Legal regimes deviating from the principles of the international nuclear third party liability conventions in Non-Contracting States without nuclear installations and their effects in neighboring nuclear Contracting States

Cross-border litigation in the European Union: can single jurisdiction be ensured in the court of the State of the nuclear accident?

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1. Introduction

For various reasons non-nuclear States may choose to abstain from adhering to international nuclear third party liability conventions such as the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended, or the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended.

Their perception[4] is, as for instance the Luxembourg government formulated it recently, that the international nuclear third party liability conventions are conceived to limit the financial risks of the nuclear industry at the disadvantage of the interests of the potential victims of a nuclear accident. Most importantly, non-nuclear states oppose the possibility allowed by the international third party liability conventions for nuclear states to limit the liability of the nuclear operator in amount. Further, they take exception to the principle of unity of jurisdiction according to which only the courts of the contracting party on the territory of which the accident has occurred are competent to receive the claims for reparation of the resulting damage. Other concerns are the limitation of liability in time and the definition of nuclear damage to be covered. Last but not least, as non-nuclear states they object to having to contribute financially in case of nuclear accident[5].

In the European Union, such considerations have led non-nuclear states such as Austria, Cyprus, Ireland Luxembourg and Malta to continue to abstain from ratifying one of the above-mentioned international nuclear third party liability conventions. In those countries either a national judge approached by a victim

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[4] As pointed out recently in the Explanatory Note ("Exposé des motifs") of the draft Luxembourg law n° 7221 on the third party liability concerning damage in relation to a nuclear accident and modifying the modified law of 20 April 2009 relating to environmental liability concerning the prevention and reparation of environmental damage, p.4-6.
[5] This would be for instance the case in the framework of the international tier of compensation provided by the Brussels Complementary Convention to the Paris Convention.

of a nuclear accident would apply general national tort law principles, or specific legislation is in place that governs third party liability for nuclear damage.

The latter is the case in Austria, where on 7 October 1998 the Parliament adopted the Federal Law on Civil Liability for Damages caused by Radioactivity[6]; it may in the future also apply to the Grand Duchy of Luxembourg, where the government tabled a draft law n° 7221 on the third party liability concerning damage in relation to a nuclear accident and modifying the modified law of 20 April 2009 relating to environmental liability concerning the prevention and reparation of environmental damage[7].

Such specific legislation is intended to have an impact on neighboring countries that are nuclear installation states. Indeed, in Austria at the moment of the adoption of the 1998 Federal Law on Civil Liability for Damages caused by Radioactivity (the "Austrian Law"), the operation of nuclear power plants in order to produce electrical energy in Austrian territory itself was already prohibited by law[8].

In a parliamentary commission in Luxembourg, the Ministers of Environment and of Health underlined that the draft law n° 7221 is in line with the anti-nuclear policy of the Government and has the aim to provoke a discussion on a national and on a European level on the real costs of atomic energy, the ultimate purpose of the draft being to exercise pressure on the neighboring countries for the shutdown of the nuclear power plants close to Luxembourg borders[9].

It is not the purpose of the present paper to enter into the political discussion of the question whether the said specific legislation is opportune and whether it in fact improves or rather worsens the situation of the victims of nuclear incidents. Much can be said on the fact that unlimited liability of the operator provided in the law does not mean unlimited compensation of the victims in practice; also one could say a lot on the disadvantages of such legislation due to the potential proliferation of lawsuits in different fora and on its consequences on the insurability of the nuclear risk.

We will rather focus, in a Paris Convention context, on the legal effects of the said specific legal regimes, established in Non-Contracting States and derogating from the international nuclear third party liability conventions, on the assets of nuclear operators (and on other actors) in Contracting states that are party to this Convention.

More especially, relating issues of private international law will be addressed in some detail, since the impact of the nuclear liability legislation of non-nuclear states largely depends on the question which judge

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[6] Bundesgesetz über die zivilrechtliche Haftung für Schäden durch Radioaktivität (Atomhaftungsgesetz 1999), hereafter the „Austrian Law".

[7] Hereafter the "Luxembourg draft Law 7221".

[8] Atomsperrgesetz, BGBI 1978/676

[9] The Minutes of the meeting of 18 april 2018 of the Environmental Commission, the Legal Commission and the Commission of Health, Equality of Chances and Sports, Chamber of Representatives Grand Duchy of Luxembourg, p. 2 state : « *Mesdames les Ministres de l'Environnement et de la Santé (…) soulignent que le projet de loi est en ligne avec la politique anti-nucléaire du Gouvernement et a pour objet de provoquer une discussion à la fois au niveau national et au niveau européen, en mettant en exergue les coûts réels de l'énergie atomique. Alors que la survenance d'un accident nucléaire n'est pas totalement à exclure et que, le cas échéant, le Luxembourg en subirait d'importantes conséquences, tant d'un point de vue sanitaire (augmentation du risque de survenance de cas de cancer), que d'un point de vue économique et social (répercussions négatives sur le système de sécurité sociale, perte de valeur des infrastructures, dévaluation de l'économie,…) le but ultime du projet est évidemment de faire pression sur les pays voisins pour la fermeture des centrales nucléaires proches de nos frontières, tout en étant conscients les chances d'aboutir sont relativement faibles* ».

will be competent and whether a judgment issued in a non-nuclear state is enforceable in nuclear states where a nuclear accident is most likely to occur.

2. Legal regimes in Non-Contracting States without nuclear installations deviating from the principles of the international nuclear third party liability conventions

The Austrian Law and the Luxembourg draft law 7221 contrast sharply with the basic principles of the international nuclear third party liability conventions.

2.1 Basic principles of the international nuclear third party liability conventions

The Paris Convention and the Vienna Convention establish a no fault liability channeled on the operator, with limits either to the liability of the operator itself or at least to the amounts of obligatory insurance or financial liability guaranteeing the liability of the operator. Above certain thresholds an intervention by public funds is foreseen. Moreover, a single judicial forum, of an exclusive nature, serves to ensure that compensation for all the damage caused by an accident is allotted by a single judge concentrating all the claims, in order to ensure equal distribution of the available financial resources.

This system establishes a mechanism of financial coverage aiming at guaranteeing the availability of funds for the indemnification of victims of a nuclear accident, while taking into account the limits in capacity of the insurance sector. It is feared, however, in particular by Non-Contracting States, that in the face of the scale of a major nuclear accident, such regime of third party liability, even taking into account the provided public intervention above certain thresholds, could be insufficient to repair all potential damage.

2.2 The Austrian Law

According to the Austrian Law, liability imposed on the operator of a nuclear plant and the carrier of nuclear material is unlimited in amount and is irrespective of fault[10].

The operator of a nuclear plant is defined as the holder of the license and any other person who is entitled to control the operation of the nuclear plant and who actually derives or is at least in the factual or legal position to derive its operating profits[11]; this allows to impose liability on the controlling company and prevent it from shifting the liability to an under-endowed operating company.

No grounds for exoneration from liability are accepted in case of events like acts of armed conflict, hostilities, civil war or insurrection, as provided for in the Vienna[12] or the Paris[13] Convention.

The definition of nuclear damage also includes among others the costs of measures of reinstatement of a significant impairment of the environment and the costs of preventive measures taken to remove an imminent threat of causing damage.

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[10] Monika HINTEREGGER, "The New Austrian Act on Third Party Liability for Nuclear Damage", *Nuclear Law Bulletin*, December No. 62 Volume 1998 Issue 2, p. 29.

[11] Section 2 sub-paragraph 4.

[12] See Article 4(3) of the Vienna Convention (as amended by the Protocol of 12 September 1997).

[13] See Article 9 of the Paris Convention (providing also that a grave natural disaster of an exceptional character is a ground of exoneration, unless excluded by national legislation).

Liability for nuclear damage is not channeled to the operator of the nuclear plant or to the carrier of nuclear material. Claims may be based on the Austrian nuclear liability law but also on other liability provisions, such as the general provisions of tort law, products liability law or state liability law[14]. There are certain restrictions, however, on the right of the victim to enforce a claim against the supplier of products or services to a nuclear plant : the responsibility for nuclear damage stays primarily with the operator; thus the action against third parties will be dismissed if the defendant can prove that an action against the operator will lead within a reasonable period of time to a decision, that this decision can be enforced, and that there are sufficient funds available to ensure compensation on behalf of the operator[15]. The rights of recourse of the operator himself are also limited[16] in the same way as provided in the international conventions.

Specific rules apply in order to facilitate the proof of causality. A presumption of causality is established by Section 12(1) of the Austrian Law : if an injured person can submit reasonable evidence of having been physically exposed to nuclear radiation originating from among others a nuclear plant or nuclear material, it will be presumed that the injury was caused by nuclear radiation, provided that nuclear radiation is known to be a cause of such damage. The presumption can be rebutted by the defendant by proving that it is probable that the damage was not caused by nuclear radiation; for the rebuttal it would be sufficient to show that in the case under consideration other causes were more probable than nuclear radiation[17]

There is no exclusive jurisdiction. An action or motion for temporary injunction can be brought both before the court in the jurisdiction in which the damage has been caused, as well as before the court in the jurisdiction in which the damage has occurred. If nuclear damage, though caused in a foreign state, occurs in Austrian territory, an Austrian court will have jurisdiction and Austrian law will be applicable[18].

2.3 Luxembourg Draft Law 7221

The Luxembourg Draft Law 7221 is based on principles that are similar to the Austrian Law in their rejection of the principles of the international conventions. The liability of the operator for damage caused by a nuclear accident involving a nuclear installation is irrespective of fault[19] but nothing is provided to channel this liability on the operator, nor is there any possibility of limitation of the liability for such damage. The operator can be exonerated only if he succeeds to prove the fault of the victim.

A thirty year prescription period is provided for, irrespective of the question whether the damage results from personal injury.

Luxembourg courts are declared competent to judge claims relating to damage resulting from a nuclear accident and from protective measures taken in case of grave and imminent threat of damage of that

[14]Monika HINTEREGGER, "The New Austrian Act on Third Party Liability for Nuclear Damage", *Nuclear Law Bulletin*, December No. 62 Volume 1998 Issue 2, p.31.
[15] Section 16 (2).
[16] A right of recourse exists only if the damage was caused by an act or omission done with the intent of causing damage, or unless the right of recourse is expressly provided for by contract (Section 19 (3) of the Austrian Law; see also article 6 sub-paragraph (f) of the Paris Convention and Article X of the Vienna Convention as amended by the Protocol of 12 September 1997).
[17] Monika HINTEREGGER, "The new Austrian Act on Third Party Liability for Nuclear Damage", *op. cit*., p.33.
[18] *Ibidem*.
[19] In deviation to the rules of the general tort law that apply before the Draft Law 7221 is voted.

nature or after a nuclear accident , in as far as the Luxembourg territory, the residents or the persons present on Luxembourg territory at the moment of the damaging facts are concerned. As far as the applicable law is concerned, the Luxembourg Draft Law 7221 simply states that in case of nuclear accident the third party liability actions are governed by Luxembourg law.

Going much further than the Austrian Law in its definition of nuclear operator, the Luxembourg Draft Law defines the operator as any physical person, any legal person of public or private law, any international organization with legal personality, the State or any other public authority, as well as any public or private entity without legal personality, having the general responsibility of a nuclear installation as indicated in the authorization and any national authority responsible of the energetic policies concerned.

This wide definition including public authorities is ostensibly inspired by the desire to provoke a debate on the use of nuclear energy and is admittedly purely anti-nuclear.

The existence of legislation such as the Austrian Law and the Luxembourg Draft Law and the divide with the principles of the international third party liability conventions inevitably raises the problem of allocating jurisdiction to Austrian or Luxembourg judges and enforceability of Austrian or Luxembourg judgements in states party to international conventions that have nuclear programs.

3. Cross-border litigation and legal effects of specific legal regimes of non-contracting States in nuclear Contracting States of the European Union

The determination of nuclear third party liability of a nuclear operator for damage caused to victims of a nuclear accident due to a nuclear installation localized in a Paris Convention contracting state of the European Union depends on the operation of several international and European legal instruments. These instruments regulate either the determination of the international jurisdiction of a court to judge a claim, or the material third party liability regime, or the recognition of a foreign court decision.

The said instruments are well known: not only the provisions of the Paris and Brussels Supplementary Conventions themselves are relevant, but also their interaction with the Brussels Ia Regulation (2012)[20], which contains the general rules on jurisdiction and enforcement of judgments. The substance of the general rules in force in the European Union has also been extended to some third States (Norway and Switzerland by the Lugano Convention (2007).

We will examine whether these rules on jurisdiction and the recognition of foreign judgments are sufficient to preserve the effectiveness of the nuclear liability rules of the Paris Convention, taking into account the way each instrument involved delimits its own international scope[21].

The hypothesis addressed is the following : in the event of an accident occurring in a nuclear power plant in a EU Member State bound by the Paris Convention (e.g. Belgium), a judgment given in a EU Member State that is not a Party to the Paris (or the Vienna) Convention orders the operator to pay full

[20] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J.* 2012, L 351.

[21] For a comprehensive overview of the "patchwork" of these instruments and of "this legal framework difficult to comprehend", see J. HANDRLICA, "The Brussels I Regulation and Liability for Nuclear Damage", *Nuclear Law Bulletin*, 2010, p. 29-47.

compensation for nuclear damage occurring in that State for an amount exceeding the ceiling authorized by the law of the first State in accordance with the Paris and Brussels Conventions.

The victims seek recognition of the judgment in the country where the nuclear installation that caused the accident is located.

It is assumed that the action is brought against the operator itself, not against an undertaking (other than an insurer of the operator) which has compensated the victims and subsequently claims against the operator, nor in respect of damage arising in connection with the transport of nuclear substances.

3.1 Reminder of relevant rules for a cross-border dispute resolution

3.1.1. Identifying rules on jurisdiction

Concerning international jurisdiction, the Paris Convention, as amended by the 1963 Convention, contains a rule on international jurisdiction (Art. 13(a) and (b)). The same applies to the Brussels Ia Regulation (Art. 4, general rule; Art. 7.2, for tort matters).

Article 13(a) of the Paris Convention states as a general rule that: "*jurisdiction over actions under Articles 3, 4, 6(a) and 6(e) shall lie only with the courts of the Contracting Party in whose territory the nuclear incident occurred*".

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

Under the Brussels Ia Regulation, as a general rule, "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*" (Art. 4).

Furthermore, "*in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State in the courts for the place where the harmful event occurred or may occur*" (Art. 7.2).

Following the case law of the Court of Justice of the European Union (*Mines de Potasse d'Alsace* judgment[22]), the term "*harmful event*" must be understood as "*either the place where the damage occurred*" or "*the place of the event which gives rise to and is at the origin of that damage*", "*at the option of the plaintiff*". This rule has regard, not to the protection of the victim as such, but rather to "*a particular close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings*" (pt. 11).

[22] Judgment of 30 November 1976, C-21/76, EU:C:1976:166.

3.1.2. Identifying rules on the recognition and the enforcement of foreign judgments

Under Article 13(d) of the Paris Convention: "*Judgments entered by the competent court under this Article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.*"

The Brussels Ia Regulation tends to facilitate the recognition of foreign judgments in the European Union, following the principle of mutual trust between the jurisdictions of Member States. However, it provides for a limitative list of grounds of refusal, including, more especially, public policy (Art. 45.1(a)). As a contrast, "*the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction*" (Art. 45.3), except when the court of origin violated a jurisdiction rule for the protection of consumers, insured persons or workers, or in matters covered by Article 24 (e.g. rights *in rem*), or when the parties have agreed that a court is to have jurisdiction to settle any dispute in the sense of Article 25 (Art. 45.1(c)). And "*under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed*" (Art. 52).

Both the Paris Convention and the Brussels Ia Regulation tend to facilitate the recognition and the enforcement of foreign judgments, along the theoretical model of "*automatic recognition*" ("*reconnaissance de plein droit*"), meaning that recognition is a principle but that some grounds of refusal are allowed. In particular, they both admit a refusal if the court of origin violated a rule giving exclusive jurisdiction to decide on the merits. In matters of torts, the Brussels Ia Regulation does not provide for an exclusive jurisdiction in favor of the court of the place of the harmful event, while the Paris Convention does.

3.1.3. Identifying the spatial scope of instruments

The notion of "spatial scope" ("*applicabilité dans l'espace*") in the sense of the choice of law method means that a legal instrument, be it national, European or international, in civil and commercial matters, has to define the situations that have a significant connection with the State or the Contracting States concerned, e.g. the place of residence of one or more physical persons, the place of an event. In other words, a distinction needs to be made between this notion and the requirement that an international instrument be in force between Contracting Parties: this notion translates rights and duties between subjects of public international law; but it does not help to determine which cross-border situations involving private parties are covered by an international instrument. A special scope rule only may define those concerned.

3.1.3.1. Identifying scope rules for allocating jurisdiction

The Paris Convention defines its scope by a general rule of applicability (Art. 2), which normally requires that the nuclear accident AND the damage occur in Contracting States: this results from negative terms whereby it "*does not apply to nuclear incidents occurring in the territory of non-Contracting States or to damage suffered in such territory*".

Thus, the jurisdiction rule of Article 13(a) whereby the courts of the State of the place of the nuclear accident have exclusive jurisdiction applies only if the accident but also the damage occur in Contracting States.

Subsequently, the 2004 Protocol amending the Paris Convention extends practically this area to cover virtually any accident OR damage occurring in a Contracting State. Under new Article 2, the Convention "*shall apply to nuclear damage suffered in the territory of […] (i) a Contracting Party, […] (iii) a non-Contracting State which, at the time of the nuclear incident, has no nuclear installation in its territory, or (iv) any other non-Contracting State which, at the time of the nuclear incident, has in force nuclear liability legislation which affords equivalent reciprocal benefits, and which is based on principles identical to those of this Convention*".

Furthermore, according to the text of the 1960 Paris Convention, Article 2 determines the scope of application "*unless the legislation of the Contracting Party in whose territory the nuclear installation for which the operator is responsible is located provides otherwise*". Similarly, new Article 2 as amended by the 2004 Protocol does not prevent "*a Contracting Party in whose territory the nuclear installation of the operator liable is situated from providing for a broader scope of application of this Convention under its legislation* » (Art. 2(b)).

Thus, according to the Paris Convention, its scope may be extended if a Contracting State so provides. Reading the text, when the State uses this power, it does act on the scope of the Convention as such. It is understood that this extension has a limited territorial effectiveness, in the sense that it is binding only on the authorities (including the judiciary) of that State.

The Brussels Ia Regulation defines the spatial scope of its rules on jurisdiction by the criterion of the location of the defendant's domicile in the Union (Art. 5). If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State is determined by the law of that Member State (Art. 6.1), except for some special matters that do not concern torts litigations. Thus, once the defendant is domiciled in the Union, the rules on jurisdiction of the Regulation apply.

3.1.3.2. Identifying scope rules for the recognition of foreign judgments

As a part of the Paris Convention, the rules on the recognition of foreign judgments have the same spatial scope as the general one of the Convention itself (Art. 2). However, they might have a special scope also, depending on the wording of the provision concerned.

To say the truth, the scope of those special rules is not quite clear, due to some inaccuracy in use of terms in Article 13(d). Indeed, the provision does not formulate that it covers judgments rendered in a Contracting State. However, it involves a judgment pronounced by the competent court under the Convention that becomes enforceable in the territory of any of the "other" Contracting Parties. This may be understood as relating only to a judgment of a Contracting Party.

However, such a restriction to the spatial scope of the Convention leads to the risk that the whole structure of the Convention based on the channeling of jurisdiction in favor of the courts of the place of the accident would be ineffective (*infra*, 3.4.1).

The Brussels Ia Regulation states more explicitly that "a *judgment given in a Member State shall be recognized in the other Member States* […]" (Art. 36.1).

Doing so, this Regulation, as well as the terms of the Paris Convention, illustrate a common understanding that obviously uniform rules might be applicable between Parties only. However, this is not an absolute principle imposed by international law.

The Brussels Ia Regulation itself provides the possibility to affect a judgment given in a State where rules on jurisdiction are applicable while they are not in the recognizing State. Thus, following Article 71*quinquies*, as added by Regulation 542/2014 relating to the Unified Patent Court and the Benelux Court in matters relating to European and Benelux patents :

> "*The Brussels Ia Regulation applies to the recognition and enforcement of:*
>
> *(a) judgments given by a common court which are to be recognized and enforced in a Member State not party to the instrument establishing the common court; and*
>
> *(b) judgments given by the courts of a Member State not party to the instrument establishing the common court which are to be recognized and enforced in a Member State party to that instrument.*
>
> *However, where recognition and enforcement of a judgment given by a common court is sought in a Member State party to the instrument establishing the common court, any rules of that instrument on recognition and enforcement shall apply instead of the rules of this Regulation."*

3.I.4. Identifying hierarchy rules between instruments

In a case where both the Paris Convention and the Brussels Ia Regulation might be applicable, a conflict may arise between instruments, unless the one gives priority to the other.

The Brussels Ia Regulation provides for such rules, which give priority to "*any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments*" (Art. 71.1). Thus, the Paris Convention relates to such a particular matter (nuclear liability). And this priority rule does not require that all Member States are Parties to the Convention[23]. By way of comparison, in the particular field of patent law, the Regulation provides for a special rule giving priority to the instrument in force in the Member State of origin of the judgment and the Member State of enforcement (see above 3.I.3.2, new Art. 71*quinquies*, al. 2).

However, the priority rule raises an interpretation issue about the recognition of judgments. On the one hand, according to article 71.2 (b), the Regulation enforcement rules are applicable when foreign court assumed jurisdiction in accordance with a convention on a particular matter; *a fortiori*, this should also be the case if the foreign court has based its jurisdiction on the Regulation, as a judge of a EU Member State not party to the Convention could do. However, on the other hand, the Convention remains applicable if it "*lays down conditions for the recognition or enforcement of judgments*", but it is added that the rules of the Regulation on the recognition "*may in any event*" be applied !

It seems that this interpretation statement tends to draw a distinction between two types of instruments, whether they provide for specific rules on the recognition of foreign judgments or not. In the latter case, the Regulation affords to the foreign judgment the facilitation of recognition offered by its general rules.

[23] This derives from § 2 of Art. 71, concerning the interpretation of § 1, considering the case where a Member State is not a party to a convention.

In the first case, it confirms the priority of the special rules of the convention, e.g. the Paris Convention, without precluding any possibility to invoke the Regulation.

Does the expression "*may in any event be applied*" imply that the party demanding the recognition may invoke in any event the Regulation? Or does it mean only that a treaty regime does not in itself prevent the judge hearing an application for recognition from applying the Regulation, without however compelling him to do so? The wording "*applied*" used instead of "*invoked*" suggests the latter interpretation. There would then be a margin of appreciation left to the judge, depending on the context, the system and the objective of the Convention concerned.

The Court of Justice had the opportunity to clarify the priority rule in the *TNT Express Nederland* judgment (2010)[24]. The case concerned a refusal by a Dutch court to recognize a German judgment where the court of origin based its competence on a Convention on the carriage of goods. The refusal was grounded on public policy because the foreign court did not take into account the *litis pendens* rule of the Regulation[25]

According to the Court, "*the rules laid down in specialized conventions have the effect of precluding the application of the provisions of the [Regulation] relating to the same question*" (pt. 48). However, "*their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles […] of predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimization of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union*" (pt. 49). According to the judgment, "*the court of the State addressed is never in a better position than the court of the State of origin to determine whether the latter has jurisdiction. […] Therefore, [a conventional rule that admits as a ground of refusal the lack of jurisdiction of the court of origin] can be applied in the European Union only if it enables the objectives of the free movement of judgments in civil and commercial matters and of mutual trust in the administration of justice in the European Union to be achieved under conditions at least as favourable as those resulting from the application of [the Regulation]*" (pt. 55).

On those grounds, the Court rules that, more especially, the recognition rules of the convention "*apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimized and that they ensure, under conditions at least as favourable as those provided for by the Regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (favor executionis)*" (pt. 56 and 65).

If this interpretation is transposed to the Paris Convention, Article 13 as a principle would have the effect of making it possible to refuse recognition of a foreign decision that does not respect the exclusive jurisdiction of courts of the place of the accident, in a case where the Regulation does not allow such a refusal. Indeed, it can be argued that the provisions of the Convention relating to jurisdiction and the recognition of judgments are predictable, aim at the proper administration of justice and avoid concurrent proceedings, provided that they ensure a concentration of disputes before the courts of the State where the accident occurred in view to providing effective and fair compensation to victims[26]. Moreover, the

[24] 4 May 2010, C-533/08, EU:C:2010:243.

[25] This rule implies that the judge where the case is brought last must stay the pronunciation of his judgment until the jurisdiction of the court where the case is brought first is known.

[26] This could also result by analogy from the *ČEZ 1* judgment (*infra*, 3.2.2), that fosters to concentrate litigations in tort matters resulting from nuclear damages before the court of the place of the power plant acting as the court of the place of the harmful event under Article 7.2 of the Regulation.

effectiveness of the Convention would be undermined if the enforcement court of a Contracting State is prevented to refuse recognition because of the Regulation when the foreign judgment conflicts with a rule of exclusive jurisdiction established by the Convention. This would preclude any possibility of ensuring, in the Contracting State of the nuclear accident, a special nuclear liability regime capable of organizing fair and effective compensation for all victims of a major nuclear accident.

3.2. Allocating jurisdiction on the merits in a Non Contracting EU Member State of the place of the damage

3.2.1. The *Mines de Potasse d'Alsace* "Ubiquity" principle

According to the Brussels Ia Regulation, legal action is possible in the EU Member State of the defendant's domicile — in this case that of the operator (Art. 4).

As regards internal competence — i.e. which court is especially competent in the State whose the courts have international jurisdiction —, it is determined according to the internal law of the court. As the OECD Nuclear Energy Agency (1990) recommends, each Contracting Party should designate one single court for its whole territory, once national courts have jurisdiction under the Convention, but it leaves it to national law to designate this court.

An action is also possible in "*tort matters*" in the Member State in which the "*harmful event*" occurs (Art. 7.2).

In the event of a claim before a court of the Member State of the damage, this court shall have jurisdiction prima facie, as far as the damage occurred in that State within the meaning of the *Mines de Potasse d'Alsace* case law (1976) and in this case, only for the portion of the damage that occurred in that State (*Shevill* case law 1995)[27].

According to this case law, the plaintiff may, at his option, act before the judge of the place where either the causal event or the damage occurs ("*Ubiquity*" principle). The objective of this interpretation is not a favor to the victim as one might think, but a good administration of justice by seizing the best placed judge. It may be noted that the place of occurrence of the damage within the meaning of the *Mines de Potasse d'Alsace* case law is not the same as the victim's place of residence[28]. According to the Court of Justice, this is the case only in disputes concerning an action for defamation or for the protection of privacy.[29]

It is uncertain whether, in the event of a nuclear accident, the place where the damage occurs meets this objective of Article 7 of the Regulation, namely to ensure the proper administration of justice and the useful organization of the trial before the judge best placed, for example for the taking of evidence. In particular, the single forum in the place where the accident occurred established by conventional law attests to this.

3.2.2. A derogation on the basis of the CEZ judgments?

[27] Judgment of 7 March 1995, C-68/93, EU:C:1995:61.

[28] See, for example, judgments *Marinari* (C-364/93, EU:C:1995:289) and *Universal Music International* (C-12/15, EU:C:2016:449).

[29] For example, judgments *eDate Advertising* (C-509/09, EU:C:2011/685), *Schrems* (C-498/16, EU:C:2018:37) and *Bolagsupplysningen* (C-194/16, EU:C:2017:766).

The *ČEZ 1* judgment of the ECJ (2006)[30] may have an impact in the event of legal action on the basis of Article 7.2 of the Brussels Ia Regulation before a court of the place where the damage occurred, to challenge the jurisdiction of the courts of that State.

In this case, the Land Oberösterreich, Austria, complained to an Austrian court about the nuisances or risks of nuisances which, according to it, could be caused by the Czech nuclear power plant in Temelin, operated by the Czech State-owned energy company ČEZ, which is located a few kilometers from the Austrian border.

The Land Oberösterreich asked the Austrian judge to instruct ČEZ to put an end to the nuisances from the plant, by application of Article 364(2) of the Austrian Civil Code.

However, under Article 364(2) of the Austrian Civil Code, an industrial installation located in Austria, where it holds an administrative authorization, cannot, by exception, be the subject of legal action seeking to obtain the cessation of nuisances in respect of neighboring land; it is only liable to action for payment of compensation for the damage caused. On the other hand, that Article does not prevent an industrial installation located in the territory of another Member State from being the subject of legal proceedings aimed at obtaining cessation of nuisances, even though it has administrative authorizations there.

Thus, in the present case, ČEZ, although it had the Czech administrative authorizations, could not invoke the exception of the Austrian Civil Code which would protect it from actions aimed at bringing an end to nuisances on the sole ground that it is not located in Austria, whereas a company established in Austria that would benefit from Austrian administrative authorization could do so.

It follows from the *ČEZ 1* judgment that an action for cessation of a neighborhood disturbance causing nuisance to agricultural land is more appropriate in the country of the nuclear power plant because it is there that the nuisance effect of this building can be best assessed; as a consequence, an action for cessation of a nuisance does not constitute a dispute having as its object rights *in rem* in immovable property in the sense of Article 24 of the Regulation, and the Austrian court had no jurisdiction on this base. Indeed, following the Court citing the Schlosser Explanatory Report, "*the actions for damages based on infringement of rights in rem or on damage to property in which rights in rem exist do not fall within the scope [of Article 24 concerning rights in rem]*" (pt. 33). The Court does not go further than answering merely to the preliminary question, that concerned the jurisdiction based on rights *in rem* only, not on tort matters in the sense of Article 7.2.

Nevertheless, one could assume that the Court recognizes a possible derogation to the *Mines de Potasse d'Alsace* case, about nuclear liability at least. Indeed, it is known that an action seeking to prevent damage ("*action en cessation*") belongs to the matter of torts in the sense of Article 7.2 of the Regulation[31]; and this is confirmed by the judgment when citing the Schlosser Report. In other words, the judgment's reasoning affects indirectly the interpretation of the place of the « *harmful event* » in the sense of this Article. In that perspective, the Court uses the *Mines de Potasse d'Alsace* statement. It does not formally overturn this case law, but at the very least, it affirms the possibility of a partial derogation, that could be valid in the nuclear sector. Indeed, for the *ČEZ 1* judgment, an examination of a preventive action, that is

[30] Judgment of 18 May 2006, C-343/04, EU:C:2006:330.
[31] Judgment *VKI & Henkel* of 1 October 2002, C-167/00, EU:C:2002:555.

knowingly covered by Article 7.2, "*does not require an assessment of facts which, being more particularly appropriate to the place where one of the two properties concerned is situated, are likely to justify conferring jurisdiction on the courts of one of the two States to the exclusion of the other*" (pt. 38). Yet, it could be different about a compensation action when, as in the *Mines de Potasse* case, "*the place of the event giving rise to the damage and the place where the damage occurred are both capable, depending on the circumstances, of being particularly helpful from the point of view of the evidence and of the conduct of the proceedings*" (pt. 38). Had the Court considered that this ruling would have been applicable to the *ČEZ* case without taking "*the circumstances*" into account, it would have helped the Austrian jurisdiction to ascertain jurisdiction in the State of the nuisance. But it did not. Admittedly, it concludes merely that an assessment at stake whether the emanations of a power station "*exceed the influences or risks normally associated with the operation of a nuclear power station in accordance with current generally recognized technological standards […] clearly requires verifications which, to a large extent, have to be undertaken at the place where the power station is located*" (pt. 39).

It would still be for the Court to confirm, in respect of an action for liability, that all on-the-spot checks would be carried out most easily in the country of a central authority as in the case of an action for an injunction. This would apply to requirements specific to the nuclear sector — unlike other environmental damage — marked, as regards actions for compensation, by the principle of the single forum laid down by conventional law for in favor of the forum at the place of the plant.

The conclusions of Advocate General Poiares Maduro could help in this direction (*infra*, 3.4.2.2).

Furthermore, the *ČEZ 2* judgment (2009)[32] could still be mobilized in this sense, although it does not concern jurisdiction but only whether the Austrian Civil Code provision differentiating international and internal situations is compatible with Article 34 TFEU[33]. In the sector of nuclear safety specially, the Court notes the "*principle of optimizing protection*" (pt. 115) and the statement in the preamble to the Convention on Nuclear Safety to which the Union is a party that "*responsibility for nuclear safety lies with the State under whose jurisdiction a nuclear installation is situated*" (pt. 129). This could help to consolidate the single forum of the place of the nuclear accident in compensation cases, by invoking this forum as an illustration of the principle of optimizing protection: this principle would imply a global and egalitarian distribution of the amounts available among all the victims of any Member State by a single court, as conventional law tends to do.

Such an interpretation could find comfort in the position taken by the EU Council when "*authorizing*" Member States to ratify the 2004 Protocol amending the Paris Convention, on behalf of the Union (Dec. 2004/294, *infra*, 3.3). In doing so, the Council is politically adhering to the Convention's ground of jurisdiction for the place where the accident occurred; and the authorization to ratify is a formula which actually reflects a legal obligation to do so addressed to the Member States concerned.

Thus, such an interpretation would entail the incompetence of courts of the Sate where the damage occurred to hear a claim for compensation for nuclear damage.

3.3 Allocating jurisdiction on the merits in the Contracting EU Member State of the place of the accident

[32] Judgment of 27 October 2009, C-115/08, EU:C:2009:660.

[33] On this judgment, see W.-G. SCHÄRF, "The Temelin-Judgement of the European Court of Justice", *Nuclear Law Bulletin*, 2010, p. 79-94.

3.3.1. The single forum principle

As a rule, the Paris Convention establishes a single forum based on the following connecting factors:

- The place where the "*nuclear incident*" ("*l'accident nucléaire*") occurred;

- the location of the "*nuclear installation*" causing the accident, where the nuclear incident did not occur in the territory of one of the Contracting Parties or where the location of the nuclear incident cannot be determined with certainty.[34]

This single forum established by the Paris Convention makes it possible to determine which courts are called upon to hear disputes relating to compensation for nuclear damage. Indirectly, it makes it possible to identify the law applicable to a dispute falling within the scope of the Convention. Indeed, the competent court will then apply the uniform substantive rules directly — provided that the damage occurred in a Contracting State, unless the State of the forum has extended the scope of the Convention (Art. 2).

This single forum of the Paris Convention is of an exclusive character, which is reflected in the conditions for recognition of a foreign judgment which has not complied with that forum. Indeed, in the field of application of the Convention, a judgment given by a court of a State other than that of the place where the accident occurred is not recognized under Article 13(d) of the Convention (*see infra*, 3.4).

The 2004 Protocol amending the Paris Convention does not call into question the principle of the single forum of the place of the nuclear incident, but envisages new hypotheses. In particular, when a nuclear accident occurs in the exclusive economic zone of a Contracting Party, assuming that the latter has notified the Secretary-General of the Organization of that space, the courts of that Contracting Party shall have jurisdiction over the case.[35]

Inversely, "*with the new system, the competent courts may belong to a State directly affected by the accident (...) and are no longer only those of the Contracting Party.*"[36]

Nevertheless, this single forum principle "*is intended to facilitate the distribution of closed envelopes without having to settle disputes between judges without having to settle disputes between judges. It ensures to select the court capable of deciding on a large number of actions*" [37].

It is also considered "*necessary to ensure an equitable distribution of available compensation funds to victims.*"[38]

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[34] Article 13 (a) and (b) of the Paris Convention.

[35] Article 13 (b) and (c) of the 2004 Protocol.

[36] M. TETLEY, "Revisions of the Paris and Vienna Conventions on Civil Liability from the Insurers' Perspective", *Nuclear Law Bulletin*, 77 (2006), p. 30.

[37] R. DUSSART DESART, "The reform of the Paris Convention on Civil Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention, an overview of the main elements of the modernization of the two Conventions", *Nuclear Law Bulletin,* 75 (2005), p. 25.

[38] Explanatory Report of the Paris Convention, point 4.

3.3.2. Jeopardizing the single forum outside the scope of the Paris Convention

This channeling rule of the Paris Convention that concentrates several actions into a single court does apply only if the case belongs to the spatial scope of the Convention. As was stated above (*supra*, 3.1.3.1.), according to the version in force, the accident must occur in a Party but also the damage. As a result, when the damage is in a third State, the court seized on the merits in the Contracting EU Member State of the domicile of the defendant or of the place of the power plant has to apply the Brussels Ia Regulation. This means (supra 3.2.1) that he has jurisdiction under Article 4 (domicile of the defendant) or, when the defendant is domiciled in another Member State, under Article 7.2 (place of the harmful event, i.e. the causal event).

On the merits, this court will not apply the uniform substantive rules of the Convention. It has to designate the national law applicable by virtue of its choice of law rules — and not of Rome II Regulation (2007)[39] which excludes nuclear liability of its scope. If this choice of law rule designates the law of the forum, or a foreign law, that does not provide for any special nuclear liability regime except implementation rules of the Convention, the court will apply to the case the ordinary regime of liability, based on a fault and giving rise to full compensation of damages with a long limitation period after the accident, and probably without the availability of any insurance scheme.

3.3.3. Preserving the single forum by extending the scope of the Paris Convention

A Contracting State could obtain another result using the extension facility offered by Article 2 of the Paris Convention (see *supra*, 3.1.3.1): the Contracting Party in whose territory the nuclear installation for which the operator is responsible is located could extend the scope of the Convention to damages occurred in a third State.

The same result will be obtained after the entry into force of the 2004 Protocol, which extends automatically to such damages (see *supra, 3.1.3.1*).

Precisely, the Council of the European Union "*authorized*" — seemingly a requirement —Member States Parties to the Paris Convention to ratify the 2004 Protocol amending the Paris Convention (Decision 2004/294)[40]. This may be seen as an approval of the Convention rules on jurisdiction.

The Protocol requires only five ratifications, but following the Convention, the entry into force of any treaty amendment requires ratification by two thirds of the Contracting States to the Convention. However, this two-thirds condition will be met practically only after the deposit of the instruments of ratification by the Member States of the Union party to the Paris Convention.

According to Council Decision 2004/294, it is understood that the deposits of the instruments of ratification of the Member States concerned are "simultaneous" (Art. 2.1); and "the date of simultaneous deposit" is determined on the basis of an exchange of information within the Council (Art. 2.2).

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[39] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *O.J.* 2007, L 199.

[40] Council Decision 2004/294/EC of 8 March 2004 authorising the Member States which are Contracting Parties to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy to ratify, in the interest of the European Community, the Protocol amending that Convention, or to accede to it, *O.J*. 2004, L 97.

Consequently, for Union purposes, the 2004 Amending Protocol must have been ratified by all the Member States bound by the Convention. However, this only seems to be required for the points of law on which Decision 2004/294 was based, namely the question of international jurisdiction and the recognition of foreign judgments, which falls within the exclusive competence of the Union under the terms of Decision 2004/294, because of the exercise of its internal jurisdiction since the adoption of Brussels I Regulation (2000).[41]

In the meantime, it seems that a Member State could not, under the Union law, ratify unilaterally the Protocol. But this should not prevent to use the possibility to extend immediately the scope of the Convention itself in its version still in force, as allowed by Article 2 of the Convention.

3.4. Recognition in the State of the accident of a judgment given in the State of the damage

3.4.1. On the hierarchy between the Paris Convention and the Brussels Ia Regulation regimes on the recognition of foreign judgments

3.4.1.1. Uncertainty about the scope rule on recognition of the Paris Convention

As stated above, Article 13(d) of the Convention provides for the recognition of a foreign judgment, only if the foreign court had jurisdiction under Article 13(a) ff. Practically, this means that only a judgment given by the court of the place of the nuclear accident may be recognized in another Contracting State.

At first glance, this rule applies only when the foreign judgment was given in a Contracting State (see *supra*, 3.1.3.2). This could be explained because any treaty applies only between Parties, but international law does not require such limitation. It belongs to several States to agree about the recognition and the enforcement of third States judgments, as well as it belongs to an individual State to determine the effects of a foreign judgment. But it is required that the enactment of rules on recognition and enforcement prevail only on the territory of the enacting State(s) and has the force of law for the authorities of concerned State(s) only[42].

(a) Doubts about the wording of Article 13(d) of the Paris Convention

As such, the text of Article 13(d) could be understood in different ways. It could tend to ascertain only that the judgment given by a court of a Contracting State of the place of the accident has to be recognized any way, and the same judgment given in the Contracting State of the place of the damage could never. It could also mean that a judgment given in a third State would never be recognized because it would exceed as a prerequisite that the foreign court belongs to a Contracting State, or that it could be recognized

[41] This is the first version of the Regulation (44/2001, December 22, 2000) in force at the time.

[42] For proposals to extend the scope of the Brussels I Regulation to third States judgments, see the Commission proposal for a revision of the Brussels Ia Regulation, doc. COM 2010, 7458, in the line of a position of the European Group for Private International Law (GEDIP) at its Copenhagen meeting (2010), www.gedip-egpil.eu. In the doctrine, see in particular M. FALLON and T. KRUGER, "The spatial scope of the EU's rules on jurisdiction and enforcement of judgments", *Yearbook of Private International Law*, 2012-2013, p. 1-36.

provided that it respects the rule on jurisdiction in the same way as a court of a Contracting State has to do.

One good reason why Article 13(d) considers a judgment in another Party only, is probably that the Convention itself applies normally only if the damage occurred in a Contracting State (*supra*, 3.I.3). In practice, a concurrent court in nuclear liability case would be a court of the place of the damage, mostly of the State of residence of victims.

Once the scope of the Convention is extended by the State of the accident to damages occurred in third States as allowed by Article 2, all provisions of the Convention apply, including the rule on the recognition of foreign judgments. Consequently, if the scope of Article 13(d) remains limited to a judgment given in a Contracting State, it would be easy for victims to sue the power plant operator abroad and to obtain recognition of the judgment afterwards in the Contracting State of the accident without a risk of refusal due the lack of jurisdiction of the foreign court of the place of the damage in the sense of Article 13(a) of the Convention. In other words, the effectiveness ("*effet utile*") of the uniform nuclear liability regime would be severely reduced, since the foreign court of a third State would not have applied this regime. In this respect, considering that the extension by the forum State means an extension of the scope of the Convention addressed to its jurisdiction, those courts should interpret Article 13(d) as applicable to a judgment given by a court in the State of the damage.

The 2004 Protocol will extend automatically to damages in some third States (having no nuclear installation or having an equivalent liability regime) and it permits also a wider extension by a Contracting State. And the substance of Article 13(d) remains unchanged. Hence, the provision will be plainly effective, any way for litigations covered by the automatic extension, since the foreign court of the place of the damage is assumed to be the court of a Contracting State.

(b) Doubts about the priority rule of Article 71 of the Brussels Ia Regulation

Another issue of importance for the scope of the rules of the Paris Convention is the effect of the priority rule of Article 71 of Brussels Ia Regulation. As seen above, it gives priority in favor of instruments concluded between EU Member States in a particular matter. This rule would apply to the Paris Convention, with respect to some problems of interpretation of Article 71.2(b) described above (*supra* 3.I.4).

Concerning the nuclear sector in particular, the position of the Council of the European Union is to be mentioned, about the ratification of the Vienna Convention by Member States on behalf of the European Union. According to Decision 2013/434:

"The rules on the recognition and enforcement of judgments laid down in Article XII of the Vienna Convention, as amended by Article 14 of the 1997 Protocol, should not take precedence over the rules on procedures for the recognition and enforcement of judgments provided for in Regulation (EC) No 44/2001. Accordingly, the Member States authorized by this Decision to ratify or accede to the 1997 Protocol should make the declaration provided for in this Decision in order to ensure the application of the relevant Union provisions." (§ 9 of the Preamble to the Decision; Art. 2).

Such position could be explained by the interpretation provision of the priority rule set in Article 71 of the Brussels Ia Regulation. However, it seems inconsistent with a margin of appraisal left in a particular case (see *supra*, 3.I.4). Furthermore, the Regulation itself does not exclude *per se* a possible priority given to common conventional rules, e.g. concerning patent law (Art. 71*quinquies*, al. 2, *supra* 3.I.3.2).

This Decision is still surprising for two reasons.

On the one hand, the Convention does not provide for such a reservation. In fact, this way of regional disconnection[43] ruins the useful effect of the conventional system based on a single forum, since, between the Member States of the Union, a foreign judgment which has violated that forum will nevertheless have to be recognized[44].

On the other hand, no similar declaration exists with regard to the Paris Convention, despite equivalent contents of both instruments. If this is confirmed, there would be inconsistency in the Union's position on the matter, unless the approach concerning the Vienna Convention would be linked to proper contextual factors.

3.4.2 Grounds to refuse recognition of a foreign judgment

Following Article 13(d) of the Paris Convention, there are two explicit grounds of refusal, namely:

- the unenforceability or finality of the judgment under the law of origin;
- the incompetence of the judge of origin who rendered the judgment.

Surprisingly, no ground pertaining to the public policy of the State where recognition is asked for is mentioned. Does it mean that such ground is excluded? Not necessarily, because Article 13(d) contains an explicit exclusion about another ground, namely further proceedings on the merits of the case (no "*révision au fond*"). Therefore, public policy may be considered as an implicit self-evident ground of refusal.

In comparison, the grounds of refusal of the Brussels Ia Regulation are described much carefully. The complete list is given in Article 45, including a limited control of jurisdiction, and public policy as well.

[43] About this concept, see more generally: C. ECONOMIDES and A. KOLLIOPOULOS, "La clause de déconnexion en faveur du droit communautaire: une pratique critiquable", *Rev. gén. dr. int. public*, 2006, p. 273-302; J. ETIENNE, "La coexistence de normes multilatérales et européennes — Une étude de la déconnexion et de la substitution", *Annales dr. Louvain*, 2011, p. 3-14.

[44] On the risk of jeopardization of the Convention by the Brussels Regulation, see: J. HANDRLICA, cited above, and "Channelling of nuclear third party liability towards the operator jeopardised by the Brussels Regulation", *Czech Yearbook of Public & Private International Law*, 2011, p. 69-81.

3.4.2.1. The ground of lack of jurisdiction of the foreign court

Both the Paris Convention and Brussels Ia Regulation are in contrast about the possibility to refuse recognition on the ground that the foreign judgment conflicts with a rule that gives jurisdiction to another court on the merits.

The Convention considers this ground of refusal as a hard and fast rule: no recognition is allowed when the foreign court had no jurisdiction on the merits according to the Convention rules. This is quite understandable, since the jurisdiction rule aims at concentrating jurisdiction on the merits, as a part of a package regime on liability channeling on the power plant operator, normally for an accident occurring in that State.

The Regulation primary objective is to standardize the rules on the recognition and enforcement of foreign judgments within the European Union. To this end, the European legislator considered it necessary also to standardize the rules on international jurisdiction. In so doing, it eliminates the risk of the trial court basing its jurisdiction on a forum which is unacceptable to the other Member States in which the judgment, once given, would be the subject of an application for recognition. In other words, the adoption of uniform rules of jurisdiction makes it possible to prevent a ground for refusing recognition of the foreign judgment. By virtue of the principle of mutual trust between the courts of the Member States on which the Regulation is based, the court having declared itself competent on the basis of the Regulation is presumed to have correctly applied the rules of jurisdiction, so that there is no longer, as a rule, any need to review that correct application at the subsequent stage of recognition of the judgment.

Under the Regulation, a refusal to recognize a foreign judgment could be based on a breach by the court of origin of a rule of international jurisdiction only in very limited matters covered by the Regulation (Art. 45.1), namely in matters relating to insurance, consumer and employment contracts, in matters relating to immovable property or when the parties agreed a jurisdiction clause.[45]

Consequently, according to the Regulation, a court of a Member State seized of an application for enforcement of a foreign Member State judgment which had based its jurisdiction in a tort matter on the location of the occurrence of the damage in that foreign Sate could not refuse recognition solely on the ground of breach of a rule of jurisdiction by the court of origin, whether that rule belonged to the Regulation or to national law. In this respect, it is irrelevant whether the court of origin erred in the interpretation of the ground of jurisdiction of the Regulation.

The explanation for such a system lies in the principle of mutual trust: the foreign Member State court is presumed to have rigorously applied the ground of jurisdiction in Article 7.2 of the Regulation in tort matters and the defendant before this court had to ensure that this correct application prevailed before it — provided that there was no default within the meaning of Article 46.1(b) of the Regulation.

[45] Significantly, the judgment in *ČEZ 1* took care to specify that an action for an injunction of nuisances from one building to the prejudice of another building does not fall within the scope of real property rights within the meaning of Article 24 of the Brussels Ia Regulation, but, implicitly, within the scope of torts as referred to in Article 7.2. This suggests that a judge hearing an application for recognition of a foreign Member State judgment in tort matters cannot base a ground for refusal on the incompetence of the court of origin.

As a result, it can be seen that the result would have been different had the Paris Convention been applied, since it provides for a refusal of recognition if the court of origin has violated the rule of the single forum in the place of the accident.

3.4.2.2. The ground of public policy of the enforcement State

The Brussels Ia Regulation provides expressly for public policy as a ground to refuse the recognition of a foreign judgment and, it is submitted, such ground has not been excluded by the Convention.

The public policy of the forum can be defined commonly as:

— a "*national rule (...) so essential to the moral, social, political or economic order of the country that it must necessarily exclude the application of any rule contrary to or different from foreign law*;" or

— *"(...) anything relating to the essential rights of the administration of justice or the implementation of contractual obligations, or even anything considered essential to the established moral, political and economic order*."[46]

(a) A strict definition of public policy

Under European law, the public policy of the forum is defined according to national law but including the fundamental European rights (*Krombach* judgment 2000[47]) and the fundamental provisions indispensable for the functioning of the internal market (*Eco Swiss China Trade* judgment[48]). However, this does not include the violation of any European rule, including the misapplication by the court of origin of the rules on the internal market (*Renault* judgment[49]).

The notion of public policy is in any case strictly interpreted. It concerns only a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order (*Apostolides* judgment[50] and *Diageo Brands* judgment[51]). The same prevails under the Convention on Human Rights, according to the Court of Human Rights, preserving against a "*manifestly insufficient protection*" (*Avotins v. Latvia*, 2016, nr. 17502/07, § 116). Thus, in the *FlyLal-Lithuanian Airlines* case[52], the Court of Justice has rejected "*purely economic interests*" or "*invocation of serious economic consequences*" such as the "*amount of potential losses*" (pt. 56 to 58) as a part of the concept of public policy. As such, it confirmed opinion of Advocate General Kokott, stating that "*a risk of State impoverishment*" as an infringement of public policy "*is highly questionable*" — and was hypothetical in that case (§§ 87-88). Nevertheless, Mrs. Kokott admitted more generally that, as to the content, public policy "*protects legal interests, or in any event interests expressed in a rule of law, connected with the political, economic, social or cultural order of the Member State concerned* » (§ 84).

[46] J.-C. WIWINIUS, *Le droit international privé au Grand-Duché de Luxembourg*, 3rd Edition, p. 61.
[47] Judgment of 28 March 2000, C-7/98, EU:C:2000:164.
[48] Judgment of 1 June 1999, C-126/97, EU:C:1999:269.
[49] Judgment of 11 May 2000, C-38/98, EU:C:2000:225.
[50] Judgment of 28 April 2009, C-420/07, EU:C:2009:271.
[51] Judgment of 16 July 2015, C-681/13, EU:C:2015:471.
[52] Judgment of 23 October 2014, C-302/13, EU:C:2014:2319.

In other words, invoking a mere interest is not enough; by way of contrast, the public policy argument could be relevant whenever State law concerned enacted specific rules tending to protect general interest.

(b) Public policy in the nuclear sector

In the field of nuclear energy, the argument of public policy could be invoked if it is established that the foreign judgment applied an unlimited liability regime, of an hybrid type characterized by a principle of objective channeled liability, but without a compensation ceiling or financial guarantee mechanism, which would compromise any possibility of a global settlement of compensation for all accident victims, on an equal footing, depending on the resources available, including the mobilization of public funds from the State in which the accident occurred, when such a global settlement regime belongs to a public interest policy of the law of the enforcement State.

Moreover, the public policy ground could be mobilized from the perspective of a mandatory requirement of security of supply, if it is established that only an objective liability system such as that established by conventional law is capable of achieving such objective. However, such a public security ground can enter a strict public policy requirement as long as the system is capable and necessary with regard to the objective.[53] In particular, the security of electricity supply could be jeopardized if, because of the risk of having to provide full compensation to the victims abroad, the State of the place of the power plant were forced to immediately follow up the anti-nuclear policy of a neighboring State by carrying out an unplanned dismantling.

Furthermore, it may be assumed that a foreign State whose courts apply a strict liability regime while giving full compensation of damages to the victims resident in that State in charge of a power plant operator located in another State without taking into account prerequisites concerning insurance coverage workability, nor the interests and policies of neighbor States, as a tool of a proper anti-nuclear policy, would outsource the costs of nuclear damages.

(c) Cost externalization as a ground of public policy

The issue concerning "*cost externalization*" by the State of the damage is underlined quite explicitly by the Advocate General in his conclusions preceding the *CEZ 2* judgment of the Court of Justice (see *supra*, 3.2.2). According to his reasoning, the court seized on the merits in the EU Member State where damages occurred "*must take account of the benefits*" of the foreign State to the existence of a power plant on its own territory and "*cannot base its decision solely on domestic interest*". Indeed, this court must know that if he outsources costs without taking into account the impact of his judgment in the country of the nuclear

[53] Comp. by analogy following judgments concerning EU internal market law: *Campus Oil* (C-72/83, EU:C:1984:256); *Commission v. Belgium* (C-503/99, EU:C:2002:328) *& v. France* (C-483/99, EU:C:2002:327); *Essent* (C-105/12, EU:C:2013:677). However, evidence of a real and serious threat is required in the judgments *Commission v. Spain* (C-463/00, EU:C:2003:272) and *Commission v. Portugal* (C-543/08, EU:C:2010:669). This case-law on internal market law accepts as a derogation in the general interest capable of justifying an obstacle to freedom of movement — provided that the principle of proportionality is respected — the objective of security of energy supply, seeing in it the possibility — to be confirmed by the State in question — of a real and serious threat affecting a fundamental interest of society.

installation, he must anticipate the risk of refusal of recognition of that judgment in that EU Member country.[54]

More specifically about a jurisdiction issue in civil and commercial matters, according to the same Advocate General in the *CEZ 1* case (see *supra*, 3.2.2), the "*spirit of cooperation which imbues*" the Brussels Ia Regulation must encourage the court hearing the tort claim, such as the court of the place of the damage, to take account of the costs in the State from which the damage originated and "*avoid the risk of cost externalization*" in a transnational dispute linked to the operation of a power plant (§ 93). This follows "*from the existence of limits on the recognition of decisions that do not respect the public policy of the legal systems involved on which recognition may be sought. To the extent that a judgment deals with a transnational situation, such as one of cross-border nuisance, the decision will not be free of effects in other States and it is in this respect that the issue of recognition of the judgment abroad may arise. The courts of the Contracting State with jurisdiction to hear the case must therefore respect the obligations arising from the consideration of what could be a judgment inconsistent with foreign public policy provisions*." (§ 94).

In the *CEZ 2* case the Advocate General insists also, as will the judgment of the Court of Justice in that case, on the fact that a nuclear installation in a Member State complies with strict European safety standards, compliance with which is ensured by the Commission.[55]

Such an element can be seen as part of the legislative package surrounding the operation of nuclear power plants in the Member States and contributing to a policy of health and environmental protection through the adoption of preventive measures. Such measures should either prevent a nuclear accident or limit its scope.

Thus, the Advocate General's argument concerning the risk of refusal to recognize a foreign EU Member State judgment means that the court of the EU Member State of the nuclear accident hearing an application for recognition of a foreign judgment may use the ground of public policy to refuse recognition of the judgment under Brussels Ia Regulation. This would be the case where the foreign court ruled by neglecting the nuclear policy of a neighboring Member State in conformity with the European policy in the field of civil exploitation of nuclear energy, in the name of an anti-nuclear policy.

Conclusion

The test case involving a nuclear accident that occurred in a Member State of the Union Party to the Paris Convention while damages occurred in a Non Contracting Member State confirms a risk of jeopardizing the core system of compensation established by international instruments on nuclear liability. One of the tools provided for by the Convention is blocking recognition of foreign judgments conflicting with the single forum rule in favor of the court of the place of the nuclear accident.

This risk results from two types of factors.

First, as long as the scope of the conventional regime does not extend to damages occurring in third States, the recognition (and the enforcement) of foreign judgments depends on the content of national rules or, as the case may be, of uniform rules binding both the State of origin of the judgment and the State of

[54] Conclusions of Advocate General Poiares Maduro preceding the judgment in *ČEZ 2*, §§ 18 and 19, repeating his conclusions preceding the judgment in *1*.
[55] Conclusions, § 17;*ČEZ 2* judgment, pt. 121 ff.

enforcement. This is the case for European Union Member States: Brussels Ia Regulation tends to facilitate cross-border recognition of MS judgments; in particular, it prevents blocking recognition in favor of the single forum and it restricts the public policy ground of refusal.

Secondly, once the scope will be extended to third State damages, the blocking tool against foreign judgments conflicting with the single forum rule should operate. However, between EU Member States, one uncertainty could remain. In principle, the Convention should prevail, according to Article 71 of the Brussels Ia Regulation. But the interpretation of this priority rule about the recognition of a foreign judgment reveals that the Convention should not compromise principles underlying European judicial cooperation such as predictability, sound administration of justice, minimization of concurrent proceedings and mutual trust. Nuclear lawyers will point out that nuclear liability conventions pursue similar objectives while taking due consideration for peculiarities of the nuclear sector.

Nevertheless, even in a case covered solely by Brussels Ia Regulation, the rules relating to jurisdiction and to the recognition of foreign judgments could be read taking into account requirements of nuclear compensation schemes.

On the one hand, about jurisdiction, the forum of the harmful event could be understood as the place of the nuclear accident, by way of derogation from the principle of a choice between the place of the causal event and the place of the damage. This could result by analogy from the ECJ reasoning in the *ČEZ 1* judgment (2006) about an action for cessation of a nuisance due to a foreign power plant, where the Court denied jurisdiction for the courts of the State where nuisances occurred.

On the other hand, about the recognition of foreign judgments, public policy as a ground of refusal before the enforcement court may not succeed to preserve the single forum rule. But it could succeed to preserve the public interest of the enforcement State, provided that it would not result in a review on the merits. Such interest could exist when this State has established, as a Party to international instruments, a specific liability regime that is proper to realize an effective and egalitarian redistribution of available funds between victims, with the support of financial guarantees mechanism in a context of international cooperation. Here again, such reasoning could be deduced by analogy with the conclusions of the Advocate General preceding the *ČEZ 1* and the *ČEZ 2* judgments: the MS court of the place of the damage should be aware of the risk that the enforcement of its judgment could be refused on the ground of inconsistency with the public policy of the enforcement Member State. This could be the case if the judgment does not avoid a cost externalization when failing to take into account the costs of compensation in the Member State of the location of the power plant involved.

For these reasons, it must be concluded that the nuclear operator in a Contracting State to the international Conventions cannot rest assured beyond any doubt that the judgments of a non-Contracting State will not be enforced in the country where the installation is situated; he is not without arguments, but the outcome will depend on the alea of the interpretation accepted by the judge who will hear the claim.