.

90. *Idem*, pp. 62-73.

against the perpetrator of that act in the courts of the place in which they themselves sustained the damage.[91]

Notwithstanding this modification, the Article 5(3) case law indicates the following general conclusions in relation to the hypothetical case-study: the criterion of "the place where the harmful event occurred" confers jurisdiction on the courts of the state where the event that gave rise to the damage occurred as well as to the courts where the damage itself occurred, at the option of the plaintiff. This possibility however does not extend to the indirect victim of an harmful event. It follows that a person in Ireland who claims to be the direct victim of damage caused by a nuclear accident in the United Kingdom would have a choice of bringing an action before the English courts (place of the event giving rise to the accident) or the Irish courts (place where the damage occurred).

4.4 The law applicable and the rules on recognition and enforcement

Having established which court will have jurisdiction, it is appropriate to consider briefly the law which would be applicable. In *Shevill and Others v. Presse Alliance SA*, the ECJ confirmed that the object of the Brussels Convention was not to unify the substantive law and procedure of the different Contracting States, but only to determine which court had jurisdiction in disputes relating to civil and commercial matters, and then to facilitate the enforcement of judgements. Questions raised by an action for damages in tort or quasi-tort – such as "the circumstances in which the event giving rise to the harm may be considered harmful to the victim, or the evidence which the plaintiff must adduce" – are to be settled "solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired."[92]

If the plaintiff in our hypothetical case decides to go to the English courts it is the conflict of laws rules of that country which will determine the question of the applicable law. If the court seized is in Ireland, Irish conflict of laws rules will be applied. This could lead to the application of different rules of substantive law, depending on the court seized, with different legal regimes governing such issues as the precise character of the causes of action (for example does an action lie for pure environmental loss?), evidence, valuation and recovery of damages (for example, can loss of profit be recovered?) and amount of compensation. This could lead to *forum shopping*, with the plaintiff understandably choosing to bring proceedings before the courts most likely to be most favourable to his or her claims.

In this regard, the Brussels Convention establishes a regime for the recognition and enforcement of judgements,[93] with the object of simplifying the relevant procedures in order to facilitate the circulation of judgements given in the Contracting States.[94] If given in accordance with the provisions of the Convention, a decision of the court of a Contracting State in our hypothetical case would be recognised and enforceable in the other Contracting States. In particular, the judgements are automatically recognised in the other Contracting States, unless one of the grounds for

91. *Idem*, paras. 10-22.

92. *Shevill and Others v. Presse Alliance* cit. *supra* note 88, paras. 38-39.

93. Title III. Articles 25-49.

94. Preamble.

the refusal of recognition specified by the Convention itself exists[95] and the merits of the decision cannot be subjected to review.[96] The Brussels Convention specifies certain requirements concerning enforcement and all other matters which are not regulated by it are subject to the provisions of the national law of the State of enforcement.[97]

5. Nuclear damage and jurisdictional issues: *Shortt and Others v. Ireland, the Attorney General and British Nuclear Fuels Plc.*

Some of the issues identified above have been the subject of consideration by the Irish courts in the ongoing case of *Shortt and Others v. Ireland, the Attorney General and British Nuclear Fuels Plc*.[98] The plaintiffs reside on the east coast of Ireland. They claim to be adversely affected by operations of British Nuclear Fuels (BNFL) at Sellafield (including operations relating to the THORP project). They claim that gaseous and liquid discharges from BNFL have caused damage to health and the environment in their area. They also claim that those activities and the increased radioactive contamination could lead to an estimated two thousands deaths in the next 10 years. They have brought proceedings in the Irish courts seeking *inter alia*: a declaration that BNFL has contravened European Directives (Council Directive 85/337/EEC and Council Directive 80/836/Euratom) and international law; injunctions restraining the defendant from continuing its project until compliance with European Directives had been assured; damages; and compensation.

An initial issue was the question of whether the Irish courts were competent to entertain the claim, given that the activities alleged occurred in the United Kingdom. The plaintiffs had brought their application not under the jurisdictional rules of the 1968 Brussels Convention but rather under jurisdictional rules under Irish law: Order 11 of the Rules of the Supreme Court, permitting service out of the jurisdiction on a person who is not a citizen of Ireland where:

> "(f) the action is founded on a tort committed within the jurisdiction; or
>
> (g) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof [...]".

BNFL challenged the approach, arguing that the plaintiffs' claim should have been brought under the 1968 Brussels Convention. This argument was dismissed by the High Court, O'Hanlon J. ruling that BNFL was a proper party to the plaintiffs' action. The High Court referred to the jurisprudence of the ECJ to conclude that the tort in question was committed within its jurisdiction (a condition for the application of Order 11). O'Hanlon J. observed that although the activities of BNFL were carried on outside the jurisdiction of Ireland they had harmful consequences within Ireland, on the atmosphere and seacoast along the east coast. Referring to the *Handelswerkerij v. Mines de Potasse d'Alsace* judgement, he concluded that "there is ample authority for the proposition that a tort

---

95. Article 26 provides for the possibility of opposing recognition. Amongst the grounds for refusal of recognition, Articles 27 and 28 include conflict with public order, lack of respect of the defendant's rights, irreconcilability with other judgements, etc.

96. Article 29.

97. Articles 33-49. For a detailed analysis of the provisions of the Brussels Convention on the recognition and enforcement of judgements see the authors cit. *supra* note 3.

98. *Constance Shortt and Others v. Ireland, the Attorney General and British Nuclear Fuels Plc.*, [1996] Irish Reports, pp. 188-220.

may be regarded as having been committed within the jurisdiction if any significant element occurs within the jurisdiction". He went on to analyse the case law of the ECJ to affirm that "as to the meaning to be attributed to the expression tort when referred to in the Convention, this was the subject of a decision by the European Court in *Kalfelis v. Schröder*, where a definition equally wide in scope to that applicable in Irish law (a wrong independent of contract) was adopted". Finally the High Court dealt with the question of the *forum conveniens*. O'Hanlon J. observed that:

> "as between trying the case in this jurisdiction or in the law courts of England, it does not appear to me that there is much to choose between the two options on the grounds of comparative costs and convenience. Some additional costs and inconvenience will be incurred by the third defendant (BNFL). From the point of view of the other parties to the suit, the High Court in Dublin would appear to be more convenient and less costly than having to travel to England, but the scales do not appear to me to come down firmly one side or another."

The High Court concluded that it was preferable that the proceedings be litigated in Ireland rather than England, having regard to the comparative cost and convenience of litigating in either jurisdiction.

BNFL appealed to the Irish Supreme Court, which dismissed the appeals. It affirmed that the case for service out of the jurisdiction under Order 11 had been made out by the High Court. It was not necessary to discuss at length the applicability of the 1968 Brussels Convention, since the plaintiffs had chosen to apply for leave under Order 11 in accordance with the traditional procedure applying to service out of the jurisdiction. However, the Supreme Court observed in passing:

> "It is possible to invoke the [1968 Brussels] Convention to institute proceedings in the national jurisdiction where the effect of the alleged wrongful act is felt. Secondly it would not appear to be possible to invoke the Convention in an administrative law action. It may be possible to invoke the Convention where the action is essentially based on some civil wrong but also contains some minor elements of administrative law."

In an interesting *obiter dictum*, the Supreme Court further held that in the instant case the invocation of Irish jurisdiction did not amount to an interference with the legislative and judicial powers of another sovereign state (the United Kingdom), since the subject matter of the litigation related to the consequences in Ireland of activities carried on in the United Kingdom rather than to the activities themselves. These decisions of the High Court and Supreme Court provide judicial authority for the approach set out in our analysis above.

6. Conclusion

It is apparent that there may be advantages and disadvantages in acting under the two sets of conventions. The advantage of the dedicated regime provided by the Paris and Vienna Conventions is that it concentrates jurisdiction over claims for an accident in a single country (and perhaps even a single court), avoiding the risk of conflicting judgements being awarded on the same issue. Furthermore, claimants under the Paris and Vienna Conventions will not have the burden of proving fault, a task which may (but not necessarily) arise under the Brussels Convention. Against this, the advantages of the Brussels Convention fall to be weighed. From the perspective of persons damaged by a nuclear accident they will have the option of choosing where to institute an action, either before their own courts or the courts of the state where the event occurred. This means that they may at least choose not to file actions abroad, with all the attendant difficulties that may bring in terms of

language, cost and geographic distance. Moreover, they will not be subject to the low limits on liability established by the Vienna and Paris Conventions, or their progeny. And they will not be subject to the narrow definitions of nuclear damage which (in the case of England at least) would exclude most environmental claims (and even claims where harm other than physical damage had occurred).[99]

The Paris and Vienna Conventions were essentially developed to nurture nascent nuclear industries. Even as amended they can scarcely be said to accommodate the interests of victims. It is surely no coincidence that it is principally nuclear-power states which have acceded to these instruments. For countries like Ireland – as well as Luxembourg and Austria – it would be difficult indeed to identify many, if any, reasons why they should accede to these conventions when the Brussels Convention appears to provide adequate or superior protection.

99. See *Merlins and Others v. BNFL*, [1990] All England Law Report 3.