

Conflict of Laws on Environmental Liability Law

■ *by Dr. Sema Çörtoğlu Koca**

I. IN GENERAL:

Nowadays, environmental problems have become important due to their global impacts. The reason of this importance is that the consequences of the environmental pollution, caused by establishments or by other polluting operations, are not limited within the boundaries of the state where the pollution has emerged. When pollution act appears within the boundaries of more than one state, the same damage can bring about negative effects for other countries at large. Like in these transboundary pollution cases, country's law that is applied here becomes a problematic area and in that case the rules of conflict of laws shall necessarily be applied.

First of all, I would like to give a short description about environmental law and international environmental disputes. Environmental law comprises of a special body of official rules, decisions, and actions concerning environmental quality, natural resources, and ecological sustainability¹. In other words, environmental law is the body of law, which is a system of complex and interlocking statutes, treaties, conventions, regulations and policies which seek to protect the natural environment which may be affected, impacted or endangered by human activities. Some of the environmental laws regulate the quantity and nature of impacts of human activities: for example, setting allow-

* Instructor in the Department of Private International Law in Başkent University, The School of Law.

¹ CUNNINGHAM, W. P. / CUNNINGHAM, M. A. / WOODWORTH SAIGO, B. : Environmental Science: A Global Concern, 7/e, <http://highered.mcgraw-hill.com/sites/0070294267/student_view0/glossary_e-1.html>, 27.04.2007.

able levels of pollution. Other environmental laws are preventative in nature and seek to assess possible impacts before human activities occur². Environmental disputes do not only rest upon local problems, they involve generally universal problems³ thereby these problems cause international environmental disputes. International environmental disputes mean that any disagreement or conflict of views or interests between States relating to the change, through human intervention, of natural environmental systems⁴.

II. ENVIRONMENTAL LIABILITY LAW:

Environmental liability aims at making the causer of environmental damage (the polluter) pay for remedying the damage that he has caused⁵. Environmental damage makes an adverse change in natural resources, such as water, land or air, impairment of a function performed by such a resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms⁶.

Environmental regulation lays down norms and procedures which are aimed at preserving the environment. Without liability, failure to comply with existing norms and procedures may merely result in administrative or penal sanctions. In any case, unless liability is not added to the Regulation, potential polluters face also the prospect of having to pay for restoration or compensation of the damage they caused⁷.

The costs of repairing environmental damage usually exceed the polluter's ability to pay. Then government seeks out others to help finance the damage of bill⁸. Each state should adopt strict liability so that, if an accident occurs, the firm can be responsible for damages regardless of its level of care⁹. Liability is only effective where polluters can be identified, damage is quantifiable and a causal connection can be shown. It is therefore not suitable to diffuse pollution from numerous sources¹⁰.

I would like to give three examples, *the Trail Smelter cases*, *Chernobyl accident* and *Sandoz Chemical Fire case*, are all about environmental liability law. The *Trail Smelter* arbitration decision is generally considered to be the leading case in the area of state liability for trans-

2 WIKIPEDIA: "Environmental law", < http://en.wikipedia.org/wiki/Environmental_law >, 22.01.2009.

3 GÜVEN, K. : General Principles of Turkish Law, March 2007, p. 250.

4 BILDER, R. B. : "The Settlement of Disputes in the Field of the International Law of the Environment", Recueil Des Cours, 1975 I, volume 144, p. 153.

5 COMMISSION OF THE EUROPEAN COMMUNITIES: "White Paper On Environmental Liability", Brussels, 9.2.2000 COM(2000) 66 final, p. 11.

6 REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union 31.7.2007, L 199 p. 41.

7 COMMISSION OF THE EUROPEAN COMMUNITIES, supra, p. 11.

8 DENT, G. W. Jr. : "Limited Liability in Environmental Liability Law", Wake Forest Law Review, volume 26, 1991, p. 151.

9 ECKERT A. / R.T. SMITH/ H. van EGTEREN: "Environmental Liability in Transboundary Harms: Law and Forum Choice", < www.uofaweb.ualberta.ca/economics/pdfs/WP-Eckert-SmithT-vanEgteren-JLEOrevision2.pdf >, 23.04.1007, p. 15. p. 1-44

10 COMMISSION OF THE EUROPEAN COMMUNITIES, supra, p. 3.

boundary pollution. It resulted from injuries caused in the American state of Washington from sulfur dioxide released by a smelter plant in British Columbia, Canada, in the 1930s. After the diplomatic protests by the United States, the two countries agreed to submit the case to arbitration. In the arbitration decision; the tribunal proclaimed a general principle of international law that would be very helpful for establishing the liability of the United States for GHG emissions. It is stated that “[a] State owes at all times a duty to protect other States against injurious acts by individuals within its jurisdiction,” and went on saying that: No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence. State actions in more recent and well-known cases would not be as helpful as in demonstrating the pervasive acceptance of a principle of liability by states today. Most important is the *Chernobyl* nuclear accident where Ukraine refused to acknowledge liability and the international community paid for the costs of withdrawing from active service of the reactors. Another example is the *Sandoz Chemical Fire* case which involved a fire at a Sandoz corporation warehouse in Switzerland. The fire resulted in thousands of cubic meters of chemically contaminated water seeping into the Rhine and constituted one of the worst environmental disasters ever in Western Europe. None of the states affected brought claims against Switzerland. Both of these cases may be special by their complex set of facts. Ukraine was poor and unable to well-afford the cost of decommissioning the reactor on its own, and Sandoz privately provided compensation for individual victims of the disaster¹¹.

Because of the importance of regulating the environmental liability, European Union countries made a directive in 2004. The reason to make this directive is an environmental damage in transboundary pollution. On Wednesday 13 November 2002, the *Prestige*, a Bahamas-registered, 26-year-old single hull tanker owned by a Liberian company and carrying 77 000 tonnes of heavy fuel oil, sprang a leak off the coast of Galicia. It eventually broke apart on 19 November and sank 270 km off the Spanish coast. Thousands of tonnes of heavy fuel oil spilled into the sea and polluted the Galician coastline. The pollution then spread to the shores of Asturias, Cantabria and the Spanish Basque country. In cases like this, there is clearly a need to ensure that the damaged environmental assets are restored; a better solution would be, and of course, that the damage does not even occur. For these reasons, prevention is also a valuable objective in this context.

11 STRAUSS, A. L. : “The Legal Option: Suing the United States in International Forums for Global Warming Emissions”, *Environmental Law Reporter*, volume 33, 2003, p. 10190.

When a significant environmental damage nevertheless occurs, the question inevitably arises of “who shall foot the bill”. The principle according to which the polluter should pay is at the root of Community environmental policy (Article 174 (2) EC Treaty); it shows that in many cases the operator who causes a damage should be held liable and be financially responsible. In April 2004 the Environmental Liability Directive entered into force following its publication in the Official Journal¹².

The law of environmental liability is regulated by the Turkish Act of Environmental Law in article 28. According to article 28/1; the person who pollutes or gives damage to the environment, is liable for damages caused by pollution and deformation even if he is not at fault. In this paragraph, objective liability is regulated. Second paragraph of article 28 is about reserving the compensation liability in Civil Law. According to article 28/2; compensation liability of polluter due to general rules of Civil Law is also reserved. Third paragraph of article 28 is about statute of limitations. According to article 28/3; the compensation claims due to the environmental damage will be barred in five years after the aggrieved person learning the damage and obligator of compensation.

III. INTERNATIONAL ENVIRONMENTAL AGREEMENTS:

States make bilateral or multilateral agreements in order to prevent environmental pollution and to compensate the damage. There is a growing number of international conventions and protocols dealing with environmental liability in several fields. In the majority of these agreements, whereas the liability of the damage is charged to the state, the liability of individuals is not regulated. When there is no regulation about the related issue, the international rules should be applied to solve the problems. Because of this reason, in the case of trans-boundary pollution, Turkish national law should care not only for its domestic law principles but also for the principles of international agreements the Turkish government has signed. Turkey signed and ratified lots of international environmental agreements, for example; Convention for the Protection of the Mediterranean Sea against Pollution-Barcelona Convention¹³, The Protocol on the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft¹⁴, The Protocol on Co-Operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency¹⁵, The Protocol on the Prevention of and Response to

12 RATSIBORINSKAY, D. N. : “Environmental Liability” <http://www.eel.nl/categorieen/intro.asp?sub_categorie=167>, 26.04.2007.

13 On 12.06.1981 Convention for the Protection of the Mediterranean Sea against Pollution-Barcelona Convention entered into force following its publication in the Official Journal (number 17368).

14 On 12.6.1981 The Protocol on the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft entered into force following its publication in the Official Journal (number 17368).

15 On 12.6.1981 The Protocol on Co-Operation in Combating Pollution of the Mediterranean Sea by Oil and Other

Pollution of the Marine Environment from Sea-Based Activities¹⁶, International Convention for the Prevention of Pollution from Ships, (MARPOL)¹⁷, Convention for the Protection of the Ozone Layer- Vienna Convention¹⁸, The Montreal Protocol on Substances that Deplete the Ozone Layer- Montreal Protocol¹⁹, Convention for the Protection of the Black Sea against Pollution²⁰, The Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²¹. All these conventions or agreements are based on a strict but limited liability, and the concept of a second tier of compensation. And another important point is that international environmental conventions or agreements which Turkey is a party, have no rule about the applicable law to international environmental disputes.

IV. ENVIRONMENTAL LIABILITY LAW ACCORDING TO TURKISH PRIVATE INTERNATIONAL LAW

I would like to give information about some theories for *tort liability* on conflict of laws before examining the Turkish law. Firstly, the governing law should be the law of the forum; secondly, that it should be the law of the place of the tort, the *lex loci delicti*; and thirdly, that it should be the proper law of the tort, or the law of the country which the tort is most closely connected²².

The first theory is that tort liability should be governed by the law of forum. The principal arguments in its favour are, first, that liability for tort is closely similar to liability for crime, where no one doubts that foreign law is inapplicable; secondly, that liability for tort is closely connected to the fundamental public policy of the forum and for this reason it must be governed by its law. Today these reasons are not convincing. The law of torts has long since been emancipated from the criminal law and has very different objectives. Another argument against the application of the law of the forum is that under the rules as to jurisdiction, the claimant may sometimes have a choice of forum in which to sue. From this point, to apply the *lex fori* is an encouragement to forum-shopping, the circumspect choice of a forum in order to attract the application of a system of law favourable to the claimant²³.

The second theory is the application of the *lex loci delicti* (the law

Harmful Substances in Cases of Emergency entered into force following its publication in the Official Journal (number 17368).

16 On 15.3.1987 The Protocol on the Prevention off and Response to Pollution of the Marine Environment from Sea-Based Activities entered into force following its publication in the Official Journal (number 19404).

17 On 24.6.1990 International Convention for the Prevention of Pollution from Ships entered into force following its publication in the Official Journal (number 20558).

18 On 8.9.1990 Convention for the Protection of the Ozone Layer- Vienna Convention entered into force following its publication in the Official Journal (number 20629).

19 On 8.9.1990 The Montreal Protocol on Substances that Deplete the Ozone Layer- Montreal Protocol entered into force following its publication in the Official Journal (number 20629).

20 On 6.3.1994 Convention for the Protection of the Black Sea against Pollution entered into force following its publication in the Official Journal (number 21869).

21 On 15.05.1994 The Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal entered into force following its publication in the Official Journal (number 21935).

22 McCLEAN, D. : Morris: Conflict of Laws, Fifth Edition, London 2000, p. 354.

23 McCLEAN, p. 354-355.

of the place of the tort). It can be justified by much more important arguments than those which support the law of the forum. The first of these is the argument from territorial sovereignty. To many lawyers, it has seemed natural to argue that the law of the place where events occur is the only law that can attribute legal consequences to them. Another argument in favour of the *lex loci delicti* is that its application usually accords with the legitimate expectations of the parties. The law of torts attaches certain liabilities to determined kinds of conduct and to the creation of certain social risks. Although there are situations in which strong arguments can be advanced against a mechanical application of the *lex loci delicti* to each and every issue arising out of each and every kind of tort. First, the place of the tort is, in modern conditions, often as occurring unexpectedly as the place of contracting is suitable to be. Secondly, the place of the tort may be ambiguous, as where the defendant's acts take place in one country, and the ensuing harm to the claimant is sustained in another. Thirdly, and the most important of all, the application of the *lex loci delicti* regardless of the domicile and residence of the tortfeasor and his victim, and having no regard of the type of issue and the type of tort involved, may lead to results which shock one's common sense²⁴.

Third theory is that tort liability should be governed by the proper law of the tort. The main point of this theory is that, while in many situations there would be no need to look beyond the place of wrong, we ought to have a conflict rule broad and flexible enough to take care of the exceptional situations as well as the more normal ones: otherwise the results will begin to offend our common sense. It was suggested that a proper law approach, intelligently applied, would furnish a much-needed flexibility and enable different issues to be separated, thus allowing a more suitable analysis of the social factors involved. It was also suggested that a proper law approach would facilitate a more rational solution of the problems that arise when acts are done in one country and harm follows in another. On the other hand, the proper law doctrine has been criticised by some because it sacrifices the advantages of certainty, predictability and uniformity of result which are claimed to follow from the application of the law of the place of the tort²⁵.

Since the environmental liability law creates the type of tort, in the area of conflict of laws born by environmental liability law, to which "*lex loci delicti commissi*" rule has been adopted by the majority of the legal systems.

According to the Turkish law, the Turkish Code of International

²⁴ McCLEAN, p. 355-356.

²⁵ McCLEAN, p. 357-358.

Private Law and Procedural Law (MÖHUK)²⁶ Art 34 (1), the *lex loci delicti* is being applied in the area of tort. If the constitutive elements of liability comprising of act and damage took place within the boundary of one state, set of *lex loci delicti* would cause no problem. In that respect, the places of act and the damage would be identical and so “*lex loci delicti*” is obvious.

There are some confronting views for the place of polluting act and of the environmental damage in a way that they are different cases but the most adopted view about this issue which is prescribed by the Turkish Code of International Private Law and Procedural Law Art 34(2) is that a place of harm accepted as *lex loci delicti*.

On this account, in *Chernobyl accident*, for the environmental damages in Turkey, according to article 34(2), Turkish law should be applied. And if there is an accident caused by a tanker in Istanbul Bosphorus, spring a leak off the coast of a country of Black Sea, this State’s law should be applied for the environmental damages²⁷.

Nowadays, two matters are very important for the law of environmental liability. Firstly, the protection of injured party (victim) and secondly, public order where damages occur. Hence, the most convenient system is the principle of place of harm.

According to the Turkish Code of International Private Law and Procedural Law Art 34(3); where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country, the law of that other country shall apply. The application of *lex loci delicti* laws can be restricted in favour of the law of place with the manifestly closer connection. When the incidents and the parties have more common relationship with one state, then the law of the manifestly closer connection can be applied.

Turkish courts have not applied “the law of the manifestly closer connection” up till now. For this reason we could not find any decisions which are applied “the law of the manifestly closer connection”. According to doctrine, if the courts would apply “the law of the manifestly closer connection”, they should look forward to two clauses, one is a positive, the other is a negative clause²⁸.

Firstly, the obligation relation which is about environmental damage should not have close connection with *lex loci delicti* in terms of event or parties. This clause is not mentioned explicitly in the Turkish Code of International Private Law and Procedural Law Art 34 (3)²⁹.

Secondly, the obligation relation which is about environmental

26 ERTAŞ, Ş.: Çevre Hukuku, İzmir 1997, p. 126-127.

27 TURHAN, T. : Haksız Fiilden Doğan Kanunlar İhtilâfi Alanında İka Yeri Kuralı, Ankara 1989, p. 371- 381.

28 TURHAN, p. 381.

29 TURHAN, p. 381.

damage has a close connection with another country. This positive clause mentions expressly in the Turkish Code of International Private Law and Procedural Law Art 34 (3). In designating this law the court should take into account the following factors:

- The place where the damage occurs
- The place where the tort occurs
- The nationality of parties
- The domicile or residence of parties
- Before the tort, center of gravity of the transaction³⁰.

There is a good example which the court applied “the law of close connection” rule. *Ware v. Ciba-Geigy Corp.* is a case which is about environmental tort liability arising from toxic waste generated in one state (New Jersey) and deposited in another state (Alabama). The defendants, New York based corporations that owned chemical plants in both New Jersey and Alabama, shipped waste produced in the New Jersey plants for disposal at the Alabama plants. The plaintiffs, who are Alabama domiciliaries living in the vicinity of the Alabama plants, claimed that they were exposed to toxic substances released by the defendants’ improper handling of hazardous waste. While they were seeking funds for future medical monitoring, they sued the defendants in New Jersey. However New Jersey law would allow the action, Alabama law would not because the plaintiffs did not claim a present physical injury. The New Jersey court found that Alabama was the state with “the greatest interest;” it applied Alabama law and dismissed the actions. The court thought it was important that, “[a]side from the issue of waste transportation, all of the dumping . . . occurred in Alabama.” The court mentioned that, although New Jersey “does have an interest in ensuring that companies that generate and transport hazardous [waste] within its borders conduct their business in accordance with New Jersey law and policies,” the plaintiffs’ exposure “came from the location and manner in which the waste was disposed . . . [and this] location . . . is a significant, if not the dispositive, factor.” The court also thought that the plaintiffs had “no contacts with New Jersey whatsoever” and had sued in New Jersey only because New Jersey law favored them. “[I]t is not clear,” said the court with feigned understatement, “that Alabama residents should receive the benefit of a favorable New Jersey law when they have no connection with the latter state.” The court also stated the practical difficulties of supervising a medical monitoring program in Alabama, hypothesizing that Alabama “may not want a New Jersey court to come into its territory and impose its law when its Supreme Court has determined

30 SYMEONIDES, S. C. : Choice of Law in the American Courts in 2005: Nineteenth Annual Survey, <<http://www.willamette.edu/wucl/journals/wlo/conflicts/05survey/05survey.pdf>>, 23.01.2009.

medical monitoring should not be available . . . and may not want New Jersey law imposed onto resident businesses who may have located in Alabama because Alabama law was more favorable to their business needs³¹.

In the European Union, the important choice-of-forum and choice-of-law questions were addressed in *Handelskwekerij G.J. Bier B.V. and Another v Mines de Potasse D'Alsace S.A.*, Case 21/76 (1976) II ECJ Reports 1735. At issue were chloride emissions from a French mining company into the Rhine river. These emissions affected downstream water quality for a Dutch nursery company that used the water to irrigate its seed beds. In bringing a tort action a District Court in the Netherlands, the issue of jurisdiction arose. The defendant argued that the Dutch court did not have jurisdiction because of a treaty that affects the adjudication of transboundary disputes. The district court agreed and refused to hear the case. The plaintiffs appealed, and because of the jurisdictional issues involved, the Appellate Court in The Hague asked for clarification of the treaty from the European Court of Justice, whose job it is to ensure uniform interpretations of the European Union law. The European Court ruled that the key phrase at issue: "where the harmful event occurs," means either where the tort occurred (France) or where the damages occur (The Netherlands). This decision resulted in the plaintiff acquiring the right to choose the forum in which an action could be brought and also the law which is to be applied in the case (choice of law)³².

The New Turkish Code of International Private Law and Procedural Law includes the party autonomy in tort disputes. Art 34(5) states that the parties shall choose the applicable law explicitly after the tort has committed. In an environmental damage, parties enable to make an agreement, choosing the law applicable to a tort claim between them after the tort has occurred. But the parties can also choose the law for the environmental damage after the event giving rise to the damage has occurred.

The New Turkish Code of International Private Law and Procedural Law also includes the admissibility of direct actions against liability insurers. Art 34(4) provides a special rule governing the availability to a tort victim of a direct action against the tortfeasor's liability insurer. This rule enables an environmental damage victim to bring his claim directly against the insurer of the person liable to provide compensation, if either the law applicable to the tort arising out of environmental damage or damage sustained by persons or property as a result of such damage or the law applicable to the insurance contract so provides. There is similar rule in Article 18 of the EC Regulation 864/2007 on

31 ECKERT, A. / SMITH, R. T. / EGTEREN, H. van, p. 3-4.

32 STONE, P.: "The Rome II Regulation on Choice of Law in Tort", Ankara Law Review, Vol.4 No.2 (Winter 2007), p. 129.

the Law Applicable to Non-contractual Obligations Regulation³³.

In the end, there is a need to indicate that the Environmental Act is a directly applicable law, therefore when the situations related to this law exist, the environmental law should be applied. It is more likely that such rules will be found in statutes. Statutes sometimes expressly give the rules they enact this mandatory character. Where the statute is silent the court will have to engage in a process of interpretation. The effect of Environmental Act provision ought, in principle, to provide for the application of mandatory rules of the law of the forum which either overrule the normal rules for the choice of law or designated by courts or modify these rules in some way³⁴.

The legal ground for applying the mandatory rules is that these rules are taking place in positive law and according to conflict of laws rules, in related subject, these rules are more private acts³⁵. Because of its aim, the Environmental Act is a private act. The aim of the Environmental Act is to protect the daily interest of the country and determine the measures to be taken and regulations to secure and to develop the life standard, civilization, health of the generation in future according to the legal and technical rudiments. Turkish Act of Environment Article 1 is about the aim of the Act. This article has been changed in 26.04.2006. According to the new Article 1, aim of this Act is to protect the joint asset of environment belong to all living beings, in accordance with the principles of sustainable environment and sustainable development. The scope of application of this Act covers all environmental pollution and damages which occur in land, earth and water. The aim and scope of application of this Act, we could mention that Environmental Act is a direct applicable Act and if the situations related to this law exist, the Act of Environment should be applied. On the other hand, if the Environmental Act did not regulate the issue, the authorities would apply to the competent law.

³³ COLLINS, L. : Dicey and Morris on The Conflict of Laws, volume 2, London 2000, p. 1558-1559.

³⁴ TEKINALP, G.: Milletlerarası Özel Hukuk Bağlama Kuralları, İstanbul 2002, p. 44.

³⁵ GÜVEN, supra p. 256.