# CROSS-BORDER POLLUTION: PRIVATE INTERNATIONAL LAW ANALYSIS OF ADMINISTRATIVE AUTHORISATIONS AS REGULATORY COMPLIANCE DEFENCE (A VIEW FROM EUROPE)

CHRISTOPHE BERNASCONI AND GERRIT BETLEM*

SUMMARY



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* CHRISTOPHE BERNASCONI is First Secretary at the Permanent Bureau of the Hague Conference on Private International Law and in this capacity has, among other things, primary responsibility for the Hague Conference's work relating to civil liability for damage caused to the environment. He has published several private international law articles on a variety of topics. He is Co-Rapporteur for the International Law Association's Committee on Transboundary Enforcement of Environmental law, and a member of the International Bar Association Capital Markets Forum Subcommittee on Legal Certainty for Intermediated Securities. Dr BERNASCONI holds a law degree (magna cum laude) from Fribourg University in Switzerland, an LL.M. from McGill University in Montreal and a doctoral degree (summa cum laude) from Fribourg University.

## INTRODUCTION

In January 2002, the European Commission adopted a Proposal for a Directive on Environmental Liability[1] . According to the Preamble (rec. 8), it does not provide for additional rules of conflict of laws when it specifies the powers of the competent authorities and is without prejudice to the rules on international jurisdiction of courts as provided for, among others, in Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In other words, the proposed Directive does not contain any new rules of private international law. This comes as no great surprise given the limited scope of the Proposal in terms of potential claimants and types of recoverable loss, primarily claims for recovery of clean-up costs by public authorities, exclusion of personal injury, damage to property and economic loss suffered by private persons. Nevertheless, future disputes under the proposed regime may well contain an international element and thus trigger questions of choice of law and/or international jurisdiction of the courts. At least three scenarios are conceivable.

First, in the European Parliament (EP) numerous amendments to the Proposal have been formulated, which, if agreed, may include

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1 COM (2002)17, Brussels, 23 January 2002; Co-decision reference 2002/0021/COD, OJ 2002 C151 E/132: http://europa.eu.int/eur-lex/en/search/search_oj.html, also available from the Commission's website: D-G Environment: Environmental Liability: http://europa.eu.int/comm/ environment/liability/index.htm.

civil actions by private claimants against polluters[2]. In transfrontier situations, the 'classic' questions of private international law would then thus arise. Second, the current proposal, to be sure, underlines that 'this Directive shall not give private parties a right of compensation' relating to (threatened) environmental damage, but leaves intact any rights of recourse or contribution by operators against other polluters in situations of multiple party causation (Art. 3(8) and 11(3)). If the case involves defendants abroad, the same issues arise as in the first scenario. Third and finally, again under current law, a public authority may need to take legal action against a polluter domiciled outside its territory[3].

At the time of writing of this contribution (June 2003), the first reading of the European Parliament has been completed. Under Article 251 of the EC Treaty, the co-decision procedure, the EP has the power to amend the (original) proposal of the Commission. As noted, numerous amendments have indeed been made by the EP. It is now up to the Council either to accept them and adopt the proposal as amended or to adopt a common position[4], which, together with a Position Statement by the Commission, will then be communicated to the Parliament for a second reading[5].

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2 See in particular the Draft Opinion of 16 October 2002 of the Committee on the Environment, Public Health and Consumer Policy for the Committee on Legal Affairs and the Internal Market by Mihail Papayannakis, available at www.europarl.eu.int. However, the Legislative Resolution adopted by the Parliament on 14 May 2003 retains the predominantly public law nature of the Proposal: see PE doc 331.499: P5_TA-Prov(2003)0211 and the Manders Report: A5-0145/2003, both at www.europarl.eu.int. As there may be a second reading by the EP, the Manders amendments are not necessarily the end of the EP's input, see further Note 4 below.

3 On the question of the (non-)applicability of the Brussels I regime see G. BETLEM, 'Public Authorities' Claims and the Notion of "Civil and Commercial Matters" under the Brussels I Jurisdiction and Judgments Regulation', 1 *Journal of International Commercial Law*, at 15 to 24.

4 The Environment Council has debated the amended Proposal during its 2517th session on 13 June 2003 in Luxemburg.

5 See generally T.C. HARTLEY, *The Foundations of European Community Law*, Oxford, 2003, at 43 to 47.

## CONFLICT OF LAWS PRINCIPLES: CHOICE OF LAW AND JURISDICTION

Whatever the outcome of the legislative process may be, the eventual Directive can be expected to give rise to disputes involving a cross-border element. Accordingly, questions of a private international law nature (or conflict of laws) will have to be answered before its substantive law provisions can be applied. The synonymous terms 'conflict of laws' and 'private international law' refer to those rules of law dealing with solely three questions: jurisdiction, choice of law, and recognition and enforcement of foreign judgments[6]. For example, in a cross-border pollution context, in the well-known French potassium mines litigation between Dutch horticulturalists who claimed to have suffered loss from the emission of salt in the river Rhine by the French operator MDPA, the first question was whether the Dutch court they applied to had international jurisdiction to rule on the case at all (or whether they would have to bring the case in France). Then there was the question of which system of national noncontractual liability governed this dispute: Dutch or French? And finally, would the eventual judgment of a Dutch court be recognised and, if necessary, enforceable outside the Netherlands?[7].

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6 See, for example, D. MCCLEAN, MORRIS: *The Conflict of Laws*, London, 2000 and G. KEGEL and K. SCHURIG, *Internationales Privatrecht: ein Studienbuch*, Munich, 2000.

7 The first and the last issues are currently covered by Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1; see also Case 21/76 Bier v MDPA [1976] ECR 1735. The second question in this case was a matter for the Dutch choice of law rule in tort, in the absence of an EC law instrument harmonising the Member States' conflict rules; in the meantime, however, the Commission has published a Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (COM (2003) 427(01), available on the website of the European Commission, http://www.europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0427en01.pdf) http://europa.eu.int/ comm/justice_home/index.htm).

This is not the place for a comprehensive analysis of the interaction between various private international law regimes and possible claims under the future Directive[8]; suffice it to say that we will only be concerned with particular issues in the context of the question of which law governs the dispute. Choice of law rules of a number of different countries will be examined, as we are interested in looking at solutions that may be adopted under future EC law. The crucial elements of any choice of law rules are the so-called connecting factors, which link the application of a particular legal system to a dispute before a court (domicile of the parties, the location of damaged land, and so on)[9]. This article will focus on one particular choice of law issue in the light of a controversial feature of the current version of the proposed Directive, namely the regulatory compliance defence and the connecting factors that are relevant when this defence is raised in a cross-border dispute. Article 9(1)(c) provides that the Directive shall not cover (threatened) environmental damage 'caused by an emission or event allowed in applicable laws and regulation, or in the permit or authorisation issued to the operator'.

Accordingly, this article will examine the impact of an administrative licence on the civil liability of a polluter who is being sued before the civil courts not of its home state (State A) but of the state where cross-border environmental damage occurs (State B). In other words, at stake is the possible legal effect of a foreign licence (foreign from the point of view of the court before

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8 See generally, C. BERNASCONI, *Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference*?, Hague Conference on Private International Law, Preliminary Document 8, available at www.hcch.net, under the headings 'Work in Progress', Recently completed topics: 'General Affairs and Policy of the Conference', 'Preliminary Document No 8' (or under: ftp://ftp.hcch.net/doc/gen_pd8e.doc).

9 There are two broad categories: personal connecting factors (link between a person's status and a legal system, for example, the cited domicile or nationality) and causal connecting factors: a linkage between a fact or event and a law (the cited place of injury or place where a contract has been concluded): see A. BRIGGS, *The Conflict of Laws*, Oxford, 2002, at 22 to 29.

which the dispute is being litigated – State B). Usually in the context of defences, that is, possible justification or disculpation grounds, it may be argued that the defendant has been granted a licence of the public authorities from the state of its domicile or the state from where polluting activity takes place, and complies with its terms. For example, a chemical plant may be licensed to discharge certain levels of hazardous substances in its waste water by State A, while being confronted with a liability claim before the courts of State B where the discharges allegedly harm the environment. Naturally, the possible justificatory effect of compliance with a public law licence on the private law liability of a polluter vis-à-vis a private plaintiff may be pleaded in any similar purely domestic dispute, but in the context of transnational litigation, additional legal questions must be addressed. It is because of this that an explicit exclusion of compliance with licence defence may be included in a statutory environmental liability regime, such as in the EC Amended Proposal for a Council Directive on Civil Liability for Damage Caused by Waste[10]. But assuming that compliance with a permit would exclude liability (or at least be relevant in the context of an action for an injunction while damages remain possible) in a domestic dispute where both the plaintiff and the defendant are based in the same state (all issues involve a single state alone), will the same apply where the licence is granted by the state of the defendant (State A) as opposed to the home state of the plaintiff (State B)?

But before a court can address this issue as a matter of substantive (domestic) non-contractual liability law (tort law), the question of which law governs this issue must be answered. Of course, at the stage of the legal debate where defences are raised, it is already established (perhaps implicitly) which law is governing the whole dispute, that is, which is the *lex causae* (State A's or State B's).

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10 OJ 1991 C192/7, Article 6(2) which provides as follows: 'The producer shall not be relieved of liability by the sole fact that he holds a permit issued by the public authorities'.

Generally speaking there are three possibilities for determining this governing law: the law of the place of the harm, the law of the place where the defendant acted, or the law of the state of the court (the so-called *lex fori*). Accordingly, in the situation where the applicable law —the *lex delicti*— is the one of the plaintiff's home state (which coincides with the law of the place of harm), the first main question becomes one of the scope of this *lex delicti*. The subsequent main question is then whether there is any reason to submit the exemption issue to a different law, separately from the dispute as a whole. Below, we examine both these questions from a comparative perspective.

## SCOPE OF THE APPLICABLE LAW

What legal issues are covered by the scope of the designated law? Several instruments contain express rules on this subject, such as Article 11 of the Proposal for a Rome II Regulation[11], Article 142 of the Swiss Statute on PIL, and Article 7 of the 2001 Dutch Act on Conflict of Laws in Tort[12].

Article 11 of the Proposal for a Rome II Regulation contains a list of the issues covered by the *lex delicti*. Under this provision, the *lex delicti* governs in particular:

a) the conditions and extent of liability, including the determination of persons who are liable for acts performed by them;

b) the grounds for exemption from liability, any limitation of liability and any division of liability;

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11 See *supra* footnote 7.

12 In Dutch: '*Regeling van het conflictenrecht met betrekking tot verbin-tenisssen uit onrechtmatige daad (Wet conflictenrecht onrechtmatige daad)*', Stb 2001, 190; see for the legislative history: *TK* 1998-1999, 26608.

c) the existence and kinds of injury or damage for which compensation may be due;

d) within the limits of its powers, the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;

e) the assessment of the damage in so far as prescribed by law;

f) the question whether a right to compensation may be assigned or inherited;

g) persons entitled to compensation for damage sustained personally;

h) liability for the acts of another person;

i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

Similar lists are found in Articles 8 of the Hague Conventions on the law applicable to traffic accidents of 1971 and on the law applicable to products liability of 1973. The corresponding provision of the Swiss LPIL is more succinct:'[t]he applicable law determines in particular the capacity to commit a tort, the conditions and the extent of liability, as well as the person who is liable' (Article 142(1)). Finally, the Dutch Act lays down that the applicable law shall determine, in particular, 'the grounds for exemption from [and] limitation of … liability' (Article 7(b)). It should be noted that in none of these texts is the list exhaustive[13].

13 See for further comparative details, T. KADNER GRAZIANO, *Europäisches Internationales Deliktsrecht*, Tübingen, 2003, at 110.

It would seem to follow that, where the applicable liability regime (in State B) differs from the (public) law under which the licence was issued (State A), it is the former not the latter which decides the effects of compliance with the permit in the context of liability. At first sight, the problem seems to have a quick and easy solution: simply, and exclusively, apply the *lex delicti* to the regulatory compliance defence. We shall see, however, that the problem at stake can be resolved satisfactorily only if the two legal systems involved are not regarded as two separate bodies, and that an amalgam of various interests needs to be addressed.

## Effects of administrative authorisation abroad

Let us look at the following example. A dispute involves an injured German, who brings an action in Germany (State B) against a person who is based and pollutes from abroad, and chooses German law *(Günstigkeitsprinzip)*. May the polluter raise the defence that, under the administrative authorisation (concession, permit or licence) issued by the authorities of his or her own country (State A), the polluting activity is permitted and cannot be made the object of a request for an injunction prohibiting it?

## The effects of an administrative authorisation in national law

We should note first of all that the effects of an administrative permit for the operation of a potentially polluting installation vary greatly from one state to another. Under German law, for example, an administrative authorisation granted to a factory within the framework of the *Wasserhaushaltsgesetz* (the Law on Supplying Water) excludes any action against the permitholder based on private law; it does not matter whether the complaint bears on the *recovery of damages*, the *cessation* of the polluting activity, or even

*measures of protection* – the permitholder may still raise a defence based on the authorisation[14]. However, a brief comparative law analysis shows that this type of authorisation excluding any action based on private law is unusual[15].

By contrast, Dutch tort law, for example, recognises as a main rule that whether and to what extent a licence impacts on the assessment of liability of a polluter who complies with it, depends on the nature of the licence and the interests pursued by the instrument on which the licence is based, taking into account the circumstances of the case in hand *(weighing of interests)*. The point of departure under this system is that liability is not limited when damage is caused which the very Act on which the licence was based was intended to prevent (exceptions to this rule may apply as will be seen below)[16]. There are also many other administrative authorisations, which, without *excluding* them, nonetheless *limit* claims based on civil law that a person who is injured by the activities of a factory which has a permit to operate may bring against it. The most frequent case is that the permit delivered excludes any suit for an *injunction against operation*, but leaves intact the possibility of seeking financial compensation.

## THE COURT FACED WITH ADMINISTRATIVE AUTHORISATIONS GRANTED ABROAD

What impact can such administrative authorisations have within the framework of civil proceedings in the state where the activity

14 M. WANDT, 'Deliktsstatut und internationales Umwelthaftungsrecht', *Revue suisse de droit international et de droit européen 1997, at 160*. It must be added, however, that following a legislative change in 1976, it is no longer possible to deliver an administrative authorisation for extracting and putting back substances into the water.

15 *Ibid.*, with other references.

16 G. BETLEM, *Civil liability for transfrontier pollution*, London, 1993, at 427. See for further comparative analysis, particularly for the United Kingdom: MARK WILDE, *Civil liability for environmental damage*, The Hague, 2002, at 223.

giving rise to the litigation causes damage? If the affirmative defence based on the permit granted abroad (State A) is accepted, the injured person will be deprived of the legal protection which his national law (State B: the law of the place where the damage was suffered) might otherwise provide.

On the other hand, if the court rejects the permit granted by the authorities abroad, the injured person might recover damages that the persons injured in the country of the permit would not have the possibility of obtaining from their own courts. In other words, the person injured abroad would be in a better situation than the injured persons of the state that had granted the authorisation. This perhaps undesirable outcome is, however, a result of differences in the substantive laws comparable to the situation where a person who can invoke EU law may be better protected than a fellow citizen in a situation governed solely by national law (so-called reverse discrimination)[17].

Legal commentators seem to be in agreement on two points. First, the *validity* of such an authorisation is governed by the law of the state that has issued it. Second, in proceedings of an international character, the question of the *effect* of such an authorisation is problematic only, from a private international law point of view, if the law applied to the substance of the case *(the lex causae)* is not that of the state that granted the authorisation[18]. For the rest, legal opinion is divided. Several approaches have been proposed.

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17 See in particular Case C-132/93 Volker Steen [1994] ECR I2715, [1995] CMLR 922 and Joined Cases 225-227/95 Kapasakalis [1998] ECR I-4239.

18 See, for example, C. VON BAR, *Environmental Damage in Private International Law*, Collected Courses of the Hague Academy of International Law, Vol. 268, at 384.

THE PRINCIPLE OF TERRITORIALITY

In the past, several jurisdictions have refused to give any effect whatsoever on their own territory to an administrative authorisation *granted abroad*: an administrative act is an *expression of sovereignty*, therefore its reach is limited to the territory of the state that issued it[19]. This position is being increasingly called into question. In fact, such a rigid application of the principle of territoriality might endanger the very existence of any factory with potentially dangerous activities which is situated near an international frontier. Indeed, if the neighbouring state completely ignores the permit issued by the national authorities in question, the factory may lose all legal protection against, for example, suits seeking an injunction against its activities. It is true that a decision ordering cessation of the activity would most likely be very difficult to enforce in the state where the factory is located. Nonetheless, resort to the principle of territoriality in this way seems to us to be misplaced in this context.

Admittedly, the principle of territoriality, at least in its classic conception, forbids a state to extend its sovereign power beyond its territory and to *impose* the effects of its own acts on another state[20]. On the other hand, the territoriality principle does not in any way prevent a state from *taking into account*, at least partially, the effects flowing from a foreign administrative act[21]. This emerges clearly from two well-known judicial decisions. In the famous case of the *Mines de Potasse d'Alsace*, the Rotterdam court stated the

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19 See, for example, the judgment of the German Bundesverwaltungsgericht, 10 March 1978, Deutsches Verwaltungsblatt 1979, at 227. In this case, German residents were complaining about the noise caused by the air traffic at the airport of Salzburg in Austria.

20 Hence, neither the polluting state can effectively decide the level of pollution acceptable in the neighbouring state, nor could the latter's courts, according to the view stated above, close down a polluting plant in the first state.

21 G. BORHEIM, '*Haftung für grenzüberschreitende Umweltbeeinträchtigungen im Völkerrecht und im Internationalen Privatrecht*', Publications Universitaires Européennes, Série II, Vol. 1803, Frankfurt 1995, at 235, with further references.

law as follows: 'in examining the acts of the defendants, the fact that they had the benefit of French permits is not in itself without importance'[22]. It is true that the court in the end did not accept the defence based on the French permits, but this was for the sole reason that the permits expressly preserved the *rights of third parties* (as do all administrative authorisations issued under French law)[23].

The second decision is an action brought by an Austrian resident against bringing into service the *Wackersdorf* treatment plant located on German territory. In its decision of 15 January 1987, the Superior Court *(Oberlandesgericht)* of Linz (Austria) explicitly took into account the operating permit delivered by the German authorities[24]. Apparently, this court did not think that the principle of territoriality prevented it from doing so. Although there might be approval of this initial step, the question still remains as to what law governs the possible exclusion of claims.

The exclusion of claims under the law of the state that issued the authorisation

22 Judgment dated 16 December 1983, Ned. Jur. 1984, n° 341, paragraph 8.7. For an English translation of the judgment, see NYIL 1984, at 471 onward.

23 One may add that on appeal and in cassation proceedings before the Dutch Supreme Court another rule affecting a civil court's power to issue injunctions was debated. The Dutch Civil Code lays down that a court has discretion to refuse to grant an injunction on the ground that the unlawful conduct should be tolerated for reasons of weighty *societal interests* (Article 6:168) whilst preserving the plaintiff's right to damages. Accordingly, the expression 'weighty societal interests' is not limited to *Dutch* interests; it encompasses, in an international dispute, *foreign* weighty societal interests. The Dutch courts thus took French interests into account on an equal footing with Dutch ones.

24 ÖJBL. 1987, at 577, judgment confirmed by the Supreme Court of Austria on 20 December 1988, see ÖJBL. 1989, at 239. The court set out three conditions for this: first, the emissions coming from the plant should not be contrary to *public international law*; second, the foreign (German) authorisation must be obtained subject to conditions similar to those imposed by (Austrian) law of the forum; third, the foreign authorisation must not have been granted without giving the Austrian real property owners the possibility of being heard.

Two tendencies can be distinguished here. One favours the application of the law of the state that issued the authorisation (State A)[25], while the other favours the law of the place where the injury occurred (State B)[26].

## INTERNATIONALLY MANDATORY RULES

Initial opinion tends to justify the application of the law of the state that issued the administrative application (State A) by relying on the theory of special linkage with internationally mandatory rules[27]. According to the principal author who favours this approach, the conditions of the *mandatory character of the foreign rule* and of the *link between the situation and the foreign law* are met. The author adds that the foreign authorisation should also meet *minimum substantive requirements*, comparable to those provided in the forum state. Thus, the licence-granting state should entitle persons residing abroad to the same possibilities to be heard in the administrative proceedings as its own citizens. The authorisation should in addition respect the principles of environmental protection established by *public international law*. If and when all the conditions are satisfied, the foreign licence will be given liability-exempting effect.

This view invites two comments. First, it should be emphasised that the mechanism of *internationally mandatory rules* does not (yet) constitute a principle recognised worldwide. Moreover, use of the theory of laws of internationally mandatory application might turn out to be too fragile to justify total exemption from liability.

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25 The solution defended in particular by WANDT, Note 14 above, at 168 to 169, and, for different reasons, by G. HAGER, '*Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen*', *RabelsZ* 1989, at 293 to 319.

26 Position defended in particular by von Bar, Note 18 above, at 390 to 393.

27 See in particular HAGER, Note 25 above, at 293 to 319.

Second, to establish as a requirement the respect for the principles of environmental protection established by *public international law* seems perilous. Since these principles do not meet with a consensus this requirement tarnishes the theory with an obvious lack of predictability and legal certainty.

## ALTERNATIVE CONSTRUCTIONS

To accept the competence of the state that issued the authorisation as the law governing exemption (State A) seems dubious to the extent that persons injured in another state (State B) are subject to the mercy of that —from their perspective foreign— law. Those who nonetheless are in favour of this respond with three observations. First of all, they say, if the law governing the dispute *(lex causae)* were also to govern the question of the quantity of emissions that a foreign plant is allowed to produce, a decision handed down by the court of the place of injury and imposing a reduction of these emissions would not, in all probability, be enforced in the state that had issued the permit.

Second, in the event that the law of the state that issued the permit (State A) excluded any action for financial compensation, the public policy exception might come into play (both as a barrier to the application of a foreign law and at enforcement stage)[28]. In other words, the foreign permit (from State A) should only be given effect in the forum of the proceedings (State B), if and when its effect was comparable to that provided in the permits issued by the forum's own administrative authorities[29].

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28 WANDT, Note 14 above, at 168.

29 See in particular K. SIEHR, *Deutsches Haftpflichtrecht für grenzüberschreitende Immissionen – Reaktionsmöglichkeiten auf die Unglücke von Tschernobyl und Schweizerhalle'*, in DUTOIT, KNOEPFLER, SCHWEIZER and SIEHR, 'Pollution transfrontière / Grenzüberschreitende Verschmutzung: Tschernobyl/ Schweizerhalle', *Beihefte zur Zeitschrift für Schweizerisches Recht*, Vol. 9, Basel 1989, at 83.

Finally, they conclude, if the injured persons have not been given the possibility of being heard during the administrative proceeding, any authorisation that was nonetheless granted would be deprived of effect and could not even be applied by the courts of the state of origin of the permit. In this respect, commentators refer to the 1983 decision of the Administrative Tribunal of Strasbourg, which annulled the authorisation granted to the *Mines de Potasse d'Alsace* to pour salty water into the Rhine, on the grounds that the initial authorisation had not taken into account the repercussions that this activity could have downstream[30].

### THE *LEX CAUSAE*

This solution subjects a regulatory compliance defence to the law which governs the dispute as a whole, that is, the *lex causae*. In particular it was adopted by the Superior Court of Linz in the decision mentioned above; it is also favoured by some German legal commentators, at least where the *lex causae* corresponds to the law of the state in which the harmful effects occurred (the law of the injured party)[31]. The principal argument is that the producer of emissions is not to be protected if these emissions cause harmful effects abroad; therefore, the competence of the law of the state where the damage occurred could not be questioned.

However, these commentators also emphasise that a foreign permit cannot simply be ignored. They seek therefore to co-ordinate the two laws in question, if necessary by substitution: it is for the *lex causae* to establish the framework, into which the effects of the foreign permit are to be inserted. In this view, the foreign authorisation (from State A) can only deploy its effects if these are comparable to those of an authorisation granted in the forum state (State B).

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30 Decision of 27 July 1983 (Ref. 227/81bis 232/81, 700/81 and 1197/81), cited in WANDT, Note 14 above, at 169 note 68, with other references.

31 See WANDT, Note 14 above, at 164, note 57.

## Conclusion

The best approach in dealing with the interplay of licence and liability, in the authors' view, is to apply the principles of equivalence of authorisations and of equality of access. The latter principle requires that persons who reside abroad should be able to avail themselves of the right to be heard in the administrative preceding that led to the grant of the authorisation. If this fundamental condition is not fulfilled, the foreign licence should not be given any effect. In addition, even where this is the case, a court should only take a foreign licence into account where it would also recognise liability excluding effect of a licence issued by its own public authorities (principle of equivalence). Finally, it should only do so in the context of a rule which distinguishes between injunctions and suits for damages while requiring that foreign weighty societal interests are taken into account on an equal footing with domestic ones.