Taking nuclear third party liability into the future

Fair compensation for citizens and a level playing field for operators

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A comparative overview of the implementation of the Paris Convention

– Conflict of laws problems within the Paris regime –

by

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1. The role of national law under the regime of the Paris Convention

The treaty relations established under the Paris Convention (PC)[1] among its Contracting Parties are designed to facilitate the bringing of claims for compensation of nuclear damage caused by a nuclear incident with transboundary detrimental effects. The regime of the Convention shall harmonize national liability regimes and shall do away with, or minimize, the problems which may occur if the general rules of private international law (conflict of laws) are to be applied to the case. The Paris Convention in particular – and this likewise applies to the other nuclear liability conventions[2] – provides rules on the law applicable and on the court exclusively competent. This creates legal certainty for both the victim and the operator liable which, *inter alia*, prevents expensive fora shopping.

Irrespective of the harmonizing effects of the Paris Convention, the nuclear liability law of the Paris States does not form a legal "bloc" which is harmonized in every regard and is totally unified. The Parties to the Convention continue being States with different national legal

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[1] [Paris] Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960 as revised on 28th January 1964 and 19th November 1982 (http://www.oecd-nea.org/law/nlparis_conv.html). The 2004 Protocol to Amend the Paris Convention (http://www.oecd-nea.org/law/paris_convention.pdf) is not yet in force.

[2] 1963 Vienna Convention on Civil Liability for Nuclear Damage (1963 VC) (IAEA Doc.INFCIRC/500); 1997 Vienna Convention on Civil Liability for Nuclear Damage (1997 VC) (IAEA Doc. INFCIRC/566 Annex); 1997 Convention on Supplementary Compensation for Nuclear Damage (CSC) (IAEA Doc. INFCIRC/567), the CSC is not yet in force.

systems including third party liability regimes.[3] The Convention bridges the national jurisdictions wherever the specifics of the nuclear risk so require to the extent that "ordinary law is not well suited to deal with the particular problems".[4] In all other fields the general national law remains applicable. So there still exist private international law problems within the Paris Convention regime which have to be solved.

Article 14 (b) PC defines the term "national law" and at the same time determines its position within the system of the Convention. The provision reads as follows:

> "National law" and "national legislation" mean the national law or the national legislation of the court having jurisdiction under this Convention over claims arising out of a nuclear incident, and that law or legislation shall apply to all matters both substantive and procedural not specifically governed by this Convention.

The second half of this Paragraph clarifies that the law of the Convention is embedded in national law, which is a corollary of the Convention's approach to only deal with those issues regarding which national law is not "well suited". According to the Convention's Exposé des Motifs, the reference to national law also includes those rules of private international law, "which are not affected by the Convention".[5] The inclusion of the rules of private international law is obvious because they are part of the national law.

In implementing the principle established under Article 14 PC, the Paris Convention contains the following references to national law.

The most famous one is Article 11 PC. It is a general clause which stipulates that nature, form, extent and the equitable distribution of compensation are governed by national law within the limits of the Convention. It covers a broad scope of applications and forms the substantial base of compensation. In the Convention there are also provisions which allocate responsibility for defined elements of nuclear liability to national law such as, *e.g.*, establishing the amount of liability or the limitation of liability in time (Articles 7, 8 PC).

In addition to explicit references to national law there are implicit or silent competences of the national law of the Parties. In some cases the Convention builds on national law as is by using language as "unless national law provides to the contrary" (Article 8 (e) PC) or "designated or recognized by the competent public authority" (Article 1 (a) (vi) PC).

In other cases the Convention does not even mention national law at all, but nevertheless the Convention's implementation and application depend on national law. This applies to those areas which under the law of conflicts are qualified as "preliminary or incidental question" (*"question préalable ou préliminaire", "Vorfrage"*). An example is the use of the term "property". Damage to and loss of property is a compensable head of damage under the Convention (Article 3 (a) (ii) PC).[6] The Convention does not provide a definition of the

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[3] See on this issue in greater detail: *Norbert Pelzer*, Conflict of Laws Issues under the International Nuclear Liability Conventions, in: *Jürgen A. Baur et al.* (eds.), Festschrift für Gunther Kühne zum 70. Geburtstag, Frankfurt a. M. 2009, pp. 819 – 842. This presentation builds to a larger extent on this former publication by the author.

[4] No. 2 of the Exposé des Motifs to the Paris Convention, revised text approved by the OECD Council on 16th November 1982, at: http://www.oecd-nea.org/law/nlparis_motif.html.

[5] No. 60 Exposé des Motifs (fn. 4). The version of Article 14 (b) as amended by the 2004 Protocol contains at the end of the first sentence after the words "nuclear incident" the following addition: "...excluding the rules on conflict of laws relating to such claims.". On this change of drafting see *Pelzer* (fn. 3) pp. 823 – 824.

[6] Regarding the 2004 Paris Convention see Article 1 (a) (vii) 2.

concept of property but it has to be determined in compliance with the relevant national law.[7] Moreover, also the acquisition and the loss of property ownership have to be assessed under the rules of national law. National approaches to establish the causal link between the incident and the damage also fall under the category of preliminary question.[8] So a great number of decisive elements which are required to justify a claim for compensation for nuclear damage will, as the case may be, have to be taken from the relevant national law and thus are subject to the law of conflicts.

2. The competent court and the law applicable

Article 13 PC designates a court exclusively competent to deal with actions under the Convention. The designation of the court has consequences for the law applicable because, in accordance with Article 14 (b) PC, the court will apply the *lex fori*. That law includes the Paris Convention and for all substantial or procedural matters not covered by the Convention the national law of the State of the court.[9] Both the Convention and the national law shall be applied without discrimination based upon nationality, domicile or residence (Article 14 (a) and (c) PC).

The applicability of the *lex fori* is a clear and a sensible solution. However, there are doubts as to whether this rule applies to all cases without any exception. Already at an early stage authors identified three fields where the rule does not apply.[10]

Pursuant to Article 7 (d) PC the amount of liability of the operator established in accordance with the Convention "shall apply to the liability of such operators wherever the nuclear incident occurs." In other words, the liability amount shall also apply if the nuclear incident, *e.g.*, during transport, occurs outside the installation State. It follows that the competent court has to apply the liability amount established by the installation State and not the liability amount under the law of the court State.

Furthermore, the application of the *lex fori* does not seem to be appropriate regarding the compensation for nuclear damage to the means of transport (Article 7 (c) PC). In those cases compensation shall not have the effect of reducing the liability amount established for the operator below a defined minimum amount. The amount of compensation of the operator is that which the installation State established and not the amount applicable under the *lex fori*.

The last exception was identified for cases to which, in accordance with Article 6 (h) PC, "provisions of national or public health insurance, social security, workmen's compensation

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[7] *Pelzer* (fn. 3) pp. 824 - 828 provides an enumeration of the Articles and of substantial areas which explicitly and implicitly refer to national law. This list covers all nuclear liability conventions. See also *Hartmut Hillgenberg*, Das Internationalprivatrecht der Gefährdungshaftung für Atomschäden, Düsseldorf 1963 pp. 54 – 55.

[8] Cf. *[Hermann] Weitnauer*, Haftung gegenüber Dritten auf dem Gebiet der Kernenergie, in: Der Betrieb 14 (1961) pp. 293 – 302 (300); *Franz Schmid*, Das Abkommen der Europäischen Kernenergieagentur (OECE) über die Haftpflicht auf dem Gebiet der Kernenergie, Wien 1961, p. 61; *Pelzer* (fn. 3) pp. 828 – 831.

[9] No. 60 Exposé des Motifs (fn. 4). On the applicability of the law of the court also see *Gunther Kühne*, Haftung bei grenzüberschreitenden Schäden aus Kernreaktorunfällen, in: Neue Juristische Wochenschrift 39 (1986) pp. 2139 – 2146 (2141); *Heinz Haedrich*, Atomgesetz mit Pariser Atomhaftungsübereinkommen, Baden-Baden 1986, p. 649 and the authors referred to in fn. 8.

[10] See *Weitnauer* (fn. 8) p. 300 and *Schmid* (fn. 8) p. 61.

or occupational disease compensation systems" apply. Obviously, these cases are to be governed by the law of the country of the respective social security system rather than by the law of the court.

The authors who identified these exceptions from the *lex fori* stress that these exceptions are the only ones. "*Auf alle anderen Fälle findet die lex fori uneingeschränkt Anwendung.*"[11] This view is particularly supported by the authors' first exception, the liability amount. Actually, the provision of Article 7 (d) PC is the only one in the Convention which clearly and expressly stipulates that the liability amount of the operator as established by the installation State shall apply "wherever the nuclear incident occurs." By *argumentum e contrario* it may be concluded that in all other cases where such express reference does not exist the law of the court has to be applied. This is a correct conclusion. But which are its consequences? Is there assurance that the law of the court including the law of conflicts of the court State, points at that law which complies with the Paris Convention? Or is there the risk that the private international law rules of the court State give priority to another law? Examples may help clarifying this issue.

Pursuant to Article 10 PC the operator's liability has to be covered by insurance or other financial security. The amount, type and terms of that coverage are to be specified by the competent public authority of the installation State. Liability amount and its coverage complement each other and form a package. This approach would not work if the liability amount were covered by the law of the installation State while the coverage were subject to the diverging law of another State. This becomes in particular evident if the other law requests prerequisites for financial security other than the installation State, which could entail that the operator does not have coverage. Such combination would not match the concept and the purpose of financial security under the Convention.

An identical situation, *e. g.*, exists if prescription periods would be imposed on the operator by the other law which differ from the prescription periods of the installation State: If under the installation State law the prescription period is ten years while the other law requires twenty years, it is difficult to justify that the operator has to satisfy claims after the elapse of the ten year period. As a matter of fact, it appears always to be problematic when the Contracting Parties have discretion to regulate certain issues. If in those cases the operator were requested to comply with the rules of a law other than the law of the installation State which he legitimately is not prepared for, the regime of the Paris Convention would be ruled out. In other words, the law of conflicts of the court State has to ensure that the law of the installation State is applied.

A comparative look at the 1963 and the 1997 Vienna Conventions[12] reveals identical problems. The "Explanatory Texts", which is a semi-official explanation of the 1997 Vienna Convention, address the extent to which the *lex fori* is the law to be applied.[13] The explanation emphasizes that "even if the competent court is not the court of the Installation State, that court will have to refer to determinations made by the Installation State in respect of matters

[11] *Schmid* (fn. 8) p. 61.
[12] Fn. 2.
[13] The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage – Explanatory Texts, IAEA International Legal Series, 3, Vienna 2007 pp. 52 – 54.

such as the designation of the liable operator (Article I.1(c)), the limit, if any, of the operator's liability or the limit of liability cover (Article VII)."[14]

In summary, the competent court shall apply the *lex fori* including the law of conflicts of the court State. However, whenever the Convention either builds on existing national legislations or grants discretion to the State Parties to legislate, the *lex fori* has to ensure that the law of the installation State shall be applied.

3. Conclusion

The problems dealt with in this presentation are the consequence of a certain degree of ambiguity or vagueness of the Convention which perhaps is due to the complexity of the subject. The provisions on the law to be applied by the competent court are not crystal clear. The directly applicable law of the Convention, on the one hand, and a broad area of issues which are governed by national law, on the other hand, have to be taken into account and jointly form the basis for the compensation of nuclear damage. Whenever the Convention points at the national law to be applied, in particular if the State Parties have discretion to legislate under the Convention, conflict of laws issues have to be solved.

Of course, these problems can be solved by way of proper interpretation of the legal texts. But interpretations may be erroneous and they do not necessarily create legal certainty among all Contracting Parties. It is therefore desirable that the Contracting Parties aim at drafting clear choice of law rules in their national implementing legislations. The EU could support that effort by providing unified yardsticks.

[14] *Op. cit.* (fn. 13) p. 52. See also *ibidem* the continuation of the respective paragraph and footnotes 165, 166.