COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

European Treaty Series - No. 150

Explanatory Report to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment [*]

Lugano, 21.VI.1993

I. The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the provisions of the Convention.

II. The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, adopted by the Committee of Ministers on 8 March 1993, has been opened for signature, in Lugano, on 21 June 1993, on the occasion of the Informal Meeting of the European Ministers of Justice.

General introduction

1. Prevention is a priority matter in environment protection and it is already the subject of extensive international co-operation. However problems relating to civil liability for damage have received, until now, little attention at the international level except in a few specific fields such as nuclear energy and the carriage of goods.

2. Following the discussions of the 15th Conference of European Ministers of Justice (Oslo, 1986), the Committee of Ministers of the Council of Europe, on a proposal of the European Committee on legal co-operation (CDCJ), set up a Committee of experts in 1987 to propose measures for compensation for damage caused to the environment.

3. Between 1987 and 1992, the Committee of experts held 14 meetings during the course of which it prepared the text of the draft Convention on civil liability for damage resulting from activities dangerous to the environment.

4. After examination by the European Committee on legal co-operation, the draft Convention was submitted to the Committee of Ministers which adopted the text and decided to open it for signature by member States of the Council of Europe on 21 June 1993.

The Convention provides for the possibility of accession by non-member States. In fact, a dangerous activity carried out in one country may threaten to cause or indeed cause damage in another country. The problems are, therefore, not necessarily confined to the territory of Council of Europe member States.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

5. In addition to representatives of all the member States [(1)] of the Council of Europe and the Commission of the European Community, the following observers attended meetings of the Committee of experts or the meeting of the European Committee on legal co-operation, when it finalised the draft Convention: Albania, Estonia, Holy See, Latvia, Lithuania, Romania, Russia, Slovenia and Yugoslavia (at an earlier stage of the work of the Committee of experts), the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the Hague Conference on private international law, the international Commission on civil status, the International Law Commission of the United Nations and the OECD. The Committee was also assisted by technical experts from several member States and Commission of the European Community and received numerous observations from bodies interested in activities dangerous to the environment.

6. The Convention aims at providing for the possibility for adequate compensation for damage resulting from activities which are dangerous to the environment. It provides for compensation not only for damage in connection with impairment of the environment but also for damage to persons and property, as well as for the cost of measures taken to prevent damage. The damage covered may result from a sudden occurrence, from continuous occurrences or from a series of occurrences.

In addition to provisions on compensation for damage the Convention contains provisions aiming at the prevention of an incident and reinstatement of the environment.

7. In order to, ensure adequate compensation for damage, the Convention provides for strict liability, i.e. liability irrespective of fault and subject to a limited number of exemptions.

The basis for this strict liability is found in the specific risk posed by a dangerous activity carried out in a professional capacity. Damage arising from carriage is covered by other international instruments and is therefore excluded from the scope of application of the Convention.

8. The person made liable under the Convention is the person who controls die dangerous activity at the time when the incident takes place or, in a particular case (Article, 7), at the time when the damage becomes known.

Attaching liability to the person in control of the activity which caused the damage, has the advantages that it is easy to trace the person liable, that overlapping liabilities are avoided, and that it is easier for an insurance company to assess the risk and insure that risk.

9. A dangerous activity means an activity performed professionally involving dangerous substances, genetically modified organisms or micro-organisms and operations concerning waste.

These concepts are included in a general definition and referred to in different Annexes containing, lists which are indicative and non-exhaustive (Article 2, paragraphs 1 to 4).

10. In order to make this system of strict liability fully effective it is reinforced by an obligation of Parties to provide for a system of compulsory financial security wherever appropriate (Article 12).

(1) Austria, Belgium, Bulgaria, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Kingdom (membership of the Council of Europe in December 1992).

11. The Convention also provides for a limited number of exemptions from liability. These concern cases where there are various inevitable events, when the activity was carried on in compliance with an order or a compulsory measure or in the interests of the person who has suffered damage, as well as where the level of pollution is tolerable (Article 8).

The fault of the person who has suffered damage can result in the compensation being reduced or even disallowed (Article 9).

12. In order to make it easier for the person who suffered the damage to prove the causal link between the event and the damage, the Convention contains guidelines concerning the causal link (Article 10) as well as a series of provisions designed to facilitate access to information held by public authorities (Articles 13 to 15) and by operators (Article 16).

Access to information held by operators is limited to technical elements which are difficult to obtain otherwise.

13. Moreover, the Convention gives associations or foundations the possibility to take legal action to obtain the cessation of an unlawful activity, to require preventive measures to be taken or to require the reinstatement of the damaged environment (Article 18).

14. The Convention is not exclusive and allows the specific provisions of internal law of Parties to apply (Article 25).

With regard to its relations with other international instruments, the Convention excludes from its scope of application damage caused by a nuclear substance under the Paris Convention of 29 July 1960 and the Vienna Convention of 21 May 1963 (Article 4, paragraph 2, sub-paragraph a). On the other hand, the person who has suffered the damage may rely on any other treaty. The latter principle also applies to provisions concerning the protection or reinstatement of the environment (Article 25, paragraph 1).

15. Finally, the Convention sets up a Standing Committee which may in particular consider any question of a general nature concerning interpretation or implementation of the Convention, draw up recommendations relating to its implementation and propose amendments to the Convention.

Commentaries on the Articles

CHAPTER I – GENERAL PROVISIONS

Article 1 – Object and purpose

16. This article indicates the general intention of the Convention. It could, where appropriate, assist in its interpretation. It provides that the Convention applies not only to claims for compensation but also to ways of preventing damage to the environment and reinstating the environment.

Article 2 – Definitions

17. The Convention makes use of certain complex notions some of which deal with its application and others which refer to general terms which are given a particular meaning. It was therefore necessary to define them. This article contains the following definitions:

1. Dangerous activity

18. This paragraph defines the dangerous activities themselves. Other paragraphs contain further definitions of dangerous substances, genetically modified organisms and micro-organisms to which reference is made.

19. The word professionally has been included in the definition of dangerous activity in order to exclude domestic activities from the scope of the Convention.

The following are examples of activities which may be considered to be professional: industrial, commercial or most agricultural or scientific activities. Such activities are therefore covered by the Convention.

20. The question of waste is dealt with in the provisions concerning the definition of dangerous activity and not in the definition of dangerous substances. This is due to the fact that waste is usually composed of a variety of substances which may be difficult to identify and that these substances are of themselves not always considered dangerous.

21. Moreover, and even if, in all cases, risks linked to the accumulation of waste exist, it appeared necessary to make a distinction between installations or sites treating waste and sites for the permanent deposit of waste, having regard to the specific character of the latter.

In fact, waste deposit is a specific category as it concerns the permanent storage of waste (be it solid or not), which will not be recycled, in open sites or underground, indefinitely or at least for a long period. The word installation has not been used for this case in order to make a clearer distinction between this type of activity and operations to treat waste carried out in an installation or on a site.

22. Installations and sites for the incineration, treatment, handling or recycling of waste (Article 2, paragraph 1, sub-paragraph c), are set out in a non-exhaustive list (Annex II). As regards sites for the permanent deposit of waste (Article 2, paragraph 1, sub-paragraph d), account has been taken of the fact that it may be difficult to determine exactly when an incident arises. A special regime of liability has therefore been provided for those sites. This regime is based on the time when the damage becomes known (Article 7).

23. Non-ionising radiation have not been included in the Convention. The question might nevertheless be reconsidered at a later stage in the framework of the Standing Committee set up under the Convention.

2. Dangerous substance

24. The definition of dangerous substances contains three parts:

– in the first part a general condition refers to a significant risk for man, the environment or property which must be present for substances to be considered to be dangerous;

– the text then refers to properties which in any event fall within this general condition and, consequently make the substance dangerous. These types of properties are listed in Annex I, Part A, which determines the criteria and methods to be applied. This provision also applies to preparations obtained by combining two or more substances.

– Annex I, Part B, is non-exhaustive, and sets out the substances which are in any event designated as dangerous. This list may include certain substances which although not dangerous themselves are dangerous owing to certain quantities or concentrations, certain risks or certain situations.

The existence of specifications of types of properties making the substances dangerous (Annex I, Part A) and a list of dangerous substances (Annex I, Part B) may ensure a higher degree of certainty for the operator.

25. The criteria used in paragraph 2, sub-paragraph a, to classify substances which constitute a significant risk for man, the environment or property are based on the Directive of the European Community 67/548/EEC dated 27 June 1967 and its amendments. Although the objective of this EEC Directive is different from the objective of the Convention, since it deals with the classification, packaging and labelling of dangerous substances and not with civil liability, the criteria used in the Directive for indicating the dangerous nature of a substance are considered to be also. appropriate criteria for the purposes of the Convention.

The properties mentioned in Article 2, paragraph 2, sub-paragraph a, second sentence of the Convention, are those which are defined in Article 2, paragraph 1, sub-paragraphs a and b, and paragraph 2 of the Council Directive 67/548/EEC as amended, for the seventh time, by Article 1 of the Council Directive of the European Communities 92/32/EEC.

Those properties, where appropriate, are determined according to the criteria mentioned in Annex VI, Part 1 (A) (a) and (b), (B) (a) and (b), and (C) of Directive 67/548/EEC, as amended, for the seventh time, by the Annex II to Directive 92/32/EEC and according to the methods mentioned in Annex V to Directive 67/548/EEC, as replaced by the Annex to the Council Directive, 84/449/EEC, which adapted Council Directive 67/548/EEC to technical progress, for the sixth time, and as completed by the Annex to the Council Directive 87/302/EEC, which adapted Council Directive 67/548/EEC to technical progress, for the ninth time.

The list contained in Annex I, Part B to the Convention is also based on Directive 67/548 EEC and on subsequent Directives adapting the list to technical progress.

The Convention provides for the way in which a Permanent Committee may revise these lists (Articles 27 to 31).

26. Whenever a substance is included in the list of dangerous substances it must be considered to be dangerous. Furthermore, a substance which is not included in the list can be considered as dangerous if it displays one or more of the characteristics under the general definition. Moreover, the general criteria are not themselves exhaustive. In fact, each time a substance, which is not contained in the list and has properties which are not included in Article 2, paragraph 2, sub-paragraph a, is a significant risk for man, the environment or property it comes within the Convention.

Radioactive substances would therefore, although not referred to in Annex I, Part A, be considered dangerous insofar as they constitute such a risk.

Consequently the courts will first have to consider whether the substance in question is included in the list of Annex *1*, Part B. If this is not the case, they will have to consider whether the substance contains properties such as defined in Article 2, paragraph 2, sub-paragraph a. If this is also not the case they will have to decide if the substance constitutes a significant risk for man, the environment or property. Therefore the courts will be able to apply the Convention to substances which are not on the list or which do not correspond to the criteria contained in Article 2, paragraph 2, sub-paragraph a, if these substances constitute a significant risk.

3. and 4. Genetically modified organisms and micro-organisms

27. The Convention contains two separate definitions, the first dealing with genetically modified organisms and the second dealing with micro-organisms.

As in the case of dangerous substances, the determining factor for the application of the Convention to compensation for damage caused by these two categories of organisms is their significant risk for man, the environment or property.

The definition of genetically modified organism refers to the definition of the organism. Organisms which are modified naturally or by certain traditional processes are not considered to be genetically modified organisms for the purpose of the Convention providing that genetically modified organisms have not been used during these processes.

It is not always possible a priori to consider a genetically modified organism or a micro-organism to be dangerous as it may only show its dangerous nature in certain conditions or in a special biotope.

Therefore genetically modified organisms or micro-organisms which seem to be inoffensive in one area may sometimes prove to be dangerous if they are released elsewhere.

28. The definitions laid down in the Convention are based on the Directives of the Council of the European Communities 90/219 of 23 April 1990 in OJEC L117/1 on the contained use of genetically modified organisms and 90/220 of 23 April 1990 in OJEC L117/15 on the deliberate release into, the environment of genetically modified organisms.

5. Operator

29. This Convention places liability on the operator who is defined as the person who exercises the control of the dangerous activity.

In fact, on one hand this person is best placed to prevent the damage and limit its extent and on the other hand the activity of this person is the source of the damage.

The financial cost of this liability is added to the products and services which are produced or supplied, in accordance with the "Polluter Pays Principle", recognised by the international community as a key principle in environment protection.

30. The notion of control should be considered in relation to the notions of effective or global control, bearing in mind all the legal, financial and economic circumstances which help to determine the person in charge of the activity, i.e. who has the power to decide upon the way in which it is carried out. One of the consequences is that the employer and not the employee is considered to be the operator. In particular the courts may take into account that the competent public authorities have designated or recognised a person as the operator.

31. An outside person who has made possible or facilitated a dangerous activity, for example by lending funds for investment in the said activity, may not be considered to be the operator, unless he exercises effective control over the activity in question. Likewise, a creditor who exercises his rights by virtue of sureties held on equipment required for the dangerous activity is not, in principle, the operator within the meaning of the Convention.

6. Person

32. The definition of person ensures that the provisions of the Convention may be applied to any individual or body including the State and its sub-divisions.

7. Damage

33. The definition of damage includes not only damage to persons and property but also damage caused by impairment of the environment and the costs of preventive measures and further loss or damage caused by the preventive measures.

34. In order for liability to arise under the Convention the damage must be caused by the dangerous nature of the activity. It would not apply, for example, if death or injury resulted from a barrel falling on someone where a dangerous substance in the barrel was not released.

The final provisions of paragraph 7 consequently indicate that there must be a causal link between the damage as defined and the dangerous nature of the activity.

35. The notion of property has not been defined and it will therefore be for internal law to decide on the extent of this notion and consequently the extent to which compensation may be granted for loss of income. Nevertheless, damage to the installation itself or to property under the control of the operator at the site is not compensated under this Convention.

36. The impairment of the environment gives rise to compensation, in the form of measures of reinstatement, the cost of which will be decided by the court.

37. According to the legal systems in question the notion of loss of profit covers different concepts and may have a greater or lesser scope.

Compensation for loss of profit following damage under Article 2, paragraph 7, sub-paragraphs a, b and d, must be given according to the conditions laid down by the internal law of States.

However, as regards Article 2, paragraph 7, sub-paragraph c, the Convention requires compensation to be given for the loss of profit resulting from the impairment of the environment even if it amounts to pure economic loss. Therefore compensation might be paid to a hotel for loss of income where the alteration of the site where it is located, has resulted in a reduction of clients.

38. Damage resulting from an acceptable level of pollution to be anticipated under local relevant circumstances is not compensated as, according to the wording of Article 8, this is a ground for exemption. To the extent that the Convention allows other existing legal regimes to apply such damage may, where appropriate, be compensated (e.g. on the basis of the law relating to nuisance).

8. Measures of reinstatement

39. This notion is fundamental as it ensures the recognition of a direct protection of the environment which may be independent of any damage to property or persons.

Furthermore, it includes specific measures as the cost of measures of reinstatement may be compensated (Article 2, paragraph 7, sub-paragraph c) and associations or foundations have the possibility to take legal action (Article 18) in order to request an order to the operator to take such measures.

40. Measures of reinstatement consist above all and whenever possible in environmental reinstatement or restoration. This concerns the establishment of an environmental situation identical to the one which existed before the damage.

When it is impossible to restore or re-establish the environment, the measures of reinstatement may be in the form of the reintroduction of equivalent components into the environment.

This applies for example in the case of the disappearance of an animal species or the irreparable destruction of a biotope. Such damage cannot be evaluated financially and any reinstatement of the environment is in theory impossible. Since such difficulties must not lead to a complete absence of compensation, a specific method of compensation has been introduced. This method of compensation is based on achieving an equivalent instead of an identical environment. This notion relies on the given circumstances of each individual case of damage and is not defined in the Convention itself.

In addition the Convention does not indicate who is entitled to take such measures. It is left to internal law to take a decision.

In any event, the measures taken in order to provide compensation must be within reasonable limits.

9. Preventive measures

41. This notion too is fundamental.

Preventive measures may consist of measures to prevent an impending serious threat of damage or to avoid the aggravation of damage.

Such measures may be taken by any person.

The cost of preventive measures are part of the definition of damage, with regard to damage to the environment as well as to damage to human beings and to property. They are only compensated as far as they are reasonable.

10. Environment

42. There are three main reasons for including a definition of the environment in the Convention. First, as the aim of the Convention is to provide compensation for damage to the environment, a definition of the notion of "environment" is necessary. Furthermore, a definition of the environment will facilitate the application of the specific provisions concerning the environment. Finally, such a definition emphasises the fact that the Convention is not limited to compensation for damage to persons and property but also extends to compensation for damage to the environment, which should be subject to a specific protection.

The definition does not however claim to be exhaustive. On the contrary, it gives examples of resources covered by this word. As the list is not exhaustive, damage to any other aspect of the environment may also give rise to liability under the Convention.

11. Incident

43. As the regime of liability under Article 6 of this Convention depends upon a causal link between the damage and the incident, it is necessary to specify the meaning of an incident.

The Convention covers damage resulting from a sudden occurence, damage resulting from a continuous occurence, as well as damage resulting from a series of occurences with the same origin.

Main examples of sudden occurences are fire, a leak or an emission. Prolonged spilling of dangerous substances into a waterway is an example of a continuous occurence.

Examples of a series of occurrences with the same origin, are a series of explosions caused by a broken gasket and affecting successively the parts of an installation, or broken pipes following excessive pressure.

A sudden occurrence, a continuous occurrence or a series of occurrences having the same origin constitutes an incident. Where there are several occurrences, therefore, all the occurrences must be considered in order to interpret the notion of incident.

However, the limitation period to which actions are subject under Article 17 runs from the end of a continuous occurrence or of the last of a series of occurrences having the same origin.

Article 3 – Geographical scope

44. In order to determine its geographical scope of application, the provisions of the Convention apply each time an event, which results in damage, occurs on the territory of a Party. When the first condition is met, the Convention applies to all damage resulting from the incident whether the damage has occurred on the territory of the Party or outside that State (Article 3, sub-paragraph a).

However, each Party may make the rules relating to compensation for damage outside its territory subject to a condition of reciprocity (Article 35).

Moreover, the Convention applies if, even though the incident does not occur in a Party, the provisions of conflicts of laws lead to the application of the law of a territory of a Party (Article 3, sub-paragraph b).

Article 4 – Exceptions

45. The Convention expressly excludes from its scope three types of damage:

– damage resulting from carriage. The notion carriage does not include carriage which takes place exclusively on a site which is inaccessible to the public. Thus, to give an example, although the Convention covers damage resulting from moving dangerous substances from one place to another within an installation, it excludes from its scope of application damages resulting from carriage covered by the Convention on civil liability for damage caused during carriage of dangerous substances by road, rail and internal navigation (CRTD), as well as damage for which compensation may be obtained on the basis of the Convention of 25 May 1984 on Civil Liability for Oil Pollution Damage, and the Protocols thereto.

– any damage which results from a nuclear incident covered by the Paris and Vienna Conventions, or where specific provisions of internal law provide at least an equivalent level of protection for persons who have suffered damage.

– damage when the Convention is incompatible with the rules of the applicable law relating to workmen's compensation or social security schemes.

Moreover, the Convention shall not take precedence over the internal law or other international agreements whenever the provisions of the Convention are less favourable to persons suffering damage or to the environment (Article 25, paragraph 1).

CHAPTER II – LIABILITY

46. This chapter concerns the liability of the operator of a dangerous activity.

Article 5 – Transitional provisions

47. This article aims at fixing the conditions to determine the time of the application of the Convention with regard to liability.

The provisions of the Convention concerning access to information and action taken by organisations can be invoked from the time of the entry into force of the Convention, insofar as they are related to damage covered by the Convention.

48. The first paragraph of this article contains the principle that the Convention does not apply retroactively to incidents which took place before its entry into force. Moreover it applies the same principle to the special case of continuous occurrences or a series of occurrences having the same origin, which occured before the entry into force of the Convention and continued afterwards: the Convention applies only to damage caused by occurrences which took place after its entry into force.

49. Specific provisions provide for permanent waste deposit sites to take account of the fact that it may be difficult to determine the time of the incident.

Therefore in relation to permanent waste deposit sites, the Convention applies to damage which first becomes known after the date of entry into force of the Convention, without taking into consideration the date on which the incident causing the damage took place.

The risk of a retroactive application of the Convention is limited by two rules: the first excludes the application of the Convention when the site was closed in a proper manner before the entry into force of the Convention, and the second enables the operator of a site, which was open before the date of the entry into force of the Convention and which continues after this date, to avoid the application of the Convention by proving that the damage is the result of waste deposited before the entry into force of the Convention.

A requirement to close the site in a proper manner was included in the first rule in order to prevent operators from avoiding liability by showing that the site had been simply abandoned. It also takes account of the legislation of several States, which provides for a control of the conditions for closure which is generally accompanied by measures to prevent any later damage (notably reinstatement of the site).

50. In any event, if the Convention does not apply, a claim for compensation may be made on the basis of internal law (see also Article 25 dealing with relations between the Convention and the internal law of the Parties).

Article 6 – Liability in respect of substances, organisms, and certain waste installations or site

51. First, this article lays down the general principle of strict liability which applies only to the operator who was in control of the dangerous activity which caused the damage at the time when the incident took place (Article 6, paragraph 1).

This general principle is therefore a strict liability principle, which does not require proof of any fault of the operator who was in control of the activity which caused the damage. The purpose of this rule is to encourage the operator to adopt all useful preventive measures to avoid the damage. The operator may avoid all or part of his liability by claiming an exemption (Article 8) or the fault of the person who suffered damage (Article 9).

52. Joint and several liability between several operators has been introduced in two cases (Article 6, paragraphs 2 and 3):

– the first case concerns an incident which consists of a continuous occurrence. Operators successively exercising control of the dangerous activity shall be jointly and severally liable.

– the second case concerns an incident which consists of a series of occurrences having the same origin. The operators exercising control of the dangerous activity at the time of any such occurrences are jointly and severally liable.

In each of these cases, the operator may avoid part of his liability by showing that the damage is divisible and that part of the damage was not due to his activity, by proving that only part of the damage has been or could have been caused by his activity.

This rule means that the person suffering damage does not have to bear the burden of proving, which in practice may be almost impossible, that the damage has arisen from an event or a series of events which are part of the incident. However, the operator may prove, such proof being easier for him. to obtain, that the damage could not or only in part have been the result of occurrences which took place during the period when he controlled the activity.

53. Article 6 includes a specific rule which applies where the activity has ceased (Article 6, paragraph 4). Liability for damage which has become known after the cessation of the activity shall lie with the last operator.

The Convention adopts this solution as although the person who has suffered damage is not always able to prove that the damage was caused by a specific activity, the last operator had a greater possibility, at the time when he took over the activity, of appreciating the circumstances which made the damage foreseeable and taking measures to avoid it.

However, the operator may avoid liability by showing that the damage was caused by an incident which occurred during a period when he did not control the dangerous activity.

In a similar manner the person who suffered damage may prove that another operator was liable (i.e. an operator other than the operator in control at the time of the closure of the site).

54. As specified in Article 6, paragraph 5, the operator retains all rights of recourse under internal law and may subsequently exercise these rights against third parties in particular against other operators or the producer of waste.

Article 7 – Liability in respect of sites for the permanent deposit of waste

55. As it is difficult to establish the precise time of the incident in the case of damage caused by waste deposited on a site for the permanent deposit of waste, the Convention provides that the date when the damage becomes known and not the date of the incident should determine which operator is liable. In the case an incident which could have occured before or after the closure of the site but the damage from which becomes known after closure, the last operator is liable (Article 7, paragraph 1).

These provisions only apply to sites for the permanent deposit of waste. Installations for the incineration, treatment, handling or recycling of waste are subject to Article 6.

56. By indicating that the nature of the waste is of no importance, the second paragraph of this article avoids having two different legal regimes, one which applies to waste which consists of dangerous substances and another to waste which does not consist of dangerous substances. This rule is justified by the fact that it is not always possible to know all the components of waste.

57. Paragraph 3 of this article gives the specific rule relating to waste precedence over the rule relating to other dangerous activities whenever several operations of a different nature are carried out on. the same site by the same operator.

If Articles 6 and 7 were to be applied concurrently for the same operator, it would be necessary to distinguish between the part of the activity which related to Article 6 and the part of the activity which fell under Article 7. To avoid this, it is preferable to allow Article 7 apply to the whole of the activity.

However, different rules may apply for different parts of the damage, when the plaintiff or the person suffering damage proves that only part of the damage is due to the operation concerning deposit of waste.

On the other hand, each time damage results from dangerous activities carried out by several operators, the liability of each operator can only be based on the legal provision which applies to his case: an action against the operator of a dangerous activity other than the permanent deposit of waste will be brought under Article 6 of the Convention and against the operator of a waste deposit site under Article 7.

The third sub-paragraph of Article 7 will apply in cases where the same operator has carried out mixed activities.

58. Finally, Article 7, as Article 6, expressly reserves the right of recourse of the operator against third parties. This could apply in particular against other operators and, where appropriate, the producer of waste.

The time of application of these provisions is dealt with under paragraph 2 of Article 5.

Article 8 – Exemptions

59. The first three paragraphs of Article 8 provide three generally recognised grounds for exemption: the first concerns an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional inevitable and irresistible character; the second concerns acts by a third party which are considered to be outside the control of the operator, and the third concerns compliance with compulsory measures.

The mere fact that an operator has obtained an administrative authorisation or has complied with the requirements of such an authorisation is not in itself a ground for exemption.

By issuing an order the regulatory authority does not become, by this mere fact, the operator of the dangerous activity.

60. The Convention provides that pollution at a tolerable level should be a ground for exemption. The level of pollution which is tolerable is determined in the light of local circumstances. Thus, the tolerable level of pollution is not the same e.g. in rural or urban zones.

The aim of this provision is to avoid extending the regime of strict liability to acceptable inconveniences. The court must consequently decide which inconveniences are acceptable having regard to local circumstances.

61. The Convention also permits one other ground for exemption: dangerous activities carried out in the interests of the person suffering damage. This ground covers in particular emergency cases or cases where the dangerous activity was carried out with consent of the person who has suffered damage. The courts must examine whether die activity was lawful; when the consent of the person who has suffered the damage is necessary they must examine whether the consent was real and unequivocal. They will also consider whether the action was reasonable in relation to the risk.

Nevertheless, the Convention does not prevent a claim for compensation under internal law as the Convention does not apply exclusively (Article 25, paragraph 1).

Finally, the Contracting Parties have the possibility of either restricting these grounds for exemption using Article 25 or by making a reservation, they may include in their internal legislation an additional ground for exemption concerning development risks (Article 35, paragraph 1, sub-paragraph b).

Article 9 – Fault of the person who suffered the damage

62. Under this provision, compensation to the person who has suffered damage may, at the discretion of the court, be reduced or even disallowed if this person has by his own fault or by the fault of a person for whom he is responsible (for example, employee, child) contributed to the damage.

Article 10 – Causality

63. This article encourages the court, when it considers the evidence concerning the causal link between the incident and the damage or, in the context of a site for permanent deposit of waste, between the activity and the damage, to take account of the increased risk of damage from, a specific dangerous activity. In order to assist the person suffering damage to obtain compensation, account is taken of the specific risks created by certain dangerous activities of causing a given type of damage. The Convention does not create a true presumption of a causal link. The provision operates as a complement to the system of strict liability. It therefore forms part of all the rules which are designed to assist the person who has suffered damage to prove the causal link which may, in practice, be difficult.

Article 11 – Plurality of installations or sites

64. The first paragraph of this article covers the situation in which incidents contributing to the damage have occurred in several installations or sites carrying out dangerous activities. It takes account of cases of synergistic pollution (i.e. pollution resulting from a combination of several different elements) where it might be extremely difficult or even impossible to establish a causal link between a given incident and the damage resulting specifically from that incident.

The provision aims at making each of the operators of the installations jointly and severally liable for the whole of the damage where it has been established that several incidents have contributed to the occurrence of damage.

65. The person suffering damage may, at his own choice, make a claim against one or several operators to pay compensation for the whole of the damage. For each operator to whom a claim is made, the person who suffered the damage must prove the damage, the occurrence of an incident in the installation of the operator as well as the causal link between the incident and all or part of the damage.

66. Nevertheless, an operator may avoid joint and several liability in such a case if he can show that only part of the damage is due to an incident which took place in his installation or site. This is the case where the damage can be divided and that part of this damage was caused by a particular incident which took place in a given installation . The burden of such proof falls however on the operator and not on the person who has suffered damage.

Here also, the provision does not prevent a right of recourse by one operator against another as they are jointly and severally liable.

The operator must prove that only part of the damage has been caused or could have been caused by his activity.

Article 12 – Compulsory financial security scheme

67. The Convention requires the Parties, where appropriate, to ensure under internal law that operators have financial security to cover the liability under the Convention and to determine its scope, conditions and form. In particular, the financial security may be subject to a certain limit.

The provision invites the Parties to take into account, in determining which activities should be subject to the requirement of financial security, the risks of the activity.

When implementing this article the following considerations can be taken into account. First, the fact that certain activities in themselves involve an increased risk of damage, secondly, that some firms may not have the financial capacity to pay compensation awarded to persons who have suffered. damage in the absence of insurance or financial security and thirdly, to avoid any failure to apply the requirement arising out of the impossibility to foresee the risk and to establish a financial guarantee to cover that risk.

A financial security scheme or financial guarantee, mentioned in this article, can exist in many different forms, e.g. an insurance contract, or a financial co-operation between operators who deal with a specific kind of dangerous activities, in order to cover the risks involved in these activities. Such financial schemes would have the function of guaranteeing compensation for the damage caused by a dangerous activity performed by one of those operators.

It would also be possible to cover the risks involved by an insurance contract. Another possibility could. be that an operator has sufficiently large financial resources himself to cover the risks involved in the dangerous activities carried out by him.

It is likely that, after the entry into force of the Convention, the insurance market in the field of environmental damage will develop further since the risks and liability for pollution will become better known, and the financial security schemes can gradually be replaced by insurance contracts.

CHAPTER III – ACCESS TO INFORMATION

68. This chapter is designed first to ensure the widest possible access to environmental information held by public authorities, even if there has been no damage, and secondly to ensure that the ability of a person suffering damage or an operator to bring an action or defend himself is not restricted by the impossibility to obtain information held by public authorities or operators. These are therefore measures which are also designed to facilitate matters relating to evidence. The measures concerning access to information held by public authorities follow the provisions of the Council Directive of the European Communities on the freedom of access to information on the environment (Council Directive 90/313/EEC of 7 June 1990, L158/56).

In general, the Convention allows Parties considerable freedom of action in the way in which they implement its principles, particularly in defining the practical arrangements relating to access to information (Article 14, paragraph 1, sub-paragraph 2), and in implementing the restrictions on the right of access to information when a number of interests which are set out are affected (Article 14, paragraph 2).

Article 13 – Definition of public authorities

69. This article defines the public authorities which are required to provide, directly or indirectly, the environmental information which they hold.

Article 14 – Access to information held by public authorities

70. This article sets out the circumstances in which public authorities may be required to communicate the environmental information which they hold.

71. Even though it is left to Parties' internal legislation to apply the general principles laid down, this is the most broad-ranging form of access in the Convention since any natural or legal person. may benefit from it, whether or not damage has been caused and without the need to demonstrate a specific interest (Article 14, paragraph 1, sub-paragraph 1).

The Parties are required to lay down in their internal legislation, the practical arrangements for this access, subject to compliance with the rules designed to make the resulting duty imposed on public authorities fully effective by formalising the procedure.

The Convention sets out seven main circumstances in which the right of access may be restricted under internal law because it would affect particular types of confidentiality, public security, matters; which are currently under investigation, confidentiality of personal data or the interests of the environment concerned (Article 14, paragraph 2).

A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner (Article 14, paragraph 3), in which case reasons must be given for the refusal and the person requesting the information may seek an administrative or judicial review according to his internal legislation (Article 14, paragraphs 4 and 5).

The public authorities are required to respond to the request, whether it is accepted or refused, within a maximum of 2 months (Article 14, paragraph 4).

A charge not exceeding a reasonable cost may be made for the information supplied (Article 14, paragraph 6).

Article 15 – Access to information held by bodies with public responsibilities for the environment

72. Bodies which are responsible to public authorities and which may be considered to, devolve from, them or to fulfil a public service function are subject to the same obligations as the public authorities themselves. The article thus takes account of the existence of many bodies which, with the public authorities themselves, are involved in the environmental field. Access to information shall be given via the competent public administration or directly by the body itself.

Article 16 – Access to information held by operators

73. The person suffering damage must have the effective possibility to request compensation for damage by obtaining information which, in such cases, is not in his possession. The same applies in the case of any operator who may be jointly and severally liable with other operators on the basis of this Convention or who, held liable on this same basis, has the intention to exercise a right of recourse against another operator under ordinary law as allowed by the Convention.

In addition to access to information held by public authorities provided by the preceding article, access is also given to information held by the operators themselves.

The person who suffered damage may at any moment, and especially before instituting legal proceedings, request information. This access to information, to which he is entitled, is in fact aimed at giving him the opportunity to gather all the elements necessary for him to determine if he can take the case to court.

On the other hand, the operator may only obtain information in so far as a request has been made to him concerning his liability. However, by not referring to legal proceedings, the Convention gives this right of access in the case where discussions are taking place prior to legal proceedings.

74. However, in order to take account of the risks to the operator of such access to information, as he holds information which could result in a finding of liability, this access is subject to strict rules: first, in the case where the operator is not willing to provide information, access must be exercised under the control of the court.

Furthermore, the court may consider, in order to determine the information which should be required to be given, the possibility of the operator to obtain information which is not yet in his possession.

The court may also reject a request which places a disproportionate burden on the operator. This notion of disproportionate burden does not refer primarily to the financial cost which is subject to special provisions but to the problems of the operator to provide the information having regard to all interests in question, including those of the person who suffered damage.

The information, which may be ordered to be given under the Convention, is restricted to objective criteria. The restrictions provided by Article 14, paragraph 2, which may be contained in internal law, apply. In any event an operator is not required to provide information which will incriminate him.

Finally, the costs of providing the information is in principle borne by the person making the request, possibly before the information is given, unless the court accepting the request by the person who has suffered damage for compensation, decides that the operator shall bear such costs. In any event the costs must be reasonable.

CHAPTER IV – ACTIONS FOR COMPENSATION AND OTHER CLAIMS

75. The chapter contains three groups of provisions. The first concerns limitation periods (Article 17), the second deals with requests by associations or foundations (Article 18) and the third covers procedural rules (Articles 19 to 24).

Article 17 – Limitation periods

76. In order to avoid *forum-shopping*, which would occur owing to the different limitation periods in States, the time limits within which the action may be brought have been provided for in the Convention and consequently not left to internal law.

77. The first time limit is a three year limit. For the better administration of justice and the avoidance of abuses, proceedings for the recovery of damages are barred unless taken within three years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator.

The time-limit can be interrupted or suspended within the framework of internal law (Article 17, paragraph 1).

78. A second time-limit after which no actions can be brought is provided under this Convention.

This time-limit is thirty years starting from the date of the incident.

Where the incident consists of a continuous occurrence, the time-limit shall run from the end of that occurrence and where the incident consists of a series of occurrences having the same origin, the time-limit shall run from the date of the last of such occurrences. In respect of sites for permanent deposit of waste, the period runs at the latest from the date of the closure of the site (Article 17, paragraph 2).

79. The thirty year time-limit is intended to preserve a balance between the interests of claimants and operators. In particular it takes into account the need for operators, especially in respect of their insurance requirements, to be certain of the date from which actions no longer can be taken.

The Convention makes no provision for the suspension or interruption of the thirty year period.

Article 18 – Requests by organisations

80. The request which an organisation may submit under the Convention is limited to the cases mentioned in paragraph 1 of the article: prohibition of a dangerous activity which is unlawful, an order to the operator to take preventive measures or an order to reinstate the environment.

81. These requests are all related to urgent situations requiring a rapid and efficient intervention for which individual persons are not necessarily in a position to act.

Paragraph 1, sub-paragraph c, aims at the adoption of provisions to prevent any damage or any aggravation of damage.

In addition, this article is part of the provisions of the Convention which promote a real protection of the environment itself.

82. The Convention only requires that the statutes of the association or foundation aim at the protection of the environment and allows Parties to fix conditions, which take account of their own interests or needs.

83. When a Party restricts access to its courts to associations having their registered seat on its territory, the Convention provides that a declaration of reciprocity may be made in die case of associations having their seat in another State and complying with the conditions of internal law in this other State (Article 18, paragraph 5).

Articles 19 to 24 – Rules relating to jurisdiction, recognition and enforcement

84. The purpose of these articles is to lay down rules relating to jurisdiction, recognition and enforcement. They indicate, in particular, to which courts the various actions must be submitted, according to the nature of the action (compensation claims, requests for access to information and requests from organisations under Article 18).

These rules are based on the Brussels (27 September 1968) and Lugano (16 September 1988) Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters.

Insofar as the State or its subdivisions engages, *jure gestionis*, in activities under Article 2, it shall hot enjoy immunity from jurisdiction for the purposes of the application of this Convention.

85. Likewise, the Convention makes use of the provisions of these two Conventions with regard to notification of proceedings to defendants, *lis pendens* of sets of proceedings involving the same cause of action brought before the courts of different Parties, related actions brought before the courts of different Parties and the recognition of judgments given by the courts of another Party.

86. Finally, the Convention does not prevent the application of other treaties establishing rules of jurisdiction or providing for recognition and enforcement of decisions given by the courts of another State.

CHAPTER V – RELATIONS BETWEEN THIS CONVENTION AND OTHER PROVISIONS

Article 25 – Relation between this Convention and other provisions

87. The first paragraph of this article is based on Article 60 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The paragraph lays down the principle that the Convention shall not take precedence over the internal law of the Parties or the international agreements by which they may be bound whenever the provisions of the Convention are less favourable to persons suffering damage. The notion of a person who has suffered damage should be interpreted in the light of the definition of the notion of damage in Article 2, paragraph 7. This concerns provisions which exist at the time when the Convention enters into force, as well as provisions established afterwards.

The same principle applies to provisions concerning the protection or reinstatement of the environment.

88. The second paragraph is a provision which has been recently used in other international conventions which provide for the membership of the European Economic Community.

Its purpose is twofold. In the first place it aims at permitting the EEC Member States, when a Convention contains subjects for which the Community has exercised its competence, to sign and ratify the Convention together with the Community without the need to make declarations about the division of their competence.

The second purpose is to make sure that the EEC Member States and the Community would not have to abstain from becoming a Party to the Convention in the case of possible minor discrepancies between the provisions of the Convention and Community rules during the period needed to bring these rules in conformity with the provisions of the Convention.

The clause would also apply in cases where only one Member State would be affected.

However, in their relations with third countries, Parties to the Convention, the EEC Member States would have to apply the provisions of the Convention itself.

Therefore, if the incident occurs on the territory of State A, which is a member State of the EEC, and damage is suffered on the territory of State B, which is not a member State of the EEC, liability for the damage suffered in State B would be regulated by the Convention.

CHAPTER VI – THE STANDING COMMITTEE

Article 26 – The Standing Committee

89. It has emerged that the objectives of the Convention and its adaptation to technical and scientific developments would be achieved more easily if representatives of the Parties were afforded the opportunity of meeting on a regular basis to assess the application of the Convention and propose measures deemed likely to improve its effectiveness.

With a view to ensuring that all Parties are represented in the discussions and given the objective of opening the Convention for accession by the greatest possible number of States, it was deemed necessary for Parties which were not member States of the Council of Europe to be associated with these discussions.

90. Accordingly, the Convention provides for the setting-up of a Standing Committee, comprising the Parties on an *ipso jure* basis and, with observer status, States that have been invited to sign the Convention, irrespective of whether they are member States of the Council of Europe, non-members of the Council of Europe which have taken part in the elaboration of the Convention, and the European Community, insofar as it is not a Party. Non-Contracting States and national or international, governmental or non-governmental bodies may also be invited to attend meetings of the Standing Committee as observers, unless a Committee member lodges an objection.

91. The main operating rules of the Standing Committee are laid down by the Convention and will be complemented by a set of Rules of Procedure. In particular, clear rules are laid down for the distribution of votes between the EC and States Parties belonging to the Community.

Article 27 – Functions of the Standing Committee

92. The general function of the Standing Committee is to monitor problems relating to the Convention.

In this connection, it can issue an opinion on any general matter submitted to it, whether it concerns the interpretation or implementation of the Convention.

The Standing Committee may adopt recommendations on the implementation of the Convention on a consolidated majority basis. These recommendations, even if they are not directly enforceable in legal terms, carry a considerable moral or political weight. They cannot, however, result in a judgment being given against a Party, as the Committee is not empowered to act as a court of law.

93. It is also the task of the Standing Committee (see Article 33, paragraph 1) to suggest that the Committee of Ministers of the Council of Europe invite certain States to accede to the Convention, and to propose amendments thereto.

The last task is a vital one because the aim is to ensure that the Convention is updated so as to reflect, in particular technological developments.

Article 28 – Reports of the Standing Committee

94. It is established practice for all committees set up under Council of Europe Conventions to report to the Committee of Ministers.

CHAPTER VII – AMENDMENTS TO THE CONVENTION

Article 29 – Amendments to the articles

95. Amendments to the articles of the Convention may be proposed by the Parties, the Standing Committee or the Committee of Ministers. They are forwarded to all member States of the Council of Europe, to the European Community and to any Signatories, Parties and States which have been invited to sign or accede to the Convention.

96. The Convention introduces a distinction between amendments to the basic provisions, which are of a technical nature and are adopted by the Standing Committee alone, and amendments to the final provisions, which, by virtue of their political and budgetary implications, require the approval of the Committee of Ministers.

97. After they have been adopted or approved, amendments are forwarded to the Parties for acceptance. In all cases, amendments come into force only in respect of the Parties that have accepted them, it being understood that amendments to the final provisions concerning the application of the Convention must be approved unanimously.

Article 30 – Amendment to the Annexes

98. Amendments to Annexes I and II of the Convention can be submitted under the same conditions as those applying to amendments to the basic articles. The same rules govern the adoption of such amendments by the Standing Committee.

However, the rules concerning acceptance procedures have been amended in order to promote their rapid entry into force.

It was necessary to adopt a more flexible procedure in view of the technical nature of the Annexes, rapid changes in their content and the fact that it is desirable for identical provisions to be applicable to each Party.

The principle that amendments may not be imposed on Parties that have not accepted them, either expressly or tacitly, remains unchallenged, however.

Accordingly, as in the case of other Council of Europe Conventions, such as the Bern Convention on the conservation of European wildlife and natural habitats (Article 17), Article 30 of this Convention provides for a tacit acceptance procedure for amendments to the Annexes. An amendment enters into force on the first day of the month following the expiration of a period of eighteen months after its adoption by the Standing Committee, unless more than one-third of the Parties have notified objections, in which case the amendment is deemed to have been rejected. Otherwise it enters into force for those Parties which have not notified objections.

Article 31 – Tacit amendments to Annex I, Parts A and B

99. Annex I, Parts A and B, on dangerous substances refers to the Annexes of the Community Directives, including the amendments thereto, as they stood when the Convention was adopted.

To ensure that the Convention remains in harmony with the Community texts which it initially adopted, Article 31 provides for the entry into force by tacit acceptance of amendments made to the Annexes to the Community documents, unless a Party requests application of the procedure laid down in the previous article. In this case, the amendment is forwarded to the Standing Committee for approval. If no Party requests the submission of the amendment to the Standing Committee, the amendment enters into force by tacit approval.

The ultimate aim of this article is to avoid the procedure of adoption by the Standing Committee unless it is requested by a Party.

CHAPTER VIII – FINAL CLAUSES

Articles 32 to 37

100. These articles make use of the wording of the model final clauses of Council of Europe agreements and conventions.

The following matters should be noted.

Article 32 – Signature, ratification and entry into force

101. In view of the international dimension of environmental issues, it was decided to allow the greatest possible number of States to sign this Convention.

Consequently, it has been opened for signature not only to the member States of the Council of Europe but also to those non-member States which took part in its elaboration, to non-member States which were invited to do so by the Committee of Ministers and to the European Community.

Article 33 – Non-member States

102. The Committee of Ministers may, on its own initiative or on the suggestion of the Standing Committee, and after consulting the Parties, invite any non-member State to accede to the Convention.

Article 34 – Territories

103. Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the Convention for any Party to exclude from the application of this instrument parts of its main territory and that there would be no need to lay this down explicitly in the Convention.

Article 35 – Reservations

104. This article lays down on a restrictive basis the reservations which can be made.