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Third Party Liability in the Field of Nuclear Law
An Irish Perspective

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A. Introduction

Ireland is not a signatory to the Paris Convention on Third Party Liability in the Field of Nuclear Energy (hereinafter referred to as "the Paris Convention"),[1] which was adopted on 29 July 1960 under the auspices of the European Nuclear Energy Agency (which later became the Nuclear Energy Agency – NEA) of the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development – OECD). Neither is Ireland a signatory to the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter referred to as "the Vienna Convention") which was adopted on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA). Ireland is, however, a member of both the NEA and the IAEA and, acutely conscious of the harm that might result to its citizens in the event of a major nuclear incident, maintains contact with both agencies by, *inter alia*, regularly attending the meetings of their governing bodies and various committees. Ireland therefore closely monitors developments in relation to both Conventions. Ireland has, to date, chosen not to ratify either Convention but this policy is kept under regular review particularly in the light of ongoing amendments to the Conventions.

The Paris Convention and the Convention of 31 January 1963 Supplementary to the Paris Convention (hereinafter referred to as "the Brussels Convention"),[2] which introduced a complementary system of indemnification of particularly costly nuclear damage from public funds, are currently being revised and the Amending Protocols are expected to be adopted over the coming months.

Ireland is, however, a Party to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (hereinafter referred to as the "BCJEJ"; see, on this subject, the article by P. Sands and P. Galizzi in *Nuclear Law Bulletin* No. 64)

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1. Please note that references to "the Paris Convention" in this article refer to the 1960 Paris Convention as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982.

2. Please note that references to "the Brussels Convention" in this article refer to the 1963 Brussels Convention as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982.

and is, along with the other member states of the European Union,[3] bound by Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters since its entry into force on 1 March 2002. This Council Regulation does not affect the substantive law to be applied to any claim under its aegis but rather is concerned with unifying the rules of conflict of jurisdiction in civil and commercial matters and simplifying the formalities in order to ensure the simple and rapid recognition of judgements in member states bound by the Regulation. It does not, however, alter the basic jurisdictional rules established under the BCJEJ.

A simulated nuclear incident was held on 22 and 23 May 2001 at the Gravelines nuclear power plant near Dunkirk in France as part of the INEX 2000 Exercise. The INEX (International Nuclear Emergency Exercise) Programme, carried out by the NEA since 1993, responds to member states' concerns to promote means of ensuring effective co-ordination between the various bodies which have a role to play in the event of a nuclear accident, in order to ensure rapid and efficient management of such a situation. This programme is composed of a series of exercises simulating nuclear accidents in which interested countries may participate. For the first time, it was decided to organise a third party liability workshop as an integral part of this exercise. Ireland was invited to take part in this Workshop on the Indemnification of Damage in the Event of a Nuclear Accident which took place on 26-28 November 2001 in Paris and the original version of this paper was prepared in order to present the views of the Irish delegation on that occasion.

This paper will first set out in summary form the main provisions of the Paris Convention, the instrument under which issues of third party liability between the majority of NEA member states affected by any such incident would be resolved, and will then set out some of the perceived advantages and disadvantages which would result from an application of the provisions of the Convention to a non-nuclear state such as Ireland.

This paper will then consider how Irish victims of a nuclear incident might recover compensation for loss and damage caused by such an incident. For reasons set out below, it is the view of the authors that Irish victims of such an incident could first bring their claim in Ireland or in France, that it is likely that Irish law would apply to any such claim and that any judgement, including any interlocutory judgement in such proceedings, could be enforced in the courts of any other European Union state, including France.

B. Brief Summary of the Paris and Brussels Conventions

Where, as in the simulated Gravelines incident, a nuclear accident has occurred in a country (France) which is a Party to the Paris Convention and damage has been caused in a country which is also a Party to that Convention (for example, Belgium), then the provisions of the Convention will apply. The courts of these states will apply the Paris Convention as enacted into their own legal system. Substantive and procedural matters not directly governed by the Convention will, per Article 14 of the Paris Convention, be determined by national legislation.

Individuals who suffer damage in a non-contracting state, for example Ireland, can bring actions under the ordinary third party liability laws where the injury is caused, as in this example, by the activities of a nuclear operator in France, a State Party to that Convention. Article 2 of the Paris Convention provides that the Convention does not apply "to nuclear incidents occurring in the territory of non-contracting states or to damage suffered in such territory, unless otherwise provided by the

3. Except Denmark which remains bound by the BCJEJ.

legislation of the Contracting Party in whose territory the nuclear installation of the operator liable is situated".

Territory includes the territorial sea of a State Party and it has also been recognised that the Paris Convention is applicable to incidents occurring and damage suffered on the high seas,[4] provided that the liable operator is subject to the Convention regime. It is clear from Article 2 that Contracting States may extend the territorial scope of the Convention by domestic legislation. In common with most Contracting Parties, France has not so extended the scope of the Convention. It should also be noted that the United Kingdom has also not extended the territorial scope of the Convention.[5]

Article 13 establishes a principle of exclusive jurisdiction, i.e. only the courts of the Contracting Party where the incident occurred will have jurisdiction over actions brought for damage caused by a nuclear accident which occurred in its territory. This of course only applies to actions brought under the Paris Convention and within its territorial scope.

Article 6(a) channels liability for claims caused by a nuclear incident onto the operator of the nuclear installation at which the incident occurred. The operator is only liable under the rules of the Convention and no other person will be liable for nuclear damage caused.

Article 3(a) provides that 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 incident […]". Whilst "nuclear incident" is widely defined in Article 1(a), the Convention does not address questions of proof of, for example, causation and damage and these are therefore "substantial or procedural" matters to be dealt with by national legislation [see Article 14(b)]. Article 14(c) provides that any such legislation "shall be applied without any discrimination based upon nationality, domicile, or residence".

Article 8 sets time limits on the bringing of actions for compensation, namely ten years from the date of the nuclear incident. Article 8(c) further provides that national legislation may establish a limitation period of no less than two years from the date on which the person suffering damage had knowledge of or ought reasonably have known of both the damage and the operator liable. This period cannot however exceed the maximum ten-year limitation period under Article 8(a).

Article 7 of the Paris Convention sets the maximum amount of liability of the operator at 15 million Special Drawing Rights (SDR),[6] although the parties may by legislation establish a lesser or greater amount of compensation, subject to an overall minimum of SDR 5 million. Article 10 requires the operator to have and maintain insurance or other financial security in order to guarantee that compensation will be paid. It should be noted that the Brussels Convention provides for additional

4. Recommendation of the Steering Committee of the NEA of 25 April 1968 [NE/M(68)1].

5. Section 13(1)(b) of the United Kingdom Nuclear Installations Act, 1965 (as amended) provides that compensation is not payable under that Act for breaches of duties imposed by Sections 7-10 thereof if the injury or damage "was incurred within the territorial limits of a country which is not a relevant territory" and a relevant territory is defined as being a country which is *inter alia* bound by an international agreement with the United Kingdom in relation to third party liability. The text of this legislation as amended in 1983 is reproduced in the Supplement to *Nuclear Law Bulletin* No. 33.

6. The Special Drawing Right (SDR) is an artificial unit of account based upon several national currencies and used by the International Monetary Fund (IMF). On 13 November 2002, the value of 1 SDR corresponded to USD 1.33.

compensation from public funds in the event that compensation under the Paris Convention is insufficient.

The Paris and Brussels Conventions[7] together provide for a maximum level of SDR 300 million. The compensation is to be provided according to a three-tier structure: (i) compensation of at least SDR 5 million which each party is required to establish by law and which has to be provided from insurance or other financial guarantee; (ii) compensation of up to SDR 175 million to be provided from the public funds of the party in whose territory the installation is situated; and (iii) compensation of up to SDR 300 million from public funds jointly contributed by all parties to the Brussels Convention.

C. Examination of the French legislation implementing the Paris and Brussels Conventions which would apply to the Gravelines scenario

Act No. 68-943 of 30 October 1968 on Third Party Liability in the Field of Nuclear Energy, as amended by Act No. 90-488 of 16 June 1990[8]

The application of the principles of the Paris and Brussels Conventions, and the advantages and disadvantages of the same for Irish victims of a nuclear incident, are to be seen in this French legislation.

Section 1 of the legislation provides that the Act lays down measures that, under these Conventions, are left to the initiative of each State Party.

The maximum liability of the operator of a nuclear installation, as set at 600 million French francs (FRF) (and FRF 150 million in the case of an installation which has been determined by decree as presenting a lower risk), is in excess of the requirements of the Conventions. Beyond this amount, the State assumes responsibility for an amount of up to FRF 1 500 million per accident, and finally all States Party to the Brussels Convention provide a further tier of compensation up to FRF 2 500 million.

Section 7 requires the operator to maintain insurance or financial security and Section 8 provides that, where victims cannot recover from the operator, guarantor or insurer, compensation shall in the last instance be met up to the maximum provided in the Act by the State.

Section 10 makes provision for the establishment by decree of a non-restrictive list of bodily injuries that shall be presumed to have been caused by the incident.

Section 13 deals with a situation where it is likely "at the time of a nuclear incident" that the maximum sums available for compensation are insufficient to compensate victims. A ministerial decree is required to be published within six months of the incident in order to set out how compensation is distributed. The decree will, having regard to, *inter alia*, the order of priority set out in Section 13(a) and (b) of the Act, set out rules for calculating the compensation available to victims for bodily injury and damage to property.

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7. The 1982 Additional Protocol to the Brussels Convention increased the amount of compensation available. The parties to the Brussels Convention must be parties to the Paris Convention.

8. The text of this Act was reproduced in the Supplement to *Nuclear Law Bulletin* No. 46.

Section 15 deals with limitation periods and provides for a maximum limitation period of up to 15 years[9] from the date of the incident. Section 16 would appear to provide that the usual rules in relation to the taking of proceedings apply to proceedings under the Act. Section 17 however provides that all actions are to be taken in the *Tribunal de Grande Instance* in Paris and Section 19 provides that the Act overrides any special rules concerning the prescription of actions against the state and local bodies.

Commentary

The above legislation makes real many of the difficulties and uncertainties that would face an Irish victim of a nuclear incident, remaining within the context of the present example at Gravelines, in seeking compensation under the Paris Convention. The usual rules of procedure and substantive law of France would seem to largely apply to the claim. In addition, there is a lack of clarity in relation to the distribution of compensation in the event that the maximum sums available are insufficient.

The legislation does not answer a number of pertinent practical questions raised in the *Vade Mecum* which was distributed in advance of the Workshop on the Indemnification of Damage in the Event of a Nuclear Accident. It is unclear how or if French law and procedure provide for:

- the establishment of an inventory of victims and of damage suffered as a result of an incident;
- the heads of damage subject to compensation according to the applicable definition of nuclear damage;
- distribution of emergency or interim payments;
- an "initial estimate" of the damage suffered in France or any other Contracting State;
- the issue of a decree under Article 13 of the French Act;
- the institution of class actions;
- the institution and processing of claims by victims resident abroad.

It would also be of interest to ascertain whether there is in existence any procedure for the provision of information by the French authorities to other NEA member states in relation to the manner in which claims for compensation may be made, the places where the necessary papers may be obtained and lodged, the provision and availability of legal advice and assistance, the deadlines for submissions of claims etc.

D. A Comparative Summary of the United Kingdom legislation implementing the Paris and Brussels Conventions

The liability of the United Kingdom Atomic Energy Authority or other licensed bodies pursuant to the Paris Convention is to be found in the Nuclear Installations Act, 1965 as amended (hereinafter

9. The State shall honour claims submitted after the expiry of the standard ten-year limitation period for a further period of five years.

referred to as "the 1965 Act").[10] The 1965 Act prohibits the use of a site for the purpose of installing or operating a nuclear installation such as a nuclear reactor or plant, and other ancillary matters, without the issuing of a licence by the Authority or a Government Department.[11] Sections 7, 8 and 9 impose strict liability on the licensee, the Authority and the Crown in respect of certain occurrences in connection with the use of nuclear sites.

Strict liability is imposed where injury to a person or damage to property arises from radiation or from a combination of radiation and the toxic, explosive or other hazardous properties of nuclear matter. The damage must, however, be physical and not purely economic loss and must relate to tangible property or property rights – *Merlin v. British Nuclear Fuels Limited* [1990] 2 QB 557. Where damage not covered by the Act occurs it would appear that under English law liability falls to be dealt with under common law rules.[12] Losses arising out of long-term risks and as yet unascertained physical harm are not covered.

As has been observed by a number of academic commentators,[13] there still remains, even where strict liability is imposed on the licensee or other body, the problem of causation. The 1965 Act requires that a causal link be established between the injury or damage suffered and the nuclear occurrence. It should be easy to establish a causal link between a major nuclear accident and persons who suffered physical symptoms such as radiation sickness shortly thereafter. It may however be impossible to establish this causal link where a plaintiff alleges that emissions from a nuclear plant have caused him or her to develop cancer over a period of years.[14]

The maximum period for bringing an action under the 1965 Act is 30 years from the occurrence giving rise to the claim or, where the occurrence is a continuing one or one of a succession all attributable to a particular happening on site, 30 years from the last relevant date. Under Section 16(1) of the 1965 Act, liability to pay compensation is limited to 140 million pounds sterling (GBP) in respect of any one single occurrence or to GBP 10 million for licensees of certain small installations, prescribed by reference to type and thermal output or radioactivity. Pursuant to Section 19 of the 1965 Act, licensees must make ministerially approved arrangements to make funds available to satisfy claims up to the amounts required by Section 16.

Section 18, as amended, imposes an obligation on the State to make available such sums as, when aggregated with contributions for other States Party to the Brussels Convention, amount to the equivalent in sterling to SDR 300 million.

10. Ibid. Footnote 5.

11. Sections 1-6 of the 1965 Act.

12. See Hughes, Jewell, Lowther, Papworth & De Prez, *Environmental Law*, 4th Edition, pp. 144 and 145.

13. E.g. Christopher Miller, (1989) "Radiological Risk and Civil Liability", *Journal of Environmental Law*, Volume 10, No. 1.

14. This problem was illustrated in two cases brought by relatives of former workers in Sellafield – *Reay v. British Nuclear Fuels* [1992] 4 LMELR 195 and *Hope v. British Nuclear Fuels* [1993] 5 ELM 178. In both cases, the plaintiffs had not been able to establish the necessary causal link between radiation emitted from the plant and the injury allegedly caused to the relatives of former workers as a result.

E. Adoption of the Paris and Brussels Conventions – Advantages and Limitations for Irish Citizens

Possible advantages for Irish victims if Ireland were to ratify the Paris and Brussels Conventions

The Paris Convention provides a unified system of liability and recovery of compensation for nuclear damage covered by the Convention throughout Contracting States.

There is a guaranteed minimum sum of money available for the payment of compensation for damage caused as a result of a nuclear incident.[15] The net effect of the application of the Paris and Brussels Conventions is that there is now a total aggregate minimum sum of SDR 300 million available in respect of a nuclear incident.

Article 10 of the Paris Convention requires the operator to have insurance or other financial security, as specified therein, in order to ensure that any compensation for which it is liable will be paid.

The injured party is only required to prove causation and damage, and does not have to prove negligence or some other civil wrong or tort on the part of the operator as a condition precedent to recovery of damages. This is made clear in Article 3 of the Paris Convention. From an Irish point of view, this is one of the few attractive aspects of the system of third party liability as currently established under the Paris Convention. The victim of a nuclear accident would under Irish law currently have to show that any loss or damage was not only caused by the nuclear operator (or other defendant) but also that this had resulted from the commission of a civil wrong. The operator is liable for loss and damage, as defined in Article 3(a) of the Convention, upon proof that the same was caused by a "nuclear incident in such installation or involving nuclear substances coming from such installation, except as otherwise provided for in Article 4". A "nuclear incident" is widely defined in Article 1 and would cover incidents such as that simulated at Gravelines.

A decision of a court, competent under the Paris Convention to deal with the claim in question, will be enforceable in the territory of another Contracting Party once it becomes enforceable in the state of the competent court under Article 13(d) of the Paris Convention. This applies equally to interim judgements. The courts of the enforcing state cannot consider the merits of the judgement handed down in the state which decided the claim. Article 13(e) also provides that states against which an action is brought cannot, except in the case of measures of execution, invoke jurisdictional immunities before the court competent to hear the case.

Possible disadvantages for Irish victims if Ireland were to ratify the Paris and Brussels Conventions

There is a clear perception among non-nuclear states that the Paris and Brussels Conventions are balanced in favour of the nuclear industry. Of particular concern to Ireland in this regard would be the requirement that actions be taken in the courts of the state where the offending installation is located, the exclusive channelling of liability onto the operator, the relatively low limits of compensation available under the Paris Convention in the event of a major nuclear accident (even where complemented by the Brussels Convention), the narrow and uncertain definition of nuclear damage for which compensation is payable and the limitation period for bringing actions.

15. See Article 7 of the Paris and Brussels Conventions op. cit.

The cap on the total compensation available under the Paris and Brussels Conventions system for all the victims of a nuclear accident would appear to be insufficient to provide adequate compensation in the event of a serious nuclear accident. This remains the case despite the extra tiers of compensation from public funds and from the international fund provided under the Brussels Convention. The maximum required to be paid under the Conventions to all victims of a single nuclear incident is SDR 300 million (this is set at FRF 2 500 million under French law and GBP 140 million under UK law). It is very likely that such a sum of compensation would be inadequate to fully, or even substantially, compensate all victims of a major nuclear disaster.

The limitation periods for the institution of proceedings for loss and damage appear unduly restrictive. The ten-year limitation period provided for under Article 8 of the Paris Convention has been strongly criticised by many commentators[16] as many of the side effects of nuclear damage do not become apparent until after ten years.

The effect of Article 13 of the Paris Convention is that only the courts of the country where the incident occurs have jurisdiction over actions for damage caused by such an incident. Non-national victims would therefore have no right to seek compensation in the courts of their own states and would have to take action in an unfamiliar and distant legal system.

Liability is limited to the nuclear operator and therefore, for example, a builder of an installation, a provider of a nuclear power plant or equipment or a state/local authority responsible for supervision of the plant could not be sued. The operator is only liable under the rules of the Convention and no other person will be liable for nuclear damage caused.

Liability is further limited to (a) damage to or loss of life of any person and (b) damage to or loss of any property where the damage was caused by a nuclear incident at a nuclear installation (this paper does not consider the rules in relation to the transport of nuclear substances which are also dealt with in the Paris Convention). A number of issues arise in this regard as follows. No guidance is provided in the Paris Convention as to the concept of "nuclear damage". The general view of commentators is that general environmental damage is not recoverable and there is also uncertainty as to whether and to what extent economic loss would be recoverable under the Convention.[17] If, for example, there was an accident at the British Nuclear Fuel plant at Sellafield which resulted in contamination of the Irish environment, Ireland might well be subsequently perceived as an unsafe or potentially unhealthy destination by tourists. This could lead to substantial economic losses to the Irish economy and particularly to individuals who are employed in the tourism industry in Ireland. It is doubtful if losses of this kind are recoverable under the Paris Convention.

An additional difficulty is caused by the failure of the Paris and Brussels Conventions system to deal with the standard of proof in relation to both causation and damage. Although Article 3 of the Paris Convention effectively provides that the liability of the operator is absolute upon proof of causation, the Convention does not address the legal principles to be applied to ascertain causation and damage and/or the threshold of damage. Article 14(b) provides for a *renvoi* to national legislation in

16. B. Moser, (1986) "Proof of Damage from Ionising Radiation", *Nuclear Law Bulletin* No. 38, and P. Stahlberg, (1994) "Causation and the Problem of Evidence in Cases of Nuclear Damage", *Nuclear Law Bulletin* No. 53.

17. Paoli Galizzi and Philippe Sands, (1999) "The 1968 Brussels Convention and Liability for Nuclear Damage", *Nuclear Law Bulletin* No. 64. Study by the NEA Secretariat, (1987) "The Accident at Chernobyl – Economic Damage and its Compensation in Western Europe", *Nuclear Law Bulletin* No. 39. See also *Merlin v. British Nuclear Fuels Limited* [1990] 2 QB 557 op cit.

these circumstances but this of course involves the risk of the Convention being applied differently in different Contracting States.

In the event that the sums available for compensation are not sufficient to cover all losses sustained as a result of a nuclear incident, the apportionment of the amount available is also left to national legislation. This again runs the risk of the Convention being applied differently in each Contracting State.

F. Ireland's Present Reliance on the Brussels Convention on Jurisdiction and the Enforcement of Judgements and on Common Law

The BCJEJ and Council Regulation (EC) No. 44/2001 on Jurisdiction and the Enforcement of Judgements

As already noted, the Paris Convention only applies to claims for compensation where the incident and damage occur in states which are parties thereto. There is provision for Contracting States to extend the application of the Convention outside its jurisdiction but this has not been done in French law or indeed in the United Kingdom legislation.

Irish victims of a Gravelines-type incident might therefore seek to rely upon the terms of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (BCJEJ) and/or Council Regulation (EC) No. 44/2001 for the enforcement of any judgement they might obtain in Ireland for damage resulting from a nuclear incident or the operation of a nuclear installation in another BCJEC/EC Regulation State. The Convention and Regulation provide an effective system for the enforcement of judgements delivered in one State Party to the BCJEJ (e.g. Ireland) in any other State Party to the Convention (e.g. France). It is our contention that an Irish victim of a Gravelines incident could bring a claim for compensation in an Irish or a French court, that the substantive laws of Ireland would likely be applied to any such claim and that any judgement arising from such claim could be enforced, if necessary, under the BCJEJ/EC Regulation system.

It should also, however, be pointed out that in the case of *Shortt v. Ireland, the Attorney General and British Nuclear Fuels Limited* [1997] ILRM 161 (see *Nuclear Law Bulletin* No. 59), the plaintiffs chose to bring a claim for what was described by the Supreme Court as being a claim in the nature of a tort or *quia timet* action under the provisions of Order 11(1)(f) of the Irish Rules of the Superior Courts. In other words the plaintiffs did not seek to bring the case under the BCJEJ and obtained leave to serve out of the jurisdiction under the traditional non-Convention procedure.[18]

The application of the BCJEJ/EC Regulation to the claim

Both Ireland and France are Parties to the BCJEJ/EC Regulation and these instruments will therefore govern the international jurisdiction of the courts of their Contracting States in their field of application. It appears that the field of application of the BCJEJ/EC Regulation includes actions for compensation for transboundary nuclear damage.

18. This case is considered more closely later in this article.

A future defendant may, however, seek to argue that such claims for compensation are not "civil and commercial matters" governed by the BCJEJ/EC Regulation. The objection that may be raised here is that the BCJEJ/EC Regulation do not apply to cases involving public authorities or authorities regulated by public law. Most states exercise strong regulatory control in the field of nuclear energy and, furthermore, public authorities often operate nuclear installations. It may, therefore, be argued that the BCJEJ/EC Regulation do not apply to any cases which arise from the operation of nuclear installations by such "public" authorities.

Public law matters are of course excluded from the scope of the BCJEJ. Guidance in relation to this question has, however, been given by the European Court of Justice (ECJ), as the ultimate arbitrator of the meaning of the BCJEJ, in three leading cases: *LTU v. Eurocontrol* (1977) 2 ELR 61, *Netherlands v. Ruffer* (1980) ECR 3807 and *Sonntag v. Waidmann* (1993) ECR 1. The rationale of those cases appears to be that the BCJEJ is excluded when there is an action between a public authority and a private person and where the public authority is acting in the exercise of its public powers. In our view it is unlikely that the ECJ would accept that the operator of a nuclear power plant, even where the plant is owned by a state agency and licensed by a state authority, is engaged in the exercise of a public power. To so hold would lead to the absurd conclusion that actions against the operators of private nuclear power plants would be within the Convention whereas those against state-owned operators would not.

In general, the BCJEJ 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*. An Irish victim of a Gravelines-type incident could however also avail himself or herself of the forum indicated by Article 5(3) of the BCJEJ. This provides that a person domiciled in one Contracting State may be sued in another Contracting State "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred". There is little doubt that "tort, delict or quasi-delict" is sufficiently wide to cover an action for damage caused by a nuclear incident. The ECJ has given this phrase a community meaning as covering all actions which seek to establish the liability of the defendant and which are not related to a contract within the meaning of Article 5(1) of the BCJEJ.

The words "the courts for the place where the harmful event occurred", following decisions of the ECJ in several cases including the famous *Mines de Potasse d'Alsace* case [1976] ECR 1735, have, in relation to direct victims of a tort etc., been interpreted as conferring jurisdiction on the courts of the state where the event giving rise to the damage occurred as well as the state where the damage itself occurred, at the option of the plaintiff. The French and Irish courts would therefore, in the incident under consideration, and at the option of the plaintiff, have jurisdiction under Article 5(3) to hear any such claim.

Order 11(1) of the Irish Rules of the Superior Courts

In any event, even if the claim were to be one that was held not to be within the terms of the BCJEJ/EC Regulation, the decision of the Supreme Court in the *Shortt* case (op. cit.) is authority for the proposition that *prima facie* the Irish courts would have jurisdiction at common law to entertain any such claim. This decision concerned the propriety of allowing the plaintiffs, resident in Ireland, to seek various reliefs in the Irish courts including declarations, injunctive relief and damages for various torts alleged to have been committed by British Nuclear Fuels Limited in the operation of the Thorp reprocessing plant at Sellafield. The High and Supreme Courts both rejected the contention of British Nuclear Fuels Limited that this was not a proper case in which to allow the service of a summons out of the jurisdiction under Order 11 of the Irish Rules of the Superior Courts.

Judge Barrington, at page 169 of the judgement, made the point that it was not the activities as such that gave the plaintiff a cause of action but the results of the activities and it was these allegedly harmful events that gave the Irish courts jurisdiction. He then referred to the future possible course of the case and made the following observations:

> "*Prima facie* it is difficult to see how any provision of English law could make legal in Ireland injury or damage which would otherwise be tortious under Irish law. Certainly it is hard to see how any provision of UK law could deprive the Irish courts of jurisdiction which they would otherwise have. *Prima facie* the relevant law would appear to be the *lex loci delicti* rather than the law of the United Kingdom."

The law to be applied to any such claim

The ECJ confirmed in the case of *Shevill v. Presse Alliance SA* [1995] 2 AC 18 that the object of the BCJEJ was not to unify the substantive law and procedure of different Contracting States but only to determine which courts had jurisdiction and 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 the effectiveness of the Convention is not thereby impaired".

It is of particular interest to first note that if an Irish plaintiff were to bring an action in the French courts for damage suffered as a result of an incident in Gravelines, then it would *prima facie* appear that the French courts would apply the *lex damni*, the law of the place of the damage, to any such claim.[19]

The *lex damni* would also be likely to be applied to cases brought in the United Kingdom. Section 11(1) of the Private International Law (Miscellaneous Provisions) Act, 1995 states the general rule that in tort the applicable law is that of the country where the events constituting the tort in question took place. Section 11(2) applies in the situation where elements of the events constituting the tort or delict in question occur in different countries. Section 11(2)(a) and (b) provide that the applicable law is "for an action dealing with bodily damage caused to a person or death resulting from the bodily damage, the law of the place where the person was when he suffered the damage" and "for an action dealing with property damage, the law of the place where the property was at the time of the damage". Section 11(2)(c) provides that in any other case, the applicable law is "the law of the country in which the most significant elements of those events occurred". Section 12 allows for the displacement of the general rule and the application of the law of another country where this appears to be "substantially more appropriate" for the reasons set out in that Section.

There are other rules applied in different legal systems to the question under discussion, e.g. Germany and Italy apply the principle of the law that is most favourable to the injured party whereas the Netherlands and Denmark apply the law of the place of the dangerous activity (*lex loci actus*).[20]

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19. See Christopher Bernasconi, (2000) "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference", *Hague Conference on Private International Law*, pp. 29-40.

20. An associated issue raised in the Bernasconi paper concerns the attitudes of national courts on the effect of an "administrative authorisation" abroad on a judicial claim involving transfrontier pollution. This

Were the plaintiff to take an action in Ireland, it is also likely that the law applied to any such claim would be the law of Ireland, the place where the injury or loss occurred. This question has not been regulated by statute in the state and common law principles therefore apply. There is little Irish authority directly on point but an analysis of case law would give grounds to argue that Irish law should be applied to any such case.

The traditional common law rule in relation to foreign torts is derived from *Philip v. Eyre* [1870] LR 6 QB 1 as modified by *Chaplin v. Boyes* [1971] AC 356. At common law there was a rule of double actionability which provided that for the plaintiff to succeed in recovering damages for a wrong committed abroad, he or she would have to show that the wrong in question (i) would, if done in Ireland, be an actionable wrong in Irish law and (ii) was not justifiable by the law of the place where the wrong was committed.

This rule was heavily criticised by Walsh J. in the Supreme Court decision in *Grehan v. Medical Incorporated and Valley Pines Associates* [1986] IR 528. In that case the plaintiff was claiming damages for personal injuries suffered as a result of the disintegration of a heart valve manufactured in the United States and which had been inserted in his heart in Ireland. Although the case only concerned the question of the jurisdiction of the Irish courts to hear the claim, the Supreme Court went on to remark that in the context of jurisdictional questions, the High Court should have regard to choice of law implications. The Court criticised *Philips v. Eyre* and suggested that a more flexible approach to the question of law should be applied in Ireland. At page 541 of the report Walsh J. stated that in his view, so far as choice of law in tort cases was concerned, "the Irish Courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions of applying any particular choice of law rule in the proceedings in question". In the later case of *An Bord Trachtala v. Waterford Foods Ltd*, High Court, 25 November 1992, Keane J. seemed, however, to prefer the traditional common law rule and stated that there was much to be said for leaving the matter of reform to the legislature.

Of particular interest are also the more recent observations of the Supreme Court in the case of *Shortt* (op cit) on the question of jurisdiction and choice of law.

Although the matter is not settled it would seem arguable that Irish law should apply to any claim of the type under consideration heard before the Irish courts on the basis of the obiter observations in *Shortt* and *Grehan*.

In the event that the traditional rule of double actionability, as seemingly preferred by Keane J. in *An Bord Tachtala v. Waterfood Foods*, were applied to such a claim it does not appear that this would necessarily put an insurmountable barrier in the way of the plaintiff. The plaintiff would have to show that the wrong was actionable in Ireland and also that the act was "not justifiable by the law of the place where it was done". There does not appear to be any general exclusion or limitation of liability under French law.[21] It also seems that where damage is not covered by the terms of the United Kingdom 1965 Nuclear Installations Act, liability falls to be determined under common law rules.

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question was alluded to in *Shortt*. In granting leave to serve outside the jurisdiction on British Nuclear Fuels Limited, the Irish Supreme Court said that it was *prima facie* hard to see how any provisions of UK law could make legal in Ireland injury or damage that would otherwise be tortious under Irish law. In relation to the Gravelines incident, it is pointed out in the Bernasconi paper that under French law, administrative authorisations expressly reserve the rights of third parties.

21. Bernasconi (op cit above), p. 42.

Summary of Irish Law in relation to such a claim

It is not the purpose of this paper to carry out a detailed analysis of the Irish law of torts but rather to refer to the likely causes of action available to an Irish plaintiff in the event of loss and damage caused by a nuclear incident.

Before summarising causes of action, however, we would first like to mention the questions of damages and limitation periods.

The general purpose of the Irish law of torts is to place a plaintiff in the same position as he or she would have been prior to the commission of the wrong. This is referred to as the principle of *Restitutio in Integrum*. The only form of compensation permitted by Irish law at present is a lump sum award. There is also no specific bar on the recovery of pure economic loss suffered as a result of tortious action. There is no limitation on the total amount that may be recovered by an individual or a group of individuals who suffer loss and damage.

The provisions of the Irish Statute of Limitations would also be more advantageous to a plaintiff as compared to the provisions of the Paris Convention. The general period of limitation for an action founded on tort is six years from the date on which the cause of action accrued – Section 11 of the Statute of Limitations 1957. Where a tort is actionable *per se*, time begins to run from the date of the act whereas where there is, for example, continuing trespass or nuisance, a fresh cause of action arises *de die in diem*. Where a tort is actionable only on proof of damage, as with negligence for example, time does not begin to run until some damage actually occurs. In addition, the Statute of Limitations (Amendment) Act, 1991 introduced a special limitation period for actions for personal injuries. Section 3(1) provides that such an action, where it is alleged the injuries were caused by negligence, nuisance or breach of duty, must be brought within three years of the cause of action accruing or the date of knowledge of the person injured (if later).

Rylands v. Fletcher

This is probably the most powerful weapon in an Irish plaintiff's armoury were he or she to sue for loss or damage caused by a nuclear incident. Under the famous House of Lords decision in *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330, any person who, in the context of a non-natural use of his real property accumulates anything that may cause harm to his neighbour in case it flows out, is strictly liable for all the damage that is the direct consequence of the outflow. Subsequent decisions have found that whereas the domestic use of electricity or gas will not fall within the scope of the rule, non-domestic use of these substances or of explosives or other highly inflammable materials may give rise to strict liability. It is therefore likely that the production of nuclear energy and the escape of harmful outflows as a result would be actionable under the rule.

Private Nuisance

A plaintiff may also consider bringing an action in nuisance in the event of a nuclear incident. Private nuisance is not actionable *per se* and actual damage must be shown and the damage must consist of physical injury to land, a substantial interference with the use and enjoyment of land or an interference with servitudes. It is only a person with an interest in the land, or an occupier of the land, who can maintain such an action.

Negligence

To succeed in any such claim a plaintiff would have to establish four elements:

(i) a duty of care, that is that the nuclear operator (or the manufacturer of parts etc.) owed the plaintiff an obligation to conform to a standard of behaviour for the protection of others against unreasonable risks;

(ii) a failure to conform to the required standard;

(iii) actual loss or damage to recognised interests of the plaintiff;

(iv) a sufficiently close causal connection between the conduct and resulting injury to the plaintiff.

It is unlikely that the courts would have much difficulty in finding that a nuclear operator in France did owe a duty of care to an Irish resident. The standard of that duty will obviously be a matter of debate and whether, on the facts of the given case, the defendant operator fell below the requisite standard. Items (iii) and (iv) are really matters of proof in court.

Trespass to Land

A plaintiff in a Gravelines-type situation may also consider seeking damages for trespass to his or her land. It is a trespass for a person to place any chattel on the land of another or to cause any object or substance directly to cross the boundary of another's land. The injury caused must be direct. Although the tort is actionable *per se*, that is without proof of any injury, the plaintiff will normally have to prove appreciable loss to obtain significant damages.

Other issues under the BCJEJ

The applicant may also seek to have any interlocutory relief obtained in the state having jurisdiction over a claim enforced in any other Contracting State. In accordance with the BCJEJ/EC Regulation, a court which has jurisdiction as to the substance of a case also has jurisdiction to order any provisional or protective measures that may prove necessary.

We would again cite the case of *Shortt v. Ireland, the Attorney General and British Nuclear Fuels Ltd* and draw your attention to the fact that the plaintiffs therein are seeking *inter alia* injunctive relief and have been given leave to serve their proceedings out of the jurisdiction under Order 11 of the Superior Courts Rules. That case was not brought under the BCJEJ but does indicate the openness of the Irish courts to the possibility of claims being entertained in this jurisdiction for damage caused by the operation of a nuclear plant in an adjoining state.

Under the Paris Convention, liability is channelled onto the operator of the nuclear installation. There is no such limitation of potential defendants under the Irish law of torts. In the event of a Gravelines-type incident, an Irish plaintiff could seek compensation from, for example, the builder of the installation and the supplier of the power plant or material that proved to be faulty.

G. Conclusion

Although there are some attractions in the system of third party liability established by the Paris and Brussels Conventions, there is little doubt that these are outweighed for Ireland by the many disadvantages and limitations set out above. The most serious of these limitations are the clearly inadequate sum of compensation available in the event of even a moderate nuclear incident and the unduly inflexible and restrictive limitation periods imposed on a plaintiff. From an Irish point of view, these Conventions appear to put the interests of the nuclear industry before the interests of those who might be injured as a result of what is, after all, one of the most potentially dangerous activities carried out by mankind.

Given that Ireland is not, and has no intention to become, a nuclear power producer, it is difficult to see any compelling legal, social, political or economic reason to become a Party to the Paris and Brussels Convention systems as they now stand.

Ireland considers that at this present time, the interests of its citizens is, on balance, better protected by relying upon the substantive law of the state and the system of recognition and enforcement of judgements originally established by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters. This is, however, a matter that is kept under review and it may well be that future amendments may persuade Ireland to take a different view and become a party to the Paris and Brussels Conventions.