Environmental Law Center

UN ECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters

Commentary

Magdalena Bar

Wrocław 2003

Copyright © 2003 Centrum Prawa Ekologicznego

ul. Uniwersytecka 1, 50-951 Wrocław
tel.: (+48 71) 34 366 95, fax: (+48 71) 34 101 97
e-mail: cpe@eko.wroc.pl
http://cpe.eko.org.pl

This project is supported by a grant from the Regional Environmental Center for Central and Eastern Europe (REC), funded by the Norwegian Royal Ministry of Foreign Affair.

The opinions expressed in connection with this publication do not necessarily represent the policies or opinions of the REC. The REC assumes no liability, expressed or implied, arising out of the activities of any of its grantees.

TABLE OF CONTENTS

Introduction

The Origin of the Protocol and the Negotiation Process

The text of the Protocol with a commentary

Bibliography

Author

Information on the Environmental Law Center

1. Introduction

The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters of the United Nations European Commission for Europe (UNECE) was signed on 21 May 2003 in the course of the fifth Ministerial Conference "Environment for Europe", held in Kiev (Ukraine)[1]. On that day the Protocol was signed by 21 countries: Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Portugal, Romania, Sweden, Ukraine and United Kingdom.

Poland, which signed it on 13 June 2003, was the 22nd signatory of the Protocol[2].

The Protocol on Civil Liability is insomuch uncommon as it was developed as a Protocol to two UNECE Conventions at the same time: the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (ratified by Poland and published in the Official Journal of 2003, No. 78, Item 702) and the Convention on the Transboundary Effects of Industrial Accidents of 1992 (signed by Poland and now (November 2003) in the course of the ratification process).

Until 31 December 2003 the Protocol is open for signature at United Nations Headquarters in New York. The following entities have the right to sign it: States members of the Economic Commission for Europe, States having consultative status with the Economic Commission for Europe and regional economic integration organizations to which their member States have transferred competence in respect of matters governed by the Protocol (such an organisation is e.g. the European Community).

However, only those of the aforementioned States and organisations that are Parties to at least one original Convention (on Industrial Accidents or on Transboundary Watercourses) may ratify the Protocol (become a Party to it).

The Protocol will enter into force on the 90th day after its ratification by the 16th State[3].

As regards the application of the Protocol in Poland, it should be pointed out that its signing is the first phase of its transposition into Polish legislation[4]. The completion of this process still requires its ratification and publication in the Official Journal. Provided, too, that the general condition for the entry into force of the Protocol has been met (16 ratifications), only then will it become part of the national legal order and be applied directly – in accordance with Article 91 of the Constitution, which provides that:

[1] For more on the Protocol, see also P. Dascalopoulou - Livada, The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, in: Environmental Liability Journal; M. Bar, A. Kodjabashev, M. Stoczkiewicz, D. Szwed, S. Vykhryst, Protocol on Civil Liability, Environmental Law Centre - Demetra - EcoPravo Khharkov, 2003

[2] The text of the Protocol and information on it (including information on the States which have signed it and the status of ratification) can be found on the UNECE website: http://www.unece.org/env/civil-liability/welcome.html.

[3] For the action which should be taken to ensure quick ratification of the Protocol, see Joerg Bally, The signing of the Protocol on civil liability in Kiev – a great challenge for the future, paper for the conference on the Protocol on Civil Liability held on the occasion of the fifth Ministerial Conference in Kiev "Environment for Europe".

[4] J. Jendrośka, W. Radecki, The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [in Polish], Environmental Law Centre, Wrocław, 1999, pp. 53-54.

"Article 91. 1. After it has been published in the Official Journal of the Republic of Poland, a ratified international agreement shall become part of the national legal order and shall be applied directly, unless its application requires the adoption of a law.

2. An international agreement which has been ratified on the basis of prior consent expressed in a law shall take precedence over a law where this law cannot be reconciled with the agreement. (...)"[5]

It follows from this provision that where an international agreement contains standards which may be applied directly (self-executing), then – following its ratification – it will take precedence over a law, while the courts and other authorities will be obliged to base their rulings directly on the agreement. The provisions of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters are certainly self-executing standards.

In accordance with Article 89(1) of the Constitution, the ratification of the Protocol will require approval expressed in a law. This Article provides:

"Article 89. 1. The ratification of an international agreement by the Republic of Poland and the withdrawal from it shall need prior approval expressed in law, where the agreement concerns:
1) peace, alliances, political or military treaties,
2) citizens' freedoms, rights or obligations as laid down in the Constitution,
3) the membership of the Republic of Poland in an international organisation,
4) substantial financial burdens on the State,
5) the matters regulated in a law and in respect of which the Constitution requires a law".

The Protocol on Civil Liability meets the conditions mentioned in points 2 and 5, as it concerns the right laid down in Article 45 of the Constitution ("*Every person has the right to a just and open hearing of his case without undue delay by the competent, independent, impartial and uncontrolled court")* and the matters "regulated in a law" – the assertion of claims for damage and the issue of environmental protection[6].

The Protocol consists of 33 Articles and 3 Annexes. The provisions which make up the **general part** of the Protocol define its purpose, definitions and scope of application. In the **substantive part** there are regulations concerning the rules of liability, the right to take action in the court, the financial limits of liability (the value of compensation), the time limits of liability and financial securities. Subsequently, the Protocol contains **rules of procedure**, primarily regarding the competence of courts, arbitration, the issues of related (court) actions, the law applicable to a given case, the relations between the Protocol and the applicable domestic law, the mutual recognition and enforcement of court judgements and arbitral awards, the relations between the Protocol and other international agreements, the relations between the Protocol and the rules of the European Union concerning the competence of the court and the recognition and enforcement of judgments as well as **final provisions** concerning the Meeting of the Parties, Secretariat, amendments to the Protocol etc.

[5] See P. Wiczorek, A Commentary on the Constitution of the Republic of Poland of 2 April 1997, Liber, Warsaw 2000.
[6] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 54.

2. The Origin of the Protocol and the Negotiation Process

The decision to start the negotiations on the Protocol was taken at a joint special session of the Parties to the two Conventions (on 203 July 2001 in Geneva). It was a reaction of the international community to the disaster in Baia Mare in Romania, where in January 2000, as the result of an accident, 1000,000 tonnes of effluent containing highly toxic compounds (including cyanides) ran off into waters, causing the contamination and enormous destruction in the Rivers Danube and Tisa. The movement of the pollutants downstream in the Danube caused damage which was difficult to estimate, in Romania and also other countries. The analysis carried out after the accident in Baia Mare demonstrated that although even then the international law included quite a large number of acts concerning liability for damage, the scope of none of them covered the situation which occurred in Romania[7]. In addition, it was found that some of these acts had never entered into force, e.g. the Convention No. 150 of the Council of Europe on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention of 1993)[8].

Within the work on the Protocol, seven negotiation sessions were held, attended by about 30 States, the European Commission as well as representatives of insurance companies and intergovernmental and non-governmental organisations. The final text of the Protocol was agreed in February 2003.

In the course of the negotiations, the need was stressed to quickly ratify the Protocol subsequently and to avoid the problems which had emerged when States launched the process of adopting the aforementioned Lugano Convention; since it imposed too restrictive obligations, this Convention has not been ratified yet by any State.

In contrast to the Lugano Convention, the provisions of the Protocol, in particular its scope as well as the limits of compensation and the minimum limits of compulsory insurance, were recognised as realistic. As mentioned above, the participants in the negotiations included e.g. representatives of insurance companies, who repeatedly voiced their views on the insurance-related provisions of the Protocol and had substantial influence on their final content (e.g. it was due to their intervention that the minimum limits of compulsory insurance were lowered).

---

[7] See the documents prepared for the 1st Joint Special Session of the Parties to the Conventions: (MP. WAT/2001/1; MP. WAT/2001/1, Add. 1 - www.unece.org/env/civil-liability (Meetings of the International Working Group) and M. Bar, A. Kodjabashev, M. Stoczkiewicz, D. Szwed, S. Vykhryst, Protocol …, op. cit.

[8] For the Lugano Conference, see W. Katner, The Convention (No. 150) on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Polish Law, in: The Legal Standards of the Council of Europe. Texts and Commentaries. Vol. II. Civil Law. M. Safijan (ed.), Judiciary Institute. Publishing Hose, Warsaw, 1995,

3. The text of the Protocol with a commentary

UNITED NATIONS
ECONOMIC COMMISSION FOR EUROPE

PROTOCOL
ON CIVIL LIABILITY AND COMPENSATION FOR DAMAGE CAUSED BY THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS ON TRANSBOUNDARY WATERS

TO THE 1992 CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND

TO THE 1992 CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS

***The Parties to the Protocol*,**

***Recalling* the relevant provisions of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, in particular its article 7, and of the Convention on the Transboundary Effects of Industrial Accidents, in particular its article 13,**

***Having in mind* the relevant provisions of principles 13 and 16 of the Rio Declaration on Environment and Development,**

***Taking into account* the polluter pays principle as a general principle of international environmental law, accepted also by the Parties to the above-mentioned Conventions,**

***Taking note* of the UNECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters,**

***Aware* of the risk of damage to human health, property and the environment caused by the transboundary effects of industrial accidents,**

***Convinced* of the need to provide for third-party liability and environmental liability in order to ensure that adequate and prompt compensation is available,**

***Acknowledging* the desirability to review the Protocol at a later stage to broaden its scope of application as appropriate,**

***Have agreed* as follows:**

1. The preamble to an international treaty (agreement, convention, protocol etc.) is its integral part, although does not contain itself any legally binding commitments. It is used to explain the reasons for the conclusion of the treaty by indicating its underlying values and

assumptions as well as its source, and to emphasise the purposes for which its has been prepared[9].

In accordance with Article 31(2) of the Vienna Convention on the Law of Treaties of 23 May 1969 (Official Journal of 1990, No. 74, Item 439), the preamble (called "Introduction" in the Vienna Convention) is one of the basic sources of interpretation of the binding provisions of a treaty[10].

2. The Preamble of the Protocol on Civil Liability first refers to its two original Conventions, in particular to those provisions of them that relate to the development of legal schemes concerning liability. This issue is covered by the identically worded Article 7 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and Article 13 of the Convention on the Transboundary Effects of Industrial Accidents. These provisions have the nature of a very general declaration, providing that: "*The Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability*." They do not even specify the type of liability concerned – whether civil, criminal, administrative or any "mixed" type of liability.

Subsequently, the Preamble recalls Principles 13 and 16 of the Declaration on Environment and Development as adopted in Rio de Janeiro (the Rio Declaration). This Declaration was one of the documents adopted by the United Nations Conference on Environment and Development which met in Rio de Janeiro on 3-4 June 1992.

Principle 13 provides: "*States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction*".

Principle 16 states: "*National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*".[11]

Principle 13 already contains reference to civil law liability, recommending, in addition, not only the development of national legislation, but also the conduct of action at an international scale.

Principle 16 of the Declaration refers to the polluter pays principle which is generally accepted in the international environmental law. This principle is directly cited by the subsequent item of the Preamble.

The last item of the Preamble, which expresses the will of the Parties at a later stage to broaden the scope of application of the Protocol, is also reflected in its subsequent provisions (e.g. Article 9(2) regarding the establishment of the upper limits of possible compensation; Article 11(2) concerning the minimum limits for financial securities and Article 21(a)(a) and (c) indicating that one of the functions of the Meeting of the Parties is "*To review the implementation of and compliance with the Protocol including relevant case law provided by the Parties*" and (…) *"To consider and undertake any additional action that may be required for the*

[9] See H. D. Trevianus, Preamble (in:) Encyclopaedia of Public International Law, Vol. III. R. Bernhard (ed.), Elsevier Publ., Amsterdam et al., 1997, p. 1097.
[10] See J. Jendrośka, W. Radecki, The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [in Polish], Environmental Law Centre, Wrocław, 1999, p. 55.
[11] The Polish text of the Rio Declaration cited from: J. Boć, E. Szamborska, Environmental Protection. Sources [in Polish], Wrocław 1994, pp. 103-104.

purposes of the Protocol"; such action may include appropriate amendments to the Protocol with a view to expanding its scope). Declarations providing for later reviews of the application of the Protocol and its possible expansion are applied in cases where certain States participating in the negotiations supported more radical solutions, whereas, ultimately, as the result of a compromise, more moderate provisions were agreed.

Article 1

Objective

The objective of the present Protocol is to provide for a comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters.

1. Article 1 indicates, in general, the purpose of the Protocol – its objective is to create provisions enabling the persons affected by the effects of transboundary industrial accidents on transboundary waters to advance related claims against the persons found liable for the damage under the Protocol.

2. Article 2 indicates that the scope of application of the Protocol is limited only to certain specific (and, practically, fairly rare) cases (only transboundary effects, only accidents on transboundary waters). The provisions regarding the scope are specified in Article 3 of the Protocol [see the commentary on this Article].

3. The compensation as awarded under the Protocol is to be "adequate", which should be understood to mean proportionate to the size of the damage suffered – both the real loss and the lost benefits (*damnum emergens* and *lucrum cessans*). In Polish law, the principle of full compensation is expressed in Article 361 § 2 of the Civil Code[12] [see also the commentary on the term "damage" under Article 2(2)(d) of the Protocol]. However, at the same time, the financial limits of the operator's liability should be borne in mind (meaning, in practice, the establishment of the upper limit of compensation which may be awarded under the Protocol) as introduced by Article 9 of the Protocol [see the commentary on this Article]. Thus, the compensation should cover both the real loss and the lost benefits, not exceeding, however, the financial limits laid down in Article 9. (In addition, however, the possibility of choosing the applicable law, referred to in Article 16(2) is important – see the commentaries on this Article and Article 9).

4. The wording of both Article 1 and other provisions of the Protocol (Articles 3, 4 and 5) indicates that it only applies to compensatory liability (for damage already done) rather than preventive liability (for the risk of damage itself). This means that under the Protocol only compensation may be sought rather than it may be demanded that the operator takes measures to prevent the risk of the damage arising.

5. The provisions of the Protocol use the term "compensation"[13] meaning, as a rule, money compensation. Does this mean that under the Protocol the court can only award money compensation, but cannot order reinstatement? The court practice will certainly provide an

---

[12] See T. Wiśniewski in: G. Bieniek (ed.), Commentary on the Civil Code. Book Three. Liabilities [in Polish], Vol. I, Wydawnictwo Prawnicze, Warsaw 1999, p. 62; Z. Banaszczyk in: K. Pietrzykowski (ed.), The Civil Code. Commentary [in Polish], Vol. I. C. H. Beck, Warsaw 2002, pp. 723-728.

[13] Compensation in English, indemnisation in French and kompensatsya in Russian

answer to this question; it seems, however, that – considering the definition of damage provided in Article 2(2)(d) and the fact that the Protocol applies to transboundary damage – exactly money compensation will be the main penalty imposed on the persons liable under the Protocol. Indeed, the definition of damage is so designed that its individual types may be remedied only by the payment of an appropriate amount of money (an exception may only be "loss of property", referred to in Article 2(2)(d)(ii), in relation to which one may conceive of an order of reinstatement – see the commentary on this Article). Furthermore, it should be borne in mind that the Protocol applies to transboundary effects; therefore, as a rule, the affected person will be resident or domiciled in a State other than the liable person – in such a situation, the award of money compensation will certainly be an easier and more effective way of ensuring that the damage is remedied.

Article 2

Definitions

1. The definitions of terms contained in the Conventions apply to the present Protocol, unless expressly provided otherwise in the present Protocol.

Article 2 contains a glossary which explains the meanings of the basic terms used in the Protocol. At the same time, in relation to those terms that are not defined, Article 2 refers to the glossaries contained in the original Conventions; of those defined in them, the Protocol uses the following ones:

From the Convention on the Protection and Use of Transboundary Watercourses and International Lakes[14]:

- "Transboundary waters" means any surface or ground waters which mark, cross or are located on boundaries between two or more States; wherever transboundary waters flow directly into the sea, these transboundary waters end at a straight line across their respective mouths between points on the low-water line of their banks (Article 1(1) of the Convention)

From the Convention on the Transboundary Effects of Industrial Accidents[15]:

- "Transboundary effects" means serious effects within the jurisdiction of a Party as a result of an industrial accident occurring within the jurisdiction of another Party;
- "Operator" means any natural or legal person, including public authorities, in charge of an activity, e.g. supervising, planning to carry out or carrying out an activity.

2. For the purposes of the present Protocol:

(a) "The Conventions" means the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents, done at Helsinki on 17 March 1992;

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes was ratified by Poland and published in the Official Journal of 2003, No. 78,

[14] The Polish text of the Convention was published in the Official Journal of 2003, No. 78, Item 702.
[15] The Polish text of the Convention is cited after: The Convention on the Transboundary Effects of Industrial Accidents, translated by J. Żurek, S. Wajda, J. Żurek (ed.), Institute of Environmental Protection, Warsaw.

Item 702. The Convention on the Transboundary Effects of Industrial Accidents was signed by Poland and now (November 2003) the ratification process is under way.

(b) "Protocol" means the present Protocol;

(c) "Party" means a Contracting Party to the Protocol;

(d) "Damage" means:

(i) Loss of life or personal injury;

(ii) Loss of, or damage to, property other than property held by the person liable in accordance with the Protocol;

(iii) Loss of income directly deriving from an impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of impairment of the transboundary waters, taking into account savings and costs;

(iv) The cost of measures of reinstatement of the impaired transboundary waters, limited to the costs of measures actually taken or to be undertaken;

(v) The cost of response measures, including any loss or damage caused by such measures, to the extent that the damage was caused by the transboundary effects of an industrial accident on transboundary waters;

The exact specification of the definition of damage is of key significance for establishing the scope of application of the Protocol, as the ability to advance claims under the Protocol depends on whether a given event may be recognised as damage.

It follows from the definition of damage cited above that it covers:

- the so-called "traditional damage" (damage to person and property),
- the damage consisting exclusively of loss of income (called "pure economic damage"[16]).

To a certain extent, this definition also covers damage to the environment understood as a common good (environmental damage), since the damage is also the cost of measures to restore the original state (reinstatement) or the cost of response measures (in such a case there must be an entity which has taken or intends to take such measures, and it is this entity which may seek compensation)[17].

Thus, the Protocol adopts a different approach to damage than does the Proposal for a Directive on environmental liability with regard to the prevention and remedying of such damage[18], covering only environmental damage and excluding traditional damage[19].

[16] In English usage.
[17] See P. Dascalopoulou-Livada, The Protocol … op. cit. p. 133.
[18] Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the presentation and remedying of environmental damage – the version of the Proposal as of 20 june 2003 (2002/0021 COD), unpublished.

When considering the definition of damage, it is interesting to note several schemes.

- Subpoints (i) and (ii) differentiate the range of entities which may suffer the particular types of damage, as regards the damage to a person, the affected person may also be the operator himself (assuming that he is a natural person) or another person liable under the Protocol (in addition to the operator, this may be the entity liable for the damage which it caused or contributed to, pursuant to Article 5 [see the commentary on this Article]), but this is not possible in the case of damage to property.
  The provision of Article 2(2)(d)(i) may be important in the case where the liability for given damage can be attributed under the Protocol to more than one person, with one of them suffering an injury or the loss of life (in the latter case, claims may be advanced e.g. by the dependents of the deceased). Thus, the person who suffered the damage may demand compensation from the other of the entities liable. Article 7 of the Protocol also concerns the possibility of the persons liable to advance counter claims, but this Article refers to the right of recourse of a person liable under the Protocol against another person liable, i.e. a counter claim for part of the costs the former person incurred by paying the compensation awarded by the court [see the commentary on Article 7].

- Point (d)(iii) recognises damage to be e.g. the "*Loss of income directly deriving from an impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of impairment of the transboundary waters (...)".* This provision indicates directly that the compensation should cover the lost benefits (the principle of full compensation). However, this does not mean that the compensation for damage in another form is limited only to the real damage (the loss of property – *damnum emergens*), where the general principle of full compensation applies, too [see also the commentary on Article 1]. In turn, point (d)(iii) refers to the situation where the real loss has not occurred at all and the damage is only limited to the lost benefits (although, certainly, in addition to the pure economic damage, a given entity may have also suffered e.g. "traditional damage").
  In the provision in question, the ground for damage to occur is "an impairment of a **legally protected** interest" (legal rather than only a real interest). This means that e.g. when fish die out in a lake the damage is suffered by the fishermen fishing in it for profit, who have, in addition, the right to use the lake (e.g. on lease), but, in contrast, it will not be suffered by anglers fishing for recreation purposes.

- The reinstatement and response measures are defined in points (g) and (h) of this paragraph [see the commentaries on these points]. The costs of these measures are regarded as damage, where the person who has incurred them is the person who has suffered the damage. In practice, these measures will relate to the environment as a common good which is not a private property – in accordance with the definitions cited below, they refer to waters which are, as a rule, public property[20] (see e.g. Article 10 of the Polish Water Act of 18 July 2001)[21]. This means that the return of their costs would be compensation for environmental damage.

---

[19] For more on the Proposal for the Directive, see: M. Bar, J. Jendrośka, Legal Liability for Environmental Damage in the European Union, Management and Banking College, Wrocław 2003.
[20] For more on the issue of the ownership of waters, see: W. Radecki in: The Water Act. Commentary, J. Rotko (ed.), TNPOŚ, Wrocław 2002, pp. 40-58; J. Szachułowicz, Public Property, Warsaw 2000, p. 14.
[21] Official Journal No. 115, Item 1229, as amended.

(e) "Industrial accident" means an event resulting from an uncontrolled development in the course of a hazardous activity:

(i) In an installation, including tailing dams, for example during manufacture, use, storage, handling or disposal;

(ii) During transportation on the site of a hazardous activity; or

(iii) During off-site transportation via pipelines;

The definition of an industrial accident is also given by the Convention on the Transboundary Effects of Industrial Accidents, but it is formulated there in a slightly different way, although it is similar to some extent (e.g. it does not include transportation via pipelines)[22]. For the purposes of the Protocol, it is the definition provided in it that is the binding one [see above Article 2(1) *in fine*].

An industrial accident is only such an event as has resulted from the conduct of a hazardous activity, which is defined below in point (b).

Subpoint (i) uses the term "installation", but this term is not defined either by the Protocol, nor any of the original Conventions. Especially, it is emphasised in it that installations include e.g. tailing dams; the reason for this was the fact that the work on the Protocol was provoked by the disaster at Baia Mare in Romania, which occurred at exactly such a dam [see the chapter "The Origin of the Protocol and the Negotiation Process"]. Thus, it was stressed in the course of the negotiations that the scope of application of the Protocol must be so set out as to include, among other things, exactly such a type of accidents.

Subpoint (ii) applies to on-site transportation of hazardous substances.

Subpoint (iii) applies to off-site transportation via pipelines, but only in the case where it is carried via pipelines rather than e.g. in a tanker lorry. In the course of the work of the Working Group negotiating on the Protocol, many doubts emerged as to whether pipelines should be included in it[23]. They related to:

- the method for calculating the amount of a hazardous substance present in a pipeline (as this affects the assessment whether the threshold quantities for the purpose of defining hazardous activities have been reached – see Annex I to the Protocol),
- the financial limits of liability (referred to in Article 9 and Part One of Annex II),
- the minimum limits of financial securities (referred to in Article 11 and Part Two of Annex II).

As a result, one option proposed was for transportation via pipelines to be excluded from the events classified as industrial accidents. Since, however, certain countries were for the provision on pipelines to be retained, it was not deleted, and it was decided that the aforementioned problems would be addressed by phrasing more precisely the contents of the Annexes (by setting pipeline-specific threshold quantities, financial limits of liability and minimum limits of financial securities). However, in the course of the negotiations it proved impossible to make appropriate amendments to the Annexes; in consequence, in accordance with Article 29 of the Protocol, the

---

[22] See P. Dascalopoulou-Livada, The Protocol …, op. cit., p. 133.

[23] For more, see the working document prepared by the Secretariat concerning the treatment of pipelines in the Protocol (MP. WAT/AC.3/3003/WP.24) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

provision concerning pipelines will enter into force only after such amendments have been made [see the commentary on Article 29].

(f) “Hazardous activity” means any activity in which one or more hazardous substances are present or may be present in quantities at or in excess of the threshold quantities listed in annex I and which is capable of causing transboundary effects on transboundary waters and their water uses in the event of an industrial accident;

The definition of hazardous activity refers to Annex I. It lists hazardous substances and their threshold quantities causing a given activity to be classified as hazardous; in consequence, claims for the damage arising in the course of its conduct may be advanced under the Protocol.

The threshold quantity of a substance is calculated on the basis of its possible presence in the course of the conduct of an activity (e.g. how much of it an installation holds) rather than on the basis of the amount of the substance which was really present at a given place at the time that the accident occurred.

The ground for an activity to be classified as hazardous is its capability of causing transboundary effects on transboundary waters. In this respect, the geographical situation of a plant (installation) is significant – if it is located at such a place that it is impossible for the substances present on its site to reach transboundary waters (e.g. via tributaries), the activity conducted there is not the hazardous activity referred to in the Protocol. In practice, it is the final effect of an accident that will decide – if it is found that the accident has caused transboundary effects on transboundary waters, a given activity should be recognised as “hazardous” in the meaning of the Protocol.

(g) “Measures of reinstatement” means any reasonable measures aiming to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred, or, where this is not possible, to introduce, where appropriate, the equivalent of these components into the transboundary waters. Domestic law may indicate who will be entitled to take such measures;

The definition of measures of reinstatement is significant insomuch as the costs of their conduct are damage in the meaning of the Protocol (Article 2(2)(d)(iv)) and, therefore, the entity which has incurred such costs may request that the operator liable (or another person liable) should reimburse them.

However, such measures need to be “justified” in a given situation in technical terms. Where the reinstatement is impossible, such measures may consist of the introduction of “equivalent components” into waters, e.g. the replacement of an extinct endemic fish species by another species.

As indicated above [see the commentary on Article 2(2)(d)(iv) and (v)], the person who has taken such measures has the right of recourse against another person liable under the Protocol in respect of the costs incurred. This provision clearly indicates that the purpose of such measures is to restore waters to their condition existing prior to the accident rather than to the optimum, or the best, condition which could be achieved in a given case. This means that the person who has caused the condition of waters to become better than before the accident, by incurring higher costs for this purpose (higher than those that would have been necessary to “reinstate” it only) would not be able to demand that the surplus should be reimbursed.

As already indicated [see the commentary on Article 2(2)(d)(iv) and (v)], waters are, as a rule, public property[24]; therefore, the measures of reinstatement are taken by persons other than

[24] See Footnote 11.

their owner (although a situation may emerge where this will be a state authority which has, at the same time, some powers relating to the right of ownership). Accordingly, the provision in question provides that domestic law may indicate who will be entitled to take such measures. At the same time, it should be borne in mind that damage on transboundary waters suffered in a State other than the one where the accident occurred is always meant here {see Articles 1 and 3 and the commentaries on them]; thus, "domestic law" referred to in this provision is the law of the country where such measures are taken (e.g. Polish law in a situation where an accident in the Czech Republic has caused pollution of the Odra, including the impairment of its Polish section). Such entities may include e.g. state authorities or environmental organisations. In this scope, Polish law does not provide for any limitation on the entities entitled.

Article 326 of the Environmental Protection Act (EPA) of 27 April 2001[25] corresponds to this provision. Article 326 provides that "*The entity which has rectified damage to the environment shall be entitled to advance a claim for compensation in return of the resources expended for this purpose from the entity which has caused the damage, with the amount of compensation in such a case limited to the justified costs of the restoration of the previous state*".

(h) "Response measures" means any reasonable measures taken by any person, including public authorities, following an industrial accident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

To some extent, the definition of response measures is designed in a similar way to the definition of measures of reinstatement; accordingly, the commentaries presented in the previous section are valid in respect of: the recognition of the costs of such measures as damage in the meaning of the Protocol; the public ownership of waters; the domestic law specifying the range of the persons entitled to take the measures. With regard to the latter issue, it is interesting to note that the definition of response measures indicates directly that they may be taken by "any person", but, at the same time, there is the reservation that domestic law may introduce limitations as to the range of the entitled persons.

In contrast to measures of reinstatement, the measures in question may apply not only directly to waters, but also to the other elements of the environment (e.g. polluted soil). In addition, it is important to note that their purpose may be e.g. to clean up the environment, thus, including the reclamation of the soil polluted by waters.

Response measures are also referred to in Article 6 of the Protocol, which requests that the operator should take such measures [see the commentary on this Article].

(i) "Unit of account" means the special drawing right as defined by the International Monetary Fund.

As of 3 November 2003, the value of the unit of account was USD 1.43178 (data from the website of the International Monetary Fund – www.imf.org).

Article 3

Scope of application

1. The Protocol shall apply to damage caused by the transboundary effects of an industrial accident on transboundary waters.

[25] Official Journal No. 62, Item 627, as amended.

2. The Protocol shall apply only to damage suffered in a Party other than the Party where the industrial accident has occurred.

Article 3 is one of the key provisions of the Protocol, since in a significant way it limits the range of situations to which it may apply.

The scope of application of the Protocol is thus limited to:

- **damage caused by the transboundary effects of industrial accidents** (furthermore, as indicated above, an industrial accident is an event resulting from a "hazardous activity", while, in turn, a hazardous activity is such as involves the presence of one or more hazardous substances listed in Annex I to the Protocol; moreover, in quantities at or in excess of the threshold quantities given in this Annex. In addition, the Protocol specifies that an industrial accident is an event resulting from a hazardous activity conducted: in installations, including tailing dams; during transportation on the site of a hazardous activity; during transportation via pipelines outside of the site of a hazardous activity);
- **damage occurring on transboundary waters;**
- **damage suffered in a State - Party other than the Party where the industrial accident has occurred**. This means that if the accident has occurred in the territory of State A and it has been caused by the pollution of a transboundary river or lake, with damage occurring on both sides of the border, i.e. in States A and B, only the persons who suffered the damage in State B may seek compensation under the Protocol (irrespective of their citizenship, as they may also include the citizens of State A), whereas persons in State A may only cite domestic law. Such a solution results e.g. from the fact that the Protocol was conceived as an instrument serving the advancement of claims by the persons who suffered damage in States other than the State which has "done the damage", as they would find it most difficult to take action to the court against the plant which has caused the pollution.
  It was proposed in the course of the negotiations that the Protocol should also apply to the situation where the accident has occurred in the territory of a Party to the Protocol, but the damage has been suffered in a non-Party State[26]. This would mean that a State which has signed the Protocol agrees to admit claims from the persons who have suffered the damage in third non-Party States, without observing the principle of reciprocity. However, this solution was recognised to be too radical and, ultimately, the winning option was that the Protocol should apply between the Parties to it. This problem was discussed along with the issue of non-discrimination in the application of the Protocol as referred to in Article 8(3) [see the commentary on this Article].

Article 4

Strict liability

1. The operator shall be liable for the damage caused by an industrial accident.

2. No liability in accordance with this article shall attach to the operator, if he or she proves that, despite there being in place appropriate safety measures, the damage was:

[26] Such a solution was proposed e.g. in the proposal submitted by REC (MP.WAT/AC 3/3003/WP.27) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

(a) The result of an act of armed conflict, hostilities, civil war or insurrection;

(b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;

(c) Wholly the result of compliance with a compulsory measure of a public authority of the Party where the industrial accident has occurred; or

(d) Wholly the result of the wrongful intentional conduct of a third party.

3. If the person who has suffered the damage or a person for whom he or she is responsible under domestic law has by his or her own fault caused the damage or contributed to it, the compensation may be reduced or disallowed having regard to all the circumstances.

4. If two or more operators are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the operators liable. However, the operator who proves that only part of the damage was caused by an industrial accident shall be liable for that part of the damage only.

1. Article 4 of the Protocol applies to strict liability. It is attributed to the operator conducting the activity as a result of which the industrial accident has occurred [For the definition of operator, see the commentary on Article 2(1)]. The feature of strict (objective) liability is that it abstracts from the fault of the person liable, as the compensatory obligation results from the very fact that an activity is conducted and that it causes damage.

The following grounds for such liability are recognised[27]:

- the occurrence of damage,
- an adequate causal relationship between the operation of a plant (installation) and the damage,
- the absence of exonerating circumstances clearly provided for in the provisions (in the Protocol, these circumstances are mentioned in paragraph 2 of the Article in question).

In Polish law, the strict liability for damage resulting from the operation of a plant (installation) is provided for by Article 435 § 1 of the Civil Code: "*The person who operates on his own account an enterprise or plant set in motion by the forces of nature (steam, gas, electricity, liquid fuels etc.) shall be liable for damage to person or property caused by the operation of the enterprise or plant, unless the damage has been caused by a force majeure or has exclusively been the fault of the person who has suffered the damage or a third person for whom the operator does not bear any responsibility*."

The construction of the provision (and the strict liability, in general) is based on the assumption that the operation itself of a plant set in motion by the forces of nature creates the risk of damage occurring to a person or property, irrespective of whether the operator acts or fails to act[28].

[27] For more, see W. Radecki, Legal Liability in Environmental Protection, Difin, Warsaw 2002, p. 92; M. Bar, J. Jendrośka, K. Tarnacka, The Right to the Court in Environmental Protection, Environmental Law Centre, Wrocław 2002, pp. 122-123.

[28] The ruling of the Supreme Court of 19 June 2001, II UKN 424/00, OSNAP – insert, 2001, no. 19, item 2.

The rulings and doctrine demonstrate the interpretation of Article 435 of the Civil Code, in according to which:

A. The absence of fault as the ground for liability also excludes the need to demonstrate the illegality of the action which has caused damage (e.g. the conduct of an activity without the required permit or in violation of its conditions)[29]. Indeed, it has been recognised that illegality is only the ground for accusing someone of being in fault[30].

B. The causal relationship between the operation of an enterprise or plant and the damage may already be recognised as demonstrated where it is established that the person who suffered the damage has been exposed to such harmful pollutants from the plant which was taken to court the normal effect of which may be a disease of the person who has suffered the damage. It is invalid that the damage may have been caused as a result of the accumulation of harmful substances by different industrial plants[31].

Thus, a broad concept of causality has been adopted here, in accordance with which the factor deciding whether a given effect is recognised as normal (i.e. recognising that there is an adequate causal relationship) is the growing probability of occurrence of this effect (normal effects are such the probability of which always grows whenever the cause of the type considered appears)[32].

It seems that the views presented above may also be used to interpret the provisions of the Protocol (they are not in contradiction with its assumptions). At any rate, it can be foreseen that they will be recognised by the Polish courts applying the Protocol.

2. Paragraph 2 of the Article in question lists the conditions which exclude the operator's fault (the exonerating circumstances). The burden of demonstrating one of them rests on the defendant operator who wishes to free himself of his liability (the reversal of the burden of proof).

In contrast to Article 435 of the Civil Code, the Protocol does not use the term "force majuere". However, at the same time, it lists the conditions which are recognised as such under the Polish Civil Code, specifically: natural phenomena (point (b)); armed conflict and similar developments (point (a)): or a compulsory measure of a public authority (point (c))[33]. All the listed circumstances must (under both Polish law and the Protocol) meet the conditions for being recognised as force majeure, such as the extraordinary nature of the event, its externality

[29] The ruling of the Supreme Court of 6 October 1976, IV CR 380/76, OSN (civil series) 1977, nos. 5-6, item 96; the ruling of the Supreme Court of 24 February 1981, IVCR 17/81, OSPiKA 1982, nos. 5-6, item 64.

[30] See B. Lewaszkiewicz-Pietrykowska, The civil liability for environmental damage of the person who operates an enterprise his own account in: Private Law Studies, Łódź 1997, p. 260; W. Radecki, Legal Liability … op. cit., p. 92.

[31] The ruling of the Supreme Court of 6 October 1976, IV CR 380/76, OSN (civil series) 1977, nos. 5-6, item 93. This ruling facilitates the situation of the person who has suffered the damage in that: it is satisfied by a hypothetical (not necessarily real) causal relationship; it reverses the burden of proof, obliging the emitter to demonstrate that the emissions it causes cannot have caused the disease of the person who has suffered; in fact, it assumes the joint and several liability of all the emitters, if only their emissions may have caused the disease of the person who has suffered the damage (W. Radecki, Legal Liability … op. cit., p. 93).

[32] A. Koch, The Causal Relationship as the Ground for Compensatory Liability in Civil Law, Warsaw 1975, pp. 139-141.

[33] In the doctrine and rulings, it is indicated that the measures of public authorities (vis imperii) which exclude due to their nature the individual's capability of opposing them may be recognised as fore majeure – see the ruling of the Supreme Court of 19 September 1934, C.I. 1959/33, RPE 1935, p. 449; see also M. Safijan, in: K. Pietrzykowski (ed.), The Civil Code … op. cit., p. 985; and W. Warkałło, Force Majeure as the Principle of the Lack of Liability and the Presumption of the Accidental Nature of Damage, Warsaw 1949, p. 107.

(meaning that its source is outside of the equipment); the incapability of preventing the event (however, this is the incapability of preventing not so much the phenomenon itself as its effects)[34]; the incapability of foreseeing the event[35].

Another exonerating condition under the Protocol is the wrongful intentional conduct of a third party (action or failure to act), provided that it was wholly the cause of the event. The intentional conduct should be understood as one in fault: such fault should, moreover, be deliberate (neglect is not sufficient); thus, to free himself of liability, he would have to demonstrate not only the fact that the accident resulted from an action or inaction of a third person, but also the fault of this person.

It is not quite clear whether the person who has suffered the damage may also be a "third person". The literal wording of this provision would indicate that this is rather not so (whereas the action of the person who has suffered the damage is directly mentioned in the next paragraph – see below), but it seems that the failure to indicate the person should rather be treated as an omission. Indeed, it would be absurd to make the operator liable for the damage caused by an exclusive action of the person who suffered the damage.

Similarly, Article 435 recognises as a condition which frees of liability the circumstances where "*the damage occurred (...) exclusively due to the fault of the person who has suffered the damage or a third person for whom [the operator] bears no responsibility*"[36].

3. In paragraph 3, the Article in question allows the court to adequately reduce or even to refuse compensation in a situation where the person who has suffered the damage or a person for whom he is responsible has contributed to the damage. In contrast to the exonerating conditions described above, paragraph 3 does not mean damage caused exclusively by such persons (since then the operator could be completely freed of liability).

An analogous regulation is contained in Article 362 of the Civil Code: "*Where the person who has suffered the damage has contributed to the occurrence or enhancement of the damage, the obligation to remedy it shall be appropriately reduced depending on the circumstances, particularly on the extent of the fault of the either party*"[37]. Article 362 also applies in the case of contributions to the damage from persons for whom the person who has suffered the damage would be responsible under the regulations on the liability for others' actions (Articles 427, 429, 430 and 474 of the Civil Code)[38].

Under Polish law, the persons for whom the person who has suffered the damage is responsible include: the person to whom no fault may be attributed, given his age or mental condition, who is in custody of the person who has suffered the damage (Article 427 of the Civil Code); the person to whom the person who suffered the damage has entrusted the performance of an action (Article 429 of the Civil Code); the subordinate (Article 430 of the Civil Code) and the person with whose assistance the person who has suffered the damage meets his liabilities (Article 474 of the Civil Code).

---

[34] The ruling of the Supreme Court of 9 April 1952, CR 962/51, OSN 1954, No. 1, Item 2; the ruling of the Supreme Court of 7 February 1953, I C 60/53, OSN 1954, Item 35; the ruling of the Supreme Court of 9 July 1962, I CR 34/62, OSNCP 1963, Item 262; see also G. Bieniek, in: G. Bieniek (ed.). Commentary …, op. cit, p. 343.

[35] Under Polish law, rulings recognise the unpredictability of an event as the criterion of force majeure (the ruling of the Supreme Court of 9 April 1952, CR 962/51, OSN 1954, No. I, Item 2) and so does part of its doctrine (J. Piątowski, Force majeure as the ground for excluding liability under Articles 152 and 153, NP. 1963, No. 1); but see also – for a converse view – M. Safijan, in: K Pietrzykowski (ed.), The Civil Code …op. cit., pp. 985-987.

[36] For more, see G. Bieniek, in: G. Bieniek (ed.), Commentary … op. cit., pp. 344-347; M. Safijan, in: K Pietrzykowski (ed.), The Civil Code …op. cit., pp. 985-987.

[37] For more, see Z. Banaszczyk, in: K. Pietrzykowski (ed.), The Civil Code …, op. cit., pp. 729-736; M. Sychowicz, in: G. Bieniek (ed.), Commentary …, op. cit., pp. 65-71.

[38] See Z. Banaszczyk, in: K. Pietrzykowski (ed.), The Civil Code …, op. cit., p. 735.

4. Paragraph 4 establishes the principle of the joint and several liability of two or more operators liable for the damage. This certainly facilitates the position of the person who has suffered the damage, since he may seek compensation from the operator from whom it would be easiest for him to receive it (e.g. given the financial standing of the different plants).

The operator who has paid the compensation has the right of recourse against the others (under Article 7 of the Protocol – see below).

An analogous provision is contained in Article 441 § 1 of the Civil Code: "*Where several persons are liable for the damage caused by an illegal action, their liability shall be joint and several*"[39].

Article 5

Fault-based liability

Without prejudice to article 4, and in accordance with the relevant rules of applicable domestic law including laws on the liability of servants and agents, any person shall be liable for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions.

1. Article 5 applies to the liability of persons – other than the operator – who have caused or contributed to the damage. In contrast to the operator, their liability is fault-based.

In seeking compensation from them, the person who has suffered the damage must demonstrate:

- the occurrence of damage,
- the objective illegality of the behaviour of the person who has caused the damage, i.e. non-compliance of his behaviour with the law,
- the fault of the person who has caused the damage (the subjectively objectionable nature of his behaviour (acts or omissions),
- the normal causal relationship between the person who has caused the damage and the damage[40].

Thus, in the case of fault-based liability, the position of the person who has suffered the damage is less favourable in respect of litigation, as the person is unable to avail of the facilitated requirements regarding evidence which are specific of strict liability [see the commentary on Article 4 above].

2. In Polish law, Article 415 of the Civil Code applies to strict liability, providing that: "*He who has caused damage to another person shall be obliged to remedy it*"[41].

Under this provision, the illegality of the behaviour of the person who has caused the damage is interpreted broadly – as a violation of not only the provisions of the law, but also other rules, e.g. those of social coexistence[42].

---

[39] For more, see M. Safijan, in: K. Pietrzykowski 9ed.), The Civil Code …, op. cit., pp. 1004-1006; G. Bieniek, in: G. Bieniek (ed.), Commentary …, op. cit., pp. 374-377.

[40] For more, see W. Radecki, Legal Liability …, op. cit., pp. 90-91; M. Bar, J. Jendrośka, K. Tarnacka, The Right …, op. cit., p. 122.

[41] See G. Bieniek, in G. Bieniek (ed.), Commentary …, op. cit., pp. 197-215; Z. Banaszczyk, in: K. Pietrzykowski (ed.), The Civil Code …, op. cit., pp. 891-901.

[42] See W. Radecki, Legal Liability …, op. cit., p. 91.

3. The Article in question provides that the rules of domestic law should be respected, including "*laws on the liability of servants and agents*". The indication of the liability of these persons refers to the principle of the responsibility, provided in many legal systems, for subcontractors, subordinates and other persons used by someone in the conduct of his activities (where he is liable for them just as much as for his own actions). In the case where damage is caused by such a person acting on behalf, and for the benefit, of the operator, the latter is responsible for this person in accordance with the rules of applicable domestic law (e.g. for the fault in the choice or within strict liability). In such a case, the operator has the right of recourse against the person who has caused the damage himself [see Article 7 and the commentary on this Article]. Moreover, the operator's liability does not exclude the possibility of seeking compensation from the person who has caused the damage himself (e.g. the subcontractor) – but only on the basis of fault-based liability.

In Polish law, the rules of the responsibility for subcontractors and subordinates are expressed in Articles 429 and 430 of the Civil Code:

"Article 429. He who entrusts the performance of an activity to another person shall be liable for the damage done by the person who has caused it in the course of performing the activity entrusted thereto, unless he is not in fault regarding the choice or has entrusted the performance of the activity to a person, company or plant which carry out such activities in the line of their professional activities."

"Article 430. He who entrusts on his own account the performance of an activity to a person who is subject to his direction in the course of performing this activity and is obliged to follow his guidance shall be liable for the damage caused by the fault of this person in the performance of the activity entrusted thereto".

The liability under Article 429 is based on the fault in the choice. The person who has commissioned the performance of a given activity is responsible for the actions of the subcontractor, unless this person is able to demonstrate that has seen to due diligence in his choice (e.g. by commissioning a professional person to do the work). Thus, the presumption of fault in choice is involved here – the plaintiff does not have to demonstrate it, whereas – in order to be acquitted of the liability – the defendant would have to demonstrate the absence of his fault (the reversal of the burden of proof).

The liability under Article 430 is strict (sometimes called "impure strict liability"). The fault (in the choice, nor any other) of the person entrusting the work to a subcontractor does not provide the ground for liability. However, it is necessary to demonstrate the existence of the fault of the said subcontractor (hence the name of "impure strict liability", but the claims are not advanced against the latter – since they are asserted against the "commissioning person"[43].

Article 6

Response measures

1. Subject to any requirement of applicable domestic law and other relevant provisions of the Conventions, the operator shall take, following an industrial accident, all reasonable response measures.

[43] For more, see G. Bieniek, in: G. Bieniek (ed.), Commentary …, op. cit., pp. 313-324; M. Safijan, in: K. Pietrzykowski (ed.), The Civil Code …, op. cit., pp. 963-971.

2. Notwithstanding any other provision in the Protocol, any person other than the operator acting for the sole purpose of taking response measures, provided that this person acted reasonably and in accordance with applicable domestic law, is not thereby subject to liability under the Protocol.

Article 6 imposes on the operator the obligation to take – following an accident – response measures with the aim of mitigating its effects, i.e. preventing, minimising or reducing the possible impact or damage [see the definition in Article 2(3)(h) and the commentary on it].

This definition also states that response measures are also the measures taken to clean up the environment (this should be understood to mean the measures applied directly to waters but also to other elements of the environment, e.g. polluted soil).

In addition to the operator, response measures may also be taken by other persons [see the definition in Article 2(3)(h)]. In such a case, the costs of such measures are damage in the meaning of the Protocol [see the definition of damage in Article 2(2)(d)(v) and the commentary on it] and the return of these costs may be demanded from the operator liable.

Paragraph 1 of the Article in question makes reference to applicable domestic law and provisions of the original Conventions ordering the operator to take measures to prevent the effects of the damage and to clean up the pollution. In Polish law, these are primarily the provisions of Title VI of the Environmental Protection Act of 27 April 2007 concerning industrial accidents, particularly Articles 260, 261 and 264 governing the obligations related to the development and implementation of an internal emergency plan and the operator's behaviour following the occurrence of an industrial accident[44].

The relevant provisions of the original Conventions are primarily:

- Article 8 of the Convention on the Transboundary Effects of Industrial Accidents, entitled "Emergency preparedness", particularly its first two paragraphs:

  *"1. The Parties shall take appropriate measures to establish and maintain adequate emergency preparedness to respond to industrial accidents. The Parties shall ensure that preparedness measures are taken to mitigate transboundary effects of such accidents, **on-site duties being undertaken by operators**. (...)*

  2. The Party of origin shall ensure for hazardous activities the preparation and implementation of on-site contingency plans, including suitable measures for response and other measures to prevent and minimize transboundary effects. (...)"[45]

- Article 11 of the Convention of the Transboundary Effects of Industrial Accidents, entitled "Response":

  "1. The Parties shall ensure that, in the event of an industrial accident, or imminent threat thereof, adequate response measures are taken, as soon as possible and using the most efficient practices, to contain and minimize effects."

- Article 3(1) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Prevention, Control and Reduction"):

[44] For more, see J. Jerzmański, in: J. Jendrośka (ed.), The Environmental Protection Act. A Commentary, Environmental Law Centre, Wrocław, 2001, pp. 714-721; J. Jerzmański, Major accidents, in: J. Jendrośka, J. Jerzmański (ed,), The Environmental Law for Practitioners, Verlag Dashofer, Warsaw, December 2001, continuous publication, updated on a quarterly basis, 1st edition 1999.

[45] The Polish text of the Convention is cited after: The Convention on the Transboundary Effects of Industrial Accidents, translated by J. Żurek, S. Wajda, J. Żurek (ed.), Institute of Environmental Protection, Warsaw.

"1. To prevent, control and reduce transboundary impact, Parties shall develop, adopt, implement and, as far as possible, render compatible relevant legal, administrative, economic, financial and technical measures, in order to ensure, inter alia, that (…)[46]*"*

Article 7

Right of recourse

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court or arbitral tribunal established under article 14 against any other person also liable under the Protocol.

2. Nothing in the Protocol shall prejudice any right of recourse to which the person liable might be entitled either as expressly provided for in contractual arrangements or pursuant to the law of the competent court.

1. The right of recourse in the matters with which the Protocol is concerned may be exercised between two operators sharing the liability and between the operator and the person who is liable within fault-based liability, in accordance with Article 5 of the Protocol [see the commentary on this Article]. Such right may be exercised where one of the persons liable has paid the due compensation to the persons who have suffered the damage (in accordance with the principle expressed in Article 4(4) of the Protocol, two or more operators liable are subject to joint and several liability – see the commentary on this Article) and also where the person has incurred the costs of response measures or measures of reinstatement as defined in Article 2(2)(g) and (h) of the Protocol. Under the definition of Article 2(2)(d) the costs of such measures are recognised as damage.

A contract concluded between liability-sharing persons may provide for the scope and manner of exercising the right of recourse between them; e.g. it may reduce or exclude such right.

The special regulation of this issue may also result from "the law of the competent court" i.e. contained in domestic legal systems. For the law of the courts ruling on cases covered by the scope of the Protocol, see Article 16 and the commentary on this Article.

2. In Polish law, Article 376 § 1 of the Civil Code applies to the right of recourse: *"Where one of the joint and several debtors has made a contribution, the content of a legal relationship existing between the fellow debtors shall decide whether and in which proportions he may demand that the others return such contribution. Unless the content of such relationship determines otherwise, the debtor who has made the contribution may demand the return in equal proportions"*.

Article 8

Implementation

1. The Parties shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the Protocol.

[46] Official Journal of 2003, No. 78, Item 702.

2. In order to promote transparency, the Parties shall inform the secretariat, as defined in article 22, of any such measures taken to implement the Protocol.

3. The provisions of the Protocol and measures adopted under paragraph 1 shall be applied among the Parties without discrimination based on nationality, domicile or residence.

4. The Parties shall provide for close cooperation in order to promote t he implementation of the Protocol according to their obligations under international law.

5. Without prejudice to existing international obligations, the Parties shall provide for access to information and access to justice accordingly, with due regard to the legitimate interest of the person holding the information, in order to promote the objective of the Protocol.

1. Article 8(1) obliges the Parties to adopt any measures to implement the Protocol. They may consist e.g. in adopting necessary amendments to domestic legislation. Under the Polish legal system (Article 91 of the Constitution), international agreements are applied directly, even with priority over the domestic law in contradiction with these agreements. Therefore, even when it turns out that in Poland there are certain regulations contradictory with the Protocol or hampering its application and – counter to Article 8(1) of the Protocol – Poland has failed to make appropriate amendments, the Protocol would have to be applied by Polish courts [for more, see the Introduction to the present Commentary]. Paragraph 2 obliges the Parties to notify the Secretariat of the measures taken.

2. Paragraph 3 of the Article in question expresses the principle of non-discrimination in the application of the Protocol. In the course of the negotiations, this approach was particularly strongly advocated by the delegation of the Netherlands and also supported by other States. In practice, its introduction means that all the persons who suffered damage in a State – Party to the Protocol other than the Party in which the accident has occurred they may seek compensation under the Protocol, even if they are citizens or based in exactly the former Party. In the course of the negotiations, another provision was also proposed, providing that the persons who suffered damage and advance their claims under the Protocol must "receive treatment no less favourable" than persons who assert their claims under the applicable domestic law (who suffered the damage caused by "internal" events which are not subject to the provisions of the Protocol)[47]. This would mean that the compensations awarded under the Protocol must not be lower and the rights of plaintiffs in the course of a trial (e.g. facilitated requirements in respect of evidence) must not be less favourable than those provided for under the domestic law. However, ultimately, this provision was not incorporated into Article 8; instead, the possibility for the plaintiff to choose domestic law rather than the law of the Party in which the accident has occurred and to apply this law rather than the provisions of the Protocol was introduced into Article 16(2) (even where the case is considered by the court of a State other than the State in which the accident has occurred; for the competence and choice of the court, see Article 13 and the commentary on it). Such choice would apply to maters of substance rather than those of procedure, since, in accordance with general principles observed in most legal systems, the court may only apply its own domestic procedure. [See the commentary on Article 16].

[47] Thus e.g. in the proposal submitted by REC (MP.WAT/AC 3/2003/WP.27) –www.unece.org/env/civil-liability (Meetings of the International Working Group).

3. Paragraph 5 concerning access to information and the related access to justice is the result of a long discussion on this subject. Its ultimate content has been greatly reduced and does not provide for very much. In the course of the negotiations, it was proposed e.g. for the following to be contained in it:

- the provision obliging the operator to disclose – on the plaintiff's request – information necessary to identify the scope of liability (e.g. concerning the production conducted or the substances used, allowing to establish whether his activity may have been the cause of the damage)[48];
- the obligation to actively disseminate information on the occurrence of an accident, i.e. providing the population with information on its range and possible effects[49];
- the repetition of the appropriate sections of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)[50].

Ultimately, however, given the objections of many delegations to expanding the provisions on access to information in the Protocol, the main purpose of which is to establish a civil liability scheme, it was decided that the provision on access to information should be as short a possible.

The mention of "international obligations" in paragraph 5 makes reference to the Aarhus Convention, whereas the reservation concerning the interest of the person holding information refers to the possibility provided for in different acts (including the Aarhus Convention, too) for the confidentiality of information (e.g. public security, the protection of personal data, commercial secrets etc.)[51].

[48] See the proposal submitted by the Environmental Law Centre (MP.WAT/AC 3/2003/WP.20) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

[49] See the proposal submitted by the Eco-Forum (MP.WAT/AC 3/2003/WP.13) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

[50] See the proposal submitted by the German delegation (MP.WAT/AC 3/2003/WP.8) and the proposal prepared by the Secretariat of the Convention (MP.WAT/AC 3/2003/WP. 19) – www.unece.org/env/civil-liability (Meetings of the International Working Group).
Poland has ratified the Aarhus Convention and it was published in the Official Journal of 2003, No. 78, Item 706.

[51] See Articles 4 and 5 of the Aarhus Convention and the commentary on these provisions in: J. Jendrośka, W. Radecki,, The Convention …, op. cit., pp. 71-74.

Article 9

Financial limits

1. The liability under article 4 is limited to the amounts specified in part one of annex II. Such limits shall not include any interests or costs awarded by the competent court.

2. The limits of liability specified in part one of annex II shall be reviewed by the Meeting of the Parties on a regular basis taking into account the risks of hazardous activities as well as the nature, quantity and properties of the hazardous substances that are present or may be present in such activities.

3. There shall be no financial limit on liability und er article 5.

1. Article 9 sets the financial limits to the operator's liability; in other words, the upper limits of the compensation which may be awarded for the damage referred to in the Protocol. Furthermore, this provision refers to Annex II which differentiates the financial limits depending on the types of "hazardous activity" conducted. The Annex distinguishes between three categories, depending on the nature and quantities of hazardous substances present in the course of a given activity. For Category A the limit of liability is set at 10 million units of account; for Categories B and C it is 40 million such units (the definition of the unit of account is given in Article 2(2)(i); see the commentary on this provision).

The limits provided for in the Article in question apply only to the principal part of the amount awarded in compensation; in addition, the operator has to incur the costs of the procedure assigned and the pay the due interest.

The financial limits apply exclusively to the strict liability of the operator rather than to the fault-based liability of persons other than the operator.

2. In discussing the issue of financial limits, however, one should bear in mind the content of Article 16(2) of the Protocol, which allows the person who has suffered damage to request, when advancing his claims before the competent court (chosen under Article 13), the application in his case of the law of the State where the industrial accident has occurred [see the commentary on Article 16]. In the case where the chosen domestic law allows the court to award compensation higher than the one set in Annex II, the court may award it.

Article 10

Time limit of liability

1. Claims for compensation under the Protocol shall not be admissible unless they are brought within fifteen years from the date of the industrial accident.

2. Claims for compensation under the Protocol shall not be admissible unless they are brought within three years from the date that the claimant knew or ought reasonably to have known of the damage and of the person liable, provided that the time limits established pursuant to paragraph 1 are not exceeded.

3. Where the industrial accident consists of a series of occurrences having the same origin, time limits established pursuant to this article shall run from the date of the last of such occurrences. Where the industrial accident consists of a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

1. The claims referred to in the Protocol are subject to time limits which run from the date that the claimant knew of the damage **and** the person liable to remedy it (with the three years counted from the date that he learned the later item of information). In all cases, however, such claims are subject to a time limit of 15 years from the date of the industrial accident, even if the person who has suffered he damage has not known of the damage within this period.

In the course of the negotiations, the establishment of the length of the latter period gave rise to many controversies, with the proposals from different States varying between 10 and 25 years. The establishment of longer time limits was justified by the fact that the damage caused by an industrial accident as a result of harmful substances penetrating into the environment often reveals itself many years after the occurrence of the accident.

2. In Polish law, Article 442 § 1 of the Civil Code applies to the time limits for the matters covered by the Protocol, providing that: "*The claim for remedying damage caused by an illegal act shall be subject to a time limit of three years from the date that the person who suffered the damage has known of the damage and of the person liable to remedy it. In all cases, however, such claims are subject to a time limit of 10 years from the date that the accident causing the damage occurred* "[52]. Thus, Polish law provides for time limits which are less favourable for the persons who have suffered damage than the Protocol does; however, where the case concerns the damage covered by the Protocol and the plaintiff chooses to avail of its provisions (without choosing the Polish law, under Article 16(2)), such application is subject to a time limit of 15 years.

Article 11

Financial security

1. The operator shall ensure that liability under article 4 for amounts not less than the minimum limits for financial securities specified in part two of annex II is and shall remain covered by financial security such as insurance, bonds or other financial guarantees including financial mechanisms providing compensation in the event of insolvency. In addition, Parties may fulfil their obligation under this paragraph with respect to State-owned operators by a declaration of self-insurance.

2. The minimum limits for financial securities specified in part two of annex II shall be reviewed by the Meeting of the Parties on a regular basis taking into account the risks of hazardous activities as well as the nature, quantity and properties of the hazardous substances that are present or may be present in such activities.

3. Any claim under the Protocol may be asserted directly against any person providing financial cover under paragraph 1. The insurer or the person providing the financial cover shall have the right to require the person liable under article 4 to be joined in the proceedings. Insurers and persons providing financial cover may invoke the defences that the person liable under article 4 would be entitled to invoke. Nothing in this paragraph shall prevent the use of deductibles or co-payments as between the insurer and the insured, but the failure of the insured to pay any deductible or co-payment shall not be a defence against the person who has suffered the damage.

[52] For more, see M. Safijan, in: K. Pietrzykowski (ed.), The Civil Code …, op. cit., pp. 1008-1012; G. Bieniek, in: G. Bieniek (ed.), Commentary …, op. cit., pp. 382-388.

4. Notwithstanding paragraph 3, a Party shall by written n otification to the Depositary at the time of signature, ratification, approval of or accession to the Protocol, indicate if it does not provide for a right to bring a direct action pursuant to paragraph 3. The secretariat shall maintain a record of the Parties that have given notification pursuant to this paragraph.

1. Article 11 obliges operators conducting "hazardous activity" to establish and maintain securities covering the claims which may be asserted under the Protocol[53]. Such securities may have e.g. the form of insurance (policy) or bond. The obligation to maintain securities for claims is to ensure that the claims of the persons who have suffered damage may be satisfied (at least, to a certain extent).

Part Two of Annex II sets the minimum limits of financial securities; just as in the case of the financial limits of liability, their values depend on the category of the activity conducted. For Category A the minimum limit of securities is 2.5 million units of account, whereas for Categories B and C it is 10 million units of account (thus, respectively, 25% of the limits of liability provided for these Categories). These values are to be reviewed by the Meetings of the Parties.

In the course of the negotiations, the values of compulsory securities were disputed[54]. The particularly active participants were representatives of insurance companies who supported their establishment at the lowest levels possible. They argued that insurance companies were not prepared to offer the insurance products of this type, since the risk involved in covering this type of damage up to higher insurance values was too high and would make it necessary to establish the insurance rates at very high levels, "choking" economic activities[55]. This, in turn, might be recognised by particular States as too restrictive a requirement and hamper the ratification process.

2. In Polish law, the issues of compulsory insurance are regulated by the Act on Compulsory Insurances, the Insurance Guarantee Fund and the Polish Bureau of Transport Insurers (Official Journal No. 124, Item 1152). In its Article 4(4), it provides that "*Compulsory insurances shall be the insurances provided for by the provisions of separate acts or the international agreements ratified by the Republic of Poland imposing on specific entities the obligation to conclude an insurance contract*". This means that when the Republic of Poland ratifies the Protocol the insurance of hazardous activity will become compulsory under this Act, too.

3. Paragraph 3 allows the persons who suffered the damage to asset their claims directly against the insurer. At the same time, the insurer may require that the operator liable should be joined in the court proceedings (in such cases, Polish law provides for the institution of garnish governed by Article 84 of the Administrative Procedure Code)[56]. The insurer may also exercise his rights and claims against the insured as agreed in the insurance contract.

---

[53] For insurance against environmental damage, see e.g. D. Maśniak, Environmental Insurance, Zakamycze, Cracow 2003.

[54] See the documents prepared by the expert group appointed for this purpose (MP. WAT/AC 3/2002/WP.25) and by the Belgian delegation (MP.WAT/AC 3/2003/WP. 23) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

[55] See the document prepared by the Insurance Company SwissRe (MP.WAT/AC 3/2003/WP. 15) – www.unece.org/env/civil-liability (Meetings of the International Working Group).

[56] Article 84 § 1 of the Civil Procedure Code: " The party who would have the right, in case of a ruling in his disfavour, to assert a claim against a their party or against a party with respect to whom the third party might have the right to assert a claim may notify such a person of the court proceedings underway and garnish it to become joined in the proceedings."

However, by way of a written notification to the Depositary, the individual Parties may exclude the right to assert claims directly against the insurer [see also the commentary on Article 30].

4. In analysing the provision on the securities for claims regarding the damage which may be caused by activities dangerous to the environment, an analogy emerges with Article 187 of the Polish Environmental Protection Act (EPA):

"*Article 187.1. Where it is dictated by a particularly important public interest related to environmental protection, in particular the risk of a substantial deterioration of the state of the environment, the permit referred to in Article 181, paragraph 1, subparagraphs 1-4, may establish a security for claims relating to the occurrence of adverse effects in the environment.*

2. The security referred to in paragraph 1 may have the form of a deposit, bank guarantee or insurance policy.

3. The security in deposit form shall be paid to a separate bank account indicated by the permitting authority, whereas the security in the form of a bank guarantee or an insurance policy shall be submitted to the permitting authority.

4. The bank guarantee or insurance policy shall provide that in case of adverse effects occurring in the environment, as the result of a failure of the entity to meet the obligations laid down in the permit referred to in Article 181, paragraph 1, subparagraphs 1-4, the bank or the insurance company shall settle the liabilities with the permitting authority."

However, the construction provided for in the Protocol has different nature:

- Under the Protocol the security is to be used to cover the claims of the persons who have suffered the damage and who assert civil claims against the operator, whereas under EPA the security is to be submitted to the permitting authority (Article 187(4) of EPA).
- Under the Protocol the security is always compulsory, whereas under EPA it is compulsory only where the administrative authority so orders in its decision (the emission permit).
- In accordance with EPA, the establishment of a security is related to the permitting procedure, whereas, for the purposes of the implementation of the Protocol, another construction may be applied to ensure that the operator is covered by a security – indeed, what is sufficient in this respect is a general obligation under legislation and its enforcement on general principles – just as in the case of other compulsory insurances (although, certainly, one may conceive of a situation where the permitting authority requests e.g. the establishment of such security, as this would ensure the greater effectiveness of this provision).

Article 12

International responsibility of States

The Protocol shall not affect the rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.

Article 12 expresses the general principle that each State bears international responsibility as provided for by the general rules of international law or by explicit treaty commitments made by a given State. In contrast, under the Article in question, it bears no responsibility for the operators who have caused the damage (unless they are State legal persons).

An analogous principle is expressed by Article 40 § 1 of the Polish Civil Code: "*The State Treasury shall bear no responsibility for the liabilities of state-owned enterprises and other*

State legal persons, unless a special regulation provides otherwise. State-owned enterprises and other State legal persons shall bear no responsibility for the liabilities of the State Treasury."

PROCEDURES

Articles 13 to 20 establish the procedure for asserting claims under the Protocol before the court or the Permanent Court of Arbitration.

Article 13

Competent courts

1. Claims for compensation under the Protocol may be brought in the courts of a Party only where:

(a) The damage was suffered;

(b) The industrial accident occurred; or

(c) The defendant has his or her habitual residence, or, if the defendant is a company or other legal person or an association of natural or legal persons, where it has its principal place of business, its statutory seat or central administration.

2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

1. Article 13 indicates in which courts claims may be brought under the Protocol, while leaving the choice of the court to the plaintiff. However, such choice may be made only between the States which are the Parties to the Protocol. Despite the fact that the application of the Protocol is only limited to the relations between the Parties and it does not cover the damage suffered in third States [see the commentaries on Articles 3 and 8], a situation may arise where it will be applied even though not all of the States mentioned in Article 13 are Parties. This will happen e.g. in the case where the accident has occurred in State A (which is a Party), the damage has been suffered in State B (which is also a Party), but the central administration of the operator is located in State C (which is not a Party). In such a case, the person who has suffered the damage may choose between the courts in States A and B. The choice of the court may be significant for the plaintiff, since, under Article 16(1) of the Protocol, all the matters of substance or procedure which are not regulated by the Protocol are subject to the provisions of the law of a given (the chosen) court. Understandably, these provisions may be different in respect of benefits and facilitations assigned to the parties [see the commentary on Article 16(1)].

In addition to the choice of the court, the plaintiff has also the right to choose the applicable law [see Article 16(2) and the commentary on it].

2. In accordance with Article 20(1) of the Protocol, where the defendant is domiciled in a member State of the European Community or where the parties to the dispute have attributed jurisdiction to a court of a member State of the European Community and one or more of the parties is domiciled in a member State of the European Community, the courts of the Parties which are members of the European Community apply the relevant Community rules instead of Article 13 [see the commentary on Article 20].

3. Paragraph 2 obliges the Parties to ensure that their courts are adequately prepared to consider cases under the Protocol. This may be ensured e.g. by assigning such cases to courts of appropriately high levels where it is easier to provide judges with adequate training.

Article 14

Arbitration

In the event of a dispute between persons claiming for damage pursuant to the Protocol and persons liable under the Protocol, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

Article 13 allows for a case regarding compensation to be submitted to arbitration by the Permanent Court of Arbitration in the Hague. This Court was established by the Convention for the Pacific Settlement of International Disputes done in the Hague on 18 October 1907. (Poland acceded to the Convention in 1929 and its text was published in the Official Journal of 1930, No. 9, Item 64).

In the light of the fact that an increasingly growing number of cases submitted to the Court concern environmental protection, it has developed the special Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment and a special panel of experts specialised in these issues has been appointed[57].

The condition for a case within the scope of application of the Protocol to be submitted to the Court is the consent of all the parties to a given dispute (meaning the parties to the dispute, e.g. the operator and the persons who have suffered the damage rather than the States – Parties).

Article 15

Lis pendens - related actions

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Parties, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

3. Where related actions are pending in the courts of different Parties, any court other than the court first seized may stay its proceedings.

4. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the

[57] For more information on the Permanent Court of Arbitration and the text of the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, see the website of the Court: www.pca-cpa.org.

court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

5. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

1. The purpose of Article 15(1) and (2) is to prevent the same actions being heard at the same time by different courts, since the fact that an action is pending in the court first seized (*lis pendens*) is a negative factor of procedure, i.e. the condition which prevents proceedings from being initiated at another court. In Polish law, an analogous principle is expressed by Article 199 § 1(2)"*The court shall decline an action … where the case regarding the same claim between the same parties is already pending or a final ruling has been passed on it*"[58].

2. Paragraphs 3 to 5 allow for several related actions to be considered together – as provided by Article 5 – in order *"to avoid the risk of irreconcilable judgments resulting from separate proceedings"*.

3. However, Article 15 does not apply to the mutual relations between the Parties which are member States of the European Community; since, in accordance with Article 20, the relevant Community rules apply [see the commentary on Article 20]. Certainly, such exclusion is not valid where only one of the Parties involved in given proceedings is a member State of the Community.

Article 16

Applicable law

1. Subject to paragraph 2, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws.

2. At the request of the person who has suffered the damage, all matters of substance regarding claims before the competent court shall be governed by the law of the Party where the industrial accident has occurred, as if the damage had been suffered in that Party.

1. Article 16(1) provides that the law of the court hearing the case should be applied (*lex fori*), provided that a given matter of substance or procedure has not been specifically regulated in the Protocol. The regulation of Article 16 should be taken into account by the plaintiff choosing (under Article 13) the court where he wishes to bring his claim [see the commentary on Article 13]. He must be aware that by choosing the court of one State rather than another State, he, at the same time, chooses the law that this court will apply [however, subject to paragraph 2, which allows for the choice of rules of substance, but not those of procedure, other than those of a given court and different from the provisions of the Protocol – see below]. In particular, the regulations of significance for the plaintiff may be those concerning e.g. the

[58] For more, see S. Dmowski, in: K. Piasecki (ed.), The Civil Procedure Code. A Commentary, Vol. I, CH. Beck, Warsaw 2001, pp. 913-916; M. Jędrzejewska, in: T. Ereciński (ed.), A Commentary on the Civil Procedure Code, Vol. I, Wydawnictwo Prawnicze, Warsaw 1999, pp. 394-397.

judicial costs, the compulsory measure regarding the counsel (which is observed e.g. in Germany to a much wider extent than in Poland), the rights of the parties during the trial etc.

The rules concerning a conflict of law referred to in paragraph 1 are, with simplification, the rules which decide the law of which State should be applied in actions (within the scope of private law) involving the so-called foreign element. In Poland, the issues of substantive law are regulated by the Act on Private International Law of 12 November 1965 (Official Journal No. 46, Item 290, as amended) which "*lays down the law specific of international personal and property relations in the scope of private law*" (Article 1 § 1 of this Act); in turn, the matters of procedure are regulated by Part III of the Civil Procedure Code, entitled "Provisions in the scope of the international civil procedure". Both of the aforementioned Acts contain a reservation to the effect that their provisions apply on the condition that the international agreement, to which Poland is a Party, does not provide otherwise; this is consistent with the provision of the Protocol to which this commentary refers.

2. The regulation contained in paragraph 2 is an expression of the principle of non-discrimination (it is also expressed in Article 8(3) of the Protocol – see the commentary on this Article). The purpose of the provision of Article 16(2) is to ensure that the claimant under the Protocol (i.e. a person who has suffered transboundary damage) receives a ruling which is no less favourable than the one received by the persons affected by the same event in the territory of the State where the accident has occurred. If such a provision were absent from the Protocol the operator would be liable to a lesser extent for transboundary damage than for the damage caused in his own country. Therefore, the plaintiff seeking compensation from the operator liable under the Protocol has to consider which regulations are more favourable for him – the Protocol or the domestic law of the State where the accident has occurred.

The plaintiff has the right to choose the applicable law in addition to the right to choose the court as provided in Article 13 [see the commentary on this Article]. This means that e.g. he can choose the court of his own State (as the damage has arisen in its territory) and, at the same time, e.g. request the application of the law of the State where the accident has occurred.

However, his choice may only cover the substantive law, as the *lex fori* principle expressed in paragraph 1 is always observed in the procedural law.

Although in a different context, Article 17 also involves the application of domestic law in the matters covered by the regulations of the Protocol [see the commentary on this Article].

Article 17

Relationship between the Protocol and the applicable domestic law

The Protocol is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.

Article 17 allows the persons who have suffered damage to apply domestic law in the matters regulated by the Protocol. This is a right of slightly different nature than the possibility of choosing the law as provided in Article 16(2). It is true that the latter provision allows for the application of domestic law, but it does so somehow "via the provisions of the Protocol", as, however, the plaintiff using Article 16(2) cites the Protocol and demands that court should apply a given (domestic) legal order on its basis (in addition, he may request the court to apply other law than its own). In contrast, Article 17 means that domestic law is applied wholly independently of the Protocol (as if it were nonexistent).

In accordance with Article 17, a foreigner may cite the law of a given State in such a scope and on such principles as are provided in it.

Article 18

Mutual recognition and enforcement of judgements and arbitral awards

1. Any judgement of a court having jurisdiction in accordance with article 13 or any arbitral award which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

(a) Where the judgement or arbitral award was obtained by fraud;

(b) Where the defendant was not given reasonable notice and a fair opportunity to present his or her case;

(c) Where the judgement or arbitral award is irreconcilable with an earlier judgement or arbitral award validly pronounced in another Party with regard to the same cause of action and the same parties; or

(d) Where the judgement or arbitral award is contrary to the public policy of the Party in which its recognition is sought.

2. A judgement or arbitral award recognized under paragraph 1 shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.

3. The provisions of paragraphs 1 and 2 shall not apply between Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgements or arbitral awards under which the judgement or arbitral award would be recognizable and enforceable.

1. In order to ensure the effective enforcement of judgements or arbitral awards pronounced in the matters under the Protocol, Article 18 provides that they should be mutually recognised and enforced by Parties.

The condition for the recognition of an award by other Parties is its final nature, i.e. it should no longer be subject to ordinary forms of review.

As soon as the necessary formalities required by a Party have been completed, the Party enforces a judgement or arbitral award.

In Poland, the formalities referred to in Article 18(2) are regulated by the provisions of Articles 1150 to 1153 of the Civil Procedure Code (e.g. it is necessary for a Polish court to rule that the judgement of a foreign court is recognised and to attribute to it the clause of enforceability)[59].

[59] For more, see K. Piasecki, in: K. Piasecki (ed.), The Code …, op. cit., Vol. III. The Lugano Convention. A Commentary, pp. 634-847; E. Marszałkowska-Krześ, in: H. Mądrzak (ed.), The Civil Procedure, C.H. beck, Warsaw 2003, pp. 443-447.

2. The provisions of Article 18 do not apply between Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgements or arbitral awards. A multilateral agreement in these matters is e.g. the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, done in Lugano on 16 September 1988 (the Lugano Convention, which Poland ratified and published in the Official Journal of 2000, No. 10, Item 132)[60].

3. However, Article 18 does not apply between the Parties which are member States of the European Community, as under Article 20 they will apply relevant Community rules [see the commentary on Article 20]. Certainly, such exclusion is not valid where only one of the Parties involved in given proceedings is a member State of the Community.

Article 19

Relationship between the Protocol and bilateral, multilateral or regional liability agreements

Whenever the provisions of the Protocol and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters, the Protocol shall not apply provided the other agreement is in force for the Parties concerned and had been opened for signature when the Protocol was opened for signature, even if the agreement was amended afterwards.

In a situation where certain of the Parties to the Protocol have concluded bilateral, multilateral or regional agreements concerning the matters regulated by the Protocol, the application of the Protocol is exclusive between them (as the aforementioned other agreements are special regulations with respect to the Protocol). The condition for such exclusion is that it would be possible at the same time to sign both the Protocol and the said other agreement; this would allow for the recognition that a given Party has deliberately chosen to apply the Protocol and, at the same time, some other agreement (in its relations with the Parties to the agreement).

Article 20

Relationship between the Protocol and the rules of the European Community on jurisdiction, recognition and enforcement of judgements

1. The courts of Parties which are members of the European Community shall apply the relevant Community rules instead of article 13, whenever the defendant is domiciled in a member State of the European Community, or the parties have attributed jurisdiction to a court of a member State of the European Community and one or more of the parties is domiciled in a member State of the European Community .

2. In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18 .

---

[60] See K. Piasecki, in: K. Piasecki (ed.), The Code …, op. cit., Vol. III, pp. 655-828.

1. Certain matters of procedure regulated by the Protocol are also subject to Community law.

In the scope of regulations concerning:

- the competence of the court (Article 13 of the Protocol),
- the matters related to *lis pendens* and related actions (Article 15 of the Protocol),
- the mutual recognition and enforcement of court judgements and arbitral awards (Article 18 of the Protocol),

the relevant rules apply instead of the Protocol.

As regards the competence of the court, the conditions for Community law to replace the Protocol are as follows:

- the defendant is domiciled in a member State of the Community, or
- the parties have attributed jurisdiction to a court in a member State and one or more of the parties is domiciled in a member State of the European Community.

Articles 15 and 18 of the Protocol are replaced by the Community rules only when all the Parties involved in a given action are EU members.

2. The Community rules referred to in Article 20 include primarily Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgements in civil and commercial matters, which e.g. regulates the issues referred to in Articles 13, 15 and 18 of the Protocol.

FINAL CLAUSES

Article 21

Meeting of the Parties

1. A Meeting of the Parties is hereby established.

2. The first meeting of the Parties shall be convened no later than eighteen months after the date of the entry into force of the Protocol and, if possible, in conjunction with a meeting of the governing body of one of the Conventions. Thereafter, ordinary meetings shall be held at dates to be determined by the Meeting of the Parties to the Protocol and, as appropriate, in conjunction with a meeting of the governing body of one of the Conventions. Extraordinary meetings of the Parties shall be held at such other times as may be deemed necessary by the Meeting of the Parties, or at the written request of any Party, provided that, within six months of such a request being communicated to them by the secretariat, it is supported by at least one third of the Parties.

3. The Parties, at their first meeting, shall adopt by consensus rules of procedure for their meetings and consider any necessary financial provisions.

4. The functions of the Meeting of the Parties shall be:

(a) To review the implementation of and compliance with the Protocol including relevant case law provided by the Parties;

(b) To consider and adopt, if necessary, proposals for amendment of the Protocol or any annexes and for any new annexes;

(c) To consider and undertake any additional action that may be required for the purposes of the Protocol.

1. Article 21 establishes the Meeting of the Parties as an instrument to implement and manage the Protocol. The first Meeting of the Parties is to be convened within one year and a half of the entry into force of the Protocol. If possible, it should be convened in conjunction with a meeting of the governing body of one of the original Conventions. In the case of the Convention on Industrial Accidents, it is called the Conference of the Parties, whereas in the case of the Convention on the Protection and Use of Transboundary Watercourse and International Lakes, it is called the Meeting of the Parties. The dates of successive ordinary meetings will be set by the Meeting of the Parties to the Protocol and, as appropriate, held in conjunction with a Meeting (Conference) of the Parties of either of the Conventions. Article 21(1) also provides for a scheme of convening extraordinary meetings of the Parties. This requires the written request of any Party, which is submitted to the Secretariat and supported by at least one third of the Parties.

2. At their first meeting the Parties will be obliged to adopt rules of procedure for their successive meetings (with consensus required) and consider the financial provisions related to the implementation of the Protocol.

3. Paragraph 4 lists the functions of the Meeting of the Parties: the review of the implementation of and compliance with the Protocol, including the monitoring of judgments passed on its basis, the issues of amendments to the Protocol and its annexes as well as the consideration and undertaking of other actions necessary to effectively achieve the purpose of the Protocol. Such generally defined functions encompass the tasks specifically indicated in Article 9(2) and Article 11(2): a regular review of the limits of liability referred to in Article 9 and Part One of Annex II and the minimum limits for financial securities referred to in Article 11 and Part Two of Annex II [see the commentaries on Articles 9 and 11].

Article 22

Secretariat

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions for the Protocol:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of the Protocol;

(c) The performance of such other functions as may be determined by the Meeting of the Parties on the basis of available resources.

Neither the Protocol, nor any of its original Conventions have established their own Secretariat; these functions have been entrusted to the Executive Secretary of the United Nations Economic Commission for Europe. Special posts have been established at the ECE in Geneva to

manage the secretariats of each of the original Conventions; the matters of the Protocol are handled jointly by these two secretariats[61].

Article 23

Annexes

Annexes to the Protocol shall constitute an integral part thereof.

The Protocol contains three annexes:

I. It lays down hazardous substances and their threshold quantities for the purpose of defining which types of activity are regarded as hazardous in the meaning of the Protocol;

II. In its Part One, it lays down the limits of liability of the operators conducting the different categories of activity {see Article 9 and the commentary on it]; in its Part Two, it sets out the minimum limits of financial securities which the operators conducting the different types of activity must maintain;

III. It sets out the manner of dispute settlement by arbitration.

Article 24

Amendments to the Protocol

1. Any Party may propose amendments to the Protocol.

2. Proposals for amendments to the Protocol shall be considered at a meeting of the Parties.

3. Any proposed amendment to the Protocol shall be submitted in writing to the secretariat, which shall communicate it at least six months before the meeting at which it is proposed for adoption to all Parties, to other States and regional economic integration organizations that have consented to be bound by the Protocol and for which it has not yet entered into force and to Signatories.

4. The Parties shall make every effort to reach agreement on any proposed amendment to the Protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

5. For the purposes of this article, "Parties present and voting" mean s Parties present and casting an affirmative or negative vote.

[61] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 109.

6. Any amendment to the Protocol adopted in accordance with paragraph 4 shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties, to other States and regional economic integration organizations that have consented to be bound by the Protocol and for which it has not yet entered into force and to Signatories.

7. An amendment, other than one to annex I or II, shall enter into force for those Parties having ratified, accepted or approved it on the ninetieth day after the date of receipt by the Depositary of the instruments of ratification, acceptance or approval by at least three fourths of those which were Parties on the date of its adoption. Thereafter it shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendment.

8. In the case of an amendment to annex I or II, a Party that does not accept such an amendment shall so notify the Depositary in writing within twelve months from the date of its circulation by the Depositary. The Depositary shall without delay inform all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance, whereupon the amendment to annex I or II shall enter into force for that Party.

9. On the expiry of twelve months from the date of its circulation by the Depositary as provided for in paragraph 6, an amendment to annex I or II shall enter into force for those Parties which have not submitted a notification to the Depositary in accordance with paragraph 8, provided that, at that time, not more than one third of those which were Parties on the date of the adoption of the amendment have submitted such a notification.

10. If an amendment to an annex is directly related to an amendment to the Protocol not referring to annex I, II or III, it shall not enter into force until such time as the amendment to the Protocol enters into force.

Article 24 lays down the manner in which amendments to the Protocol are to be adopted, with a distinction between amendments to the Protocol and amendments to its Annexes. In principle, all amendments (both to the text and the annexes) should be adopted by consensus; it is only when agreement cannot be reached that an amendment may adopted by a three-fourths majority of the Parties present and voting (under paragraph 5, this means Parties present and casting an affirmative or negative vote; thus the Parties abstaining are not counted).

Amendments to the Protocol require ratification, acceptance or approval. They enter into force on the ninetieth day after the relevant documents were submitted to the Depositary by three fourths of the Parties. They enter into force only for the Parties which have ratified, accepted or approved the amendments (they are not binding for the others).

Amendments to annexes do not require ratification, acceptance or approval. However, each Party may submit a notification to the effect that it does not accept a given amendment within twelve months from the date of its receipt of the amendment from the Depositary. The absence of a notification means that the Party accepts the amendment. Amendments to annexes enter into force after 12 months from their communication by the Depositary for those Parties which have not submitted a notification that they do not accept them, with the additional condition that the number of the Parties which have rejected a given amendment does not exceed three fourths of all the Parties[62].

Exceptionally, if an amendment to an annex is directly related to an amendment to the text of the Protocol, it enters into force along with the amendment to the Protocol.

[62] See J. Jendrośka, W. Radecki, The Convention …, op. cit., pp. 109-110.

Article 25

Right to vote

1. Except as provided for in paragraph 2, each Party shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

In accordance with a general principle, each Party has one vote. It is only a Party which is a regional economic organisation (in practice, this is the European Union) which has the right to the number of votes equal to the number of its member States are Parties to the Protocol.

The second sentence of Article 25(2) prevents double voting by the organisation and its member States[63].

Article 26

Settlement of disputes

1. If a dispute arises between two or more Parties about the interpretation or application of the Protocol, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to the Protocol, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex III.

3. If the parties to the dispute have accepted both means of dispute settlements referred to in paragraph 2, the dispute may be submitted only to the International Court of Justice, unless the parties to the dispute agree otherwise.

Article 26 lays down a mechanism for the settlement of disputes arising between or among the Parties about the interpretation or application of the Protocol.

The principle is for the matter to be settled by negotiation or any other manner of dispute settlement to which they agree. Where a dispute cannot be resolved in this manner, it may be submitted for resolution: to the International Court of Justice based in the Hague or to an hoc arbitral tribunal (following the procedure laid down in Annex III). Annex III adopts the so-called American system of arbitration[64], i.e. the submission of a dispute to a three-member mixed

[63] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 108.

[64] For more, see R. Bierzanek, J. Symonides, International Public Law, Warsaw, 1994, p. 340.

tribunal, consisting of representatives of the parties to the dispute. Subsequently, these persons appoint the president of the tribunal.

Each Party may consent to the submission of possible disputes to the Court or arbitration when signing, ratifying, accepting, approving or acceding to the Protocol, in writing to the Depositary. When a Party accepts both ways of dispute settlement, the dispute will be settled by the International Court of Justice, unless both parties agree that in this case it will be submitted to arbitration[65].

Article 27

Signature

1. The Protocol shall be open for signature at Kiev (Ukraine) from 21 to 23 May 2003 and thereafter at United Nations Headquarters in New York until 31 December 2003 by States members of the Economic Commission for Europe, as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by the Protocol, including the competence to enter into treaties in respect of these matters.

2. Upon signature, a regional economic integration organization shall make a declaration specifying the matters governed by the Protocol in respect of which competence has been transferred to that organization by its member States, the nature and extent of that competence, including the competence to enter into treaties in respect of these matters.

1. The Protocol was signed on 21 May 2003 in the course of the fifth Ministerial Conference "Environment for Europe", held in Kiev (Ukraine). On that day the Protocol was signed by 21 countries: Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Portugal, Romania, Sweden, Ukraine and United Kingdom. Poland, which signed it on 13 June 2003, was the 22nd signatory of the Protocol.

2. The following entities have the right to sign the Protocol:

1) States members of the Economic Commission for Europe
2) States having consultative status with the Economic Commission for Europe
3) regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by the Protocol, including the competence to enter into treaties in respect of these matters.

All these entities may sign the Protocol until 31 December 2003 at United Nations Headquarters in New York.

3. It is very important that the right to sign the Protocol was not limited only to the Parties to the original Conventions. However, this limitation already applies in respect of

[65] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 111.

ratification, acceptance or accession. This means that any entity belonging to one of the three aforementioned groups may become Signatory, but only an entity which is Party to at least one of the Conventions may become Party to the Protocol (however, subject to Article 28(3) – see the commentary on this provision). Such a solution should be regarded as a fairly unfortunate one, as in principle the signing of an international agreement should be the first step to its ratification (acceptance, accession). But the Protocol does not allow for the ratification by those Signatories which are not Parties to either of the Conventions. Such a solution is the result of a compromise between the supporters of different concepts concerning the opening of the Protocol for signature and ratification as put forth in the course of the negotiations (ranging from proposals that the Protocol should be open for signature and ratification by all the States and organisations, irrespective of whether they have signed either of the Conventions, to proposals allowing this only for the entities which are Parties to both Conventions).

4. The entities which will not have signed the Protocol by 31 December 2003 may become bound by it through accession, but only if they meet the aforementioned condition of being a Party to at least one of the Conventions.

Article 28

Ratification, acceptance, approval and accession

1. The Protocol shall be subject to ratification, acceptance or approval by the signatory States and regional economic integration organizations referred to in article 27, provided that the States and organizations concerned are Parties to one or both of the Conventions.

2. The Protocol shall be open for accession by the States and organizations referred to in article 27, provided that the States and organizations concerned are Parties to one or both of the Conventions.

3. Any other State, not referred to in paragraph 2, that is Member of the United Nations may accede to the Protocol upon approval by the Meeting of the Parties. In its instrument of accession, such a State shall make a declaration stating that approval for its accession to the Protocol had been obtained from the Meeting of the Parties and shall specify the date on which approval was received.

4. Any organization referred to in article 27 which becomes a Party to the Protocol without any of its member States being a Party shall be bound by all the obligations under the Protocol. If one or more of such organization's member States is a Party to the Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under the Protocol concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 27 shall declare the extent of their competence with respect to the matters governed by the Protocol. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

1. In accordance with the Vienna Convention on the Law of Treaties, a State may be bound by an international agreement by way of its ratification, acceptance, approval or accession. Irrespective of which of the aforementioned forms a given State uses, the practical effect in international relations is the same – the commitment of the State to abide by the agreement.

2. As mentioned above [see the commentary on Article 27], the Protocol may be assigned, ratified, accepted, approved or acceded to by the States and organisations listed in Article 27, if they are Parties to at least one of the original Conventions (thus, the right to sign is not limited).

3. In accordance with Article 28(3), each other State which is not mentioned in Article 27 or is not a Party to one of the Conventions may accede to the Protocol provided that it receives approval of the Meeting of the Parties. However, this State must be a member of the United Nations.

It follows from the formulation of paragraph 3 that it applies to both the States referred to in Article 27, but which are not Parties to any of the Conventions, and those that are not referred to in Article 27, which are, at the same time, not Parties to any of the Conventions. A third solution (a State not included in Article 27, but which is a Party to the Conventions, is impossible, since none of the Conventions allows for the accession of such States).

4. After the internal procedure of ratification, accession etc. has been completed the State should submit the relevant documents to the Depositary of the Protocol – at the United Nations Legal Department in New York through the duly authorised representative of a given country (most often the Head of the Mission to the United Nations)[66].

Article 29

Entry into force

1. Subject to paragraph 2, the Protocol shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. Article 2, paragraph 2 (e) (iii), shall enter into force when thresholds, limits of liability and minimum limits of financial securities for pipelines are set in annexes I and II in accordance with article 24, paragraphs 8 and 9.

3. For the purposes of paragraph 1, any instrument deposited by an organization referred to in article 27 shall not be counted as additional to those deposited by States members of such an organization.

4. For each State or organization referred to in artic le 27 which ratifies, accepts or approves the Protocol or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Protocol shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

---

[66] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 113.

1. Article 29 lays down the conditions for the entry into force of the Protocol – on the ninetieth day after the date of deposit of the sixteenth document confirming the fact of being bound by it.

2. Paragraph 2 contains an exception to this rule, by laying down in a different way the entry into force of the provision stating that in the meaning of the Protocol an industrial accident is also an event which has occurred in the course of transportation via pipelines outside of the site where a hazardous activity is conducted. This provision will enter into force only when appropriate amendments are made to Annexes I and II in order to set in them the special thresholds, limits of liability and minimum limits of financial securities for pipelines [see also the commentary on Article 2(2)(c)]. These amendments will be adopted in the procedure for amendments to annexes, meaning that their ratification is not required; however, Parties may notify that they do not accept the amendment [see Article 24(8) and (9) and the commentary on it].

3. Paragraph 3 prevents the double counting of the documents deposited by an organisation and its States members.

Article 30

Reservations

No reservation may be made to the Protocol.

In accordance with the Vienna Convention, "reservation" means "*a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*" (Article 2(1)(d)).

Under Article 30, such reservations are inadmissible with respect to the Protocol. One should bear in mind, however, the content of Article 11(4), which allows the States to notify that they do not recognise the right of the persons who have suffered damage to directly assert their claims against the insurer or any other entity providing the financial security referred to in Article 11 (they do not provide for such a right) [see the commentary on Article 11]. Such a notification may be submitted at the time of signature, ratification, approval of or accession to the Protocol; thus, it satisfies the definition of reservation given above.

Article 11(5) should, therefore, be regarded as *lex specialis* with respect to Article 30; it should be assumed that no reservations are admissible in relation to the Protocol, with the exception of the one referred to in Article 11(5). A situation where only certain strictly defined reservations are admissible is provided for by the Vienna Convention, which states e.g. "*A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless (...)* ***the treaty provides that only specified reservations****, which do not include the reservation in question, may be made*" (Article 19(b) of the Convention).

Article 31

Withdrawal

1. At any time after three years from the date on which the Prot ocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.

2. Any such withdrawal shall take effect one year from the date of its receipt by the Depositary, or on such later date as may be specified in the notification.

Each of the Parties to the Protocol has the right to withdraw from the Protocol and, in consequence, it will no longer be bound by it. However, such withdrawal is admissible only after three years from the date on which the Protocol has entered into force. The condition for effective withdrawal is the observation of the procedure provided in Article 31.

Article 32

Depositary

The Secretary-General of the United Nations shall act as the Depositary of the Protocol.

In practice, the tasks of the Depositary are carried out at the Treaty Section in the Legal Department of the United Nations in New York[67].

Article 33

Authentic texts

The original of the Protocol, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary -General of the United Nations.

All the authentic texts have the same legal significance and are purported to be identical. In practice, certain subtle differences in meaning may occur.

The authentic texts of the Protocol are the three official UNECE languages: English, French and Russian[68].

[67] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 112.
[68] See J. Jendrośka, W. Radecki, The Convention …, op. cit., p. 114.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the Protocol.

DONE at Kiev, this twenty-first day of May, two thousand and three.

<u>Annex I</u>

HAZARDOUS SUBSTANCES AND THEIR THRESHOLD QUANTITIES FOR THE PURPOSE OF DEFINING HAZARDOUS ACTIVITIES

1. The threshold quantities set out below relate to each hazardous activity or group of hazardous activities.

2. Where a substance or preparation named in part two also falls within a category in part one, the threshold quantity set out in part two shall be used.

Part One

CATEGORIES OF SUBSTANCES AND PREPARATIONS NOT SPECIFICALLY NAMED IN PART TWO

Category	*Threshold quantity (tons)*
I. Very toxic ...……………………………………………………..	**20**
II. Toxic ..…………………………………………………………...	**200**
III. Dangerous for the environment..………………………………...	**200**

Part Two

NAMED SUBSTANCES

Substance	*Threshold quantity (tons)*
Petroleum products: **(a) Gasolines and naphthas,** **(b) Kerosenes (including jet fuels),** **(c) Gas oils (including diesel fuels, home heating oils and gas oil blending streams)**	**25,000**

Notes on the indicative criteria for the categories of substances and preparations given in part one

In the absence of other appropriate criteria, such as the European Union classification criteria for substances and preparations, Parties may use the following criteria when classifying substances or preparations for the purposes of part one of this annex.

I. VERY TOXIC

Substances with properties corresponding to those in table 1 or table 2, and which, owing to their physical and chemical properties, are capable of creating industrial accident hazards:

Table 1

LD_{50}(oral) mg/kg body weight $LD_{50} \leq 25$	LD_{50}(dermal) mg/kg body weight $LD_{50} \leq 50$
LD_{50} oral in rats LD_{50} dermal in rats or rabbits	

Table 2

Discriminating dose mg/kg body weight	< 5
where the acute oral toxicity in animals of the substance has been determined using the fixed-dose procedure	

II. TOXIC

Substances with properties corresponding to those in table 3 or 4 and having physical and chemical properties capable of creating industrial accident hazards:

Table 3

LD_{50}(oral) mg/kg body weight $25 < LD_{50} \leq 200$	LD_{50}(dermal) mg/kg body weight $50 < LD_{50} \leq 400$
LD_{50} oral in rats LD_{50} dermal in rats or rabbits	

Table 4

Discriminating dose mg/kg body weight = 5
where the acute oral toxicity in animals of the substance has been determined using the fixed-dose procedure

III. DANGEROUS FOR THE ENVIRONMENT

Substances showing the values for acute toxicity to the aquatic environment corresponding to table 5:

Table 5

LC_{50} mg/l $LC_{50} \leq 10$	EC_{50} mg/l $EC_{50} \leq 10$	IC_{50} mg/l $IC_{50} \leq 10$
LC_{50} fish (96 hours) EC_{50} daphnia (48 hours) IC_{50} algae (72 hours)		
where the substance is not readily degradable, or the log Pow > 3.0 (unless the experimentally determined BCF < 100)		

List of abbreviations

Pow	-	partition coefficient octanol/water
BCF	-	bioconcentration factor
LD	-	lethal dose
LC	-	lethal concentration
EC	-	effective concentration
IC	-	inhibiting concentration

<u>Annex II</u>

LIMITS OF LIABILITY AND
MINIMUM LIMITS OF FINANCIAL SECURITIES

Part One

LIMITS OF LIABILITY

1. For the purposes of defining the limits of liability under article 4, pursuant to article 9, the hazardous activities are grouped in three different categories, according to their hazard potential.

2. These categories are as follows:

Category A: Hazardous activities in which one or more hazardous substances falling into categories specified in part one of annex I are or may be present in quantities not exceeding four times the threshold quantities specified in annex I;

Category B: Hazardous activities in which one or more hazardous substances falling into categories specified in part one of annex I are or may be present in quantities exceeding four times the threshold quantities specified in annex I;

Category C: Hazardous activities in which one or more hazardous substances named in part two of annex I are or may be present in quantities at or in excess of the threshold quantity specified in annex I.

3. The limits of liability for the three categories of hazardous activities are as follows:

Category A hazardous activities ....10 million units of account;
Category B hazardous activities .... 40 million units of account;
Category C hazardous activities .... 40 million units of account.

Part Two

MINIMUM LIMITS OF FINANCIAL SECURITIES

4. For the purposes of defining the minimum limits of financial securities under article 11, the hazardous activities are grouped in three different categories, according to their hazard potential.

5. These categories are as follows:

Category A: Hazardous activities in which one or more hazardous substances falling into categories specified in part one of annex I are or may be present in quantities not exceeding four times the threshold quantities specified in annex I;

Category B: Hazardous activities in which one or more hazardous substances falling into categories specified in part one of annex I are or may be present in quantities exceeding four times the threshold quantities specified in annex I;

Category C: Hazardous activities in which one or more hazardous substances named in part two of annex I are or may be present in quantities at or in excess of the threshold quantity specified in annex I.

6. The minimum limits of financial securities for the three categories of hazardous activities are as follows:

Category A hazardous activities ....2.5 million units of account;
Category B hazardous activities .... 10 million units of account;
Category C hazardous activities .... 10 million units of account.

Annex III

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 26, paragraph 2, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of the Protocol whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to the Protocol.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of the Protocol.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information;

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to the Protocol which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to the Protocol.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

BIBLIOGRAPHY

1. M. Bar, J. Jendrośka, Odpowiedzialność prawna za szkody ekologiczne w Unii Europejskiej, Wyższa Szkoła Zarządzania i Bankowości, Wrocław 2003
2. M. Bar, J. Jendrośka, K. Tarnacka, Prawo do sądu w ochronie środowiska, Centrum Prawa Ekologicznego, Wrocław 2002
3. M. Bar, A. Kodjabashev, M. Stoczkiewicz, D. Szwed, S. Vykhryst, Protocol on Civil Liability, Centrum Prawa Ekologicznego - Demetra - EcoPravo Charków, 2003
4. J. Boć, E. Samborska - Boć, Ochrona środowiska. Źródła, Wrocław 1994
5. G. Bieniek (ed.), Komentarz do Kodeksu cywilnego, Księga trzecia. Zobowiązania, tom 1, Wydawnictwo Prawnicze, Warszawa 1999
6. R. Bierzanek, J. Symonides, Prawo międzynarodowe publiczne, Warszawa 1994
7. P. Dascalopoulou - Livada, The Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters w: Environmental Liability Journal, 4/2003
8. T. Ereciński (ed.), Komentarz do kodeksu postępowania cywilnego, część pierwsza. Postępowanie rozpoznawcze, tom 1, Wydawnictwo Prawnicze, Warszawa 1999
9. J. Jendrośka (ed.), Ustawa - Prawo ochrony środowiska. Komentarz, Centrum Prawa Ekologicznego, Wrocław, 2001
10. J. Jendrośka, J. Jerzmański (ed.), Prawo ochrony środowiska dla praktyków, Verlag Dashofer, Warszawa, wydawnictwo ciągłe, aktualizowane kwartalnie, I wydanie 1999
11. J. Jendrośka, W. Radecki, Konwencja o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska z komentarzem. Centrum Prawa Ekologicznego, Wrocław, 1999
12. W. Katner, Konwencja (nr 150) o odpowiedzialności cywilnej za szkody wyrządzone działalnością niebezpieczną dla środowiska a prawo polskie., in: Standardy Prawne Rady Europy. Teksty i komentarze. Tom II. Prawo cywilne. Ed. M. Safijan, Instytut Wymiaru Sprawiedliwości. Oficyna Wydawnicza, Warszawa 1995
13. A. Koch, Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym, Warszawa 1975
14. B. Lewaszekiewicz - Pietrykowska, Odpowiedzialność cywilna prowadzącego na własny rachunek przedsiębiorstwo za szkodę ekologiczną in: Studia z prawa prywatnego, Łódź 1997
15. D. Maśniak, Ubezpieczenia ekologiczne, Zakamycze, Kraków 2003
16. K. Piasecki (ed.), Kodeks postępowania cywilnego. Komentarz, C.H. Beck, Warszawa 2001
17. K. Pietrzykowski (ed.), Kodeks cywilny. Komentarz, tom I, C.H. Beck, Warszawa 2002
18. W. Radecki, Odpowiedzialność prawna w ochronie środowiska, Difin, Warszawa 2002
19. J. Rotko (ed.), Prawo wodne. Komentarz, TNPOŚ, Wrocław 2002
20. J. Szachułowicz, Własność publiczna, Warszawa 2000
21. H. D. Trevianus, Preamble (in:) Encyklopedia of Public International Law, Vol. III. R. Bernhard (ed.), Elsvier Publ., Amsterdam et al., 1997
22. S. Wajda, J. Żurek (ed.), Konwencja w sprawie transgranicznych skutków awarii przemysłowych, tłum. J. Żurek, , Instytut Ochrony Środowiska, Warszawa
23. W. Warkałło, Siła wyższa jako zasada nieodpowiedzialności i domniemanie przypadkowości szkody, Warszawa 1949

Magdalena Bar

MA in Law, Counsel

Partner in Jendrośka, Jerzmański & Bar. Corporate and Environmental Law, Sp.z o.o. Vice-President of the Environmental Law Centre

In 2002-2003 she took part in the negotiations on the UNECE Protocol on Civil Liability for Transboundary Damage Caused by Hazardous Activity.

Representing the Polish Government, she participated in the consultations with the European Commission on the Proposal for a Directive on Access to Justice in Environmental Matters and in the meetings of the Task Group appointed by the first Meeting of the Parties to the Aarhus Convention, dealing with access to justice within the framework of the Convention.

She has been one of the collective authors of books, including a commentary on the Environmental Protection Act of 2001 and publications on access to justice in environmental protection.

She has written a large number of articles, studies and expert analysis as well as a number of legal opinions in the scope of environmental law commissioned by the Sejm (Lower House of Parliament) and the Senate of the Republic of Poland, the Ministry of the Environment and other authorities.

One of the authors of the commentary on the legislation on packaging and on the product and deposit charges.

A founding member of the Association of Consultants on Environmental Assessments, a member of the Society of Environmental Law of the Central and Eastern Europe and New Independent States (GUTA).

In 1997-1999 she cooperated with the Bureau of Information and Guidance on Environmental Law with the Scientific Society of Environmental Law.

Centrum Prawa Ekologicznego (CPE) – The Environmental Law Center is an independent think tank and advisory body which specialises in environmental law

CPE collaborates with **Jendrośka, Jerzmański & Bar. Corporate and Environmental Law,** a paralegal office.

Our main activities comprise of:

- consultancy, providing information, advice and preparing legal opinions on Polish and European Union's environmental laws, especially in the context of European integration;
- law-drafting;
- publishing;
- organising workshops and conferences;

CPE's main clients:

- businesses;
- central governmental authorities and administration;
- governmental and self-governmental administration;
- non-governmental organisations;

CPE collaborates with various institutions:

- national:

- Lower and Upper Houses of Parliament;
- Ministry of the Environment;
- Local and regional governmental authorities at different level;
- Governmental administration;

- international:

- UNECE
- UNEP
- European Commission

We also co-operate with the Regional Environmental Center (REC) in Szentendre, the Environmental Law Institute in Washington DC, the Eco-Institute in Darmstadt, American Bar Association CEELI and many Polish research centers, academic institutions and consultancy enterprises.

CPE's activities are run by outstanding environmental law and policy experts with significant domestic and foreign experience.
The CPE Board comprises of:

- Mr Jerzy Jendroska, Ph.D. (President),
- Mr Jan Jerzmanski, Ph.D. (Vice-President),
- Ms Magdalena Bar, LL.M (Vice-President).

CPE's staff also includes: Marcin Stoczkiewicz, Ph.D., Zbigniew Bukowski, Ph.D. and Prof. Jerzy Rotko, Ph.D.
Other permanent collaborators are: Prof. Marek Górski, Ph.D.; Elżbieta Kaleta-Jagiełło, Ph.D.; and Dariusz Szwed.

Consultancy and advisory activities

We offer a comprehensive environmental law-related consultancy. Our offer is directed towards the entrepreneur, governmental and local governmental administration, as well as to others institutions and persons.
It includes, among others, preparing overall legal analysis, especially in the context of the duties resulting from polish accession to the European Union. This covers mainly:

- environmental protection in investment process, including legal aspects of conducting Environmental Impact Assessment;
- issuing ecological permits;
- air protection;
- drinking- and wastewater management;
- waste management;
- soil protection;
- nature protection;
- noise and radiation protection;

Publishing and training

- CPE offers a wide range of publications. The most important are the following:
- Environmental Protection Law. Commentary. ed. J. Jendrośka
- Waste Act. Commentary. ed. Jan Jerzmański
- Packaging and Product and Deposit Charges Legislation. Commentary. ed. Jerzy Jendrośka and Magdalena Bar
- Access to Justice in Environmental Matters, Magdalena Bar, Jerzy Jendrośka, Kamila Tarnacka, Wrocław 2002
- Environmental Law in Poland in the Context of Accession to European Union – Selected Issues. ed. J. Jendrośka
- New Environmental Legislations in Poland Harmonized with EU Requirements. ed. J. Jendroska
- New Nature Protection Act. Commentary to the Act of 7 December, 2000 on Amendments to Nature Protection Law, Magdalena Bar, Marek Górski, Jan Jerzmański;
- Pollutant Release and Transfer Registers as an Instrument of Environmental Policy. Organisational and Legal Aspects. ed. J. Jendrośka

In addition to that, in co-operation with the publishing house Dashofer Verlag, CPE issues "Environmental Law Textbook for Practitioners", an updated quarterly guidebook on environmental law, edited by J. Jendrośka and J. Jerzmański. It describes actual and planned environmental regulations in Poland and evaluates their compliance with the EU legislation. All texts are written by a group of outstanding environmental law specialists (e.g. Professors:

W. Radecki; Ph.D., M. Górski; Ph.D., A. Lipiński; Ph.D., J. Rotko; Ph.D. and E. Kaleta-Jagiełło, Ph.D.).

Our experts organise numerous workshops and conferences on polish and EU environmental law. These events are attended by representatives of various governmental and self-governmental bodies and by representatives of the business and NGO's.

Consultancy on environmental aspects of EU enlargement

EU enlargement is one of our priority areas of activity, with special consideration given to the implementation of environmental acquis to Polish environmental law.
From May 1999 to December 2001 CPE in co-operation with Dutch organisations: Stichting Natuur en Millieu and MilieuKontakt OostEuropa, implemented an international project "Time for EU membership" sponsored by the Dutch Foreign Ministry within the MATRA programme. The project focused on providing information and workshops on EU environmental legislation, as well as on scrutinising the approximation process in Poland in this respect.

President – Jerzy Jendrośka, Ph.D. was appointed Ministry of Environment advisor on the EU adhesion for the years 2000-2001

Centrum Prawa Ekologicznego
ul. Uniwersytecka 1
50-951 Wrocław
tel.: (+48 71) 34 366 95
fax: (+48 71) 34 101 97
e-mail: cpe@eko.wroc.pl
http://cpe.eko.org.pl

Kancelaria Jendrośka, Jerzmański & Bar.
Prawo gospodarcze i ochrony środowiska.
Sp. z o.o.
ul. Uniwersytecka 1
50-951 Wrocław
tel.: (+48 71) 34 102 34
fax: (+48 71) 34 101 97
www.jjb.com.pl
e-mail: jjb@jjb.com.pl