

Transboundary River Pollution and “Consideration of Foreign Law under Applicable Law” — A Study Based on 2000 Baia Mare Accident (summary)

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This paper examines the extent of the “consideration foreign state’s administrative permission as facts” under applicable law, on the subject of the Baia Mare Cyanide Spill accident in 2000.

In the Baia Mare accident, the gold mine in Romania operated by a joint venture owned by the REMIN as a state-owned enterprise in Romania and the Esmeralda as a foreign-owned company from Australia, has caused serious damage in neighbouring countries by enormous cyanide spill from its collapsed tailing dam into the rivers Someş (Szamos), Tizsa and finally Danube.

The gold mine in Romania used a toxic cyanide for gold extraction. The wastewater was stored in the tailing dam and circulated in facilities. The joint venture operating the mine had got all needed administrative and environmental authorizations from Romanian government before the operation. The tailing dam was already decrepit at the time of starting the operation and the closed circulation system had also problems. In end of January 2000 the tailing dam was suddenly collapsed and the cyanide-rich tailing was spilled into the rivers. The BMTF (Baia Mare Task Force) which investigated into the accident pointed out in its report that the Environmental Impact Assessment (ELA) by Romanian government did not fulfill the standards of quality internationally accepted, though the mine has complied with Romanian law.

In this case, the mine operating company pled in defense for justification in a lawsuit in Hungary that it had granted official permissions and its operation was then normally within a scope of that permissions.

The applicable law to the liability of transboundary nuisance, *lex loci delicti*, would be in this case Hungarian civil law as the law of the state where the damaging effect took place. It also could be taken into account by courts in this case Romanian administrative law as the law of the state which granted the official permissions for the operation.

A illegality or unlawfulness of the nuisance as a legal condition of civil liability should be decided all together with its legal consequences by *lex loci delicti*, not separately and not

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preliminarily decided by the law of the state where the permission was granted.

Taking foreign law into consideration under applicable law is an issue under choice-of-law rules. To consider this issue should be distinguished applying a provision of no-fault-liability from the otherwise lawful activities of specific industries from applying a provision which defines general fault-liability.

The fact that the operating enterprise had complied with and it operated in accordance with its governmental authorities' law, could be considered as a factual element of legal condition of the "lawful activities" in no-fault liability and also make the spill justified for factual situations under legal condition "not intentionally or accidentally" in general delict liability, though it should be also considered whether it can be allowed by rules of public international law.

In the case, Romania refused an enforcement of the judicial decision by Hungarian court, the plaintiffs did not receive descent compensation by the trial of Baia Mare accident.