BEYOND BORDERS, BEYOND CONTROL? EU PERSPECTIVES ON JURISDICTION AND CONFLICT OF LAWS IN NUCLEAR DAMAGE TRANSBOUNDARY CASES[1]

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Abstract: The current legal framework governing civil liability for nuclear damage may exhibit normative inconsistencies and interpretative ambiguities in the determination of international jurisdiction and the applicable law in cross-border disputes within the member states of the European Union. The aim of the article is to identify potential shortcomings in the legal framework governing civil liability for nuclear damage within the context of international private and procedural law, with a particular focus on two core issues: the determination of international jurisdiction and the subsequent identification of the applicable law governing the obligations arising from such liability. While jurisdiction, applicable law, and the recognition and enforcement of judgments in civil and commercial matters are largely governed by EU regulations, nuclear liability and safety remain substantially excluded from the ratione materiae of the Rome II regulation. Certain provisions of the 1963 Vienna Convention on Civil Liability for Nuclear Damage exhibit regulatory interplay with selected EU legal instruments, warranting a closer examination of their intersection and legal ramifications. The article further explores on the specific nature of newly defined heads of nuclear damage as a category of transboundary torts, emphasising their unique position at the intersection of public law, private international law, and domestic private law. Particular attention is devoted to the challenges associated with harmonising liability standards and procedural safeguards in Slovakia and, more broadly, across the member states of the European Union in cross-border contexts. The study critically examines the legal and institutional mechanisms underpinning the legitimacy of Slovakia's nuclear programme, with a specific focus on the 1997 Protocol and its potential to ensure an expanded scope of liability and compensation in the event of nuclear incidents.

Resumé: Současný právní rámec upravující občanskoprávní odpovědnost za jaderné škody může vykazovat normativní a interpretační nejasnosti při určování mezinárodní jurisdikce a rozhodného práva v přeshraničních sporech v rámci členských států Evropské unie. Cílem článku je identifikovat potenciální nedostatky v právním rámci upravujícím občanskoprávní odpovědnost za jaderné škody v kontextu mezinárodního práva soukromého a procesního, se zvláštním zaměřením na dvě klíčové otázky: určení mezinárodní jurisdikce a následné určení rozhodného práva upravujícího povinnosti vyplývající z takové odpovědnosti. Zatímco jurisdikce, rozhodné právo a uznávání a výkon rozsudků v občanských a obchodních věcech se z velké části řídí předpisy EU, jaderná odpovědnost a bezpečnost zůstávají v podstatě vyloučeny z věcné působnosti nařízení Řím II. Některá ustanovení Vídeňské úmluvy o občanskoprávní odpovědnosti za jaderné škody z roku 1963 vykazují regulační souhru s vybranými právními nástroji EU, což vyžaduje bližší zkoumání jejich průniku a právních důsledků. Článek se dále zabývá specifickou povahou nově definovaných kategorií jader-

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ných škod jako kategorie přeshraničních deliktů a zdůrazňuje jejich jedinečné postavení na průsečíku veřejného práva, mezinárodního práva soukromého a vnitrostátního práva soukromého. Zvláštní pozornost je věnována výzvám spojeným s harmonizací standardů odpovědnosti a procesních záruk na Slovensku a obecněji v členských státech Evropské unie v přeshraničním kontextu. Studie kriticky zkoumá právní a institucionální mechanismy, které jsou základem legitimity slovenského jaderného programu, se zvláštním zaměřením na Protokol z roku 1997 a jeho potenciál zajistit rozšířený rozsah odpovědnosti a odškodnění v případě jaderných nehod.

Key words: nuclear liability, applicable law, jurisdiction, international private and procedural law.

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Introduction

This article focuses on addressing key issues of international private and procedural law in the context of civil liability for nuclear damage with a cross-border dimension. Simultaneously, it seeks to identify potential solutions to the normative pluralism characterising the area under analysis and to provide a structured framework for navigating the complex web of interactions among the relevant sources of law.

> The historical origins of the legal framework governing liability for nuclear damage trace back to the 1960s when two parallel regimes emerged. The Vienna regime, embodied by the Vienna Convention on Civil Liability for Nuclear Damage (Vienna Convention)[2], stands as an open system with 'worldwide applicability' inviting all states to join without any limitations. On the other hand, the Paris regime, represented by the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960,[3] with subsequent amendments by the Additional Protocol of 28th January 1964 and the Protocol of 16th November 1982[4] (Paris Convention), is exclusively accessible to OECD member states.[5,6]

[2] The Vienna Convention on Civil Liability for Nuclear Damage was established on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA). [online].

[3] See also HANDRLICA, J. A new transnational regime for nuclear liability and compensation in Europe. In: *Czech Yearbook of Public and Private International Law*, 11, 2022, pp. 225–249.

[4] Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Protocol of 28th January 1964 and by the Protocol of 16th November 1982. [online].

[5] NOVOTNÁ, M., VARGA, P. The relation of the EU law and the nuclear liability legislation: Possibilities, limits and mutual interaction. In: *Societas et iurisprudentia*, 2014, No. 3, p. 97.

[6] NOVOTNÁ, M. Unravelling the Enigma of the Interplay between the Vienna Convention on Civil Liability for Nuclear Damage and EU Law on Jurisdiction and Applicable Law in Cross-Border Cases. In: *Czech Yearbook of Public & Private International Law,* 2023, Vol.14, pp. 331–344.

As experts explain, these parallel legal regimes, shaped by the specific historical context of the 1960s, an era marked by the nascent development of nuclear technology, early nuclear incidents, and an emerging international consensus on the necessity of codifying liability norms while simultaneously promoting the peaceful use of nuclear energy, laid the normative foundation for the subsequent evolution and harmonisation of the international nuclear liability framework.[7] Their coexistence offered distinct opportunities for states to engage in international agreements, tailored to their respective affiliations and aspirations.[8] The submitted article focuses on the European Union (EU or Union) and its member states, with a particular emphasis on the Slovak Republic. Some member states are part of the responsible system created by the Paris Convention, and these can be generalised as the developed states of Western Europe.[9] Simultaneously, in addition to this regime, a number of member states are part of the system created by the Vienna Convention,[10] particularly the new EU Member States, including the Slovak and Czech Republics.[11] Due to the delineation of the research question, this analysis will focus primarily on the Vienna Convention, however, the conclusions regarding the legal status of this treaty within the system of sources governing matters of international private and procedural law in the context of civil liability for nuclear damage with a transboundary character may, by analogy, be generalised to the legal position of the Paris Convention.

The core research question addressed herein lies in the observation that the current legal framework governing civil liability for nuclear damage may present normative inconsistencies and interpretative ambiguities, particularly in relation to the determination of international jurisdiction and the applicable law in cross-border disputes within the member states of the European Union. The primary objective of the article is to identify potential deficiencies within the legal regulation of civil liability for nuclear damage, assessed through the lens of international private and procedural law, with a particular emphasis on two foundational issues: the determination of international jurisdiction and the subsequent determination of the applicable law governing the non-contractual obligation. The scope of the research questions is limited to the legal environment of the European Union and its member states. Given the evolution and globalisation of international obligations, it can be reasonably anticipated that such legal relationships will increasingly transcend national borders, thereby activating the relevant sources of international private and procedural law. While it may initially appear that only select provisions of the Vienna Convention are applicable in this

[7] See HANDRLICA, J. The unbearable lightness of nuclear jurisprudence. In: *Journal of Energy and Natural Resources Law*, 39, 2021, p. 380, HANDRLICA, J. Mirage of Universalism in International Nuclear Liability Law: A Critical Assessment 10 Years after Fukushima. In: *Review of European, Comparative and International Environmental Law*, 30, 2021, pp. 375–386.

[8] NOVOTNÁ, M. Unravelling the Enigma of the Interplay between the Vienna Convention on Civil Liability for Nuclear Damage and EU Law on Jurisdiction and Applicable Law in Cross-Border Cases. In: *Czech Yearbook of Public & Private International Law,* 2023, Vol.14, pp. 331–344.

[9] Paris Convention: Latest status of ratifications or accessions. [online]. Available at: https://www.oecd-nea.org/jcms/pl_31798/paris-convention-latest-status-of-ratifications-or-accession .

[10] Vienna Convention: Latest status of ratifications or accessions. [online]. Available at: https://www.iaea.org/sites/default/files/24/03/63_vc_status.pdf .

[11] HANDRLICA, J., NOVOTNÁ, M. Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963 [European Union and Protocol from 1997, which supplements the Vienna Convention on Civil Liability for Nuclear Damage from 1963]. In: *Justičná revue*, 66, 2014, No. 2, pp. 252–268.

area, thus posing no significant interpretative or practical difficulties, a partial aim of this study is to confront the normative pluralism inherent in the subject matter. This pluralism manifests in the coexistence of legal rules contained in international conventions, fragmented across the Vienna and Paris regimes, supplemented by EU Regulations, as well as the national legal frameworks of member states, to which certain states may resort with greater procedural ease than others. It is precisely these disparities that this article seeks to highlight, while also clarifying the practical application of the relevant provisions and identifying those legal norms that hold precedence in the interpretative and applicative hierarchy. A partial objective of this article is to identify and analyse the principal interpretative and applicative challenges posed by the existing regulatory framework in this area.

1. The Vienna Convention and Its Protocols: Normative Foundations and the Interrelation of International Liability Regimes

Prior to an examination of the intersection between the international private and procedural law regimes in matters of civil liability for nuclear damages, it is necessary to address the interrelationship between the legal regimes contained in the Vienna and Paris Conventions. The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (Joint Protocol) was conceived as an instrument to establish treaty-based interconnectivity between the respective legal orders of these Conventions. Its principal function is to harmonise the application of these two distinct yet functionally analogous liability regimes and to obviate the emergence of legal uncertainty or normative conflict in cases where both Conventions might otherwise simultaneously govern the same nuclear incident. In line with this purpose, eligibility to accede to the Joint Protocol is expressly confined to states that are already contracting parties to either the Vienna or the Paris Convention.[12] The interrelationship is addressed in Article III of the Joint Protocol, which states that cumulative application to a single incident is excluded and that 'in the case of a nuclear incident occurring in a nuclear installation, the applicable Convention shall be that to which the State is a Party within whose territory that installation is situated.'[13] The last paragraph adds conflict resolution in the event of a nuclear incident outside a nuclear installation.[14] It may be asserted that the adoption of the Joint Protocol significantly enhanced the foreseeability and legal certainty of the respective liability regimes, particularly in terms of their practical applicability in cases involving transboundary nuclear damage. Such cross-border scenarios inevitably trigger the application of provisions of international private and procedural law, which constitute the core subject of the present article.

The Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage of 1997 (1997 Vienna Protocol) has also had a certain degree of impact on the area under analysis. This Protocol was adopted with the intention of effecting substantial amendments to the Vienna Convention on, in order to broaden its scope of application, increase the

[12] Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. [online]. Available at: https://www.iaea.org/sites/default/files/infcirc402.pdf .

[13] Art. III (1)(2) of the Joint Protocol.

[14] Art III (3) of the Joint Protocol: 'In the case of a nuclear incident outside a nuclear installation and involving nuclear material in the course of carriage, the applicable Convention shall be that to which the State is a Party within whose territory the nuclear installation is situated whose operator is liable pursuant to either Article II.1(b) and (c) of the Vienna Convention or Article 4(a) and (b) of the Paris Convention.'

liability limits imposed upon the operator of a nuclear installation, and strengthen the legal and financial mechanisms available to ensure adequate, equitable, and effective compensation for nuclear damage. Its provisions reflect a concerted effort to modernise the regime of civil liability in accordance with contemporary standards of risk allocation and victim protection.[15] However, a review of the official status table[16] indicates that, to date, the Protocol counts only 17 states as its contracting parties. Regrettably, neither the Slovak Republic nor the Czech Republic are among them, which underscores a significant gap in the regional alignment with this updated and internationally endorsed liability regime. From the perspective of legitimising the Slovak Republic's nuclear programme, it must be acknowledged that the current posture may give rise to concerns regarding the extent to which the programme inspires confidence within the international community as being transparent, safe, and responsibly governed. Furthermore, by refraining from acceding to this legal instrument, Slovakia has, in effect, declined to avail itself to an institutionalised mechanism for the mitigation of legal and political risks, particularly in the event of a transboundary nuclear incident. The intricate and, at times, thankless challenges that may arise in the practical application of relevant provisions of private international and procedural law will become apparent in the analysis that follows, particularly at those points where the examined provisions reveal their full conceptual and interpretative complexity.

2. Jurisdiction in Cross-Border Civil Nuclear Liability: Doctrinal and Normative Considerations

As previously noted, the key harmonised legal framework at the international level is embodied in the coexisting regimes of the Vienna and Paris Conventions. One of the objectives of this article is to examine how these regimes respond to fundamental questions of international private and procedural law in the context of claims arising from civil liability for nuclear damage, namely, the determination of international jurisdiction and the determination of the applicable law. This necessarily places us within the legal domain of private-law relationships with a foreign element, transcending the territorial boundaries of a single state. Given the complexity of the subject matter, the scope of the present analysis has been deliberately narrowed to the perspective of the EU and its member states, with a particular focus on the Slovak Republic. The normative pluralism inherent in the regulation of civil liability for nuclear damage under international treaty law is, within the EU context, further complemented by Union instruments adopted under the framework of judicial cooperation in civil and commercial matters, as well as by the domestic rules of international private and procedural law applicable within individual member states.

The central doctrinal challenge lies in identifying and analysing the interrelationship between these various normative sources, whose scope of application may, and often does, operate cumulatively within a single case. From our perspective, it would be desirable, *pro futuro,* to extend the applicability of the regime established by the aforementioned international Conventions also to the legal order of the European Union. The transfer of

[15] IAEA. Vienna Convention on Civil Liability for Nuclear Damage. [online]. Available at: https://www.iaea.org/topics/nuclear-liability-conventions/vienna-convention-on-civil-liability-for-nuclear-damage .

[16] Status table, Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. [online]. Available at: https://www.iaea.org/sites/default/files/23/09/protamend_status.pdf .

competence in the field of international private and procedural law to the Union, and the subsequent exercise of such competence internally, necessitates a corresponding reflection of this authority in the Union's external competence as well.[17] This alignment is to be achieved through the doctrine of AETR and the principle of complementarity.[18] In doctrinal discourse, some scholars have argued for the recognition of a parallel whereby the exercise of internal competence may be transposed into external action, thereby reinforcing the EU's capacity to act on the international plane in this domain.[19] In instances where the Union adopts provisions with the aim of harmonising a policy under the Treaties, member states forfeit the right to enter into contractual obligations with third countries in that particular area, which could have consequences for Union rules.[20] It follows that even in the absence of explicit conferral of exclusive competence to the Union in a particular area, the conclusion of treaties in that area is permissible, provided that complete harmonisation has been achieved.[21] An illustrative example can be found in the harmonisation of jurisdictional matters within the Brussels regime,[22] which demonstrates that the European Union should, by virtue of its internal competence, also be vested with the external competence to assume international obligations in this field vis-à-vis third countries. Such obligations, once undertaken by the Union *per se*, would consequently bind the member states by virtue of the Union's accession to the respective international convention.[23, 24]

However, this brings us to several legal challenges. The first pertains to the fact that certain member states are contracting parties to the Vienna Convention, others to the Paris Convention, while some are not part of any international nuclear liability regime at all. This diversity may, in practice, generate complications should the European Union decide to accede to one of these regimes. Nevertheless, recognising that this is a matter falling within the Union's competence, the Union, for this purpose, authorises the member states and, in effect, delegates that competence back to them in order to enable their accession to the relevant international treaties. This, naturally, concerns the accession of a member state following its accession to the EU, as international treaties concluded by member states

17 EECKHOUT, P. 2004. *External relations of the European union – legal and constitutional foundations.* New York: Oxford University Press, 2004. s. 135. ISBN 978-0-19-925165-0.

18 Judgment of 31 March 1971, *Commission v Council*, C-22/70, EU:C:1971:32.

19 CONWAY, G. 2015. *EU law.* New York: Routledge, 2015. s. 277. ISBN 978-0-415-81631-1.

20 Judgment of 31 March 1971, *Commission v Council*, C-22/70, EU:C:1971:32.

21 Opinion of the Court of 15 November 1994, *Accords annexés à l'accord OMC*, 1/94, EU:C:1994:384, para 96.

22 Currently in the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *(OJ L 351, 20.12.2012, pp. 1–32)* (the Brussels I bis Regulation).

23 See: Judgment of the Court of 16 June 1998, *Hermès International v FHT Marketing Choice*, C-53/96, EU:C:1998:292.

24 It is for this reason that also Council decision authorising certain member states to ratify, or to accede to, the Protocol amending the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 , in the interest of the European Union, and to make a declaration on the application of the relevant internal rules of Union law *(OJ L 220, 17.8.2013, s. 1 – 2)* states: 'The Union has exclusive competence with regard to Articles XI and XII of the Vienna Convention as amended by the 1997 Protocol in so far as those provisions affect the rules laid down in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1). Regulation (EC) No 44/2001 is to be replaced as of 10 January 2015 by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters…'

prior to their accession to the Union are subject to a distinct and separate legal regime.[25] An example of such a retroactive transfer of competence to member states is the aforementioned Council decision authorising certain member states to ratify, or to accede to, the Protocol amending the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 , in the interest of the European Union, and to make a declaration on the application of the relevant internal rules of Union law. Among the member states authorised by the EU in this manner is the Slovak Republic, which, as previously noted, has to date not exercised this competence and has not acceded to the Protocol in question. At the same time, the relevant international treaties presuppose that only states, as original subjects of public international law, may become contracting parties, and do not permit accession by a regional economic integration organisation. Based on the foregoing, it cannot be assumed that any alteration to the *status quo* is envisaged with respect to the existing normative pluralism in the area under analysis. The analysis of the interrelationship between the sources governing matters of international private and procedural law within the member states of the EU necessitates a structured exposition of the respective legal regimes. For the purposes of this article, the focus will be placed exclusively on the Vienna Convention, as it constitutes the relevant international framework for both the Slovak Republic and the Czech Republic. However, from the perspective of the interaction of legal sources, comparable conclusions may be drawn with respect to the Paris Convention in relation to those member states that are parties to that regime.

The Vienna Convention addresses the question of jurisdiction, applicable law, as well as the question of recognition and enforcement. In this particular instance, the 1997 Protocol can be disregarded, as neither the Slovak Republic nor the Czech Republic is bound by it. The Vienna Convention is the governing legal instrument in this regard, with Article XI specifically addressing the matter of jurisdiction. This Article provides that the courts of the contracting party which is the location of a nuclear incident shall have exclusive jurisdiction to adjudicate such disputes, a power that is further reinforced by the use of the term "only".[26] The second paragraph of this Article adds: '2. Where the nuclear incident occurred outside the territory of any contracting party, or where the place of the nuclear incident cannot be determined with certainty, jurisdiction over such actions shall lie with the courts of the installation state of the operator liable.'[27] Regarding the second paragraph, we would like to add a caveat that the official translation of the Convention into the Slovak language has made a mistake in this respect, when paragraph 2 of the Article in question refers confusingly to the applicable law instead of jurisdiction;[28] the Czech translation of the Convention is correct in this respect. Should there be competing jurisdiction in the courts of more than one contracting party, the third paragraph deals with the determination of jurisdiction in these situations.[29] The Treaty employs a specific terminology, the meaning of which is clarified within the text of

[25] See Art. 351(1) of the Consolidated version of the Treaty on the Functioning of the European Union *(OJ C 326, 26.10.2012, pp. 47–390)* (TFEU).

[26] Art. XI (1) of the Vienna Convention.

[27] Art. XI (2) of the Vienna Convention.

[28] Oznámenie č. 70/1996 Z. z. Oznámenie Ministerstva zahraničných vecí Slovenskej republiky o pristúpení Slovenskej republiky k Viedenskému dohovoru o občianskoprávnej zodpovednosti za škody spôsobené jadrovou udalosťou. [Announcement of the Ministry of Foreign Affairs of the Slovak Republic on the accession of the Slovak Republic to the Vienna Convention on Civil Liability for Damage Caused by a Nuclear Incident]

[29] Art. XI (3) of the Vienna Convention.

the instrument itself. From the standpoint of general legal doctrine, it must be emphasised that the treaty in question may confer jurisdiction solely upon the courts of its contracting parties. As non-contracting states are not bound *ex conventione*, the Treaty cannot impose any obligation upon their judicial authorities to adjudicate matters falling under its scope. This gives rise to a primary practical difficulty inherent in the current regulatory framework, the risk of *forum shopping* in non-contracting states. In such jurisdictions, which are not bound by the Treaty and, in the case of third countries outside the European Union, are not subject to a harmonised supranational regime, the applicable rules governing international jurisdiction are typically derived from domestic international private and procedural law. These domestic rules may be based on entirely different jurisdictional connecting factors (*forum loci delicti, forum domicilii,* etc.), thereby enabling claimants to seek out more favourable forums based on divergent standards.

Numerous authors have cited the Fukushima Daiichi accident as a model example illustrating that nuclear installation operators may harbour legitimate concerns about being subjected to litigation before the courts of a foreign jurisdiction. In the case at hand, plaintiffs opted for a U.S. forum for a variety of reasons, including the perceived procedural and substantive advantages conferred by the applicable *lex fori*. These advantages may include the availability of punitive damages, higher compensatory awards, potentially broader liability thresholds, and other claimant-favourable procedural mechanisms. With respect to the Fukushima incident specifically, the U.S. courts accepted jurisdiction over the claims. This was possible primarily because, at the time, no bilateral treaty or international agreement establishing mutual rules on jurisdiction over nuclear damage existed between the United States and Japan. The absence of a harmonised legal framework on international jurisdiction in such cases effectively enabled *forum shopping*, particularly in instances involving transboundary harm. As noted by Mr. Omer F. Brown, U.S. courts have demonstrated a willingness to assert jurisdiction over nuclear incidents that occurred outside the territorial jurisdiction of the United States and that did not produce any direct damage on U.S. soil.[30] Ulrich Magnus rightly observes that one of the core objectives of international nuclear liability regimes is to attract the participation of non-nuclear states, thereby dissuading them from establishing unilateral domestic liability frameworks that could, in turn, facilitate *forum shopping*. This phenomenon is intrinsically linked to the subsequent recognition and enforcement of foreign judgments, and specifically to the potential invocation of the *ordre public* exception as a defence mechanism. In this regard, Magnus argues that, in the interest of ensuring prompt compensation for victims, the use of alternative dispute resolution mechanisms offers a number of advantages, the most prominent of which is undoubtedly the speed and efficiency of proceedings.[31]

In cases that do not fall under the regime of multipartite conventions or bilateral extra-union treaties of member states in a special regime, the Brussels I bis Regulation, as the general rule for determining jurisdiction in civil and commercial matters within the EU, does not exclude from its *ratione materiae* the Civil Liability for Nuclear Damage. The reason

[30] BROWN, O.F. In: OECD 2024 NEA No. 7429. *Third International Workshop on the Indemnification of Damage in the Event of a Nuclear Accident*. Workshop Proceedings Bratislava, Slovak Republic 18-20 October 2017. [online]. Available at: https://www.ujd.gov.sk/wp-content/uploads/2024/02/7429-Bratislava-Report.pdf?utm_source=chatgpt.com .

[31] MAGNUS, U. In: Ibid.

which weakens its applicability in these cases is that the Regulation itself, in Article 71(1), gives primacy of application to the aforementioned Conventions: '1. This Regulation shall not affect any conventions to which the member states are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.'[32] It is precisely in this context that the aforementioned conventions may be classified as addressing particular matters. Indeed, the Jenard Report on the original Brussels Convention explicitly lists, among the treaties to be accorded priority of application, the Paris Convention as an illustrative example within this category.[33] This application preference can also be applied as a *lex specialis* rule in relation to multipartite conventions in those cases where the Union *per se* is a contracting party, which, as we have already mentioned, is not possible in the current state of the convention regimes.

A problematic aspect of the application of the Brussels regime to member states that are not party to the Conventions may be the fact that the personal scope of the Regulation is limited to a defendant domiciled in the EU. In the non-contractual relationship under scrutiny, the establishment of jurisdiction would be predicated on the general rule delineated in Article 4, which stipulates the defendant's domicile as the determining factor. Alternatively, the specific jurisdiction delineated in Article 7(2) could be invoked, as it stipulates that, in the context of non-contractual obligations 'a person domiciled in a Member State may be sued in another Member State… (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.[34] Although the criterion of jurisdiction may appear at first sight to be determined in a similar way to that of the Vienna Convention, the Court of Justice of the EU interprets this provision more broadly. It states that the purpose of the criterion is not to provide protection to the weaker party,[35] and that

> in the case where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' … must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant may be sued, at the option of the claimant, in the courts for either of those places…[36]

Interpreting this provision through the lens of the case law of the Court of Justice, it may be argued that the grounds for establishing jurisdiction under Brussels I bis Regulation are, in comparison with the Vienna Convention, considerably broader. Attention should also be drawn to the possibility of the defendant's appearance before the court pursuant to Article 26 of the Brussels I bis Regulation. However, the applicability of this provision is strictly contingent upon the fulfilment of the Regulation's personal scope of application, accordingly, Article 26 cannot be invoked in proceedings against a defendant who is not domiciled within the European Union.[37]

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[32] Art. 71(1) of the Brussels I bis Regulation.

[33] Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (*OJ C 59, 5.3.1979, pp. 1 – 65).*

[34] Art. 7 (2) of the Brussels I bis Regulation.

[35] Judgment of 25 October 2012, *Folien Fischer and Fofitec*, C133/11, EU:C:2012:664, para. 46.

[36] Judgment of 16 January 2014, *Kainz*, C-45/13, EU:C:2014:7, para. 23.

[37] Art. 6 of the Brussels I bis Regulation.

Therefore, in addition to the application of the Brussels I bis Regulation, the application of national rules of international private and procedural law is also an option for member states that are not bound by the Paris or Vienna Convention regimes in those cases that fall outside the scope of the Brussels I bis Regulation, which can be assumed in relation to defendants domiciled outside the EU. In such a case, the scope of the Brussels I bis Regulation would not be fulfilled and a court of a member state not bound by an international treaty, with the impossibility of fulfilling the scope of the Brussels I bis Regulation, could resort to national legislation and establish jurisdiction based on its own rules.[38] Note, however, that there may be a question of subsequent recognition and enforcement of the decision in such a non-member state.

In concluding the section dedicated to jurisdiction, the appropriate procedural approach for EU Member States may be outlined as follows. Where a member state is a contracting party to either the Vienna or Paris Convention, the rules on jurisdiction contained in those instruments should be applied with priority, irrespective of any jurisdictional bases that may be available under Brussels I bis Regulation. For other member states that are not bound by either of these conventions, or in cases falling outside the *ratione materiae* of the Conventions, the jurisdictional regime under Brussels I bis shall apply, provided that the conditions for its applicability, most notably its personal scope, are fulfilled. Where such applicability is not established, particularly due to the lack of domicile of the defendant within the EU, member states may fall back on their national rules of international private and procedural law procedure to determine jurisdiction. We allow ourselves a degree of critical reflection in this regard. The multiplicity of applicable regimes governing jurisdictional matters across the member states, whether of international, Union, or purely domestic origin, results in a fragmented and inconsistent legal landscape. In light of this, it would be highly desirable for all EU Member States to accede to one of the two international conventions relevant to the area under analysis. Such accession would contribute not only to greater predictability and legal certainty within the European Area of Justice, but also to the partial unification of jurisdictional rules at the Union level in a field that is already complicated by the coexistence of two overlapping international regimes.

3. The Applicable Law Puzzle in Transboundary Nuclear Damage Cases

The determination of the applicable law to govern the question of civil liability for nuclear damages is, like the question of jurisdiction, contained in the international regimes mentioned above. This issue is addressed in the provision of Article VIII of the Vienna Convention, which provides: 'Subject to the provisions of this Convention, the nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court.'[39] This provision essentially incorporates a reference to the application of the *lex fori*, that is, the law of the court seized of the matter, whose jurisdiction is established in accordance with the above-mentioned rules set forth in the Convention. The reference to the *lex fori* may be viewed favourably in that it has the potential to expedite proceedings, as the forum court is relieved from the burden of having to ascertain and apply foreign law, applying instead the legal system with which it is inherently familiar. Another

[38] Art. 6 of the Brussels I bis Regulation.
[39] Article VIII of the Vienna Convention.

advantage lies in the elimination of the need to enforce *lex fori* overriding mandatory rules, which, under certain conditions, might otherwise be triggered where foreign law applies. In this context, the forum's own law applies in its entirety, thereby ensuring procedural efficiency and predictability. A further benefit is that a substantial number of substantive provisions applicable to civil liability for nuclear damage are expressly contained within the Convention itself. As such, there is no need to refer to the forum's applicable substantive law for these matters, since the Vienna Convention, by which the forum state is bound, directly governs these issues. In this regard, Articles II to VII of the Convention 'make the operator of a nuclear installation liable for nuclear damage in certain circumstances and subject to certain limits, and provide for insurance.'[40]

A minor drawback of the current choice-of-law framework may lie in the potential necessity to give effect to an overriding mandatory provision that is different from the *lex fori* or *lex causae*, in cases where the application of such an absolute mandatory norm from another legal system is required in order to safeguard compelling public interests. Certain scholars identify environmental norms as falling within the category of overriding mandatory rules, given their capacity to satisfy the criterion of public interest protection. This particularly includes rules governing liability for nuclear damage, provisions that quantify compensation for environmental harm, as well as statutory requirements concerning compulsory insurance.[41] In our view, it is not a necessary condition that the overriding mandatory provision in question be directly and narrowly connected to the event itself in order to justify its application; rather, its enforcement may be warranted where the legal system from which it emanates demonstrates a sufficiently close connection to the case. Under the regime of the Vienna Convention, the applicable law is the *lex fori*, and the Convention's jurisdictional rules do not permit a forum to assume competence unless a genuine link exists between the forum state and the incident.

On this basis, we find room for critical reflection regarding the extent to which foreign overriding mandatory rules may be taken into account. Drawing inspiration from the jurisprudence of the Court of Justice of the European Union, we propose that such rules should not be applied *per se,* but rather considered as factual elements, provided that the scope of application scope of the foreign norm is satisfied and that there exists a sufficiently close connection between the case and the legal order from which the mandatory rule originates. Outside the framework of international conventions, the interaction between legal systems may be expected to operate with greater intensity, as the absence of a unified international regime creates fertile ground for *forum shopping*. In such instances, overriding mandatory provisions may function as a barrier through which the forum court can obstruct access to a more favourable legal regime for the parties responsible for the incident. It is also necessary to clearly define the scope of application of the applicable law. This scope is indicated directly in the quoted Article, while some other Articles further supplement this scope, e.g., by referring to the limits of setting the period of extinction or prescription and the application of the applicable law to these issues. Notwithstanding the above, there are still a number of issues where it is not entirely clear whether the applicable law determined under the Convention will apply. For example, the Convention does not mention whether

[40] DICKINSON, A. *The Rome II Regulation. The law applicable to non-contractual obligations.* New York: Oxford University Press, 2008, p. 231.

[41] FACH GOMEZ, K. Law applicable to cross— border environmental damage: from the European autonomous systems to Rome II. In: *Swiss Yearbook of Private International Law,* 2004, pp. 291–318.

the *lex fori* will apply equally to the question of capacity to incur liability in delict in the area of so-called personal status or whether the court will apply a different criterion in the event of a conflict there.

The plurality of legal sources governing the applicable law in matters of civil liability for nuclear damage is narrower than in the case of jurisdiction, primarily due to the express exclusion of this subject matter from the *ratione materiae* of the general Union instrument for determining the applicable law in non-contractual obligations in civil and commercial matters, namely the Rome II Regulation.[42]

> This exclusion is explained by the importance of the economic and State interests at stake and the Member States' contribution to measures to compensate for nuclear damage in the international scheme of nuclear liability established by the Paris Convention of 29 July 1960 and the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997 and the Protocol of 21 September 1988.[43]

Some authors have noted that the exclusion of this subject matter from the uniform conflict-of-law rules at the level of EU law may create *opportunities* for states that are not bound by the relevant international conventions to formulate domestic choice-of-law rules in a manner that, whether deliberately or not, privileges the domestic nuclear industry or, conversely, unduly restricts and overregulates foreign operators.[44]

A. Dickinson aptly highlights the potential practical difficulties associated with the application of Article 1(2)(f) of the Regulation, which excludes from its material scope non-contractual obligations arising out of nuclear damage.[45] Magnus further observes that the underlying *ratio legis* suggests that Article 1(2)(f) was drafted in an extensive manner, thereby excluding from the scope of Rome II certain important issues that are not, in practice, comprehensively addressed by the relevant international conventions. Notably, this includes claims for protection against ionising radiation, which remain excluded from the Regulation notwithstanding the absence of adequate treaty-based regulation.[46]

As an illustrative example, we refer to the well-known case of *ČEZ*, adjudicated by the Austrian courts. The dispute concerned alleged interference caused by ionising radiation emitted from a nuclear power plant located in the Czech Republic, which, unlike Austria, is a contracting party to the Vienna Convention. The claimant was an Austrian province, acting in its capacity as owner of the affected land.[47] The legal issue under consideration was whether such a claim falls within the material exclusion set out in Article 1(2)(f) of the Rome II Regulation, even in circumstances where the relevant international regime is inapplicable. In this regard, A. Dickinson rightly points out that states which are not parties

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42 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 *(OJ L 199, 31/07/2007, pp. 40–49)* (the Rome II Regulation).

43 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (ROME II) COM(2003) 427 final, 2003/0168 (COD).

44 MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPIL. Commentary. Rome II Regulation.* Köln: Sellier. European Law Publishers, 2019, p. 114.

45 Art. 1(2)(f) of the Rome II Regulation.

46 MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPIL. Commentary. Rome II Regulation.* Köln: Sellier. European Law Publishers, 2019, p. 114.

47 Judgment of 18 May 2006, *ČEZ*, C-343/04, EU:C:2006:330.

to the Conventions cannot be presumed to attribute less significance to their public and economic interests than those states that are bound by the international instruments.[48]

In the aforementioned *ČEZ* case, the Court of Justice also addressed a qualification issue, specifically whether, for the purposes of the Brussels regime on jurisdiction, the proceedings could be characterised as relating to rights *in rem* in immovable property.[49] The relevance of this question lies in the fact that, if such an interpretation were accepted, then pursuant to Article 24(1) of the Brussels I bis Regulation, exclusive jurisdiction would lie with the courts of the member state in which the property is situated. The Schlosser Report confirms that actions for damages based on the infringement of rights *in rem* or damage to property subject to such rights do not fall within the scope of this Article, as the existence and content of rights in rem, typically ownership, are only marginally relevant in this context.[50] In light of established case law and the interpretation provided in the Jenard Report, it was, in our view, unsurprising that the Court of Justice in this case excluded the possibility of qualifying the situation, for the purposes of the Brussels regime, as involving a right *in rem* in immovable property.[51, 52]

We concur with the interpretative approach that

> [I]t is submitted that the better view is that a wide, independent meaning should be given to the concept of 'nuclear damage', consistently with the developments in the 1997 and 2004 Protocols referred to above and with the broad meaning given to 'damage' in Art 2(1) of the Regulation. It should extend, therefore, to claims for environmental and economic damage suffered as a consequence of a nuclear accident.[53]

Such an interpretation also reflects an evolutive approach and acknowledges the autonomous character of legal terms as inherent to the treaties themselves. However, this interpretative extension leads to the exclusion from the scope of the Regulation of a wide array of issues involving any damage directly caused by a nuclear installation. This may include, for instance, the release of radioactivity into the environment, air, or water, liability arising from the use of radioisotopes by medical professionals or hospitals, or an accident involving

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48 DICKINSON, A. *The Rome II Regulation. The law applicable to non-contractual obligations.* New York: Oxford University Press, 2008, p. 233.

49 Judgment of 18 May 2006, *ČEZ*, C-343/04, EU:C:2006:330, para. 19.

50 Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (*OJ C 59, 5.3.1979, s. 71 – 151), para.* 163.

51 Interpretation of the provision which is today the content of Article 24 (1) of the Brussels I bis Regulation: 'Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code) in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.' (Judgment of 18 May 2006, *ČEZ*, C-343/04, EU:C:2006:330).

52 Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (*OJ C 59, 5.3.1979, pp. 1 – 65).*

53 DICKINSON, A. *The Rome II Regulation. The law applicable to non-contractual obligations.* New York: Oxford University Press, 2008, pp. 233-234.

a vehicle transporting nuclear material. Nevertheless, Magnus raises an important nuance in this regard, suggesting that, for example, inadequate medical treatment administered in the aftermath of a nuclear event might qualify as a *causa superveniens* and therefore fall outside the immediate exclusion linked to the nuclear origin of the harm.[54] Equally contentious may be the question of the degree of indirectness in, for example, injuries sustained by protesters at the hands of security personnel or police guarding a nuclear power plant.[55] However, we are inclined to adopt the position that such a claim would not be sufficiently connected to nuclear damage and, as a result, should not fall within the exclusion set out in Article 1(2)(f) of the Rome II Regulation.

If we trace the path of a teleological interpretation of this exclusion, it becomes apparent that the Commission's intention was, indeed, to safeguard the integrity of the international nuclear liability regime enshrined in the relevant Conventions.[56] In contemplating the rationale behind this approach, one cannot ignore the fact that a substantial portion of the substantive rules applicable to nuclear damage is directly embedded within the Treaties themselves and, as such, apply with priority over any domestic or otherwise applicable law. This suggests that a harmonised conflict-of-law framework may have been viewed, perhaps not unreasonably, as somewhat redundant. Yet, this presumption encounters resistance when one considers that a number of states have not acceded to the 1997 Protocol, leaving the definition of "nuclear damage" under the original Vienna Convention considerably narrow. Thus, in cases where damage results from a nuclear incident but falls outside the narrowly circumscribed material scope of the Convention, due to the absence of the Protocol's extended definition, the Convention would, by its own terms, be inapplicable. Could the Rome II Regulation then step in to resolve the question of applicable law? Arguably not. On the basis of the foregoing, one could infer a broad reading of the exclusion laid down in Article 1(2)(f), which may effectively bar recourse to Rome II even in such lacunae. This, in turn, raises the legitimate question of whether a general priority clause in favour of international agreements of this nature, such as that codified in Article 28 of the Rome II Regulation, might not have been sufficient in and of itself, without the need for a categorical exclusion of nuclear damage claims from the Regulation's material scope.[57] The boundary of the interpretation of the provision in question is in the hands of the Court of Justice, where we would like to encourage the national judicial authorities not to hesitate to refer a question for a preliminary ruling under Article 267 TFEU in order to clarify the content of this provision.

The potential interpretative and practical difficulties associated with the Rome II Regulation on matters of civil liability for nuclear damage do not alter the fundamental fact that such matters are, as a rule, excluded from the Regulation's scope of application, irrespective of whether the exclusion is construed broadly or narrowly. This lack of a harmonised conflict-of-law regime within the Union *acquis* results in a legal landscape where member states either determine the applicable law on the basis of international conventions or rely on their

54 MAGNUS, U., MANKONWSKI, P. *European Commentaries on Private International Law ECPIL. Commentary. Rome II Regulation.* Köln: Sellier. European Law Publishers, 2019, p. 114.

55 Ibid.

56 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (ROME II) COM(2003) 427 final, 2003/0168 (COD).

57 Art. 28(1) of the Rome II Regulation: '1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.'

respective national conflict rules. This legal reality leads to a significant degree of divergence in conflict-of-law approaches among member states, despite the overarching objective of the progressive convergence of legal systems within the European Union. In light of the evolution of the field and the practical implications of this normative gap, we consider it both desirable and necessary to reflect upon the possible adoption of a conflict-of-law instrument that would be uniformly applicable across the member states, whether by means of a Union-level legislative measure or through the potential accession to an international convention. Once again, we are led to the conclusion that a common regime governing the determination of the applicable law, be it within the framework of the two interlinked Conventions or by way of a Union instrument, is not merely preferable but a normative imperative.

Conclusion

From the perspective of public international law, civil liability for nuclear damage is governed primarily by two key multilateral treaty regimes, namely the Vienna Convention and the Paris Convention, both of which have been supplemented by a series of amending protocols. Given that the present article focuses on the legal context of the Slovak Republic and, to a particular extent, the member states of the European Union more generally, the analysis is centred on the Vienna regime, to which both the Slovak Republic and the Czech Republic are contracting parties. The key instrument amending the Vienna Convention is the 1997 Protocol, which introduced a number of substantive modifications to the original regime. However, the Slovak Republic has not acceded to this Protocol, thereby effectively obstructing the path to a legal framework that would reflect the evolutionary developments in the field of nuclear liability. Among the most significant innovations introduced by the 1997 Protocol are the expansion of the Convention's scope of application, the increase of liability limits imposed on nuclear installation, and the strengthening of legal and financial mechanisms aimed at ensuring adequate, equitable, and effective compensation for nuclear damage. It is our position that, in order to demonstrate the Slovak Republic's commitment to subjecting its nuclear programme to international legal oversight, thus enhancing transparency, responsibility, and accountability, it would be desirable and legally coherent for the Slovak Republic to accede to the 1997 Protocol.

The failure to accede to the 1997 Protocol has implications that extend beyond the substantive liability regime and into the field of international private and procedural law. A partial objective of this article is to address, within the specific legal context of the Slovak Republic and EU Member States, two fundamental questions of international private and procedural law arising in the context of civil liability for nuclear damage with a cross-border dimension, namely, the determination of jurisdiction and the determination of the applicable law. As outlined in this article, these issues are governed by a complex constellation of legal sources, international conventions, relevant provisions of the EU *acquis*, and the national private international law frameworks of individual member states. Navigating this normative plurality presents significant interpretative and applicative challenges, especially given that the interaction between legal sources varies depending on whether a member state is a party to one of the relevant international regimes.

Naturally, the overall coherence of the legal landscape would benefit from broader participation of member states in these international treaty frameworks. Within EU law,

jurisdictional matters are regulated by the Brussels I bis Regulation, while choice-of-law rules are primarily governed by the Rome II Regulation. However, the latter expressly excludes nuclear liability from its *ratione materiae*, precisely to leave room for the application of relevant international conventions. This exclusion, however, raises multiple interpretative questions. For instance, if a member state fails to accede to the Protocol that expands the definition of nuclear damage beyond that provided in the original Vienna Convention, such cases may fall outside both the scope of the Convention and, cumulatively, of the Rome II Regulation. As a result, the national private international law of the forum state becomes applicable, analogous to the legal situation in states that are not parties to any international nuclear liability regime.

This situation raises a fundamental question: Is such a state of legal plurality and fragmentation in the field of international private and procedural law, with respect to civil liability for nuclear damage, sustainable in the long term? We submit that, in light of the current status of Treaty ratifications and protocol accessions across EU Member States, it is imperative that the European Union exercise its competence also in the field of conflict-of-law rules governing non-contractual obligations arising from nuclear damage.