CHANNELLING OF NUCLEAR THIRD PARTY LIABILITY TOWARDS THE OPERATOR JEOPARDISED BY THE BRUSSELS REGULATION

Jakub Handrlica

Abstract: Paper deals with the relations between an international convention (Vienna Convention on Civil Liability for Nuclear Damage of 1963) and an act of European law (Brussels 1 Regulation) in regarding to the announced plans to multiply nuclear power plants in the Czech Republic. It deals with the question, how is the principle of liability channeling, as laid down in the Vienna Convention, challenged by the provisions of the Brussels 1 Regulation. The issue is interesting not only for professionals dealing with the legal aspects of „nuclear renaissance", but also for academic discussions about the relations between the international and EU law.

Resumé: Článek se věnuje vztahu ustanovení pramene mezinárodního práva (Vídeňské úmluvy o občanskoprávní odpovědnosti za jaderné škody z r. 1963) a pramene evropského práva soukromého (Nařízení Brusel I.) a to s ohledem na jejich aplikace v rámci výstavby nových jaderných zařízení, tzv. "jaderné renesance". V r. 1994 Česká republika přistoupila k Vídeňské úmluvě za účelem participovat na mezinárodním standardu odpovědnosti a kompenzace a transponovat tak v zahraničí existující principy odpovědnosti za jaderné škody. V režimu Vídeňské úmluvy je za veškeré škody odpovědný výlučně provozovatel zařízení. Přistoupení České republiky do Evropské unie a následná unifikace pravidel soudní příslušnosti a vykonatelnosti rozhodnutí prostřednictvím Nařízení Brusel I. ovšem věc situaci dále zkomplikovaly. Předmětem článku je problém vykonatelnosti soudních rozhodnutí, vydaných soudem státu, který není vázán Vídeňskou úmluvou. Autor poukazuje na skutečnost, že se může jednat o riziko, které by mělo vliv na transparenci investičního prostředí v České republice a navrhuje řešení, které by spočívalo v unifikaci pravidel mezinárodního a evropského práva.

Key words: Vienna Convention, State guarantees, nuclear liability, Enforcement provisions.

On the Author: Jakub Handrlica graduated in Law at the Charles University in Prague and received Diploma in International Nuclear Law at the International School of Nuclear Law at the University of Montpellier 1 (with honors, 2008). Currently, he is Lecturer at the Institute for Administrative Law and Administrative Science at the Law School, Charles University in Prague. In his research, he deals mainly with international and European nuclear and energy law. He is a member of the International Nuclear Law Association, of the Board of Editors of the International Journal of Nuclear Law and of the Expert Group on Nuclear Third Party Liability established by the European Commission.

In order to achieve international acceptance for their nuclear programs, the post-Communist countries of Central and Eastern Europe acceded to the Vienna Convention on Civil Liability for Nuclear Damage of 1963 (the "Vienna Convention")[1] and to the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 1988 (the "Joint Protocol")[2] during the 1990s.

This was also the case of the Czech Republic. The Czech Republic acceded to the Vienna Convention and the Joint Protocol in 1994. Due to the lower financial obligations arising from the nuclear liability regime created by the Vienna Convention, the country preferred to accede to this treaty rather than to the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 (the "Paris Convention"), to which a number of West European states belong.[3]

The obligations arising from these international treaties were subsequently transposed into Czech legislation, through Article 32 of the Act on Peaceful Use of Nuclear Energy 1997 (the "Czech Nuclear Energy Act").[4] In accordance with the Vienna Convention, this Act provides that the person that is *exclusively* liable for nuclear damages is the holder of the license for operating the nuclear installation. Two factors have motivated the fathers of the Vienna Convention in favor of this *channeling* of all nuclear liability onto the operator: Firstly, they considered it desirable to avoid difficult and lengthy questions of complicated legal cross-actions to establish in individual cases who is legally liable. Secondly, such channeling obviates the necessity for all those who might be associated with the construction or operation of a nuclear installation other than the operator himself to also take out insurance, and thus allows a concentration of the insurance capacity available.[5] Consequently, no other person may be held liable for damages arising from an incident caused by the operation of a nuclear power plant.

Further, the Vienna Convention provides for exclusive jurisdiction, which is considered to be another of the basic pillars of the existing international nuclear liability framework. This principle results in the fact that only the courts of the contracting

[1] The Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 entered into force on 12 November 1977.

[2] The Joint Protocol relating to the Application of the Vienna Convention and Paris Convention of 21 September 1988 entered into force on 27 April 1992.

[3] Furthermore, on 18 June 1998, the Czech Republic also signed two other multilateral treaties on nuclear third party liability, but hasn't yet ratified them: the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage of 1997 (the "1997 Protocol") and the Convention on Supplementary Compensation for Nuclear Damage of 1997.

[4] Due to this "transposition clause", nuclear liability matters are to be governed in the Czech Republic by the following legal provisions and in the following order: (1) provisions of international nuclear liability treaties that are binding on the Czech Republic, i.e. of the Vienna Convention and the Joint Protocol; (2) provisions of the Czech Nuclear Energy Act that contain special nuclear liability rules, as foreseen in international treaties; (3) provisions of the Czech Civil and Commercial Codes, governing, in general, issues of liability.

[5] Stoiber, C., Baer, A., Pelzer, N. and Tonhauser, W. *Handbook on Nuclear Law*, IAEA: Vienna, 2003, on p. 112.

party where the nuclear incident occurred will have jurisdiction over actions brought for damage caused by a nuclear incident which occurred in such a territory.

Both principles are of importance for those suppliers of products (nuclear technologies) or services that are interested in investing in the territory if the Czech Republic, or any other contracting party to the Vienna Convention in the Central Europe. The issue is of major importance if the current plans for a "*nuclear renaissance*" are taken into consideration. However, the question is whether these principles could be jeopardised by the application of the Brussels I Regulation (the "Brussels Regulation")[6] and by the enforcement of judgements issued by those EU member states that do not belong to the Vienna Convention. This is particularly the case of neighbouring Austria.

The aim of this paper is to deal with this very serious legal issue arising from a potential conflict between commitments ensuing from international treaties and from European regulation. The results do not have an impact merely on the situation in the Czech Republic and the other contracting parties of the Vienna Convention in the Central Europe,[7] but *mutatis mutandis* also on the relationship of other non–conventional member states to member states that are contracting parties to the Paris Convention.[8]

I. The nuclear liability framework created under the Vienna Convention

1. Exclusive jurisdiction

Concerning the matter of jurisdiction, Article XI of the Vienna Convention provides a general rule on jurisdiction in paragraph (1): "*Except as otherwise provided in this Article, jurisdiction over actions under Article II shall lie only with the courts of the Contracting Party within whose territory the nuclear incident occurred.*"

The principle of *exclusive jurisdiction* strictly binds all courts of a contracting party to the Vienna Convention. If a plaintiff were to approach any other court in some of the contracting parties to this treaty, such court has to dismiss the action on the grounds that such court is not competent to address it.[9] The *ratio* of such exclusivity is seen in the fact, "*the concentration of procedures within one single court not only creates legal certainty but also excludes the possibility that victims of nuclear incidents will seek to submit their claims in states in which their claims are more likely to receive favourable treatment. Such forum shopping is costly for operators and may result in the financial resources available for compensation being quickly exhausted, leaving other victims without compensation."*[10]

---

[6] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

[7] Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.

[8] E.g. Luxembourg (non- contracting) and France (Paris Convention).

[9] See Magnus, U., Jurisdiction and Enforcement of Judgements under the Current Nuclear Liability Regimes within the EU Member States, in: Pelzer, N. (ed.) *Europäisches Atomhaftungsrecht im Umbruch,* Nomos Verlag: Baden Baden, 2010, on p. 111.

[10] See Stoiber, C., Baer, A., Pelzer, N. and Tonhauser, W., *op. cit.,* on pp. 115 *et seqq*.

2. Exclusive liability (channelling of liability)

Further, the Vienna Convention provides in its Article I (1) that "*for the purposes of this Convention, 'Operator', in relation to a nuclear installation, means the person designated or recognized by the Installation State as the operator of that installation.*" "*Except as otherwise provided in this Convention, no person other than the operator shall be liable for nuclear damage*." So, the provisions of the Vienna Convention anchored the principle of exclusive liability of the operator, a person who is to be designated by the installation state. In this respect, the Explanatory Text to the Vienna Convention stated that "*Like the principle of strict liability, the principle of exclusive liability of the operator facilitates the bringing of claims on the part of the victims of a nuclear incident, since it relieves them of burden of proving the liability of parties other than the operator. But the principle also obviously favours the manufacturer, supplier or carrier of the material or equipment, since it obviates the necessity for them to take out insurance, as well as any other person who may have contributed to the nuclear incident.*"[11] Consequently, the Czech Nuclear Energy Act provides that the person exclusively liable for nuclear damages is the holder of the license for operating the nuclear installation, the holder of the license for any activities associated with the usage of nuclear installations and the holder of the license for the transport of nuclear material.

Furthermore, the Vienna Convention provides in its Article V (1) that the liability of the operator may be limited by the contracting party. So, the Vienna Convention enables their contracting parties also to lay down unlimited liability for nuclear damages. However, it is a matter of fact that all contracting parties to the Convention which have any nuclear installations in their territory did in fact anchor the limit of an operator's liability, which has been traditionally understood as a kind of *quid pro quo* for channeling all liability to one single entity.[12] According to the Czech Nuclear Energy Act,[13] the liability limits are as follows:

(1) in cases of a nuclear incident having occurred by the operation of a nuclear installation that is operated for the purpose of electricity production, in cases of final storages and repositories of nuclear waste or of any material which came into existence through reprocessing of this waste, the limit of an operator's liability has been set at eight billion Czech crowns for each nuclear incident,

(2) in cases of a nuclear incidents having occurred by the operation of installations other than those identified above and by the transport of nuclear material, the liability limit has been set at two billion Czech crowns for each nuclear incident.

Furthermore, as contemplated in Article VII (1) of the Vienna Convention, the Czech Nuclear Energy Act provides that operators have to maintain mandatory insurance, or other kinds of financial security, for their nuclear liability. However,

[11] See the IAEA Explanatory Text to the Vienna Convention on Civil Liability for Nuclear Damage of 1963, note 234, on p. 11.

[12] See Wolff, K., The Vienna International Conference on Civil Liability for Nuclear Damage, in Weinstein, J. (ed.) *Progress in Nuclear Energy*, Pergamon Press: Oxford 1966, on p. 7.

[13] Article 35 of the Czech Nuclear Energy Act.

according to current legislation,[14] rather than an obligation to insure the entire liability limit, specific amounts are specified to be insured:

(1) in the cases where operator liability is limited to eight billion Czech crowns, operators are obliged to maintain insurance in the minimum amount of two billion Czech crowns,
(2) in the cases where operator liability is limited to two billion Czech crowns, operators are obliged to maintain insurance in the minimum amount of three hundred million Czech crowns.

Since the whole amount of operator liability is not required to be insured under the current Czech Nuclear Energy Act, the Czech Republic was challenged to find a form complying with provisions of the Vienna Convention, which requires that the *"Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to Article V."*

Therefore, a "*state guarantee*" was laid down in the Czech Nuclear Energy Act.[15] The State guarantees the coverage of claims arising from nuclear damages in cases where they are not reimbursed from the financial resources created by mandatory insurance, or by other means of financial security. The scope of this state guarantee is limited as follows:

(1) the State guarantees coverage of claims arising from nuclear damages in cases where they haven't been reimbursed from the mandatory insurance, which is to be held in the amount of two billion Czech crowns, up to the limit of operator liability in the amount of eight billion Czech Crowns,
(2) furthermore, the State guarantees coverage of claims arising from nuclear damages in cases where they haven't been reimbursed from the mandatory insurance, which is to be held in the amount of three hundred million Czech crowns, up to the limit of operator liability in the amount of two billion Czech Crowns,

The Convention also provides for very limited liability exonerations and last, but not least, the claims for nuclear damages are to be brought before a court within a limitation period of three years from the date on which the person sustaining the nuclear damage had knowledge or should have had knowledge of the damage and of the operator liable for the damage, but at the latest within ten years from the date of the nuclear incident, or, as appropriate, in a period longer than ten years if the operator's liability is so covered by insurance.

3. Consequences for other nuclear suppliers and constructors

Consequently, in the case of a nuclear incident occurring in a nuclear installation situated on the territory of the Czech Republic, plaintiffs from all of the neighboring countries which are also contracting parties to the Vienna Convention have to assert

[14] Article 36 of the Czech Nuclear Energy Act.
[15] Article 37 of the Czech Nuclear Energy Act.

their claims before the competent Czech court.[16] The same applies to plaintiffs from countries that are contracting parties to the Paris Convention,[17] which belong – similar to the Czech Republic – under the regime of the Joint Protocol.[18] Under the Vienna Convention, no other person involved in the construction and operation of a nuclear installation may be held liable for any damages. The only liable entity is the operator of the installation, the operator which holds the license under Czech law.

One of the results of this liability system is that the third parties involved in the peaceful use of nuclear energy, i.e. the technology suppliers and the constructors, are basically not required to maintain any insurance for their risks arising from being involved in the nuclear business. The Vienna Convention provides for very limited rights of recourse of the operator towards any third party. Basically, according to its Article X, the operator shall have a right of recourse only *"if this expressly provided for by a contract in writing."* Consequently, if a claim for damages is filed directly against such a third party, such claim should be basically dismissed by the court.

II. The nuclear liability framework created in the non-contracting states

1. Position of the non- contracting states in general

It has already been pointed out several times in literature that some of the non-nuclear countries (Austria in particular) tend to evaluate the provisions of existing international nuclear liability treaties as having been essentially developed to nurture nascent nuclear industries and not accommodating the interest of victims: "*For countries like … Austria – it would be difficult to identify many, if any reasons why they should accede to these conventions…*"[19] "*Generally speaking, however, the conclusion finally arrived at is that the rules on jurisdiction laid down in the Paris and Vienna Convention are no longer appropriate to protect the potential victims of a nuclear accident. They still reflect a bias in favour of the development of the nuclear industry, development of which was the dominant concern of the governments involved at the time they were drafted…*"[20] Very critical doubts have been expressed by these non-contracting states

[16] Basically, the provisions of the Brussels Regulation should be applied, which would enable the plaintiff to claim for damages in the place where damage was sustained. However, Article 71 (1) of the Regulation contains an exclusion clause which grants priority to the special conventions. Pursuant to this provision, the Brussels Regulation "*shall not affect any conventions to which the member states are parties and which in relation to particular matters, govern jurisdiction or recognition or enforcement of judgments*. The purpose of the exception is to ensure compliance with the rules of jurisdiction laid down in such specialised conventions, "*since when those rules were enacted, account was taken of the specific features of the matters to which they relate*". See ECJ [1994] ECR I - 5439 (C-406/92 *Tatry v Maciej Rataj*) ECR [1994], in paragraph 46.

[17] E.g. Germany, Netherlands, Slovenia etc.

[18] See Busekist, O., Haftungsprobleme im Verhältnis zwischen Vertragsstaaten des Pariser und des Wiener Atomhaftungsübereinkommens, in Pelzer, N. (ed.) *Friedliche Kernenergienutzung und Staatsgrenzen in Mitteleuropa*, Nomos Verlag: Baden-Baden 1987, on pp. 271 *et seq*.

[19] See Sands, P. and Galizzi, P., The 1968 Brussels Convention and Liability for Nuclear Damage, *Nuclear Law Bulletin,* 1999, on p. 27.

[20] See Galizzi, P., Questions of Jurisdiction in the Event of a Nuclear Accident in a Member State of the European Union, *Journal of Environmental Law,* 1996, on pp. 96 *et seq*.

as to whether the principles of exclusive jurisdiction and channelling of liability are really of advantage to the potential victims of a nuclear incident. Basically, the argumentation is that these principles serve exclusively the interest of the nuclear operators and consequently lack anything that would favour potential plaintiffs.[21]

Concerning the principle of exclusive jurisdiction, it has been argued that a plaintiff should have the possibility to claim before a court which will be neutral and not linked economically to the nuclear industry. Further, the applicable law should be that of the plaintiff. These arguments also stress the provisions of the Brussels Regulation, which provides in its Article 5 that a person domiciled in a member state may be sued in another member state at the courts for "*the place where the harmful event occurred or may occur.*" According to these arguments, the risk of *forum shopping* is solely the result of the fact that liability limits do vary from one contracting party to another. The issue is that if there would not be a limit on an operator's liability, it would mean that liability would be unlimited and then the risk of forum shopping would not be of importance.[22]

A similar criticism has been expressed *vis-á-vis* the principle of liability channelling. It has been questioned whether channelling effectively works to the benefit of potential victims or whether it in fact works to their detriment by depriving them of potential options for legal action. Some authors go even further in questioning the protective nature of channelling and claim that it does not serve the victim's interests, but was conceived out of purely financial reasons: *"Apparently, channelling means that insurance considerations in some respects have been given priority over the interests of the claimant."*[23] According to these arguments, it is precisely beneficial for the victims to sue various parties because this allows them to receive higher compensation, even though it also implies additional procedural costs.[24] From the victim's perspective, there may be more advantages than disadvantages to the liability of multiple parties. Interestingly, this is not only the position of non-contracting states. Some operators have also maintained that concurrent liability of other parties would probably benefit victims, as this would create a larger pot of cash for their respective compensations.[25]

2. Legal framework of nuclear liability created in Austria

In this respect, Austria's nuclear liability framework needs to be examined in particular as it constitutes a very important challenge to the legal framework created

[21] See Curie, D., Liability for Nuclear Power Incidents: Limitations, Restrictions and Gaps in the Vienna and Paris Regimes, in Stockinger, H. et al. (eds.), *Updating International Nuclear Law*, Intersentia: Vienna, 2007, on pp. 87 *et seq*.

[22] See Hinteregger, M. and Kissich, S., *Atomhaftungsgesetz 1999*, Manz Verlag: Vienna, 2004, on p. 52.

[23] See Røsceg, E., The impact of insurance practices on liability conventions, in: *Legislative Approaches in Maritime Law*, Oslo University: Oslo, 2000, on p. 42.

[24] See Vanden Borre, T., Channelling of Liability, in Horbach, N. (ed.), *Contemporary Developments in Nuclear Law*, Kluwer Law International: The Haague, 1999, on pp. 29 *et seq*.

[25] See Ameye, E., Channelling of Nuclear Third Party Liability towards the Operator: Is it Sustainable in a Developing Nuclear World or is there a Need for Liability of Nuclear Architects and Engineers?, *European Energy and Environmental Law Review,* 2010, on pp. 33 *et seq.*

under the Vienna Convention. In 1998, Austria adopted the Federal Act on Civil Liability for Damages caused by Radioactivity (the "Austrian Nuclear Liability Act"),[26] which completely *re-examined* the basic principles governing liability for nuclear damages and which stands in sharp contrast to the basic principles of both the Paris and Vienna Conventions:[27] liability is *unlimited*, legal channelling is to a great extent *eliminated* and there is *no exclusive* jurisdiction. The law ensures that an Austrian court is deemed to be the competent court and that Austrian law is applicable if damage is sustained on Austrian territory.

Basically, the Austrian Nuclear Liability Act does not channel the liability onto the operator and does not restrict any liability obligations provided by other liability provisions. The harmed person is free to assert his or her claim for nuclear damages against the operator of a nuclear installation pursuant to this Act, or pursuant to another law as well as against another party. Claims may be based, for example, on the general provisions of tort law, on product liability law or on state liability law.

Further, the Austrian Nuclear Liability Act provided in its Article 16 (2) also for a possibility to claim against the supplier of products or services to a nuclear installation. Pursuant to this provision:

"Persons having suffered damage may also bring proceedings directly in the courts against persons who delivered goods or rendered services to the operator, except where the defendant can prove that:

1. judgement is expected within a reasonable time on a previous complaint filed against the operator of a nuclear installation,
2. the judgement will be enforceable against the operator, and
3. adequate funds are available for compensation in the event of operator's liability."

This provision is clearly intended to make sure that the liability for nuclear damages stays primarily with the operator, who is in the best position to prevent the damage and to provide insurance if damage occurs.[28] The right of the harmed person to claim against the supplier of products or services to a nuclear installation is restricted. The action will be dismissed if the defendant can prove that an action against the operator will lead to a decision within a reasonable period of time, that such decision can be enforced, and that there are sufficient funds available to ensure compensation on behalf of the operator. However, it is for the defendant to prove that these preconditions are fulfilled and it will be up to the Austrian court to assess them. If the assumption proves false, the case against the supplier can be reopened.

Consequently, current Austrian legislation basically makes it possible to claim against the suppliers of nuclear technologies and to issue decisions against them in order to compensate damages. The question is whether such decisions will be enforced in the

[26] Bundesgesetz über die zivilrechtliche Haftung für Schäden durch die Radioaktivität.

[27] See Hinteregger, M., The new Austrian Act on Civil Liability for Nuclear Damage, *Nuclear Law Bulletin,* 1998, on pp. 27 *et seq.*

[28] See Hinteregger, M. and Kissich, S., *op. cit.,* on p. 120 and Hinteregger, M., *op. cit,* on p. 31.

neighbouring countries, in particular in those belonging to the Vienna Convention. The following part will deal with this very serious question.

III. Enforcement provisions of the Brussels Regulation: a torpedo against the Vienna nuclear liability regime?

1. Applicability of the Brussels Regulation to nuclear liability issues

Facing the legal framework of the Vienna Convention, Austria obviously prefers the application of the Brussels Regulation to those cases of nuclear liability where it "*appears to provide adequate or superior protection.*"[29]

Are the provisions of the Brussels Regulation to be applied also to claims arising from a nuclear incident? According to Article 1 (1) of the Regulation, it shall be applied in "*civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*" The Regulation does not define expressly which relations fall within "*civil and commercial matters.*"[30] There are several ways of interpreting the scope of this term:

(1) Firstly, it is possible to provide for a comparison with the wording of another legal act issued in the area of judicial cooperation in civil matters. E.g. the Rome II Regulation[31] expressly *excludes* the non-contractual obligations arising from nuclear damages from the scope of its application. In the absence of such a special exclusion in the wording of the Brussels Regulation, it is possible to consider it as generally applicable also on matters of nuclear liability, as far as they can be classified as "*civil and commercial matters.*"[32]

(2) Secondly, the exact definition of the scope of application is a matter for the interpretation of the European Court of Justice. In relation to the use of nuclear energy, the particular issue of classifying this industrial activity as falling under the "acts of a public authority in the exercise of its powers" (*acta iure imperii*)[33] had been discussed in

[29] See Sands, P. and Galizzi, P., *op. cit.,* on p. 27.

[30] Article 1 (2) expressly excludes the application of the Regulation in matters relating to: „1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; 3. social security; 4. arbitration."

[31] Regulation (EC) No. 864/2007 of the European Parlament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199/40.

[32] *Accord* in Magnus, U., *op. cit.,* on p. 108 and in Sands, P. and Galizzi, P., *op. cit.,* on pp. 17 *et seq. Sands* and *Galizzi* refer to the *Jenard Report* to the original version of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, which stresses that the drafters intentionally decided to avoid a detailed definition of the term. According to the Report, however, the term „civil and commercial matters" should be interpreted extensively and all matters of civil and commercial matters, excluding only those expressly indicated in the provisions of the Convention. See *op. cit.* on p. 17, in note 50.

[33] See ECJ [1976] ECR 1541 (C-29/76 *Eurocontrol*); ECJ [1980] ECR 3807 (C-814/79 *Ruffer*) and ECJ [1993] ECR I-1963 (C-172/91 *Waidmann*). Consult also Hess, B. 'Europäisches Zivilprozessrecht', C.F.Müller Verlag: Heidelberg, 2010, on pp. 251 *et seq*.

> the past.[34] Due to the fact that since the 1960s, issues of nuclear liability have been dealt with through the means of international civil liability and taking in account the fact that the industrial use of nuclear energy is widely considered to be an activity of a commercial nature, there seems to be currently no doubt about the civil nature of nuclear liability matters. However, the nature of liability relationships arising from the operation of nuclear installations for military purposes, which are basically excluded from the scope of application of existing international nuclear liability conventions, hasn't been clarified in a definite manner as yet.[35]

Taking of all the issues presented above into consideration, it can be argued that the provisions of the Brussels Regulation are, unless expressly stipulated otherwise in the wording of the Regulation, applicable directly to the issues of damages arising from the operation of nuclear installations in the member states of the European Union.

Therefore, if a nuclear incident occurs in a nuclear installation situated in the Czech Republic, which is a contracting party to the Vienna Convention, and causes damages in the territory of neighbouring Austria, the provisions of the Brussels Regulation as *lex generalis* will be applicable for jurisdiction and enforcement of judgements. An Austrian plaintiff will have the possibility to choose between making use of the *actor sequitur forum rei* provision, which means claiming abroad at the Czech court as provided in Article 2 (2) of the Brussels Regulation and using the provision of Article 5 of the Regulation, which enables him to claim against the operator in "*the place where the harmful event occurred",* meaning claiming in his home country and according to his own law.[36]

2. Question of enforcement of judgements issued by the courts of non- contracting states

Consequently, if a plaintiff makes use of the possibility to claim for damages at home, the judgments are to be executed as provided in the relevant provisions of the Brussels Regulation in the country where the operator, or perhaps another liable entity, is domiciled. The enforcement of such judgments, which *via facti* torpedoes

[34] See Sands, P. and Galizzi, P., *op. cit.,* on pp. 18 *et seqq*., Magnus, U. 'Probleme des internationalen Atomhaftungsrecht', in Baetge, P., Von Hein, J. and Von Hinden, M. (eds.), Die Richtige Ordnung, Mohr Siebeck: Thübingen 2008, on p. 604 and Magnus, U. *op. cit.,* on p. 108.

[35] Consequently, the direct application of the Brussels Regulation to liability relations caused through the military use of nuclear technologies (unless they are to be considered as "acts of a public authority in the exercise of its powers") can also be the subject of discussion. See Magnus, U. *op. cit.,* on p. 109.

[36] It is true that the 1997 Protocol will provide for an enlarged geographical scope of the revised Vienna Convention, once it has entered into force in the Czech Republic. Consequently, plaintiffs from a non-contracting-state will be entitled to claim with the court competent in the country where the nuclear incident occurred under the same circumstances as plaintiffs from the contracting parties to the treaty which is in force in that state. However, the possibility to claim at home, as the Brussels Regulation provides for, will clearly remain.

the basic liability principles laid down in the Vienna Convention, has already become a matter of long-lasting academic debates.[37]

In general, those opposing the possibility to enforce the judgments on nuclear liability matters issued by the courts of non-contracting-states point out mainly the following provisions of the Brussels Regulation:

Article 34 of the Brussels Regulation provides in its paragraph 1 that recognition of a judgment shall not be granted if such recognition is manifestly contrary to *public policy* in the member state in which recognition is sought. It can be argued that the principle of *exclusive jurisdiction* as laid down in the Vienna Convention, which is binding for the member state in which the judgment is to be executed, is a part of the "*procedural*" *ordre public* of this state. Consequently, the enforcement of such judgment should be denied by the court of a contracting party to the Vienna Convention, on the grounds that it was issued by a court which was not competent to do so. However, such an interpretation cannot be considered to be correct. As paragraph 3 of Article 35 provides, the test of public policy referred to in point 1 of Article 34 *may not be applied to the rules relating to jurisdiction*. Consequently, the competence of the court does not rank among the *ordre public* and the court cannot dismiss the enforcement merely due to the fact that the Vienna Convention provides for another competent court.[38]

Furthermore, the court of a contracting state to the Vienna Convention can deny enforcement of a judgment issued by the court of a non-contracting-state due to the reasons laid down in Article 35[39] of the Brussels Regulation. However, this Article does not stipulate a disregard of any exclusive jurisdiction under any of the conventions enjoying priority over the Regulation under its Article 71. Furthermore, Article 35 expressly refers to Article 72 of the Regulation, but not to the adjacent Article 71. Any analogy and extension of the reasons for denial of any jurisdiction are considered to be unacceptable.[40]

Finally, it seems to be that the *only* grounds on the basis of which the courts of the contracting parties to the Vienna Convention can deny the enforcement of judgments issued in countries that are not contracting parties is the "*material*" *ordre*

[37] See Hinteregger, M. and Kissich, S., *op. cit.,* on p. 133 and Magnus, U., *op. cit.,* on p. 117 *et seq.* See also Koch, I. 'Diskussionsbericht zur Ersten Arbeitssitzung' in Pelzer, N. (ed.), Europäisches Atomhaftungsrecht im Umbruch, Nomos Verlag: Baden Baden 2010, on pp. 142 *et seq.*

[38] *Accord* in Hinteregger, M. and Kissich, S., *op. cit.,* on pp. 134 *et seq.* and in Magnus, U. *op. cit.,* on p. 119.

[39] Article 35 provides for the following: „1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72, 2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction, 3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction"

[40] See Magnus, U. *op. cit.,* on p. 118.

public, as provided in paragraph 1 of Article 34. This *"material" ordre public* contains two very characteristic features: On one hand, the protection of the interests of the state, on the other hand, it is considered to be a tool to guarantee justice.[41] The most salient examples of why the court of a member state has to deny enforcement of a judgment because of this reason, include e.g. *exorbitant compensation*, *grave deviation of the tort law of the releasing state from the legal principles of the state where the judgment has to be enforced* etc. Consequently, the European Court of Justice will have the final word in this case and will have to answer the question of whether the *channelling of liability* is to be considered as part of the "*material*" *ordre public*.

3. Preliminary conclusions

At this stage, it is possible to point out that several persuasive arguments have been presented in favor of enforcement in the contracting states of the Vienna Convention of judgments on nuclear liability matters issued by a court of a non–contracting state. According to these arguments, "*it would contradict the essential aims of the Brussels Regulation if the … judgment has to be recognised only in some EU states but not in others. It would impair the clear and reliable system of the Regulation if the recognition and enforcement of each judgment could be attacked on the ground that it did not comply with an exclusive jurisdiction provision valid only in the enforcement state."*[42] A further argument is of importance: Non-contracting member states cannot be forced to observe the principles of those international conventions that they are not parties to. Only the provisions of European law concerning nuclear liability are to be observed in those member countries.

Consequently, in such a case, the European Court of Justice would be faced with having to balance two different interests: Those of the plaintiff from a non-contracting state, which sustained damages and has claimed according to the legal framework of his home country and awaits the enforcement of the judgments as provided by European law. On the other hand, there will be the concerns of nuclear operators and suppliers of nuclear technologies, being in an uncertain situation as concerns theirs legal commitments regarding their liability and mandatory insurance.

4. How to overcome the current uncertainties?

The application of the provisions of the Brussels Regulation allows a plaintiff to claim in his home country, basically in his own language, with application of the law of his nation. Those opposing such a system and supporting the regime of exclusive jurisdiction argue that "*it is a utopian wish that courts in different countries could and would voluntary coordinate their proceedings and could achieve a just and equal distribution of the assets of the person liable."*[43] However, it is a matter of fact that such coordination is a serious challenge which needs to be currently addressed by

[41] See Geimer, R. and Schütze, R., *Europäisches Zivilverfahrensrecht*, C. H. Beck: München 2010, on p. 643.

[42] See Magnus, U., *op. cit.,* on p. 119. *Accord also in* Hinteregger, M. and Kissich, S., *op. cit.,* on p. 133.

[43] See Magnus, U. *op. cit.,* on p. 111.

European institutions, as it is clear that the Brussels Regulation would be applicable to a number of hypothetical nuclear liability cases. Furthermore, such coordination will also be needed in cases of damages sustained as result of a grave industrial disaster other than one of a nuclear nature (e.g. incidents occurring in a chemical factory), or in cases of damages sustained as result of nuclear incidents which are not covered by existing nuclear liability treaties (e.g. a nuclear incident in a military installation).

However, the situation is not merely unsatisfactory for potential plaintiffs alone, but also for the operators of nuclear installations. While the principle of *exclusive jurisdiction* as laid down in the Vienna Convention serves *inter alia* to protect the operators from the costs of extensive *forum shopping*,[44] the virtual possibility to claim in non contracting countries and enforce judgments under the Brussels Regulation in the contracting parties to the international treaties makes such a protection rather inefficient. Further, prospective investors (suppliers of nuclear technologies) are also in a rather uncertain situation, as their risks arising from investing in the states belonging to the Vienna Convention can hardly be estimated.

As pointed out above, the jurisdictional arrangements related to nuclear third party liability issues are, in principle, exclusive Union powers. The most recently published Legal Report on *"Accession of Euratom ..."* also points out the fact that the most appropriate legal alternatives for coping with the current challenges arising from the existing nuclear liability "patchwork," will consist of an instrument under European Law, enabling a high degree of harmonisation.[45] Furthermore, the Report explicitly provides that:

> "No action would expose the (…) Community to possible claims based on a breach of the general Community law principle on non – discrimination, as refered in Article 12 of the EC Treaty, given that there is no objective justification to justify a difference in treatment of victims of nuclear accidents in the Paris Convention EU Member States, the Vienna Convention EU Member States and the non – convention states under the current state of play."[46]

Without prejudice to the political viability of such option, one can argue that under Article 81 (2) of the Treaty on Functioning of the European Union there is still competence to act in this field, in particular in the course of amending the Brussels Regulation in an appropriate way. To point out the most important issues of prospective amendment, one can identify the following:

(1) Regulating the issue of enforcement of the judgments issued by the courts of the non contracting states in the state where the nuclear incident occurred. Obviously, this ranks among the gravest uncertainties arising from the current situation, one which may be overcame with an explicit legal regulation.
(2) When supporting the enforcement of the judgments of the non-contracting parties in the contracting states, explicit rules have to be made on the cooperation of courts and

[44] See Stoiber, C., Baer, A., Pelzer, N. and Tonhauser, W., *op. cit.,* on p. 116.
[45] TREN/CC/01 – 2005, on p. 7.
[46] Ibid, on p. 61.

on the appropriate distribution of the assets available. Only such explicit regulation can create a balance between the interest of the contracting member states and non-contracting states and guarantee the same kind of balance of the interest of operators, investors and potential victims.

(3) Otherwise, enforcement of judgments conflicting with the basic principles laid down in the international nuclear liability conventions should be expressly prohibited. Only such an explicit legal regulation can contribute towards the transparency of the legal framework.

Clearly, the current lack of transparency is not contributing to a legal environment which would be supportive of a forthcoming "nuclear renaissance." It is a matter of fact that in the early 1990s, the Czech Republic acceded to the Vienna Convention with the clear intention of providing all parties involved in the peaceful use of nuclear energy with transparent and internationally recognised rules of liability and compensation. After the unification of the rules on jurisdiction and enforcement of judgments under the Brussels Regulation, this transparency became eroded. Consequently, we must aim for clarifying the rules and creating a legal framework which appropriately balances the interests of all parties involved in the peaceful use of nuclear energy.