FRANCISCO JAVIER ZAMORA CABOT
LORENA SALES PALLARES
MARIA CHIARA MARULLO
Directors

THE FIGHT AGAINST CLIMATE CHANGE IN THE JUDICIAL SPHERE

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Faculty of Juridical Sciences and Economic - FCJE

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Do the cases of cross-border pollution in the light of the Brussels I Bis and Rome II Regulations make it necessary to undertake reforms of European instruments?

José Luis IRIARTE ANGEL

Professor of International Private Law Public
University of Navarra

SUMMARY: I. ASSUMPTIONS AND DETERMINING FACTORS OF THE RULES, II. INTERNATIONAL JURISDICTION: THE SOLUTIONS OF THE BRUSSELS REGULATION Ia.
1. *Introduction,* 2. The *forum of the defendant's domicile,* 3. The forum of the site of the harmful event. III. APPLICABLE LAW: THE SOLUTION OF THE ROME II REGULATION. 1. *Introduction and preamble, The* 2. *alternative between the law of the country where the damage occurred and the law of the country where the event giving rise to the damage took place.*
IV. CONCLUSIONS.

I. PREMISES AND CONDITIONS OF THE REGULATIONS

As a preliminary and introductory point, we must refer to the premises and conditions, both legal *and* factual, that weigh on the Brussels I a. and Rome II Regulations when they deal with the regulation of aspects related to cross-border pollution,

For the above-mentioned Regulations *"[E]nvironmental damage' is to be understood as the adverse change of a natural resource, such as water, soil or air, the impairment of a function performed by that natural resource for the benefit of another natural resource, or the impairment of a function performed by that natural resource for the benefit of another natural resource".*

natural resource or the public, or a detriment to variability between organisms. alive"[1].

Article 191 of the Treaty on the Functioning of the European[2] Union is an ambitious provision in terms of environmental protection and takes into account the inevitable extra-European projection of this issue. Thus, it states that the Union's policy in this area will contribute to achieving, inter alia, the objective of *"promoting measures at international level to deal with regional or worldwide environmental problems and in particular to combat climate change"*. This idea is subsequently reaffirmed by stating that *"[w]ithin the framework of their respective competences, the Union and the Member States shall cooperate with third countries and the competent international organisations. The modalities of the Union's cooperation may be the subject of agreements between the Union and the third parties concerned*". In other words, the European legislator sees clearly that this is a problem that transcends the borders of the Union and that, therefore, if it is to act with real effectiveness, cooperation with third states and international organisations is essential in order, among other objectives, to articulate a broad network of international agreements. In this respect, we will refer later to the question of the relationship between international treaties and the Regulations we are now dealing with.

Article 191 also states that *"Union policy on the environment shall aim for a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principle of preventive action, on the principle of correcting environmental damage, preferably at source, and on the polluter-pays principle.* It thus provides us with a series of hermeneutical criteria to be taken into account when applying Brussels I bis and Rome II. In this respect, it should be noted that statement 25 of the Preamble of the Regulation

1. Statement 24 of the Preamble of the Rome II Regulation.
   See also tangentially the following Communication: European Commission, **"Guidelines providing a common understanding of the term '**environmental **damage**' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to **the prevention and remedying of environmental damage", *OJEU* C 118,** 7 April 2021, pp. 1-49. The Communication emphasises the variety of adverse effects that fall within this definition and the need **for technical and scientific expertise to address this issue.**
2. Statement 25 of the Preamble to the Rome II Regulation refers to its legislative precedent, the Article of the174 Treaty establishing the European Community, which was **essentially the same as the provision currently in force.**

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1d between agencies

.and the European[2] Union Environment Agency

European of this project.

In this area, the *Scale of measurements to scale -regional or global Climate change".* Idea *"W]ithin the framework of its -TheCommission will cooperate with the competent authorities.* It is essential for international agreements to be *concluded between the* European Union and the Member States, in order to ensure that *the* issue is clearly and effectively addressed.

.you Regulations that

The Union's high level of protection, in the various preventive 1.1.

? *preferably in the aga". Thus*, it will be necessary to *be* very careful with IT. In this respect, the Regulation

dcaci6n: Commission Euro comt1n of the term 'dafio Environmental Directive 2004/35/EC **in relation to environmental** matters', *OJEU* C of118, The **definition of the term 'definition' shall be**

I refers back to its precedent, which was fundamental for the European Union.

Rome II conclu

des that this article, by virtue of the objectives and principles it sets out, *"fully justifies recourse to the principle of favouring the victim".*

Similarly, the recognised *'polluter pays'* principle, although in many cases its practical materialisation is not very satisfactory[3], is another element which should reinforce the idea of seeking solutions that tend to favour the victims of cross-border pollution.

Another condition to be borne in mind is that, in the field of damage in general, and environmental damage in particular, there are several international multilateral conventions of considerable relevance. For example, we can cite the Paris Convention of 29 July 1960 on Third Party Liability in Nuclear Matters, as amended by the Protocol of 16 November 1982[5], the Brussels Convention of 29November 1969 on Civil Liability for Damage Caused by Pollution of the Seawaters by Hydrocarbons, and the Brussels Convention of 18 December 1971 on the Establishment of an International Fund for Compensation for Oil Pollution Damage. These Conventions, when they bind Member States of the Union and third States, on the basis of the provisions of Articles 71.1Brussels I bis and 28Rome II, supersede those Regulations. This solution has the undoubted advantage, not only that the signatory countries harmonise their rules with a variety of States inside and outside the Union, but above all that it introduces important and necessary specialisation which cannot be achieved by European rules.

It should also be borne in mind that cases of cross-border jurisdiction are usually very complex both thematically and legally. They are often cases that involve parties located in several different countries, sometimes very far apart; in this regard, we can recall, for example, the case of the injustice of states affected by radiation from the fire at the *Chernobyl* nuclear power plant. Sometimes, too, those responsible for the damage are domiciled in different countries, as in the case of *Amoco Cadiz,* to which we will refer later, or in cases where the environmental damage is caused by a local subsidiary with no assets and it is necessary to sue the parent company of the group before the courts of its domicile in order to try to obtain compensation.

3. European Court of Auditors, Special Report 12/2021: The 'polluter **pays** principle **Inconsistent implementation**[11] **of** EU **environmental policies and actions.** https://www.eca.europa.eu/Lists/ECADocuments/SR21_12/SR_polluter_pays_principle_EN.pdf.
4. BOE of 22November 1975.
5. BOE of 1November 1988,
6. BOE of 8March 1976.
7. BOE of 11March 1982.

To this must be added the difficulty for plaintiffs to articulate the evidence in aspects such as the causal relationship, the identification of the material elements by means of which the damage has been caused or the actual quantification of the damage.

On the other hand, in certain cases, the claim for compensation for environmental damage is raised in criminal proceedings, as for example in the well-known *'Prestige'*[8] case. This case clearly showed the inadequacy of criminal proceedings to try to resolve the civil liability aspects arising from such damage. However, this jurisdictional channel may give rise to the application of article 7.3 of Brussels I bis.

It is also very important to consider that the issue we are now dealing with is closely linked to an emerging but growing area of litigation, which concerns claims for action against climate change[10]. These claims may in some cases relate to purely domestic issues, but more often than not they involve elements of foreign affairs and fall within our field of interest.

Finally, we must not forget that the injured party's decision as to the State before whose courts he will bring his claim is, or should be, very much conditioned by issues such as, among others, the substantive law that will be applied by those courts or the participation of the State.

8. ALVAREZ RUBIO, J.), "El siniestro del buque Prestige: realidad juridica en presencia y delimitación de competencias", in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz,* 2012, pp. 261-311, *Id.,* "Hada un nuevo Derecho de dai\os marftimo: tendencias actuales", in ALVAREZ RUBIO, J. J. (Dir.), *Las lecciones jur{dicas del caso Prestige. Prevenci6n, gesti6n y sanci6n frente a la contaminaci6n marina par hid1'Dcarbnros,* Cizur Menor, pp2011,. 13-35. *Id.,* "Responsabilidad par dafios environmental: procedural channels of action, international "in ZAMORA CABOT, F.J., GARCfA CfvICO,)., SALES PALLARES, L. (Eds.), *La responsabilidad de las multinacionales por violaciones de los derechos humanos,* Cuadernos Democracia y Derechos Humanos, N.°Alcala9, de Henares, pp2013,. 215-247.

9. MANKOWSKI, P., "Article 7", in MAGNUS, U, MANKOWSKI, P. (eds.), *European Commentaries on Private International Law ECPIL. Volume I, Brussels Ibis Regulation,* K61n, pp2016,. 340-344.

10. VAN LOON, H., "Strategic Climate Litigation in the Dutch Courts: a Source of Inspiration for NGOS Elsewhere?", *Acta Universitatis Carolinae. Iuridica,* Vol. LXVI (4) (2020), pp. 69-84, https:/ /karolinum.cz/data/clanek/8615/Iurid_66_4_0069:pdf.

The Committee would point out that the local subsidiary which does not have a head of the group will be repaired. The following shall be added

. indemnification for a procedure *!ge'.* That justly The Committee would like to draw the Commission's attention to the application of the

The Committee notes that the problem is that of internal 1.1.1.

of the petjudicate in r the demand estii, The State's participation, inter alia, in the law

The legal status of the present case -*International and Relations* to a new right of J, J, (Dir.), *Las lecciones la contaminaci6n marina* onsabilidad por dal\os tcional", in ZAMORA ls.), *La responsabilidad de* mdernos Democracia y !47.
'SKI, P. (eds.), *European Brussels Ibis Regulation,*

:'.ourts: a Source of Ins *Iuridica*, Vol. LXVI (4) urid_66_4_0069.pdf.

For example, in the case of the *Amoco Cadiz, a* Liberian-flagged oil tanker which sank off the coast of Brittany, the injured parties (90 French municipalities, the French State, fishermen, tourist companies among others) sued *Standard Oil of Indiana, the* parent company of the . corporate, *Amoco Intenational Oil Company, Amoco Transport Company of Monrovia, the* formal owner of the ship, and other subsidiaries of the multinational oil company, as well as *Astilleros Espafioles* and several salvage companies, before an American Federal Court, seeking to avoid the shipowner's liability under the French and Liberian laws and seeking to obtain compensation for *punitive damages. In* fact, the aforementioned Court declared the joint and several liability of the defendant companies, excluding the maritime salvage companies. In fact, the Court declared the defendant companies jointly and severally liable, excluding the maritime salvage companies, for an amount which, although much lower than that requested by the claimants, was undoubtedly higher than that which would have been awarded by courts obliged to apply the rules on the limitation of liability.[12]

11. INTERNATIONAL JURISDICTION: THE SOLUTIONS OF THE BRUSSELS I BIS REGULATION

1. INTRODUCTION

In the regulatory system of the Brussels I Bis, three forums of international jurisdiction are potentially operative in cross-border pollution cases: the express or tacit consent of the parties (Articles 25 and 26), the defendant's domicile (Article 4) and the place of the harmful event (Article 7.2).

Observation of practice shows that in this type of litigation the forum of submission is practically inoperative, so we do not dwell on it.

11. BELINTXON MARTfN, U., "La responsabilidad civil en el Derecho Maritimo: la efec tiva aplicaci6n de las medidas de prevenci6n en materia de seguridad mar.i'.tima", in ALVAREZ RUBIO, J. J. (Dir.), *Las lecciones juridicas...,* cit., pp. 194-205.
12. ROSENTHAL, L., RAPER, C., "Amoco Cadiz and limitation of liability for oil spill pollution: domestic and international solutions", *Virginia Journal of Natural Resources Law,* Vol. N5,.º (19851), pp. 259-295.

2. THE FORUM OF THE DEFENDANT'S DOMICILE

It is also clear from observation of practice that the forum of the defendant's domicile is of limited operation in cross-border [13] pollution claims. In the case of the plaintiff, it may be more attractive for the injured parties to sue in the courts of the location of the damage. This is despite thefact that the European Court of Justice has said that when acase is brought before the courts of the Member State of the defendant's domicile, they have jurisdiction to rule on the totality of the damage suffered, i.e. they have the capacity to rule on the totality of the damage suffered in any place.[14]

However, for a few years now, this forum, in conjunction with that of the passive litisconsortium provided for in Article 8.1 and with the reference to the domestic law of each Member State in Article 6.1, has proved very useful in cases of environmental damage caused outside the European Union by local subsidiaries of multinationals domiciled in a Member State of the Brussels I bis Regulation.

Indeed, the doctrine had pointed out that its provisions do not make it easy for the courts of European States to have jurisdiction over claims of this nature. Thus, it had been pointed out that the Regulation's jurisdictional forums, apart from now irrelevant exceptions, only operate when the defendant is domiciled in a Member State, the general forum of joint jurisdiction is that of domicile and the forum of procedural connection in cases of passive litisconsortium requires all the defendants to be domiciled in the Union, unless the law of the specific State where the action is brought states otherwise.[15]

But, as has already been mentioned, European courts have recently handed down interesting judgments, which we must now consider. Thus, the Court of Appeal in The Hague handed down an important judgement on the 18th December 2015[16], on Dooh and others v R. D. Shell, whose head office is in Holland, *Shell Petroleum D C of Nigeria,* whose domicile is in such African country and other affiliates of Shell who are domicilied in Holland and the United Kingdom. The plaintiffs called for compensation for the damage to the land, the environment and the people caused by the oil spills coming from the Respondents' pipelines in Nigeria [17].

13. **In general, it is a relatively absent light in international tort litigation, although there are exceptions such as cases of Spanish practice in** traffic accidents occurring abroad in which the liable party is domiciled in **Spain.**
14. Judgment of the Court of Justice of the European Union in7 Case 1995,C-68/93 Fiona Shevili [1995] *ECR* 19951-415, paragraphs and 25following.
15. REQUEJO ISIDRO, M., "Access to Remedy. Abusos contra derechos humanos en terceros Estados, ljusticia civil en Europa?", in ZAMORA CABOT, F.J., GARCIA C!VICO, J., SALES PALLARES, L. (eds.), *La responsabilidad de las multinacionales...,* cit.
16. Case numbers: (200.126.843case c) + (200.126.848cased).

The Court declared the jurisdiction of the Dutch courts in respect of R.D. Shell on the ground that it was domiciled in that country [currently: arts. 4 and 63 of Regulation (EU)1215/2012], with regard to the rest of those domiciled in in European States relied on the procedural forum of the passive litisconsortium (currently: Art. 8.1 of the Regulation) and in respect of the Nigerian subsidiary invoked a provision of Dutch procedural law which provides that where the courts of the Netherlands have jurisdiction over one of the defendants they also have jurisdiction over all the other defendants provided that the actions against the various defendants are connected in such a way that it is justified to consider them together for reasons of efficiency.

Undoubtedly, the Court could not justify its international jurisdiction over the defendant domiciled in Nigeria on the basis of Article 8(1) of Regulation (EU) 1215/2012, as this expressly refers to *"a person domiciled in a Member State"*. However, attention should be drawn to Article 6(1) of the same European Regulation, which states: "*if the defendant is not domiciled in a Member State, jurisdiction shall be governed, in each Member State, by the law of that Member State, without prejudice to Articles 18(1), 21(2), 24 and 25*".Accordingly, the Dutch court resorted to the rules on international jurisdiction contained in its domestic law of origin and declared itself to have jurisdiction over the defendant domiciled outside the European Union by means of the forum of litisconsortium passive provided for in its domestic law.[18] The Dutch court also declared itself to have jurisdiction over the defendant domiciled outside the European Union by means of the forum of litisconsortium passive provided for in its domestic law. Basically this interpretation has been maintained in three judgments handed down on 21 January 2021 by the Court of Appeal in The Hague in cases of Nigerian claimants harmed by pipeline spills, although the Court has also emphasised the reality of the corporate group and the consequent liability of the Dutch-domiciled parent company for environmental damage caused by its local subsidiaries [19].

17. See also: GARCIA ALVAREZ, L., "Danos privados por contaminaci6n en el trafico extemo: a prop6sito de! caso Akpan vs. Shell (Nigeria)", *Cuadernos de Derecho Trausnacional,* Vol. (52) (2013), pp. 548-583.
18. CALVO CARAVACA, A. L., CARRASCOSA GONZALEZ, J., "Sociedades de capi tal y otras personas jurfdicas", in CALVO CARAVACA, A. L., CARRASCOSA GONZALEZ, J. (Dirs.), *Tratado de Derecho Internacional Privado,* Valencia, 2020, T. III, pp. 2710-2711.

The judgment of the *High Court of* England and Wales of 27 May 2016 concerned a claim brought by Zambian farmers for damage caused to their land by a Zambian-domiciled company, a subsidiary of *Vedanta Resources, domiciled in* the United Kingdom. The Court justified its jurisdiction in the forum of *Vedanta's* domicile and as regards the Zambian subsidiary on the nature of the corporate group and the financial, management and dependency relationships existing within!

This[20] judgment was substantially confirmed by the European Court of Justice. For example, in the recent judgment in *Okpabi v Royal Dutch Shell Plc.21, the* liability of the parent company of the group, domiciled in the United Kingdom, for environmental damage caused by its subsidiaries abroad has once again been upheld. Specifically, the case concerned a claim brought by two Nigerian communities against *Royal Dutch Shell Plc.* and *Royal Dutch Shell Petroleum Development Company of Nigeria Ltd.* for damage caused by oilspills.

19. BARTMAN, S. M., DE GROOT, C., "The Shell Nigeria Judgments by the Court of Appeal of the Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared", *European Company Law,* vol. N18,.[0] (20213), pp. 97-105.
Similarly, the forum of the defendant's domicile has implicitly operated to **confer jurisdiction on the Dutch courts in the *Milieudefensie v. Shell* case,** which has given rise to the recent judgment of the District Court of The Hague of 26 May 2021. ZAMBRANA-TEVAR, N., "Milieudefensie v. SheJI: el efecto horizon **tal de las derechos humanos y las obligaciones medioambientales de las empresas",** in ZAMORA CABOT, F. J., SALES PALLARES, L., MARULLO, C., *La ludha en clave judicialfrente al cambio climatico,* Cizur Menor, 2021; VAN LOON, H., "Strategic Climate Litigation...", pp. 79-82.

20. ARISTOVA, E., "UK Court on Tort litigation Against Transnational Corporations", *Conflict of Laws. Net. News and Views in Private International Law.* http:/ **/conflict-fl.aws.net/2016 / uk-court-on-tort-litigation-against-transnational-corporations** /; ***Id.,*** **uJurisdiction of the English Courts over Overseas Human Rights Violations",** *The Cambridge Law Journal,* 75 (3) (2016), pp. 468-471; MUIR-WATT, H., "Compe **tence du juge anglais en matiE!re de responsabilite de la societe mere pour les dom** mages causes par safiliale a L'etranger", *Rev. crit. DIP,* 2017,pp. 613-620; ZAMORA **CABOT, F. J., u Access to justice and business and human rights: important** decision of the UK Supreme Court in the case of Vedanta v. Lungowe", *Cuadernos Europeos De Deusto,* n.' (2020), pp. 33-56. 63 (2020), pp. 33-56. https:/ /doi.org/10.18543/ ced-63-2020. pp. 33-56.

21. [2021] UKSC 3, [2021] 1 WLR 1294. TROMANS, S., BARNES, K., BOUKRAA, A, DAVID, S., HELME, N., "Significant UK Environmental Law Cases 2020-21", *Journal of Environmental Law,* Vol. (332) (2021), pp. 10-11.

caused by

The company, which is domiciled in the United Kingdom, was established in the United Kingdom. *Vedanta's* registered office and in business and fas 1 existing within the Tri:
The Commission has so far been responsible for the oil spills; control over the *Okpabi and Royal oil spills in* the United Kingdom. In particular, the Nigerian *velopment Company of* oil spills; control over the oil spills.

,dgments *by* the Court of **1temational Enviromental ompared", *European Com-***

Milieudefensie v. Shell, Hague, Netherlands,26 *represented by Mr Milieudefensie.*
v. Shell: the horizontal **and environmental** effect **of the companies',** JLLO, C., *The Key Fight* LOON, H., 'Strategic Cli-

1snational Corporations", *mal Law.* http://conflicto **sna tional-corporations/; uman-rights-violations",** UIR-WATT, H., "Compe **Jciete mere pour les dom** .7, pp. 613-620; ZAMORA **Vedanta v. Lungowe",** ltps:/ /doi.org/10.18543/.

NBS, K., BOUKRAA, A., lw **Cases 2020-2 1'*Journal***

The control that the *parent company* exercises over its foreign subsidiaries justifies the liability of the former and consequently the jurisdiction of the United Kingdom courts.

Similar solutions can be reached today in the Spanish system in cases of claims against companies domiciled in Spain and their subsidiaries abroad for damages caused outside our country. Jurisdiction with respect to the Spanish multinational can be justified in the article of4[Regulation (EU) 1215/2012, and with respect to its foreign subsidiaries in Article 22 ter.3 of the Organic Law of the Judiciary, which states: *"in the event of multiple defendants, the Spanish courts shall have jurisdiction when at least one of them is domiciled in Spain, provided that a single action or several actions are brought between which there is a nexus by reason of the title or cause of action that makes their joinder advisable".*

3. THE FORUM OF THE PLACE OF THE HARMFUL EVENT

Article 7.2 of Brussels I Bis attributes jurisdiction in tort, delict or quasi-delict matters to the courts *"of the place where the harmful event occurred or may occur". The* same terms are used in Article 5.3 of the Lugano Convention of 30 October 2007 '

The concept of tort, delict or quasi-delict is autonomous and specific to EU law and alien to the law of any Member State. In this regard, the Court of Justice has stated in its judgment of 12 September 2018 that *"According to settled case-law..., the concept of 'matters relating to tort, delict or quasi-delict' includes any claim which seeks to establish the liability of a defendant and which does not relate to 'contractual matters' within the meaning of Article 5(*1*,a) of Regulation No 44/2001 (judgment of September Kalfel, Kalfel and Kalfel, Kalfel and Kalfel, Kalfel and Kalfel).*°*44/2001 (judgment of* 27*September Kalfelis1988,, 189/87, EU:C:1988:459, paragraphs 18 and* 17*18; of* 13*March 2014, Brogsitter, C-548/12, EU:C:2014:148, paragraph* 20; *of* 21 *April 2016, Austro-Mechana,C-572/14, EU:C:2016:286, paragraph* 32, *and of 16 June* 2016, *Universal Music International Holding,* C-12/15, *EU:C:2016:449, paragraph 24)*[21] -. Environmental damage, as defined for the purposes of the regulations before us, falls squarely within that definition.

It is important to note that the actions falling within the scope of the article 7.2 include, in addition to those aimed at obtaining compensation for the damage, those aimed at the cessation of harmful activity and also legal actions of a preventive nature,

22. Case C-304/17, Lober. ECLI:EU:C:2018:701, para. 19.

i.e., those actions that aim to prevent damage that has not yet occurred, but may occur in the future. These three types of actions are the ones that can potentially be operative in cases of environmental damage, in which it is undoubtedly essential to obtain financial compensation, but it can also be very important to seek the cessation of a polluting activity or to sue for the prevention of future damage.

The forum of the place of the harmful event is appropriate and commonly accepted in comparative law, in that it is justified by the principles of proximity and good administration of justice by conferring jurisdiction on the judge best placed to try the case, who is also often the one to whom the injured parties have the easiest access. However, it is a problematic forum in cases of distance wrongdoing and especially in cases where the place of the harmful[23] event is unpredictable, especially for the defendant allegedly responsible for the damage.

Although the problem of the unpredictability of the place of the damage does not usually arise in cases of cross-border pollution, especially with the means and technical knowledge currently available to us, it is inherent to them that the problem of remote offences arises, i.e. those cases in which the event giving rise to the damage occurs in one country and the damage materialises in one or more other countries, and in this respect it is necessary to specify the place of the harmful event. It was precisely in a case of cross-border pollution that the European Court of Justice first addressed the latter problem.

Indeed, in the well-known Alsace Potash Mines case[24], the Court was confronted with the following situation: a company domiciled in France discharged waste into the Rhine River in France, with the result that the land of a Dutch agricultural undertaking was salinised and thus lost its fertility. The aggrieved entity brought its claim before the Dutch courts, i.e. the courts of the place where the damage occurred; the defendant, on the other hand, argued that the place of the harmful event could only be the place where the event giving rise to the damage occurred, which was located in French territory.

23. The situations to which the unpredictability of the place of the harmful event can lead **have recently been described as some of the most complicated cases in** our field: CARRASCOSA GONZALEZ, J., *Derecho internadonal privado y dog matica juridica,* Granada, pp2021,. and233 ff, especially pp. 235-238.
24. Judgment of 30November 1976.21/76. ECLI:EU:C:1976:166. CARRAS COSA GONZALEZ, J., "Distance torts: the Mines de Potasse decision forty years on", *Yearbook of Private International Law,* Vol. XVIII (2016-2017), pp. 19-38.

In cases of doubt, it can be very important to be able to sue for damages in the event of doubt or to sue for damages in the event of doubt.

The Commission has not been able to find a solution to the problem of the alleged wrongfulness of the offence in the case, which is justified by the facts of the case, and which, in addition to the fact that it is not only justified by the facts of the case, but also by the fact that the offence is not a crime.
>s that is unpredictable, responsible for! daiio,

The place of the place of detention is not usually 11.1.
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i Potash from Alsace[24] the 1 company domiciled in Rhine with the consequent Dutch agricultural company, lad petjudicada plan', i.e. the 1 defendant held that the event 1giving rise to the

<lei place <lei fact dai **most complicated cases in** *private international and dog* pp'. 235-238.
l:EU:C:1976:166.CARRAS-
se decision forty years on",
l, pp. 19-38,

The Court of Justice of theEuropean Communities ruled that *'in the event that the place of origin of the event giving rise to* tort, delict or quasi-delict liability may arise is defined as the fact that and where the location of the damage, are not identical, the expression 'the place where the harmful event occurred' is to be understood as meaning, 'the place where the damage occurred and the place where the harmful action was carried out' at the same time. *It follows that proceedings against the defendant may be brought, at the option of the plaintiff, before the Court from the place where the damage occurred, or even the place where the damage was caused.*

J. This thesis, often referred to as ubiquity, which was originally formulated in a cross-border pollution case, has been repeatedly upheld by European case law up to the present day,[25]and is still used today.
"It has also been applied to other areas, such as reputational damage, infringement of industrial and intellectual property rights, liability of the issuer of a certificate for the prospectus relating thereto and for breach of legal reporting obligations or infringement of Competiton Law.

At this point it is necessary to make an important clarification: the solution adopted by the Court of Justice in the Alsace Potash Mines case did not respond to the idea adopted by the Court of Justice in the Alsace Potash Mines case did not respond to the idea of protecting the party injured by the damage; paragraph 17 of the judgment states "that, in view of the close relationship between the constituent elements of any liability, it does not seem appropriate to opt for one of the two points of connection mentioned to the exclusion of the other, since each of them may, depending on the circumstances, provide particularly useful indications from the point of view of evidence and the conduct of the proceedings". Subsequent European case law has been very clear on this point, for example in the judgement of the Court of Justice of 16 January 2014.It is stated that 'the argument put forward by Mr Kainz that the interpretation of special jurisdiction in criminal or quasi-criminal matters must take into account, in addition to the interests of the proper administration of justice, that of the injured party, by allowing him to bring his action before a court of the Member State in which he is domiciled, cannot succeed ...The Court has already held that Article 5(3) of Regulation No 44/2001 does not pursue the objective of affording the weaker party enhanced protection (see, to that effect, Case C-133/11 Folien Fischer and Fofitec, paragraph 46)".

But admitting all that has been said in the previous paragraph, it must also be acknowledged that the thesis of ubiquity is in most cases favourable to the interests of the injured party, not only because it allows him to sue before the court that can provide him with the most efficient procedural response in terms of time, costs, etc., but also because it makes it easier for him to bring his claim before the courts that are usually the most accessible to him, insofar as the place where the damage occurred, in cases of cross-border pollution, is often the most accessible to him, since frequently the place where the damage has occurred, in cases of cross-border contamination, usually coincides with the place where the domicile of the injured party is located. Indeed, in the Alsace Potash Mines case this was the case and the two claimants had sued in the Netherlands where they were domiciled.

The provisions of the 7.2 Brussels I Bis Article must be supplemented by two further elements. The first is the system of passive litisconsortio set out in Article 8.1; on the basis of this, in cases where there are several defendants, a claim may be brought before the Courts of the domicile of any of them, with the consequence that a claim for cross-border pollution damage may be heard by a Court which, not being the Court of the place of the damage, is the one in which one of the co-defendants is domiciled[27]. This reality broadens the possibilities of legal action for the injured parties.

A second complementary element is that in practically all the legal systems of the Member States of the European Union there is a rule of internal origin such as that contained in article 22 *quinquies* b) of the Organic Law of the Judiciary, which operates only when the plaintiff is domiciled outside the European Union and attributes jurisdiction to the Spanish Courts when the harmful event has occurred in Spanish territory. A rule of this type can have an important operative value in countries such as ours, which, being within the geographical limits of the Union, is close to countries whose standards of environmental protection are lower than those of Europe. Provisions of this nature could be relevant in cases where pollution from countries outside the Union caused by companies domiciled in third countries causes damage in Member States, since they would make it possible to sue in our courts with the sales and guarantees that this entails.

27. CALVO CARAVACA, A. L., CARRASCOSA GONZALEZ, J., "Obligaciones extracontractuales", in CALVO CARAVACA, A. L., CARRASCOSA GONZALEZ, J. (Dirs.), *Tratado de...,* cit., T. III, p. 3621.

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III. APPLICABLE LAW: THE SOLUTION OF THE ROME II REGULATION

1. INTRODUCTION AND PRELIMINARY CLARIFICATIONS

The Rome II Regulation devotes a specialised regulation, namely its Article 7, which governs the law applicable to non-contractual obligations arising out of environmental damage. The existence of the aforementioned provision makes it clear that the law applicable to non-contractual obligations arising out of environmental damage is emphasised that the European legislator was aware of the particularities of this type of damage in international situations and acted accordingly by issuing a provision which partially departs from the general solution and is clearly oriented towards the protection of the environment itself, and especially to that of the successful bidders an their assets.

In this respect it is important to note the scope of Article 7. This provision refers to a non-contractual obligation *"arising out of an environmental damage* or *damage suffered by persons* or *property as a consequence of such damage"*. Observation of practice shows that, although there are cases where the object of the claim is to make a company comply with environmental legislation and thus the object of the litigation is itself the protection of the environment, in the vast majority of cross-border environmental cases the object of the claim is to obtain compensation for damage suffered by natural or legal persons and their property. Certainly, the increasingly widespread social concern about climate change will lead to a significant increase in claims for purely environmental protection in the coming years, but claims for compensation for environmental damage will always be more numerous, especially at the international level.

The freedom of choice provided for in Article 14 of Rome II potentially operates in the field of environmental damage, i.e. it is possible for the parties (the injured party or victim, the liable party and, where appropriate, those subrogated to his rights) to designate the legal system which will govern the specific non-contractual liability binding on them. The choice shall be subject to the limitations laid down in paragraphs (a) and (b) of Article 14.1.

Observation of practice shows that, in general, the choice of law decisions in the field of non-contractual obligations are not very common, although they can be useful in certain areas[28], but even more unusual in the case of environmental damage.

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iA GONZALEZ, J. (Dirs.),

28. JACOBS, H., "Why international commercial contracts should include express choice-of-law clauses for non-contractual obligations", *CDT,* vol. N9,.⁰ (20171), pp. 153-160.

Indeed, the particularities that usually accompany this type of damage, to which we referred at the beginning of this paper, make the conclusion of such agreements not very favourable.

2. THE ALTERNATION BETWEEN THE LAW OF THE COUNTRY WHERE THE DAMAGE OCCURS AND THE LAW OF THE COUNTRY WHERE THE EVENT GIVING RISE TO THE DAMAGE OCCURRED

Article 7 of the Rome II Regulation refers in principle to Article 4.1 of the Rome II Regulation, i.e., to the application of the law of the country where the damage occurs. In this way, the European legislator is relying on the first solution provided for in the general rule. However, in international cases of environmental damage, we usually find ourselves faced with situations of tort at a distance, and in these cases the provisions of Article 4.1 do not always lead to fully satisfactory results, especially from the perspective of the injured party who seeks to obtain compensation.

A first problem may arise when the remote environmental offence is multi-localised, i.e. the damage occurs in several countries. As we said at the beginning of this work, situations of this nature can be frequent in cases of cross-border pollution. In these cases, the solution would be that of ubiquity or mosaic, consisting of the fact that the damage occurring in the territory of each State is exclusively governed by the law of that Specific State[29] without denying that the article of the 4.1 Rome II Regulation inevitably leads to this thesis, one may also consider two faults: The first is that the injured party, if he has suffered damage in several countries, will be obliged to base his claims on several different legal systems; although it is true that in cases of cross-border pollution this type of situation does not usually arise. A second, perhaps more serious, concern is that injured parties who have suffered the same damage for the same cause may receive very different financial compensation simply because they have suffered damage in different countries, which may be due to something as simple as the place where they actually live. However, we will return to the problem of the application of the law of the place of damage and its possible nuances or exceptions later.

29. BOGDAN, M., HELLNER, M., "Article 7", in MAGNUS, U, MANKOWSKI, P. (eds.), *European Commentaries on Private International Law* ECPIL. *Rome II Regulation,* KNn, pp2019,. 293-295.

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The second problem raised by the solution of Article 4.1, when it is applied to cases of transboundary pollution, is that which arises when the event giving rise to the damage occurs in a country with high legal standards for the protection of injured parties and yet the damage occurs in another State whose legislation is not very demanding in terms of compensation for damages. In fact, it may be tempting for highly polluting companies to locate their factories in places which, due to the conditioning factors (proximity to a border, direction of winds and currents, etc.), assure them that the environmental damage will occur in another country or countries whose legislation provides little protection to injured parties and in any case much less than that granted by the legislation of the country in which their manufacturing centres are located. There is also the case of Western companies, let's say Spanish, that send the polluting waste from their production to third countries, for example Pakistan, because they know that these are less environmentally demanding environments.[30]

To address this problem, Article 7 of the Rome II Regulation, after referring to Article 4.1, goes on to say: *"... unless the person claiming damages chooses to base his claim on the law of the country in which the event giving rise to the damage occurred"*. In other words, the injured party, and only the injured party, has the choice between basing his claim on the law of the place where the damage occurred or on the law of the place where the event giving rise to the damage occurred. In this way, he is offered specific protection for situations such as those described in the previous paragraph and corporate actions aimed at directing polluting elements to countries with more permissive legislation are avoided.

However, the reference to Article 4.1 leaves open, in principle, the problem of the application of the law of the place of the damage in cases where both the event giving rise to the damage and the damage itself occur in a country with environmental legislation that is not very protective of the injured party. In this regard, we should recall the disputes cited above in which the damage is caused by a foreign subsidiary, for example a Nigerian one, in its own country and the courts of a European state declare themselves to have jurisdiction because of the domicile of the parent company of the group.

In these cases, the application of the law required by Article 4.1 can be excluded essentially by means of two mechanisms. The first is the public policy of the forum (Article 26 of Rome II); indeed, it would be manifestly contrary to the fundamental principles of the law of any European State, and even of the European Union itself, for a law not to grant compensation to injured parties or to grant a minimum or disproportionately low compensation or to make the obtaining of such compensation subject to unacceptable conditions.

30. https:/ / www.abc.es/ espana/comunidad-valenciana/abci-investigan-22-empresas **esp anolas-contaminar-enviar-pakistan-residuos-electricos-sin-control-**202107181934. video.html.

The second mechanism may be the proof of foreign law; the position of the judge on this thorny issue may be decisive in deciding whether or not to apply the foreign law claimed by the conflict rule. A very demanding jurisprudential stance can have a decisive effect. In this regard, it should be noted that the text of the Rome II Regulation has a "Commission Declaration on the treatment of foreign law" attached at the end, which has not really had any real consequences.

IV. CONCLUSIONS

Bearing in mind the conditioning factors mentioned at the beginning of this work, which often have a decisive influence on legal rules, we can say that the Brussels I Bis and Rome II Regulations, with regard to disputes arising from transboundary pollution, offer technically correct and appropriate solutions to construct legal responses that are coherent with the principles that inspire European Union law in environmental matters, such as, among others, the polluter pays principle and the principle of favouring the victim.

In addition, the case law of both the Court of Justice of the European Union and the Member States has adapted these rules to specific cases and has generally improved them, making them more operational and efficient for the cases that arise in practice.