

# Policies underlying Conflict of Law Choices in Environmental Law

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# INTERNATIONAL ENVIRONMENTAL LAW: CONTEMPORARY CONCERNS AND CHALLENGES

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# POLICIES UNDERLYING CONFLICT OF LAW CHOICES IN ENVIRONMENTAL LAW

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Ivana Kunda\*

## ABSTRACT

The purpose of this paper is the analysis of the impact that the environmental law principles, proclaimed in the Treaty on the functioning of the European Union and integrated in the secondary EU law, have on the conflict of law provisions in the Rome II Regulation. This entails examination of the provisions on parties' choice of applicable law, special provision for environmental damages, and certain provisions which specifically address the public interest concerns, such as the one on taking account of rules of safety and conduct and the one on applying the forum overriding mandatory rules. The scrutiny focuses on the issue of the extent to which the conflict of law provisions presently in force serve as a mechanism additional to the substantive and procedural rules in implementing the EU environmental policy.

**Key words:** environmental law principles, conflict of laws, international private law, environmental damage, public interest concern.

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## 1. INTRODUCTION

Despite the relatively recent emergence of international environmental law, there are certain principles, which have received widespread acceptance and have been implemented in international conventions as well as regional and national laws. Such principles include the conservation principle, the precautionary (preventive) principle, the protection principle, the polluter-pays principle, and the principle of equitable utilisation.<sup>1</sup> They are usually implemented by means of substantive law rules which prescribe sanctions for certain detrimental conduct, such as condemnations, fines and/or damages for not complying with a specific environmental standard. They may also be advanced by means of procedural rules, for instance by affording the right to sue to environmental associations or a wide range of other persons, or even to every citizen. The question may be asked as to whether such international environmental principles are taken into account in the process of drafting the conflict of law rules.

An important purpose of the conflict of laws is to determine the law of which country is applicable in a situation which is related to more than one legal system. Such issues are raised in the context of environmental pollution due to its increasingly cross-border nature. This results from ever intensified international economic activities, especially industrial and transport activities. Despite international and European harmonisation, the existing legal instruments concern only certain sorts of environmental incidents and primarily focus on the issues of substantive law or international jurisdiction and recognition and enforcement of judgments, leaving aside the conflict of law rules. Consequently, differences in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation are still significant so that the conflict of law provisions seem to be gaining importance.

The conflict of law provisions currently consists of two main elements: the specific legal relationship under dispute, and the factor, which connects the relationship with the law of a certain country to be applied to the disputed legal relationship. The functions of the connecting factor are multiple, and the traditionally most important one is the application of the law most closely connected to the legal relationship in question. Its further role is to advance legal certainty allowing the parties to

<sup>1</sup> See e.g. A Kiss and D Shelton, *Manual of Environmental Law* (Grotius Publications Ltd. 1993) 36-41; L Krämer, *EC Environmental Law* (4th edn, Sweet & Maxwell 2000) 9-20; C Lister, *European Union Environmental Law* (Wiley 1996) 21-29; F Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge Univ. Press 2006) 49-55; P H. Sand, *Transnational Environmental Law: Lessons in Global Change* (Kluwer Law International 1999) 2.

adjust their conduct even before the dispute has arisen to the applicable law. No less important role of the conflict of laws is to promote certain policy objectives.<sup>2</sup>

Tort law offers an insight into the problem of such instrumentalisation of conflict of laws. Taking for instance the EU provisions in this field, one may notice that it proclaims the principles of legal certainty and justice in individual cases. However, there are a number of other principles that play a role within the specific areas. Such principles aim to protect certain values underlying national substantive laws. These values are translated to the rules of conflicts. For instance, the substantive rules of environmental damage generally establish the balance between two different interests in the society: preserving the human life and health on the one hand, and industrial development on the other. A country merely intending to achieve a higher level of industry growth, will design its substantive laws permitting higher levels of pollution. Moreover, such country will draft conflict of law rules with the protection of its own industry (polluters) in mind and will attempt to avoid the application of stricter (foreign) civil sanctions. Conversely, if a country is aiming at sustainable development, it will adjust all of its rules, including the conflict of law rules to serve this purpose. Diverse approaches serve different goals which are perceived by their legislator as the essential values of that society at that particular point in time.

Environmental policy of the European Union is specifically mentioned in Title XX of the Treaty on functioning of the European Union (hereinafter: the TFEU),<sup>3</sup> where Article 191(2) provides: "It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." Additionally, Article 11 of the TFEU states: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." So far those other policies are agricultural, transport, energy and trade policies.<sup>4</sup> The question posed in this paper is the extent to which this has been realised by the instruments adopted under the Title V "Area of Freedom, Security and Justice", notably those creating compatibility among conflict of law rules generally aimed at ensuring effective access to justice. In order to answer this question it is necessary to examine the pertinent provisions of the Regulation (EC) No 864/2007 of the European Parliament and of

<sup>2</sup> In conflict of law terminology, it is the conflict between the "substantive justice" and the "conflicts justice." See S C Symeonides, "Private International Law at the End of the 20<sup>th</sup> Century: Progress or Regress? General Report on the 15th International Congress of Comparative Law (Bristol, England, 1998)" in S C Symeonides (ed), *Private International Law at the End of the 20th Century: Progress or Regress?* (Kluwer Law International 1999) 3, 43-62.

<sup>3</sup> [2008] OJ C115/47.

<sup>4</sup> L Krämer (n 1) 262-275.

the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).<sup>5</sup> At the outset, background information on the Rome II Regulation is briefly presented, followed by assessment of the primary conflict of law provision allowing parties choice and the subsidiary conflict provision designed specifically for the cases of environmental damage.

## 2. ADOPTION OF THE ROME II REGULATION

The idea of unifying the conflict of law rules in Member States dates back to half a century ago. In 1967, the group of experts was designated to work on the EEC Draft of a Convention on the law applicable to contractual and non-contractual obligations, which saw the light of the day in 1972.<sup>6</sup> This text did not provide for a specific provision on environmental damages. In fact, it is not likely that this was considered as a specific issue at the time. Following the first wave of enlargement which included Denmark, Ireland and UK, the segment on non-contractual obligations was abandoned because of lack of agreement by the then new Member States,<sup>7</sup> hence the Convention on the law applicable to contractual obligation was signed in Rome in 1980.<sup>8</sup>

Following the introduction of the legislative basis in Article 65(b) of the Treaty on the European Community by amendments in the Treaty of Amsterdam,<sup>9</sup> the process leading to adoption of the Rome II Regulation commenced in 2002 by launching the public consultation on the basis of the Preliminary Draft Proposal for a Council

<sup>5</sup> [2007] OJ L199/40.

<sup>6</sup> Published in English in (1973) 21 *American Journal of Comparative Law* 587. See e.g. C G J Morse, *Torts in Private International Law* (North-Holland Publishing 1978) 326–336; A E von Overbeck and P Volken, 'Das internationale Deliktsrecht in Vorentwurf der EWG' (1974) 38 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 55.

<sup>7</sup> V Bouček, 'Prijedlog Uredbe Rim II iz 2003. i opće odredbe deliktneog statuta u hrvatskom Zakonu o međunarodnom privatnom pravu' in R Knez and others (eds), *Zbornik prispevkov – Evropski sodni prostor* (Pravna fakulteta Univerze v Mariboru 2005) 203, 204–205.

<sup>8</sup> [1980] OJ L266/1; consolidated version [2005] OJ C334/1. It has been replaced by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, [2008] OJ L177/6.

<sup>9</sup> Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain acts, [1997] OJ C340/1; Treaty establishing the European Community (consolidated version after the Amsterdam Treaty), [1997] OJ C340/173. The phenomenon of communitarisation is discussed in e.g. K F Kreuzer, 'La comunitarizzazione del diritto internazionale private in materia di obbligazioni extracontrattuali («Roma II») in P Picone (ed), *Diritto internazionale privato e diritto comunitario* (CEDAM 2004) 421; M Sonntag, 'Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II-Verordnung' (2006) 105 *Zeitschrift für vergleichende Rechtswissenschaft* 256.

Regulation on the law applicable to non-contractual obligations (hereinafter: the 2002 Preliminary Draft Proposal),<sup>10</sup> and was further boosted by the Hague program adopted by the European Council in 2004.<sup>11</sup> Upon processing the comments from the public, in 2003 the Commission presented the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligation ("Rome II") (hereinafter: the 2003 Rome II Proposal).<sup>12</sup> In 2006, following the amendments recommended by the European Parliament, the Commission put forward the Amended proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligation ("Rome II") (hereinafter: the 2006 Rome II Amended Proposal).<sup>13</sup> The complex co-decision procedure (now known as the ordinary legislative procedure) brought about the deadlock between the positions of the Council and the Parliament,<sup>14</sup> so the stage of conciliation took place where the Commission acted as a mediator. In 2007, an agreement was reached resulting on the adoption of the Rome II Regulation.

<sup>10</sup> <<http://www.eadp.org/main7/position/RomeIIConsultationPrelimDraft030502.doc>> accessed 9 May 2012.

<sup>11</sup> Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice /\* COM/2005/0184 final \*/ , <<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML>> accessed 9 May 2012.

<sup>12</sup> COM(2003) 427 final, 2003/0168 (COD), Brussels (22 July 2003). For the comment see e.g. P Beaumont, 'Private International Law of the European Union: Competence Questions Arising from the Proposed Rome II Regulation on Choice of Law in Non-Contractual Obligations' in R Brand (ed), *Private Law, Private International Law and Judicial Cooperation in the EU-US Relationship* (Vol 2 CILE Studies, Thomson 2005) 15; A Fuchs, 'Zum Kommissionsvorschlag einer „Rom II“-Verordnung' (2004) 50 *Recht der internationalen Wirtschaft* 100; S Leible and A Engel, 'Der Vorschlag der EG-Kommission für eine Rom II-Verordnung' (2004) 15 *Europäische Zeitschrift für Wirtschaftsrecht* 7; C Nourissat and E Trepozz, 'Quelque observations sur l'avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non contractuelles „Rome II“' (2003) 130 *Chunet* 7; J von Hein, 'Die Kodifikation des europäischen Internationalen Deliktsrecht: Zur geplanten EU-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht' (2003) 102 *Zeitschrift für Vergleichende Rechtswissenschaft* 528.

<sup>13</sup> COM(2006) 83 final 2003/0168 (COD), Brussels (21 February 2006). For the comment see e.g. S Poillot-Peruzzetto, 'Proposition de règlement Rome 1 et Rome 2 : vers un code européen de droit international privé' (2006) 50 *Revue de jurisprudence commerciale* 229; S Turner, 'Rome II – All Change?' (2006) 156 *New Law Journal* 1666; G Wagner, 'Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der europäische Deliktgerichtsstand' (2006) 26 *Praxis des internationalen Privat- und Verfahrensrechts* 372.

<sup>14</sup> Among other matters, which caused this deadlock, was also the notion of the "environmental damage". See W Posch, 'The Draft Regulation Rome II in 2004: Its Past and Future Perspectives' (2004) 6 *Yearbook of Private International Law* 129, 133.

### 3. SCOPE OF THE ROME II REGULATION

The Regulation's scope *ratione materiae*, most relevant for the topic which this paper is focused on, is confined to non-contractual obligations in civil and commercial matters involving a conflict of laws, and excludes, in particular, revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). This corresponds to the delineation between the private and public laws, but is to be interpreted autonomously from any national concept.<sup>15</sup> Even prior to enactment of the Rome II Regulation there were discussions as to whether the notion of "civil and commercial matters" covers environmental cases.<sup>16</sup> These discussions developed because the same notion defined the scope of the then Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, replaced a decade ago by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Brussels I Regulation).<sup>17</sup> The "green" interpretation, which would include virtually all situations in which public authorities might use the tort law remedies in recovering environmental damages, was suggested as the best suited to accommodate the EU environmental legal principles as regulated in the primary and secondary EU law and interpreted by the EU Court of Justice. The argumentation relies mostly on the contextual and dynamic approach according to which every provision of EU law should be interpreted in the context of the EU law as a whole, its objectives and the state of evolution at the time of application.<sup>18</sup>

The above interpretative approach does not seem to coincide with the prevailing opinions and judicial interpretations. As the number of cases decided by the EU Court of Justice shows, "civil and commercial matters" is an autonomous concept which does not include situations in which public authority is acting in the exercise of its powers and not in private capacity.<sup>19</sup> In one of the recent cases, the Advocate General Colomer summarizes these cases concluding that "in order to determine whether

<sup>15</sup> P Rogerson in U Magnus and PMankowski (eds), *Brussels I Regulation* (2nd edn, Sellier 2011) 53.

<sup>16</sup> G Betlem, *Civil Liability for Transfrontier Pollution* (Graham & Trotman/Martinus Nijhoff 1993) 35 et seq.

<sup>17</sup> [2001] OJ L12/1. It is useful to point out that the autonomous notions such as "civil and commercial matters" are to be interpreted alike in all conflict of law instruments: the Brussels Convention, the Brussels I Regulation, the Rome I Regulation and the Rome II Regulation (Recital 7 of the Rome II Regulation).

<sup>18</sup> G Betlem (n 16) 33 et seq. See also G Betlem and C Bernasconi, 'European private international law, the environment and obstacles for public authorities' (2006) 122 *Law Quarterly Review* 124.

<sup>19</sup> See judgments in the EU Court of Justice cases C-29/76; C-814/79; C-172/91; C-167/00; C-271/00; C-266/01; C-265/02; C-292/05.

an act is an act *iure imperii* and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and the basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals. The 'private' criterion refers to a formal aspect, while the 'subordination' criterion relates to the basis and nature of the action and to the detailed rules for exercise of the right of action.<sup>20</sup> Today, Recital 9 of the Rome II Regulation further clarifies that the claims arising out of *acta iure imperii* include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. The Rome II commentaries explain that the State or a public body will usually act in performing public powers when eliminating the damage to the environment and claiming compensation for the costs of that elimination. However, the claim should fall under the scope of the notion of "civil and commercial matters" if the State's claim is relying on the private rights which private persons could rely on as well.<sup>21</sup>

It is additionally important to note that non-contractual obligations arising out of nuclear damage are excluded from the scope of the Rome II Regulation by virtue of the provision of Article 1(2)(f). Although this exclusion was part of the 1972 EEC Draft Convention, it was not listed in the 2002 Preliminary Draft Proposal. Seen as an important matter, its insertion was suggested by some of the commentators in the course of the consultation procedure.<sup>22</sup> It is justified by the importance of the economic and State interests at stake and the Member States' contribution to measures to compensate for nuclear damage under the international regime for nuclear liability established by the Paris Convention on third party liability in the field of nuclear energy of 29 July 1960<sup>23</sup> and the Brussels Convention supplementary to the Paris Convention of 31 January 1963,<sup>24</sup> the Vienna Convention on civil liability for nuclear damage of 21 May 1963,<sup>25</sup> the Convention on supplementary compensation

<sup>20</sup> Opinion of Advocate General Ruiz-Jarbo Colomer delivered on 8 November 2006 in case C-292/05, para. 46.

<sup>21</sup> A Fuchs in P Huber (ed), *Rome II Regulation: Pocket Commentary* (Sellier 2011) 210.

<sup>22</sup> Hamburg Group for Private International Law, 'Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations' 5-9, <<http://www.mpipriv.de/de/data/pdf/comments-hamburggroup.pdf>> accessed 10 May 2012 (published also in (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1).

<sup>23</sup> <<http://www.oecd-nea.org/law/paris-convention.html>> accessed 12 May 2012.

<sup>24</sup> <<http://www.oecd-nea.org/law/brussels-supplementary-convention.html>> accessed 12 May 2012.

<sup>25</sup> <<http://www.iaea.org/Publications/Documents/Conventions/liability.html>> accessed 12 May 2012.

for nuclear damage of 12 September 1997<sup>26</sup> and the Joint Protocol relating to the application of the Vienna Convention and the Paris Convention of 21 September 1988.<sup>27</sup> Other exclusions are possible pursuant to the provisions on precedence of: a) EU law which, in relation to particular matters, prescribes conflict of law provisions relating to non-contractual obligations and b) international conventions to which one or more Member States are parties at the time when the Rome II Regulation is adopted and which contain conflict of law provisions relating to non-contractual obligations, but not of the conventions concluded exclusively between two or more Member States.<sup>28</sup>

#### 4. THE NOTION OF "ENVIRONMENTAL DAMAGE"

Article 7 of the Rome II Regulation is titled "Environmental damage" and its provision contain the following phrase serving as the indication of the type of legal relationships it covers "a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage". Therefore the crucial notion is "environmental damage". It was not introduced from the outset. Instead, the 2003 Rome II Proposal used the notion of "violation of environment" while the intention was to cover both damage to property and persons, and damage to the ecology itself, provided it is the result of human activity reflecting recent developments in the substantive law.<sup>29</sup> This was opposed by some claiming that damage to property or persons may be covered by the general conflict of laws provision, while the damage to the environment is the matter of administrative and not civil law.<sup>30</sup> Opposed by the European Parliament as insufficiently precise, the term

<sup>26</sup> <<http://www.iaea.org/Publications/Documents/Infocircs/1998/infocirc567.shtml>> accessed 12 May 2012.

<sup>27</sup> <<http://www.oecd-nea.org/law/joint-protocol.html>> accessed 12 May 2012. See Explanatory Memorandum to the 2003 Rome II Regulation Proposal (n 12) 9. Article 11 of the Paris Convention in conjunction with Article 14(2) of the Brussels Supplementary Convention provides that the law applicable to claims arising out of the nuclear incident (the nature, form and extent of the compensation, as well as the equitable distribution thereof) is the law of the competent court, which entails a further reference to Article 13 of the Paris Convention (and Article 11 of the Vienna Convention). It is, nevertheless, disputed among scholars whether the reference to the law of the competent court includes *renvoi* or is a simple reference to the substantive provisions of the *lex fori*.

<sup>28</sup> Articles 27 and 28 of the Rome II Regulation. See e.g. C Brière, 'Réflexions sur les interactions entre la proposition de règlement "Rome II" et les conventions internationales' (2005) 132 *Clunet* 677.

<sup>29</sup> Explanatory Memorandum to the 2003 Rome II Regulation Proposal (n 12) 19.

<sup>30</sup> N Bouza Vidal and M Vinaixa i Miquel, 'La responsabilidad por daños ambientales transfronterizos: propuesta de regulación europea y derecho internacional privado' (2003) 4 *Anuario español de derecho internacional privado* 75. See also references in M A Michinel Alvarez, 'La Ley aplicable a la

"violation of environment" was replaced by the presently used terminology in the 2006 Rome II Amended Proposal. In the attempt to clarify the meaning of the notion "environmental damage", the Recital 14 of the 2006 Rome II Amended Proposal made a reference to the secondary EU law, namely the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.<sup>31</sup> The meticulous nature of the definition contained in the Article 1 of the cited Directive and difference in the intended scopes of the two instruments<sup>32</sup> encouraged the legislators to finally adopt a simplified and at the same time comprehensive autonomous definition of the notion of "environmental damage", which is contained in Recital 24 of the Rome II Regulation. This notion means "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms." This seems to be the compromise between aligning the notion of "environmental damages" in the Rome II Regulation with the one in the secondary EU environmental law and affording a definition operable within and suitable for the purpose of the conflict of laws.

In order to remove doubts, if any, regarding the notion of "damage", it should be pointed out that it covers any consequence arising out of tort/delict, and not only those consequences that have already occurred, but also the consequences that are likely to occur.<sup>33</sup> Likewise, the Regulation applies to non-contractual obligations that are likely to arise.<sup>34</sup> One may therefore conclude that the provision of Article 7 applies regardless of whether the damage or other consequence to environment arising out of the tort has occurred or is only threatening, and regardless of the type of remedy claimed (declaratory or condemnatory relief, compensatory relief or injunction).<sup>35</sup>

responsabilidad civil por daños ambientales en el Reglamento Roma II' in M A Michinel Alvarez and Rafael-Andrés Velázquez Pérez (eds), *Desarrollo económico, protección ambiental y bienestar social: el derecho de la sostenibilidad desde la perspectiva hispano-cubana* (Dykinson 2011) 33, 36.

<sup>31</sup> [2004] OJ L143/56 amended by the Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006, [2006] L102/15 and the Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009, [2009] L140/114.

<sup>32</sup> The purposes and scopes of the two legal instruments may vary given that the Directive 2004/35/CE is far from exclusive EU legislation covering the public law aspects of environmental protection, while the Regulation is intended to cover damage to any segment of the environment. Thus, the discrepancies between the two definitions, such as the absence of the air in the Directive 2004/35/CE and absence of attributes of significant and measurable damage in the Rome II Regulation, should not be the source of difficulties.

<sup>33</sup> Art 2(3)(b) of the Rome II Regulation.

<sup>34</sup> Art 2(2) of the Rome II Regulation.

<sup>35</sup> Cf M Bogdan, 'The Treatment of Environmental Damage in Regulation Rome II' in J Ahern and W

Contrary interpretation excluding the injunctions from the scope of the Article 7 would contravene the Rome II Regulation objectives in environmental cases, especially the prevention principle.

## 5. FACTORS DETERMINING THE APPLICABLE LAW

Among the factors relevant for the purpose of establishing the law which applies in a specific case of environmental damage, the primary one in the conflicts cascade is the party autonomy. Given that it might not be of such practical importance as in the contractual matters, particular attention is devoted to the secondary connection in the special conflict of law provision, referring to some and excluding other general conflict of law provisions.

### 5.1. Party Autonomy

Party autonomy in choosing the law applicable to a cross-border non-contractual liability seems not as important as one might conclude from its characterisation of the primary connecting factor. The lesser importance of parties' choice of law in non-contractual cases is basically owed to two main reasons. The choice of applicable law before the event giving rise to damage takes place will, in principle, only be viable in situations in which the parties are already in a contractual relationship at the time of the tortious event,<sup>36</sup> and then by virtue of the accessory connection such tort liability will anyhow be submitted to the same law as the contract.<sup>37</sup> Furthermore, the choice of law subsequent to the event giving rise to damage seems to be an unlikely development, given that parties' interests are already in conflict and that choosing a certain law would be advantageous to one party and of course disadvantageous to the other. Nevertheless, there are situations in which such choice might be welcomed by the parties,<sup>38</sup> as in the case commenced by the Dutch market gardeners against the French Potassium Mines claiming compensation for damage caused to the plaintiff's

Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff 2009) 219, 221–222.

<sup>36</sup> T M de Boer, 'Party Autonomy and Its Limitations in the Rome II Regulation' (2007) 9 *Yearbook of Private International Law* 19, 27.

<sup>37</sup> See art 4(3) in fine of the Rome II Regulation.

<sup>38</sup> On the usefulness of the party autonomy in torts see TKadner Graziano, 'Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation' in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff 2009) 113.

crops by discharge of saline waste into the Rhine.<sup>39</sup> Faced with the decision to apply French or Dutch law as applicable, the *Rechtbank Rotterdam* relied on the parties' agreement at the hearing where the defendant agreed with the plaintiff that Dutch law be applicable. This may be explained by a feature of the Dutch cassation system, where it is impossible to claim erroneous application of foreign law by the lower courts.

Because the provision of Article 7 of the Rome II Regulation does not explicitly exclude the party autonomy under Article 14, as is the case with unfair competition and acts restricting free competition as well as infringements of intellectual property rights,<sup>40</sup> it is understood that the primary connecting factor is party autonomy.<sup>41</sup> Under Article 14 of the Rome II Regulation, parties are free to choose, explicitly or implicitly, the law to govern their relationship. The parties may agree to submit their legal relationship arising out of the tortious event to any law they choose provided that this agreement is entered into after the event giving rise to the damage occurred. They may also agree on the applicable law by an agreement freely negotiated before the event giving rise to the damage occurred provided that all the respective parties are pursuing a commercial activity. Further restriction states that parties' choice of law may not prejudice the rights of third parties, such as the victim in a case of choice of law between the tortfeasor and any other of its victims, or its insurer.<sup>42</sup> And finally, the choice of law of one country in situations connected to one other country only is precluded to the extent that the mandatory provisions of the latter country would be replaced by the chosen law. Translated to the EU level, the choice of law of a non-Member State in situations connected to one or more Member States only is precluded to the extent that the mandatory provisions of EU law would be replaced by the chosen law.<sup>43</sup>

<sup>39</sup> *Rechtbank Rotterdam* 8 January 1979, 11 [1980] NYIL 326; *Hof Den Haag* 10 September 1986, [1988] NYIL 469; *Hoge Raad* 23 September 1988, 21 [1990] NYIL 434. The case is otherwise known by the judgment of the EU Court of Justice in C-21/76 *G J Bier BV v. Mines de potasse d'Alsace SA*, following the reference for a preliminary ruling on the interpretation of the concept of "place where the harmful event occurred" under Article 5(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>40</sup> See art 6(4) and 8(3) of the Rome II Regulation.

<sup>41</sup> See e.g. I Bach in P Huber (ed), *Rome II Regulation: Pocket Commentary* (Sellier 2011) 326; S Francq, 'La Règlement Rome II sur la loi applicable aux obligations non contractuelles' in *Actualités du droit international privé* (Anthemis 2009) 99 (both mentioning only unfair competition, acts limiting free competition and intellectual property infringements).

<sup>42</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 22 and 24.

<sup>43</sup> Art 14(2) and (3) of the Rome II Regulation.



Some authors consider the party autonomy in environmental torts to be unwarranted and even a distortion of the system established under Article 7 in conjunction with Article 4(1) in a view of the strong territorial connections as well as the policies underlying the environmental torts.<sup>44</sup> In our view, the party autonomy in conflict of laws is rooted in the party autonomy in the respective field of substantive law. The more freedom is left to the parties to dispose of their substantive rights and obligations, the less reason to deny the parties the conflicts right to choose the law governing those rights and obligations. As evident for instance in introduction, however limited, of private enforcement of environmental law and widening the spectrum of potential plaintiffs,<sup>45</sup> the scope of disposition left to the parties in environmental law seems to be gradually widening. For that reason, there seem to be no strong objection to the party autonomy in cases concerned with environmental damages, especially its restrictive formulation in the Rome II Regulation. From the policy perspective, *lex autonomiae* in environmental cases should be judged in the context of limitations imposed over validity of choice of law agreements.

By establishing the basic precondition that choice of law agreements may be entered into only *ante eventum*, the protection is afforded to the weaker parties, normally the persons sustaining damage. These parties are believed to be more attentive to the adverse affects of the choice of certain law after the tortuous event occurred, especially since that law will more often than not be proposed by the wrongdoer and thus presumably unfavourable to the person sustaining damage. Even in non-contractual relationships between two commercial subjects which may be concluded prior to the event giving rise to damage occurred, the validity of a choice of law agreement depends on whether that clause was "freely negotiated" or not. Hence, the protection is afforded against choice of law imposed in the form contracts or general terms and conditions assuring that none of the parties was in a weaker positions in which it could not have had negotiated the clause.<sup>46</sup> As a result, the described preconditions, under which an agreement on applicable law is valid, not only function as protection for the weaker parties but also indirectly safeguard the policies promoted by virtue of the objective connecting factors, such as those in Article 7. In addition to the safe net against displacing the EU environmental mandatory rules in intra-Union cases, these considerations seem to be important pieces in the assessment of the degree to which the environmental principles are upheld by the conflict of law provisions.

<sup>44</sup> M A Michinel Alvarez (n 30) 38.

<sup>45</sup> The most prominent examples concern the right of the NGOs to commence against polluters the judicial proceedings in the Netherlands. See G Betlem (n 16) 307-334.

<sup>46</sup> Recital 31 of the Rome II Regulation; Commission Opinion in the 2006 Rome II Amended Proposal (n 13) 3.

## 5.2. Objective Factors

In the Rome II Regulation system, the environmental damages are separately regulated in Article 7, as opposed to the provisions applicable to torts in general in Article 4. The provision of Article 7 reads: "The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred." The relevant part of the provision defining the connecting factors has not been changed in comparison to the provisions in Article 7 of the 2003 Rome II Proposal and Article 8 of the 2006 Rome II Amended Proposal. However, the fraction of the Recital providing for the explanation of such structure of connecting factors, i.e. "the use of the principle of discriminating in favour of the person sustaining the damage", was erased from the Recital 14 of the 2006 Rome II Amended Proposal to be reinserted in the final text of the Recital 25 of the Rome II Regulation.

Analysis of the provision of Article 7 reveals that reference is first made to the general provision in Article 4(1), according to which the governing law is the law of the country in which the damage occurs (*lex loci damni directi*) irrespective of the country in which the event giving rise to the damage occurred (*locus actus*) and irrespective of the country or countries in which the indirect consequences of that event occur (*locus damni indirecti*). Such conflict scheme is intended to align the connecting factors in the Rome II Regulation with the jurisdiction criteria in the Brussels I Regulation.<sup>47</sup> This rule is designed for the torts in general and establishes an objective link between the damage and the applicable law. In the majority of cases, it also enables the person sustaining damage when suing under its own courts to rely on its own law against the foreign polluter.<sup>48</sup> According to the Commission, it also reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct. It further states that at present times the dominating feature of tort liability is the compensation function, as can be seen from the proliferation of no-fault strict liability schemes represented in the environmental protection policy as well.<sup>49</sup> Scholars have identified the shift towards the restitution (or compensation) function of tort liability

<sup>47</sup> The provision of art 5(3) of the Brussels I Regulation has been interpreted by the EU Court of Justice on the basis of the principle of ubiquity distinguishing between the place where the wrongful act took place (*locus actus*) and where the consequences of that act took place (*locus damni*) which are both relevant for the purpose of establishing special jurisdiction in tort matters. Case C-21/76 (n 39).

<sup>48</sup> K Fach Gómez, 'The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II', (2004) 6 *Yearbook of Private International Law* 291, 300.

<sup>49</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 12 and 19.

as the consequence of development of mechanics and increasing risk that machines present to people and property.<sup>50</sup> This seems to be in direct relation to environmental damages, which as a rule result, either of the machine error or the human-generated error in operating machinery and plants. Nevertheless, it appears that the tort liability in general, and environmental tort liability in particular, are not driven solely by the compensation goal but are equally oriented towards prevention and with it related cost allocation, the concretisation of the latter being precisely the polluter-pays principle.<sup>51</sup> Probably aware of the combination of these functions, the Commission explains that the basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. It further states that the provision is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to take optimal care and avoid environmental impairment by paying heed to the higher levels of protection in neighbouring countries. This in turn should remove the incentive for an operator to establish the plant in a low-protection country, so the application of the *lex loci damni* would contribute to raising the general level of environmental protection.<sup>52</sup>

One of the drawbacks of the connection based on the place of damage is that in situations where the damage occurs in more than one country, which would not be a rare situation in cases of environmental incidents especially when the toxic substances are released in water or air, the laws of all those countries are applicable to the respective portions of damage.<sup>53</sup> Such vertical fragmentation of the applicable law resulting in multiple applicable laws is called the mosaic principle or *Mosaicbetrachtung*. Its unattractiveness is mainly related to increased procedural

<sup>50</sup> See H Stoll, 'Chapter 8: Extracontractual Obligations', in K Lipstein (gen ed), *International Encyclopedia of Comparative Law* (Vol XI, J C B Mohr (P Siebeck) 1971) 8 et seq. See also A E Ehrenzweig, 'Chapter 32: Enterprise Liability' in K Lipstein (gen ed), *International Encyclopedia of Comparative Law* (Vol III, J C B Mohr (P Siebeck) and Stijhoff & Noordhoff 1980) 5. The notion of "compensation function" in the civil law scholarship corresponds to the notion of the "corrective justice" in the common law scholarship. See e.g. A M Dugdale, 'Chapter 1: Principles of Liability in Tort' in *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2006) 8.; T Honore, 'The Morality of Tort Law – Questions and Answers' in D G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 73, 79.

<sup>51</sup> V Bruggeman, *Compensating Catastrophe Victims: A Comparative Law and Economics Approach* (Kluwer 2010) 22–24.

<sup>52</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 19.

<sup>53</sup> As in relation to ubiquity (see n 43), the relevance only of the place of direct damage derives from the judgment of the EU Court of Justice where it is clarified that only the place of the direct consequence of the wrongful act (*locus damni directi*) is relevant, and not any of the places where the indirect consequences may be felt. Case C-364/93 *Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company*.

costs and complexity, legal uncertainty in ascertaining their content and protraction of the proceedings.<sup>54</sup> Although such consequences may in certain number of cases be avoided by resorting to the escape clause in Article 4(3) of the Rome II Regulation, such venue is unavailable for cases falling under the scope of Article 7. The way out in such cases might be in applying the law of the country in which the event giving rise to the damage occurred, which most probably in environmental cases will be located in a single country leading to the application of a single law. Namely, in addition to the law of the country in which the damage occurs, the person seeking compensation for damage may choose the law of the country in which the event giving rise to the damage occurred. Although this might appear as a good solution, it actually hides a very serious risk of jeopardising the EU environmental policy. If opting for the *lex loci actus* is motivated solely by circumventing the unattractive effects of the mosaic principle, it might disregard the stricter favourable features of the laws that would otherwise apply and be made at the expense of those laws.

As already pointed out, Article 7 puts two alternative connecting factors at the unilateral disposal of the party sustaining damage.<sup>55</sup> Conversely, the tortfeasor has no control whatsoever over whether the applicable law will be determined on the basis of the *locus damni* or the *locus actus*. Such structure of the connecting factors is based not only on physical contacts with a certain country ("jurisdiction-oriented" provisions) but also on the content and underlying policies of the laws of the contact states ("content-oriented" provisions),<sup>56</sup> because in all probability the stricter of the two laws will be applied. This result is by some commentators regarded as detrimental to the nature of the conflict of law provisions because this would create new obstacles to realisation of the EU freedoms.<sup>57</sup> The rationale for allowing the party sustaining damage the option between two laws is not to benefit that party's interests *per se*, as one might expect from the embodiment of the principle of *favor laesi* or *Günstigkeitsprinzip*. The Commission itself states that victim's option to choose the most favourable among the laws would go beyond its legitimate expectations and

<sup>54</sup> See generally A Mills, 'The Application of Multiple Laws under the Rome II Regulation' in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff 2009) 133.

<sup>55</sup> According to the Recital 25 of the Rome II Regulation, the question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seized. See also Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 20.

<sup>56</sup> S C Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173, 183.

<sup>57</sup> Andrew Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?' (2003) 1 *Journal of Private International Law* 197, 227.

would cause legal uncertainty.<sup>58</sup> Rather, the victim's option is simply the vehicle for ensuring the desired result, namely the application of whichever of the two laws would subject the polluter to a higher level of environmental protection.<sup>59</sup> As Commission explains, the additional, and apparently more compelling, objective is "to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity."<sup>60</sup> The tortfeasors are thereby discouraged to strategically position their facilities at the countries' border in order to be able to discharge toxic substances into a river and benefit from the neighbouring country's rules lacking strictness.<sup>61</sup> This helps achieve the TFEU and secondary EU law objectives endorsing high level of environmental protection based on the precautionary principle and the prevention principle, the principle of priority for corrective action at source and the principle that the polluter pays. Consequently, the public interests at stake provide sufficient justification to discriminate in favour of the person sustaining the damage.<sup>62</sup> At any rate, the tortfeasor cannot seriously claim to be surprised if its acts are subject to the law of the country in which those acts are committed, even if that law implements higher standards of environmental protection. There are certain concerns expressed in scholarship about the lack of foreseeability of the applicable law for the party liable,<sup>63</sup> however, in the modern circumstances in which cross-border effects of environmental incidents are no longer an exception, the foreseeability should no longer be a governing criterion in selecting one connecting factor or the other.<sup>64</sup>

Against this background, the question whether a different option would be more successful in accommodating the EU environmental goals seems inevitable. According to some, these goals would be better achieved if the conflict of law rule based on victim's options would offer more than only the present two alternatives. This proposal has in mind primarily the laws based on personal contacts with the parties involved. Thus, it is argued that an additional connecting factor available for

<sup>58</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 11–12.

<sup>59</sup> S C Symeonides (n 56) 210–211; N Joubert, 'Les règles de conflit spéciales en matière de délits dans le Règlement du 11 juillet 2007 (Rome II)' in S Corneloup and N Joubert (eds), *Le Règlement communautaire «Rome II» sur la loi applicable aux obligations non contractuelles* (Litec 2008) 55, 71–72.

<sup>60</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 19.

<sup>61</sup> Ibid 19–20.

<sup>62</sup> Recital 25 of the Rome II Regulation.

<sup>63</sup> S C Symeonides (n 56) 212.

<sup>64</sup> T Kadner Graziano, 'The Law Applicable to Cross-Border Damage to the Environment: A Commentary on Article 7 of the Rome II Regulation' (2007) 9 *Yearbook of Private International Law* 71, 73.

the environmental damage should be wrongdoer's habitual residence, to cover cases in which that person's habitual residence is neither located in the country in which the act was committed nor in the country in which the damage occurred. If the law of the wrongdoer's habitual residence is the strictest among the three laws, such an additional connection might lead to the application of the most desirable law from the perspective of the EU environmental principles.<sup>65</sup> There seems to be little ground to object to this proposal since the rationale is similar to the above concerning the applicability of the *lex loci actus*. Thus, if a company chooses to have its habitual residence in a certain country (for reasons of company or tax law, for instance), that company should not find it objectionable to be subject to the environmental laws of the same country whose benefits it is enjoying on the basis of other laws. Such a result not only seems just, but also foreseeable to the wrongdoer.<sup>66</sup> Possible setback to this connecting factor is that it might discourage the companies from creating or maintaining their establishment in EU, in favour of non-Member States in which the environmental standards are significantly lower. Especially, in cases in which the EU-based companies operate their plants in parts of the world where the environmental policy makes many concessions to economic development and choose to do so precisely because they are able to minimise their business risks and costs there.

## 6. PUBLIC INTERESTS

There are two basic mechanisms through which public interests may affect the law that is applicable on the basis of the previously analysed conflict of law provisions: rules of safety and conduct and overriding mandatory provisions.

### 6.1. Rules of Safety and Conduct

One of the complexities of the non-contractual liability for environmental damage relates to the number of rules of safety and standards of conduct, which are of public law nature. The Commission states that in circumstances in which the *locus actus* is in the country which permits certain conduct (such as toxic emissions), while the

<sup>65</sup> T M de Boer, 'The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation' (2009) 56 *Netherlands International Law Review* 295, 325.

<sup>66</sup> Conversely, the law of the habitual residence of the person sustaining damage seems to be completely unforeseeable to the wrongdoer and should not, in our opinion, be put on the list of alternative connecting factors. Others agree that the habitual residence of persons sustaining damage, such as landowners, should not be adopted, but for different reasons. They believe that strong territorial roots of the environment law effectively reduce the weight to be given to personal points of contact. Hamburg Group for Private International Law (n 22) 27.

*locus damni* is in the country which forbids such conduct, the court should have the possibility to take into account the fact that the polluter complied with the rules in force in the country in which it acts.<sup>67</sup> Article 17 of the Rome II Regulation is based on this approach. There is a possibility that the wrongdoer may exonerate itself from liability based on the rules of safety and conduct in force in the country in which the event giving rise to damage occurred. It is important to note that such rules cannot extend to any other issue under the tort law, save for unlawfulness.<sup>68</sup> This provision encountered opposition owed to the weakening of the principle of *in favorem laesionis* embodied in Article 7 aimed at securing that the stricter of the two environmental standards applies.<sup>69</sup>

Although such opposition to Article 17 seems justified, one has to be mindful of the distinction made between the terminology used in regular conflict of law provisions (“application of law”), and phraseology employed in Article 17 (“taking into account as a fact and as far as appropriate”).<sup>70</sup> The latter is phrased in line with the *Datumstheorie*, according to which the foreign public law rules may affect the outcome of the dispute, not on the basis of the conflict of law provisions but taking them into account as facts.<sup>71</sup> This theory resolves the otherwise existing problem of extraterritorial application of public law which is contrary to the principle of state sovereignty. Hence, the courts regard these rules as facts only and have the discretion to assess whether their taking into account would be appropriate *in casu*.

The court practice preceding the Rome II Regulation illustrates similar tendencies. In the abovementioned decision of the *Rechtbank Rotterdam* in the case concerned with the saline discharged into Rhine eventually affecting the Dutch crops, it was held that

<sup>67</sup> Explanatory Memorandum to the 2003 Rome II Proposal (n 12) 20.

<sup>68</sup> K Fach Gómez (n 48) 307-308.

<sup>69</sup> P Stone, *EU Private International Law: Harmonisation of Laws* (Edvard Elgar 2006) 370.

<sup>70</sup> More on this distinction in the context of contract law see e.g. A Bonomi, *Le norme imperative nel diritto internazionale privato* (Schulthess 1998) 371; H Gaudemet-Tallon, ‘Le nouveau droit international privé européen des contrats’ (1981) 17 *Revue trimestrielle de droit européen* 217, 262; G Sperduti, ‘Les lois d’application nécessaire en tant que lois d’ordre public’ (1977) 66 *Revue critique de droit international privé* 257, 265.

<sup>71</sup> On *Datumstheorie* in Rome II see Thomas Pfeiffer, ‘Datumstheorie und „local data“ in der Rom II-VO – am Beispiel von Straßenverkehrsunfällen’, in R Michaels and D Solomon (eds) *Liber Amicorum Klaus Schurig zum 70. Geburtstag* (Sellier 2012) 229. Generally on *Datumstheorie* see e.g. J Beulker, *Die Eingriffsnormenproblematik in internationalen Schiedsverfahren* (Mohr Siebeck 2005) 91; E Jayme, ‘The Rome Convention on the Law Applicable to Contractual Obligations (1980)’, in P Šarčević (ed), *International Contracts and Conflicts of Law* (Graham & Trotman and Martinus Nijhoff 1990) 36, 46; K Friedrich-Kreuzer, *Ausländisches Wirtschaftsrecht von deutschen Gerichten, Zum Einfluß fremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte* (C Müller Juristischer Verlag 1986) 57; P Kinsch, *Le fait du prince étranger* (LGDJ 1994) 341 et seq.

in assessing the defendant’s acts, the fact that they obtained licence from the French administrative bodies is not in itself without merit.<sup>72</sup> In the case at hand, however, the licence was not taken into account because it was clear that no third parties were allowed to participate, as is ordinary under the French administrative law. Further example of such judicial practice involves German administrative licence in the proceedings before the *Oberlandesgericht Linz*.<sup>73</sup> The court set three preconditions to taking into account such licence: first, emissions released from the plant cannot be contrary to the international public law, second, obtaining the foreign licence has to be subject to the conditions equivalent to those under the *lex fori*, and third, the permit has to be issued in the proceedings which allow the interested domestic parties to state their opinion (in this case, owners of the land affected by the emissions).<sup>74</sup> These preconditions seem as criteria, which the courts might potentially rely on in assessing the appropriateness of certain rules of safety and conduct to be taken into account under Article 17 of the Rome II Regulation.

## 6.2. Overriding Mandatory Provisions

Overriding mandatory provisions are regulated in Article 16 of the Rome II Regulation which provides that nothing in this Regulation restricts the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. Although the regulation fails to provide the definition of the overriding mandatory provisions, the gap may be filled in by looking into the parallel provision in the Rome I Regulation related to contractual obligations. Article 9(1) of the latter provides that overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. In applying the cited provision the court considers two elements: the interest criterion and the overriding criterion. The rule has to be assessed as to whether its underlying interests match to any of those enumerated in

<sup>72</sup> Para 8.7 of the decision of 16 December 1983, [1984] NJ 341.

<sup>73</sup> *Oberlandesgericht Linz*, 15 January 1987, [1987] ÖJBl 577; confirmed by *Oberster Gerichtshof*, 20 December 1988, [1989] ÖJBl 239.

<sup>74</sup> Cited in C Bernasconi, *Civil liability resulting from transfrontier environmental damage: A case for the Hague Conference?* (Preliminary Document No. 8 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference) 42 <[http://www.hcch.net/upload/wop/gen\\_pd8e.pdf](http://www.hcch.net/upload/wop/gen_pd8e.pdf)> accessed 12 May 2012.

the definition, as well as in respect to the degree of the rule's indispensableness for preserving those interests.<sup>75</sup>

This provision may have an important role in advancing the environmental principles of the forum country as it allows the court to apply, at the expense of the otherwise applicable law, its own provisions safeguarding fundamental state interests. Such interests may also belong into the realm of environmental law. It is possible to envision the situation in which the forum law permits certain limitation of liability in environmental cases, while the applicable law permits twice as lower amount. Upon analysing the purpose and nature of the said limitation of liability, the court may conclude that it is essential for the social and economic state interests and enforce these interests by applying its own overriding mandatory provision instead.

## 7. CONCLUSION

In conflict of laws today more than ever the state policies play an important role. That the field of environmental law is no exception has been recently confirmed in the EU legislation on law applicable to non-contractual obligations, the Rome II Regulation. The conflict of law scheme relevant to the cases of environmental damages is modelled to accommodate the most important environmental principles proclaimed in the TFEU and embodied in the secondary EU law aiming at strengthening the environmental protection standards. The most important provision to that effect is contained in Article 7 where the combination of the law of the place of damage and the law of the place of the event giving rise to the damage, at the option of the person claiming damage, is envisaged. Such conflicts structure is generally guaranteeing the application of whichever law is stricter. Although this might have been reinforced by the additional alternative connecting factors under victim's option, such as the polluter's habitual residence, the overall efficiency is undeniable. It is not undermined either by the possibility that the parties together may choose the applicable law, due to the safeguards against irrational choice on the part of the (future) victim. Neither is it diminished by the possibility to take account of the less strict rules of safety and conduct in the country in which the wrongful act was committed with the prospect for exoneration from liability, because such rules are taken into account only as fact and as far as the court deems appropriate in a particular case. The role of the overriding mandatory provisions, might also prove important as the court may apply such substantive provisions of the forum law that are indispensable for protecting

crucial country's social, economic or political interests. In the era when the need to preserve the environmental heritage is stronger than ever, it is indeed necessary to focus on to the way the conflict of law provisions are drafted and interpreted, in order to avoid not only incentives for the potential polluters to resort to "pollution shopping", but also the race to the bottom in which the countries would compete in dismantling the public and/or private regulatory environmental standards.

<sup>75</sup> More on the overriding mandatory provisions see I Kunda, 'Defining Internationally Mandatory Rules in European Private International Law of Contracts' (2007) 4 *Zeitschrift für Gemeinschaftsprivatrecht* 210.