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# LA CONFÉRENCE DE LA HAYE DOIT-ELLE REFORMULER L'ÉTENDUE ET LA NATURE DE SES ÉVENTUELS TRAVAUX DANS LE DOMAINE DE LA RESPONSABILITÉ CIVILE POUR LES DOMMAGES CAUSÉS À L'ENVIRONNEMENT ?

*établi par le Bureau Permanent*

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# SHOULD THE HAGUE CONFERENCE REVISIT THE SCOPE AND NATURE OF POSSIBLE WORK IN THE FIELD OF CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE?

*drawn up by the Permanent Bureau*

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Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

# LA CONFÉRENCE DE LA HAYE DOIT-ELLE REFORMULER L'ÉTENDUE ET LA NATURE DE SES ÉVENTUELS TRAVAUX DANS LE DOMAINE DE LA RESPONSABILITÉ CIVILE POUR LES DOMMAGES CAUSÉS À L'ENVIRONNEMENT ?

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# SHOULD THE HAGUE CONFERENCE REVISIT THE SCOPE AND NATURE OF POSSIBLE WORK IN THE FIELD OF CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE?

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## I. Introduction

1. The topic of civil liability for environmental damage has been on the Hague Conference's agenda for almost twenty years. The relevant organs of the Conference (Special Commissions and Councils on General Affairs and Policy of the Conference, Diplomatic Sessions) discussed the matter on numerous occasions.[1] The result of these discussions has always been to keep the topic on the agenda, but without priority. The main reasons that prompted the Members to decide that the Conference should not embark on any legislative activity in this field were budgetary constraints and efficient resource allocation, the political nature of some of the issues raised by the topic and the work undertaken by other organisations in this field.[2]

2. While the basic result of the discussions has remained the same over the years, the *scope* of the topic under discussion has somewhat evolved. In 1993, when the topic was first discussed by the (then) Special Commission on General Affairs and Policy, the focus was on the question of the *applicable law*; questions arising from the conflicts of jurisdiction were only mentioned as a possible addition to the topic, and questions relating to the recognition and enforcement of foreign judgments were not mentioned at all.[3] Then, in its 1995 Note, the Permanent Bureau echoed a conclusion of the 1994

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[1] The history of the discussions on this topic may be summarised as follows: in 1992, the Permanent Bureau suggested adding the topic to the Conference's agenda (see the "Note on the law applicable to civil liability for environmental damage", Prel. Doc. No 9 of May 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference, in *Proceedings of the Seventeenth Session*, Tome I, *Miscellaneous matters*, The Hague, SDU, 1995, pp. 187-211). The Seventeenth Session accepted the suggestion and included the topic in the Conference's agenda (see *infra* note 3). This prompted the Hague Conference and the University of Osnabrück to jointly organise in 1994 an important colloquium on liability for environmental damage (see Ch. Von Bar (ed.), "Internationales Umwelthaftungsrecht I – Auf dem Wege zu einer Konvention über Fragen des Internationalen Umwelthaftungsrechts", *Osnabrücker Rechtswissenschaftliche Abhandlungen*, Vol. 48, Cologne 1995; see in particular the "ten points of Osnabrück", pp. 219-221). A second Note on the topic was drawn up by the Permanent Bureau in 1995 ("Note on the law applicable and on questions arising from the conflicts of jurisdiction in respect of civil liability for environmental damage", Prel. Doc. No 3 of April 1995 for the attention of the Special Commission of June 1995 on General Affairs and Policy of the Conference (hereafter "1995 Note"), in *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous matters*, The Hague, SDU, 1999, pp. 73-85). Following a recommendation of the Special Commission of June 1995 (*ibid.*, p. 109), the Eighteenth Session (held in 1996) decided that the Permanent Bureau was to continue to "monitor / study / encourage" work in the area of environmental law (*ibid.*, p. 243); as a result, the topic was retained in the Conference's agenda (see the Final Act of the Eighteenth Session, 30 September 1996, *ibid.*, pp. 27-47). A third, comprehensive Note on the topic was drawn up by the Permanent Bureau in 2000 ("Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" Prel. Doc. No 8 of April 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference (hereafter "2000 Note"), in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous matters*, The Hague, SDU, 2008, pp. 321-411). The Special Commission recommended that the topic be kept on the agenda, but without priority (*ibid.*, p. 83); the Nineteenth Session (held in 2001 and 2002) endorsed this Recommendation (*ibid.*, p. 46, point 3 *b)*). In the subsequent years, no further Notes were produced. The Permanent Bureau provided the Special Commissions and Councils on General Affairs and Policy of the Conference with oral updates on relevant developments and the topic remained on the Conference's agenda. The Final Acts of the Twentieth and Twenty-First Sessions (held in June 2005 and November 2007, respectively, available on the website of the Hague Conference at < www.hcch.net >) do not address matters of the Conference's work programme.

[2] The most recent discussion on the topic occurred during the Council of 2009 on General Affairs and Policy of the Conference; the Council invited the Permanent Bureau to continue to follow developments in a number of areas, including "the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage" (see "Report of the Council on General Affairs and Policy of the Conference of 31 March to 2 April 2009", Prel. Doc. No 1 of December 2009 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference, p. 15, available on the website of the Hague Conference at < www.hcch.net > under "Work in Progress" then "General Affairs").

[3] The Seventeenth Session (held in 1993) decided "to include also in the agenda for the work programme of the Conference the question of the determination of the law applicable, and possibly questions arising from the conflicts of jurisdiction, in respect of civil liability for environmental damage" (Final Act of the Seventeenth Session, 10 May 1993, in *Proceedings of the Seventeenth Session* (*op. cit.* note 1), p. 43). The question of the recognition and enforcement of foreign judgments was not included in this specific item because the Seventeenth Session decided to make the question of the recognition and enforcement of foreign judgments in civil and commercial matters in general a priority item of the Conference's agenda (*ibid.*); this work eventually led to the *Hague Convention of 30 June 2005 on Choice of Court Agreements*.

Osnabrück Colloquium[4] and stressed that a possible Hague Convention should have a broad view and encompass in its attempt at unification not only the conflict of jurisdictions, the conflict of laws and the recognition and enforcement of foreign judgments, but also certain aspects of procedural law, as well as relations with other conventions providing for indemnification from compensation funds and the important problem of insurance.[5] This comprehensive approach was endorsed by the Eighteenth Session (1996).[6] It also formed the basis for the third, comprehensive Note submitted by the Permanent Bureau in 2000, which addressed numerous issues raised by the topic in all fields of private international law: adjudicatory jurisdiction, applicable law, recognition and enforcement of foreign judgments, and international judicial and administrative cooperation.[7] The Final Act of the Nineteenth Session retained a broad description of the topic in the Conference's agenda.[8] This broad, inclusive formulation of the topic was never questioned in subsequent years; the most recent discussion on the topic, which took place during the Council of 2009 on General Affairs and Policy of the Conference, was also predicated on this broad, inclusive conception.[9]

3. While the scope of the topic has expanded over the years, the *nature of the work* under discussion has never been questioned: it was always assumed that the work possibly to be undertaken by the Hague Conference in this field would lead to a *binding* instrument, *i.e.,* a Convention. The decision-making organs of the Conference never examined the possibility of developing a *non-binding instrument* in this field.

4. It is against this background that the Permanent Bureau invites the Council on General Affairs and Policy of the Conference to reflect on the merits, if any, of examining the topic of civil liability for environmental damage from a somewhat different angle: first, whether the topic should be limited to the question of the *applicable law*; and secondly, if work should be undertaken with a view to developing a *non-binding instrument*.

## II. Limiting the topic to questions of applicable law?

5. Why is it possibly worthwhile limiting the scope of the topic to questions of applicable law only? The primary reason is that there seems to be growing support for the principle of the law that is more favourable for the injured party *(Günstigkeitsprinzip)*. By virtue of the *Günstigkeitsprinzip*, it is either the law in force at the place where the damage is suffered (the State where the emission causes its effects) or the law in force at the place where the wrongful act was committed (State of the emission) that applies, depending on which law is more favourable to the injured party. Depending on how the

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[4] See *supra* note 1.
[5] 1995 Note (*op. cit*. note 1), para. 38.
[6] See the Final Act of the Eighteenth Session (*op. cit*. note 1), p. 47, point 3. The Final Act expressly refers to conflicts of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage; it does not expressly refer to recognition and enforcement of judgments, but it is clear from the discussions held before and during the Session that this aspect of the topic was also included.
[7] See *supra* note 1.
[8] See the references in note 1, *in fine*. The Final Act of the Nineteenth Session of 13 December 2002 (see *Proceedings of the Nineteenth Session*, Tome I, *op. cit.* note 1, p. 35) expressly refers to conflicts of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage; it does not expressly refer to recognition and enforcement of judgments, but it is clear from the discussions held during the Session that this issue remained part of the topic (see *Proceedings of the Nineteenth Session*, Tome I, *op. cit.* note 1, pp. 33-59). The same is true for the Final Act of the Twentieth Session and for the understanding of the discussion in the recent past (available on the website of the Hague Conference at < www.hcch.net >).
[9] See *supra* note 2.

principle is put into operation, the choice may be made by the victim or *ex officio* by the court.

6. This approach had already been advocated in the Permanent Bureau's 2000 Note; the Note explained the history, nature and advantages of the *Günstigkeitsprinzip* and also identified a number of jurisdictions on different continents where this principle already applied.[10] In what are undoubtedly important subsequent developments, the *Günstigkeitsprinzip* was unanimously endorsed in 2006 by the *International Law Association* (through the work carried out by its former Committee on the Transnational Enforcement of Environmental Law),[11] and adopted by the *European Union* in the Rome II Regulation on the law applicable to extra-contractual obligations.[12]

7. A basic purpose of the project would be to assess the possibility of enacting, at the global level, the principle of the law that is more favourable for the injured party.[13] Limiting the scope of the topic to the question of the applicable law (as originally envisaged)[14] would have the obvious advantage that the (more) difficult technical questions relating to conflicts of jurisdictions, recognition and enforcement, cooperation and other procedural issues, would not have to be tackled – at least not in the immediate future.[15] While the broad, inclusive approach may simply be too ambitious at this point in time, work limited on applicable law issues appears to be more manageable, promising and indeed potentially useful.

## III. Developing a non-binding instrument?

8. The above suggestion might be implemented (even) more easily if the work undertaken by the Hague Conference was to lead to a non-binding instrument rather than a Convention. It would not appear too ambitious to attempt implementing the principle of the law that is more favourable for the injured party in a series of provisions which, together with other articles (on, for example, the scope of the applicable law, definitions, and possibly a choice of law clause), would form a *Model Law on the law applicable to civil liability resulting from transfrontier environmental damage.* Such a Model Law would undoubtedly have the potential to encourage national legislators to

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[10] Note of 2000 (*op. cit.* note 1), pp. 355-361 and in particular p. 365.

[11] See the Committee's final Report submitted at the Toronto Conference in 2006, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/31 > (last consulted on 5 February 2010). The primary rule on the applicable law (Rule 5(1)) adopted by the ILA reads as follows: "(1) In proceedings relating to the preceding Rule, the applicable law shall be, at the option of the injured party: a) the law of the State in which the damage arose or may arise, or b) the law of the State in which the event giving rise to the damage occurred or may occur." For more detailed comments on the question of the applicable law in general and the *Günstigkeitsprinzip* in particular, see the Report submitted by the Committee at the Berlin Conference in 2004, also available at < http://www.ila-hq.org/en/committees/index.cfm/cid/31 > (see in particular section 3.1. of the Report) (last consulted on 5 February 2010).

[12] Art. 7 of 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) reads as follows: "The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [*i.e.*, the law of the country in which the damage occurs], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred."

[13] In addition to EU countries (with the exception of Denmark) that follow the *Günstigkeitsprinzip* through the "Rome II" Regulation, this principle is also found with various modalities in the following countries: Japan (Art. 17 of *Act on the General Rules of Application of Laws* (2006)), Macau (Art. 44 of *Civil Code of Macau*), Macedonia (Art. 33 of *Law on PIL* (2007)), Peru (Art. 2097 of *Civil code of Peru*), South Korea (Art. 32 of *Act No 6465 of April 7th 2001 amending PIL*, as interpreted in : *Seoul District Court (May 23rd 2003), Docket No. 99 Gahap 84123*), Switzerland (Art. 138 of *Federal Law on PIL*), Tunisia (Art. 70 of *Code of PIL*), and Venezuela (Art. 32 of *Act on PIL*); see also Art. 1219 of *Civil Code of the Russian Federation*). Finally, it is worthwhile noting that before the coming into force of the "Rome II" Regulation, the principle was already being followed by the Czech Republic, Bulgaria, Estonia, Germany, Greece, Hungary, Lithuania, Slovakia and Slovenia.

[14] See *supra* note 3 and accompanying comment.

[15] Depending on the Council's decision, these questions might, however, be addressed in the context of future work on the judgments project, see "Continuation of the Judgments Project", Prel. Doc. No 14 of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference.

revisit their domestic conflict of laws rules in this field and, where necessary, to amend them accordingly.

9. This work would undoubtedly benefit from the experience gained with the development of a non-binding instrument of choice of law in international contracts. Work in the environmental field could in turn also add to the Conference's experience with the development and promotion of such instruments.

10. The development of a model law limited to questions of the applicable law would of course not prevent the future addition of other provisions dealing with questions of jurisdiction, recognition and enforcement or indeed international judicial and administrative cooperation. This building-block approach is in fact easier to put into practice on the basis of a non-binding instrument rather than a binding instrument. Also, the development of a Model Law would obviously not prevent the Conference from developing, at a later stage, a binding Convention which, if appropriate, would take the findings of the Model Law into account.

## IV. Conclusion

11. The Permanent Bureau invites the Council on General Affairs and Policy of the Conference to examine (i) whether the topic of civil liability for environmental damage should be limited to the question of the *applicable law*, particularly with a view to assessing the possibility of enacting at the global level the principle of the law that is more favourable for the injured party *(Günstigkeitsprinzip)*, and (ii) if, on that limited scope-basis, work should be undertaken in an attempt to develop a *non-binding instrument*. If the Council was to decide that work should be undertaken on the basis of this proposal, the Permanent Bureau would further suggest that an Experts Group be established; this Group should start its work during the next Financial Year. As regards necessary resources, the preparation and support of the work conducted by such an Experts Group would require (i) the continued direction by, and the involvement of, including the drafting skills, a senior lawyer, (ii) the assistance of a junior lawyer, and (iii) the assistance of one or more interns.

12. This proposal is obviously not intended to limit the possible decisions that the Council may take – the Council may of course also decide to keep the topic on the agenda in its current form, in any other revised form, or indeed to remove the topic altogether from the Conference's work programme. The primary purpose of the suggestion made in this Note is simply to open another path that seems both reasonable and worthwhile exploring.