

Transboundary Water Pollution in Private International Law

La contaminación transfronteriza de las aguas en el Derecho Internacional Privado

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Abstract

Cases of transboundary water pollution raise questions concerning jurisdiction and the applicable law when it comes to liability litigation. To favour the injured person and environmental protection, European international procedural law gives them the choice to bring an action at the place of the harmful event or at the place of direct damage. The conflict-of-laws rules also usually allow the injured person to choose between the law at the place of the harmful event and the law at the place of direct damage. Specific problems occur at the interface between private and public law when the tortfeasor is a public authority, when it comes to compensation for purely ecological damage, or when the harmful behavior was in compliance with applicable standards or was even authorized.

Keywords

Transboundary Water Pollution, Conflict of Laws, International Tort Law, Ecological Damage, Sovereign Immunity, Foreign Administrative Authorizations.

Resumen

Los casos de contaminación transfronteriza de las aguas plantean cuestiones relativas a la jurisdicción competente y a la ley aplicable en materia de litigios por responsabilidad. Para favorecer a la persona perjudicada y la protección del medio ambiente, el Derecho procesal internacional europeo le da la opción de interponer una demanda en el lugar de la acción o en el lugar del daño directo. Las normas de conflicto de leyes también permiten a la persona perjudicada elegir entre la ley del lugar de la acción y la ley del lugar del daño directo. Se plantean problemas específicos en la interfaz entre el derecho privado y el derecho público cuando el causante del daño es una autoridad pública, cuando se trata de indemnizar daños puramente ecológicos o cuando el comportamiento perjudicial cumplía las normas aplicables o incluso estaba autorizado.

Palabras clave

Contaminación hídrica transfronteriza, Conflicto de leyes, Derecho internacional de responsabilidad civil, Daño ecológico, Inmunidad soberana, Autorizaciones administrativas extranjeras.

1. Introduction

On 1 November, 1986, an environmental disaster occurred in the Schweizerhalle industrial zone near Basel, when a warehouse belonging to the Sandoz chemical company caught fire. 15,000 cubic metres of firefighting water, which became a reddish mixture of water, pesticides, mercury

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derivatives, and phosphoric esters, spilled into the Rhine. Downstream, France, Germany, and the Netherlands were affected. This led to a massive dying of wildlife in the Rhine. Fishing was banned for six months in the contaminated areas. It took several years for the ecosystem to recover.

The Schweizerhalle disaster was not only the reason for new public environmental protection rules (Romy, 1990, p. 28 et seq.) and for a new provision² introducing criminal liability for companies if a felony or misdemeanor was committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it was not possible to attribute this act to any specific natural person due to the inadequate organization of the undertaking (Pieth, 2003, 353 et seq.). This event – sometimes also called “Tschernobâle” – is also a leading example of transboundary water pollution³ triggering cross-border civil liability.

The first part of this contribution deals with the rules that are currently in force for determining jurisdiction and applicable law in cross-border civil liability litigations, which may also arise from a purely national case of water pollution, where only one of the claimants is resident abroad (Müller, 1994, p. 20 et seq.). Given that liability often depends on public environmental law, several questions relating to the role of public authorities and public law in cross-border civil liability litigation are addressed in the second part.

2. Applicable Rules of Private International Law

2.1. Determination of Jurisdiction

2.1.1. Primacy of International Treaties

In Europe, the determination of jurisdiction in most civil and commercial matters is governed by international conventions. Swiss Private International Law, for example, recognizes explicitly the primacy of international treaties (art. 1 para. 2 Swiss Federal Act on Private International Law). A Swiss court is namely bound by the Lugano Convention, which is, in its 2007 version,⁴ a parallel agreement between the European Union, Denmark, Iceland, Norway and Switzerland to the former Regulation (EU) No 44/2001 (Brussels I Regulation)⁵.

In Switzerland, the 2007 version of the Lugano Convention came into force on January 1, 2011. Subject to the provisions of art. 22 (exclusive jurisdiction regardless of domicile) and art. 23 (prorogation of jurisdiction), the Lugano Convention is territorially applicable, if the defendant is domiciled in a State bound by this Convention in the sense of art. 1 para. 3 (e contrario art. 4 para. 1). According to art. 60 Lugano Convention, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, central administration or principal place of business (see for these terms Jung, 2025, N. 634 et seqq.).

In matters of environmental damage, the Lugano Convention gives way to the special rules of more specific international conventions (art. 67 Lugano Convention). But many

² Former Art. 100^{quater} Swiss Criminal Code and now Art. 102 Swiss Criminal Code.

³ One could define a transboundary water pollution as any deliberate or accidental water pollution, the physical origin of which is subject to the national jurisdiction of a country and which is situated wholly or in part in the area under the national jurisdiction of that country, and which has effects in the area under the national jurisdiction of another country (Romy, 1990, p. 25); see also for the term of (marine water) pollution Art. 2 let. a Barcelona Convention on the protection of the Mediterranean Sea against pollution, Official Journal of the European Union L 240, 19.9.1977, p. 3–11: “Pollution’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities”.

⁴ See Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 339, 21.12.2007, p. 3–41.

⁵ Meanwhile Regulation (EU) 1215/2012 (Brussels Ibis Regulation).

international treaties on environmental protection, such as the Helsinki Water Convention⁶, the Aarhus⁷ Convention or the Convention on the Protection of the Rhine (done at Berne, 12 April 1999, Official Journal of the European Union L 289, 16.11.2000, p. 31–37), do not contain any provisions on matters of jurisdiction in private liability cases. An exception is art. 13 of the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960.

According to art. 9 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, actions for compensation against the shipowner, insurer, or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties in whose territory, including the territorial sea, the damage occurred (Official Journal of the European Union L 256, 25.9.2002, p. 9–16). Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention (Art. 9 para. 3).

Art. 19 para. 1 of the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 21 June 1993 provides that actions for compensation under this Convention may only be brought within a Party at the court of the place where the damage was suffered, where the dangerous activity was conducted or where the defendant has their habitual residence, but this Convention has not yet entered into force. The same is true for art. 13 para. 1 of the Kiev Protocol⁸, which has been negotiated following the accident that occurred in January 2000 in a tailings dam in Baia Mare (Romania), where the discharge of 100,000 tons of wastewater containing highly toxic pollutants led to massive pollution of the water of the Tisza and the Danube.

2.1.2. Determination of Jurisdiction according to the Lugano Convention

The determination of the applicable rules depends on the facts, the nature of the claim, its legal basis, and the choices made by the claimant. Let's take the example of a French professional fisher in the Schweizerhalle case, who has suffered a loss of profit because of being unable to fish for six months. This fisher can base their claim for damages against Sandoz Ltd (Basel) in particular on tort law and possibly on property law. The dispute relating to their damage is international in nature because it has a foreign connection.

The parties' domiciles and statutory seats, respectively, as well as the place of the event and the place of damage, are in two different countries: Switzerland and France. If the fisher wishes to sue Sandoz Ltd at its statutory seat in Basel, the court will verify its jurisdiction under the Lugano Convention. Neither art. 34 para. 2 of the Revised Convention for Rhine Navigation, signed in Mannheim on 17 October 1868, nor the International Convention for the Unification of Certain Rules Relating to Civil Jurisdiction in Respect of Collisions, concluded in Brussels on 10 May 1952, are applicable in this dispute. The International Convention on Civil Liability for Oil Pollution Damage of 1969 and 1992 only applies to seagoing vessels or marine craft and to oil pollution.

⁶Convention on the protection and use of transboundary watercourses and international lakes, done at Helsinki, 17 March 1992, Official Journal of the European Union L 186, 5.8.1995, p. 44–58. Art. 7 obliges the Parties only to "support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability". The same is true according to art. 13 of the Convention on the Transboundary Effects of Industrial Accidents, done at Helsinki, 17 March 1992. The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at London, 17 June 1999, is not more precise in this respect.

⁷The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998, only obliges the Parties in art. 9 to ensure that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

⁸Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, done at Kiev, 21 May 2003, which gives individuals affected by the transboundary impact of industrial accidents on international watercourses a legal claim for adequate and prompt compensation.

According to its art. 2 para. 1 and the principle *actor sequitur in forum rei*, the Lugano Convention provides for the international jurisdiction of the Swiss courts. The domestic jurisdiction of the Zivilgericht Basel-Stadt in matters of tort is then derived from art. 129 phr. 1 Swiss Federal Act on Private International Law. It is generally accepted that this international tort law rule takes precedence over the international property law rule of art. 97 Swiss Federal Act on Private International Law, even though there is no explicit conflict rule with regard to jurisdiction as it exists in art. 99 para. 2 Swiss Federal Act on Private International Law in the field of conflict-of-laws (Lahusen, 2001, p. 50; Asche, 2000, p. 90 et seq.; Göksu, 2024, no. 5).

If the fisher prefers to sue Sandoz Ltd at their own domicile in Mulhouse, the Court will consider whether it has jurisdiction in principle under the Brussels *Ibis* Regulation (EU, Regulation (EU) No 1215/2012, Official Journal of the European Union L 351, 20.12.2012, p. 1–32.) which normally takes precedence over the Lugano Convention (art. 64 para. 1 Lugano Convention). However, this regulation is not applicable in this case because the defendant does not have its statutory seat in a Member State (e contrario art. 6 para. 1 Regulation (EU) No 1215/2012)⁹. The parties can only agree to the jurisdiction of the Tribunal Judiciaire de Mulhouse to hear their dispute arising under art. 25 Regulation (EU) No 1215/2012, which is expressly reserved by art. 6 para. 1 Regulation (EU) No 1215/2012. But it is unlikely that Sandoz Ltd would agree to this.

Thus, the French Tribunal Judiciaire de Mulhouse, being a court of a Member State of the European Union bound by the Lugano Convention¹⁰, will also apply the Lugano Convention (art. 64 al. 2 let. a Lugano Convention) and consider whether it has jurisdiction under art. 5 no. 3 of that Convention¹¹. According to this rule, in matters relating to tort, delict or quasi-delict, a person domiciled in a State bound by the Lugano Convention may, in another State bound by this Convention, be sued in the courts for the place where the harmful event occurred or may occur. Even if the plaintiff's claim is based on a right in rem, this provision overrides the exclusive jurisdiction rule in art. 22 no. 1 Lugano Convention¹².

According to its wording, the rule is now also expressly applicable to preventive actions (in this sense already Lahusen, 2001, p. 50 et seq.). If – as in the case of transboundary environmental damage – the place where the event giving rise to liability in tort or delict occurred and the place where this event caused immediate damage are not identical (offences over a distance), the expression “place where the harmful event occurred” is to be understood, according to established case law and overall consensus, to include both the place where the damage occurred and the place of the event giving rise to such damage¹³, at the plaintiff's discretion¹⁴.

The proposal to attribute jurisdiction to the court of the State in which the major part or a decisive part of the damage occurred was rejected in the last revision of the Lugano Convention

⁹ CA Aix-en-Provence, ch. 4-6, 29 sept. 2023, no 22/12855.

¹⁰ The Convention between the Swiss Confederation and France on jurisdiction and enforcement of judgments in civil matters, signed at Paris on 15 June 1869, was repealed by an exchange of letters when the Lugano Convention of 1988 came into force on 1 January 1992 (Décret no 92-179 du 25 février 1992, Journal Officiel de la République Française, n° 40 du 27 février 1992).

¹¹ Only, if a polluter does not have its statutory seat in a State bound by the Lugano Convention, a French court would apply art. 46 of the French Code of Civil Procedure by its extension to the international level and would consider itself internationally competent if the harmful event occurred in France or if the damage was suffered there.

¹² See European Court of Justice, 18 May 2006, Case C-343/04, Land Oberösterreich v ČEZ as, European Court Reports 2006, p. I-04557.

¹³ See for this principle of ubiquity European Court of Justice, 30 November 1976, Case C-21/76, Handelskwekerij Bier v Mines de Potasse d'Alsace, European Court Reports 1976, p. 01735 (the judgment concerns excessive salination of the Rhine by the defendant).

¹⁴ To offer jurisdiction also at the place where the results of the tort occurred aims at protecting the weaker party. The tortfeasor may be able to choose the place of the event according to low standards of protection and may profit from rules protecting the domestic economy. The place of damage is also often the place of residence of the injured party.

on the grounds that such a test could lead to frequent disputes¹⁵. However, the European Court of Justice has made it clear that the courts of the place where the damage occurred only have jurisdiction over damage caused within their jurisdiction (Judgment ECJ, 1995, *Shevill v. Presse Alliance*, paras. 30 and 33). This solution has the disadvantage that the jurisdiction over the same case is split between the courts of several States.

The so-called mosaic principle does, however, have the advantage that the courts with the closest links to the dispute are declared competent. To avoid an inappropriate extension of the jurisdiction under art. 5 no. 3 of the Lugano Convention to courts that are too loosely connected with the dispute, it is generally accepted that indirect damage¹⁶ and subsequent consequences¹⁷ are not to be taken into account. The term “place where the harmful event occurred” cannot be interpreted so broadly as to encompass a place where the harmful consequences of an event occurred only indirectly through the mediation of a previously incurred loss.

The court considers the direct interference with the protected legal interest to be decisive even if the applicable tort law (*lex causae*) does not require such an interference, as is the case in French law, for example, in contrast to German and Swiss law (Acocella, 2022, no. 247). If, for example, a German resident must consult a doctor in the German border region because of having eaten contaminated fish in a restaurant in Mulhouse, they cannot sue Sandoz AG in Germany where they have only suffered indirect and subsequent damage (cf. Lahusen, 2001, p. 54). They must bring their complaint before the Zivilgericht Basel-Stadt (art. 2 para. 1 Lugano Convention and art. 129 phr. 1 of the Swiss Federal Act on Private International Law) or the Tribunal Judiciaire in Mulhouse, where they ate the fish and their health was harmed (art. 5 no. 3 Lugano Convention).

The defendant in an environmental damage case could thus be brought before the courts of several States for the same harmful event. Art. 28 Lugano Convention may then be invoked to ensure certainty in the law and to avoid the risk of conflicting judgments of courts located in States bound by the Lugano Convention. Under the rules of related actions, the court in which the first action is brought has jurisdiction in principle to hear subsequent actions. This applies *mutatis mutandis* to preventive actions that are possible at the place where the harmful event is likely to occur.

Under art. 11 para. 1 Lugano Convention, in respect of liability insurance, the insurer may also be joined in proceedings which the injured party has brought against the insured, if the law of the court permits it, as is the case in Swiss law (art. 73 Code of Civil Procedure). If Sandoz Ltd's liability insurer is based in Switzerland, for example, the fisher can also bring a direct action against that insurer under art. 11 para. 2 in conjunction with the arts. 8, 9, and 10 Lugano Convention, because Swiss law (art. 60 para. 1^{bis}) – like French (L. 124-3 para. 1 Code des assurances) and German law (§ 115 VVG) – provides for a direct action against the liability insurer.

2.2. Determination of the Applicable Law

2.2.1. Determination by Swiss Courts

If our fisher sues Sandoz Ltd at its statutory seat, the Zivilgericht Basel-Stadt will apply Swiss civil procedure law and determine the applicable law in accordance with the Swiss conflict-of-laws rules. These conflict-of-laws rules include international conventions that have entered into force in Switzerland and contain conflict-of-law's provisions. However, the Swiss judge must

¹⁵ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar, Official Journal of the European Union C 319, 23.12.2009, p. 1–56, no. 59.

¹⁶ See European Court of Justice, 11 January 1990, Case C-220/88, *Dumaz France v Hessische Landesbank*, European Court Reports, p. I-49, no. 20 et seqq.; HGer ZH ZR 2000, 244 et seqq.

¹⁷ See European Court of Justice, 19 September 1995, Case C-364/93, *Marinari v Lloyd's Bank*, European Court Reports, p. I-2719, no. 14 et seqq.; critical on this Müller, 1994, p. 112.

first take into consideration the provisions of international uniform law, as these provisions claim priority over the conflict-of-laws rules. This is the case, for example, concerning civil liability in the field of nuclear energy under the 1960 Paris Convention, the shipowner's liability for pollution damage caused by hydrocarbons carried in bulk or used as bunkers under the 1992 and 2001 Conventions, and the limitation of liability in inland navigation under a 2012 Convention that entered into force in Germany, Luxembourg and the Netherlands in 2019 and in Switzerland in 2024, but not yet in France.

Outside the limited scope of these conventions, the Swiss judge will apply the autonomous Swiss rules. Confronted with the case of our fisher, they will direct their attention to a rule of international tort law that was designed specifically for transboundary environmental damage. According to art. 138 Swiss Federal Act on Private International Law, claims arising out of damaging nuisances originating from immovable property are governed at the option of the injured party by the law of the state in which the property is located or by the law of the state in which the effects have occurred (in depth Asche, 2000, p. 150 et seqq.). The special conflict rule in international tort law (art. 138 Swiss Federal Act on Private International Law) supersedes the rule in international property law (art. 99 para. 2 Swiss Federal Act on Private International Law). As a special conflict-of-laws rule, it is, with its principle of ubiquity (Asche, 2000, p. 221 et seqq.), more favorable to the injured party than the general and subsidiary rule in art. 133 Swiss Federal Act on Private International Law, which provides for a cascading approach and does not grant the injured party a right of choice.

The special and precedence claiming rule in art. 138 Swiss Federal Act on Private International Law not only favors the injured party (*favor laesi*) but also indirectly the environment (*favor naturae*). By focusing on the emissions from a piece of land and by facilitating the choice of the law where the property is situated (the location of the property corresponds to the place of the harmful event), it also considers that international property law is governed by the *lex-rei-sitae*-principle. If the injured party does not choose a legal system, the court must ask the injured party a second time (Lahusen, 2001, p. 57). If there is still no choice, a Swiss court should apply Swiss law as *lex fori* in accordance with Art. 16 para. 2 Swiss Federal Act on Private International Law (Lahusen, 2001, p. 57; concerning violations of personality also Chenaux, 1990, p. 245).

However, this is not unproblematic if the *lex fori* does not correspond to the law determined by the place of the event or the place of damage, because the injured party is then de facto granted a further option if they refuse to make a choice. To solve this problem, three other approaches are generally proposed to determine the applicable law: (1) determination of the applicable law according to the principle of favorability (critical Dasser, 2020, no. 14), (2) determination of the law with which the tort has the closest connection (concerning violations of personality Stäheli, 1990, p. 53) and (3) recourse to the general conflict of tort laws rules in art. 133 Swiss Federal Act on Private International Law (Asche, 2000, 197; Dasser, 2020, no. 14). The latter solution deserves approval as the application of the general default rule is appropriate when the injured party frustrates the application of the special rule of art. 138 Swiss Federal Act on Private International Law.

In any case, the general conflict-of-laws rule in matters relating to tort set out in art. 133 Swiss Federal Act on Private International Law applies if the damage is caused by movable property, which is the case, for example, in the event of an accident involving a chemical tanker on the Rhine in Basel (Asche, 2000, p. 171 and 177 et seq.). However, if an aircraft pollutes the water by dumping fuel shortly before making an emergency landing, this may be considered an emission of the airport as immovable property within the meaning of art. 138 Swiss Federal Act on Private International Law (cf. Dasser, 2020, no. 6 on aircraft noise emissions during take-off and landing).

If our fisher was injured in Mulhouse by movable property situated in Basel, the Swiss court would, in accordance with the general rule of art. 133 al. 2 phr. 2, be required to apply French law because the tortfeasor and the injured party are not domiciled in the same State, the effects of the tort occurred in France, and the tortfeasor would be expected to have foreseen that the effects would occur there, which is certainly the case concerning damage caused downstream by river pollution, especially in a neighboring region such as Basel (Siehr, 1989, p. 81).

2.2.2. Determination by French Courts

The Mulhouse Court will determine the applicable law in accordance with art. 7 of the Rome II Regulation (EU) No 864/2007. According to this provision, 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 Art. 4 para. 1 Regulation (EC) No 864/2007, 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 (Muir Watt, p. 129).

In comparison to art. 138 Swiss Federal Act on Private International Law, this rule has the advantage that it states clearly which law is applicable if the injured party fails to make a choice. According to art. 4 para. 1 Regulation (EC) No 864/2007 the applicable law is then that of the country in which the damage occurred, irrespective of the country in which the event giving rise to such damage occurred and irrespective of the country or countries in which the indirect consequences of that event have materialized.

3. Public Law Issues in Private International Law

3.1. Public Authority as Tortfeasor

If a public authority is the source of the damage, the international law of civil procedure and the rules of conflict-of-laws are applicable only if the public authority has acted as a subject of private law in the same way as a private individual – *acta iure gestionis* – and not in the exercise of sovereign powers – *acta iure imperii* – (Müller, 1994, p. 31 et seqq.; Siehr, 1989, p. 59 et seqq.). The operation of nuclear power plants, for example, is not considered an act *iure imperii* (Amtsgericht Bonn, Neue Juristische Wochenschrift 1988, 1393, 1394; Hess, 1992, p. 154 et seqq.). This applies even more if the state is a shareholder in a polluting private company as it is then, strictly speaking, not identical with the tortfeasor (Siehr, 1989, p. 60 citing the example Mines de Potasse d'Alsace¹⁸). But a state is also free to grant more immunity on its own initiative.

In Switzerland, for example, immunity is also granted for *acta iure gestionis* if the facts of the case do not have a sufficiently strong connection to Switzerland to justify holding a foreign state accountable before Swiss courts¹⁹. In any case, if a public authority has breached its environmental monitoring obligations, it has acted *ratione imperii* and may invoke its sovereign immunity before the courts of another State (Gornig, 1986, p. 980). The qualification as act *iure imperii* is made by the court according to the lex fori (Müller, 1994, p. 31). The 1972 European Convention on State Immunity, which is in force in Germany and Switzerland, but not in France, does not exclude the invocation of immunity in the case of offences over a distance (cf. art. 11; Siehr, 1989, p. 58).

¹⁸ See European Court of Justice, 30 November 1976, Case C-21/76, Handelskwekerij Bier v Mines de Potasse d'Alsace, European Court Reports 1976, p. 01735.

¹⁹ See only BGE 44 I 49, 54 et seq.; BGE 56 I 237, 254 et seq.; BGE 82 I 75, 76; BGE 86 I 23, 30; BGE 106 Ia 142, 148.

3.2. Compensation for pure ecological damage

Damage to the environment may either result in personal injury or property damage (Hager, 1990, 397; Müller, 1994, p. 14 et seq.), or it may harm only nature as a common good, thereby causing pure ecological damage (Asche, 2000, p. 56 et seqq.; Wessner, 2008, p. 286)²⁰. In general, compensation for pure ecological damage is a matter of public law and therefore not a matter for private international law (Guillaume/Planas, 2011, p. 134 et seq.; see also concerning Directive 2004/35/EC Führ/Lewin/Roller, 2006, 67 et seqq.).

However, it is perfectly conceivable that a coastal local authority could, under private law, seek compensation for purely ecological damage or reimbursement of the cost of beach restoration²¹. The dispute is only of a public law nature if public action is based on public law and if the authority asserts sovereign powers in the proceedings²².

3.3. Significance of foreign administrative authorizations

In environmental liability cases, administrative authorizations and public environmental protection regulations play an important role as an instrument of justification, although their effect in excluding liability can vary greatly under national law²³. The situation becomes even more complex in cross-border situations, where the first question is as to whether an authorization granted in the forum state must be observed by a domestic court even if it has to apply foreign law in accordance with the relevant conflict-of-laws rules. This is generally answered in the affirmative with reference to the principle of territoriality and the principle of unity in a legal system (Asche, 2000, p. 273 et seqq.; Hager, 1989, p. 300).

If, on the other hand, a polluter complies with the existing environmental protection standards at the place of its activity or if it has even received an administrative authorization for the relevant conduct in the State in which it operates²⁴, the difficult question arises as to whether such compliance can be invoked before a foreign court. The court will in fact be reluctant to recognize foreign administrative standards or authorizations due to the principle of territoriality²⁵ and the fact that the affected parties abroad were generally not involved in the standard-setting and authorization procedure (Hager, 1989, p. 301; Lahusen, 2001, p. 137 et seqq.).

Nevertheless, a court may consider foreign standards and administrative authorizations of the State of the applicable law (Roggenbuck, 1997, p. 89; Bornheim, 1995, p. 247; for emission limits Kreuzer, 1992, p. 295). According to art. 13 Swiss Federal Act on Private International Law, for example, the application of a foreign legal rule is not precluded by the mere fact that a provision is considered to have a public law character. Even if an authorization is not a legal rule,

²⁰ According to BGer 4C.317/2002 cons. 5.2 compensation of a pure ecological damage is the exception and is only possible if Swiss law expressly provides for this; see also Chappuis, 2009, 1 et seqq.; Dupont, 2005; Werro, 2017, no. 113 et seqq.

²¹ This was, for example, the case in Cour d'appel de Paris, 30 March 2010 (RG n° 08/02278) concerning the Erika tanker accident.

²² This is why in European Court of Justice, 16 December 1980, Case C-814/79, Netherlands State v Reinhold Rüffer, European Court Reports 1980, p. 3807 the court held that a governmental or administrative body having incurred costs while removing a wreck cannot seek to recover those expenses from the responsible party if the removal was carried out in the context of the agent's public authority and was done to ensure public safety or waterway maintenance; see also European Court of Justice, 15 May 2003, Case C-266/01 *Préservatrice foncière TIARD v Staat der Nederlanden*, European Court Reports 2003, p. I 4867, no. 23 et seqq.; European Court of Justice, 14 November 2002, Case C-271/00, *Gemeente Steenberg v Luc Baten* European Court Reports 2002, p. I 10489, no. 30 et seqq. (recovery of costs of social assistance).

²³ In German law, for example, an administrative authorisation excludes liability in principle for water pollution (§ 16 Wasserhaushaltsgesetz) whereas according to § 14 Bundesimmissionsschutzgesetz an authorisation of emissions only excludes the right to cease polluting activities but not claims for protective measures or compensation.

²⁴ However, the disasters of Schweizerhalle and Chernobyl were not covered by any authorization (see also Siehr, 1989, p. 83).

²⁵ See for example in German law Oberlandesgericht Saarbrücken, *Neue Juristische Wochenschrift* 1958, 752, 754; Bornheim, 1995, p. 234 et seqq. and Roggenbuck, 1997, p. 91 et seqq.; in French law Paris, 2014, 644 et seqq.; in Swiss law Asche, 2000, p. 300.

its impact on private law relations is comparable in effect. As a result, the foreign injured party is also treated in the same way as the domestic injured party, against whom the authorization could easily be asserted in accordance with the applicable domestic law.

If the court has to apply its own law (*lex fori*), it can consider a foreign authorization as “local data” (Ehrenzweig, 1966, p. 55 et seq.; Jayme, 1988, p. 216) constituting a “rule of conduct” pursuant to art. 17 Regulation (EU) No 864/2007 or art. 142 para. 2 Swiss Federal Act on Private International Law. Then, however, not only general and abstract rules, but also individual case regulations by administrative acts must be regarded as “rules of conduct” within the meaning of these provisions, which corresponds to an only just conceivable meaning of the term.

Generally, a foreign authorization is recognized under domestic law if it complies with international law²⁶, if it is essentially comparable with a domestic authorization in terms of requirements (e.g. formal authorization procedure, consideration of third parties’ rights) and effects (Rossbach, 1988, p. 593) and if it does not serve any foreign state policy objectives²⁷. Some authors also require the participation of affected nationals in the foreign authorization procedure (Hager, 1989, p. 309 et seq.), which will usually mean that the authorization cannot be taken into consideration before a foreign court. Other authors, by contrast, are content with the mere compatibility of the foreign authorization with domestic public policy, but the requirements for this are too low as the public policy reservation is only an exception to principally applicable private law rules and is not intended to justify, in a positive manner, the consideration of foreign standards and authorizations (also critical Hager, 1989, p. 309).

As an alternative to the prevailing approach, some authors (Hager, 1989, p. 306 et seq.; Roggenbuck, 1997, p. 100 et seqq., Lahusen, 2001, p. 88 et seqq.) propose a recourse by analogy to the consideration of mandatory provisions of foreign law (e.g. art. 19 Swiss Federal Act on Private International Law). This would, however, lead to strict requirements as, for example, Art. 19 Swiss Federal Act on Private International Law would only allow a standard or authorization to be taken into consideration, which is aimed at having an extraterritorial effect and, according to the domestic view, reflects a legitimate and clearly overriding interest.

Moreover, in view of Art. 17 Regulation (EU) No 864/2007 or art. 142 para. 2 Swiss Federal Act on Private International Law, there is no regulatory gap and in many legal systems there are no provisions which, like Art. 19 Swiss Federal Act on Private International Law, would lend themselves to such an analogy. There is also no need for a special unwritten conflict-of-laws rule concerning the question of unlawfulness (Bornheim, 1995, p. 239 et seqq.; critical Lahusen, 2001, p. 80 et seqq.; Roggenbuck, 1997, p. 95 et seq.). And finally, the tortfeasor would be unduly privileged if he were subject to foreign authorization standards without any equivalence test (Bornheim, 1995, p. 243 et seq.).

4. Conclusion

Cases of transboundary water pollution raise many questions concerning the determination of jurisdiction and the applicable law at the intersection of private international law, public international law, and national law. Even if the European legal systems converge in their aim to favor the injured party and environmental protection, there remain numerous differences in detail. A largely unsolved problem remains the recognition of foreign pollution permits.

²⁶ See in Austrian law Oberster Gerichtshof, 23 February 1988, JBl. 1988, 459.

²⁷ Concerning a public prohibition of assignment in German law Bundesgerichtshof, 17 December 1959, BGHZ 31, 367, 371.

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