

**ENVIRONMENTAL LIABILITY UNDER THE
INCOTERMS: A SOUTH AFRICAN PERSPECTIVE**

**A mini dissertation submitted in partial fulfilment of
the requirements for the degree Magister Legum
at the North-West University (Potchefstroom Campus)**

by

M.W. VERMEULEN

1207 4551

Successfully completed modules: LLMI 884

Study supervisor: Mr. L.J. Kotze

October 2005

TABLE OF CONTENTS

	Page
Acknowledgements	i
Abstract	ii
Afrikaans summary	iv
1 Introduction	1
2 Incoterms	2
2.1 <i>Defining Incoterms</i>	2
2.2 <i>Types of Incoterms and environmental liability</i>	3
3 Liability for environmental damage	8
3.1 <i>Environmental liability in South Africa</i>	8
3.2 <i>Principles of environmental law</i>	21
4 Environmental liability under the Incoterms	24
4.1 <i>Proposals for incorporation of environmental liability into Incoterms</i>	24
4.2 <i>A critical analysis</i>	26
5 Conclusion	32
6 Bibliography	34

Acknowledgements

First and foremost I want to thank my study supervisor, Mr Louis Kotze, without whom the completion of this dissertation would never have been possible. The advice and critique based on your insight and experience guided me through the process. You believed in this topic and in my abilities. Thank you!

To Christine Bronkhorst at the Ferdinand Postma Library - thank you for your competence and swift help when I needed resource material.

To all the staff at the Faculty of Law: thank you for the valuable contributions you made to my academic life.

To my father, the ultimate teacher and academic, who taught me by the example he set and who made it possible for me to develop my talents.

To my family and friends whose support carried me through.

To my fiancée, Dalina, you always believed in me, and were always there cheering me on!

To the Lord God, who gave me the ability to complete this study.

Abstract

International trade is an important aspect of development in the South African constitutional state. Section 24 of the *Constitution of the Republic of South Africa*, 1996, embodies the principle of sustainable development that is also applicable to international trade. The aim of this dissertation is to investigate how trade can be made more sustainable by way of the incorporation of environmental liability provisions under the Incoterms to provide for instances where environmental damage is caused during the trade and transport of hazardous substances.

Incoterms are a set of international rules for the interpretation of the most commonly used trade terms in foreign trade, and were developed under the auspices of the *International Chamber of Commerce* (ICC). Incoterms are recognised by the *United Nations Commission on International Trade Law* (UNCITRAL) as the global standard for trade term interpretation. They define the transfer of risks for loss or damage of goods between the seller and purchaser. They are the definitive text for the determination of costs and risks allocated to the parties. Incoterms are regularly incorporated into sales contracts worldwide and have become part of the daily language of trade. The use of Incoterms permits that the uncertainties of different interpretations in different countries be avoided or at least reduced to a considerable degree.

However, environmental damage may occur during the transport of goods. This damage may include aspects such as hazardous and noxious substance spills on land and in water, which may have a detrimental effect on the environment and which may also give rise to significant costs to rectify and rehabilitate the environment. Liability for environmental damage may cause uncertainties in international trade relationships, especially between parties from different countries. It may accordingly be a useful strategy if Incoterms were to incorporate and provide for the determination of risk and liability in the case of environmental damage caused during international trade practices.

In light of the above, this dissertation investigates whether provisions under the Incoterms provide for liability for environmental damage caused during international trade practices, and if so, to what extent.

Afrikaans summary

Internasionale handel vorm 'n integrale deel van die ontwikkeling van die Suid-Afrikaanse grondwetlike staat. Die konsep van volhoubare ontwikkeling, wat ook op internasionale handel van toepassing is, word in artikel 24 van die *Grondwet van die Republiek van Suid Afrika*, 1996, omskryf. Die doelwit van hierdie verhandeling is om 'n ondersoek in te stel hoe handel meer volhoubaar gemaak kan word deur omgewingsaanspreeklikheid onder Incoterms in te sluit om voorsiening te maak vir gebeurlikhede waar omgewingskade aangerig word tydens die koop, verkoop of vervoer van gevaarlike stowwe.

Incoterms is 'n stel internasionale reëls wat daargestel is vir die interpretasie van die mees algemene handelsterme in buitelandse handel en is ontwikkel in samewerking met die *Internasionale Handelskamer*. Incoterms word deur die *Verenigde Nasies se Kommissie vir Internasionale Handel* (UNCITRAL) erken as die globale standaard vir die interpretasie van handelsterme. Met Incoterms word die oordrag van die risiko van verlies of skade aan goedere tussen die koper en verkoper gedefinieer. Dit is die mees gesaghebbende teks vir die vasstel van kostes en risiko's wat aan die verskillende partye toegeken word. Incoterms word gereeld wêreldwyd in verkoopskontrakte ingesluit en het sodoende deel geword van die daaglikse handelstaal. Die gebruik van Incoterms dra daartoe by dat die onsekerheid oor verskillende interpretasies in verskillende lande aangespreek kan word.

Tydens die vervoer van goedere kan daar soms skade aan die omgewing aangerig word. Hierdie skade kan die verspilling van gevaarlike en giftige stowwe op land of in die water insluit. Dit kan ernstige gevolge vir die omgewing inhou en die kostes om die skade te herstel en die omgewing te rehabiliteer, kan geweldig hoog wees. Die aanspreeklikheid vir omgewingskade mag onsekerheid in internasionale handelsverhoudinge veroorsaak. Dit kan daarom 'n voordelige strategie wees om aanvullend tot die Incoterm-bepalings, ook 'n klousule in te sluit wat spesifiek verwys na die

aanspreeklikheid en risiko waar omgewingskade tydens internasionale handelspraktyke mag voorkom.

In die lig van bogenoemde wil hierdie verhandeling vasstel of daar onder Incoterms voorsiening gemaak word vir die vasstelling van aanspreeklikheid vir moontlike omgewingskade wat tydens internasionale handelspraktyke mag voorkom.

1 Introduction

When transporting trade goods, the reality that environmental damage may occur needs to be considered. This environmental damage may include aspects such as hazardous substance¹ spills on land and in water, which may have a detrimental effect on the environment and which may also give rise to significant costs to rectify and rehabilitate the environment.² As a result, an important question arises: who bears the costs to rectify and rehabilitate the environment?

Incoterms define the transfer of risks for loss or damage of goods between the seller and the purchaser.³ Sales agreements predominantly include Incoterms that regulate the transfer of the risk of the product during the transfer of the ownership of the goods, from the seller to the purchaser.⁴ However, the transfer of risk mentioned above only pertains to the loss of or damage to the goods or the cargo as mentioned in the specific sales agreement.⁵ Do Incoterms also provide for the transfer of environmental liability or risks? Should environmental liability be negotiated by parties in their trade agreements?⁶ If environmental damage does occur, these questions, if unanswered, may lead to various problems pertaining as to who the liable party is.

The problem statement to be addressed in this research is: Do the provisions under the Incoterms provide for liability for environmental damage caused during international trade practices, and if so, to what extent? This dissertation accordingly investigates the question by means of a literature study. It is then firstly important to determine

1 Hazardous substance means a substance which may cause environmental damage.

2 The recent past has seen the transportation of ever-increasing volumes of various hazardous and toxic substances across the world's seas. Glazewski *Environmental Law South Africa* 237.

3 Day and Griffin *International Trade* 58.

4 Ramberg *Incoterms 2000* 11.

5 Goode *Commercial Law* 947.

6 Wessels *Sasol Discussion Document* 2.

what Incoterms bring about in the transfer of risks and liabilities between the parties. As this dissertation is done from a South African perspective, the applicable environmental liability laws of South Africa and relevant environmental principles will be discussed. Finally, conclusions will be drawn and recommendations made regarding environmental liability under the Incoterms.

2 Incoterms

2.1 Defining Incoterms

In international commercial custom that consists of commercial practices, international agencies such as the International Chamber of Commerce (ICC) and other international trade associations have formulated usages or standards.⁷ One of these usages and standards is known as Incoterms (general international trade terms). Incoterms are recommended by the United Nations Commission on International Trade Law (UNCITRAL).⁸ They are also referred to in the 1999 Model Sales Contract for Perishable Goods released by the International Trade Centre, which is a joint venture held in conjunction with the World Trade Organisation (WTO) that promotes international trade in developing countries such as South Africa.⁹

Incoterms 2000¹⁰ are the most recent edition of the ICC rules for the interpretation of the most commonly used trade terms.¹¹ They define the transfer of risks for loss or damage of goods between the seller and the purchaser.¹² This document is the definitive text for the

⁷ Cremona and Fletcher (eds) *Foundations and Perspectives* 39.

⁸ Ramberg *Incoterms 2000* 10.

⁹ Cremona, and Fletcher (eds) *Foundations and Perspectives* 40.

¹⁰ For the purpose of this mini-dissertation Incoterms 2000 will be used.

¹¹ First published by the International Chamber of Commerce in 1936, Incoterms have been revised at 10 year intervals; Incoterms 1980, 1990 and 2000. The updating of the various versions is done in order to take into account the latest developments in international trade such as containerisation, development of multimodal transport and the use of electronic data interchange.

¹² Schmitthoff *Schmitthoff's Export Trade* 11.

determination of costs and risks allocated to the seller and the purchaser.¹³ Incoterms are regularly incorporated into sales contracts worldwide and have become part of the daily language of trade, also for South African traders.¹⁴ The use of Incoterms permits avoiding the uncertainties of different interpretations in sales contracts in different countries, or at least reducing them to a considerable degree.¹⁵ The importance of Incoterms in sales agreements is then apparent, as they predominantly regulate the transfer of the risk to damage of the product during the transport thereof.¹⁶

However, the transfer of risk only pertains to the loss of, or damage to, the goods or the cargo as mentioned in the specific sales agreement.¹⁷ Does it provide for the passing of environmental liability or risks?¹⁸ This question is answered by firstly investigating the various types of Incoterms.

2.2 Types of Incoterms and environmental liability

The various types of Incoterms are discussed to determine how each of them regulates on the transfer of risk from the seller to the purchaser and to determine when liability involves transfer in the international transport cycle.¹⁹

The Incoterm Ex Works (EXW) represents the minimum involvement of the seller and the maximum involvement of the purchaser in the movement of the goods from the point of 'works'.²⁰ The 'point of works' must be qualified by stating the address of the 'works'. This

¹³ See in general Dillon and Van Niekerk *South African Maritime Law and Marine Insurance* 166; Schmitthof *Schmitthof's Export Trade* 11.

¹⁴ Van Niekerk and Schulze *The South African Law of International Trade* 48.

¹⁵ Chuah *Law of International Trade* 71.

¹⁶ Ramberg *Incoterms 2000* 11.

¹⁷ Van Niekerk and Schulze *The South African Law of International Trade* 48.

¹⁸ Wessels FC *Sasol Discussion Document* 2.

¹⁹ It is important for this dissertation to determine whether any reference is made in regards to environmental liability in any of the various Incoterms.

²⁰ Van Niekerk and Schulze *The South African Law of International Trade* 48.

may be a factory, site or warehouse.²¹ Under EXW the risk and responsibility pass from the seller to the purchaser when the cargo is made available on the ground at the specified place, on the agreed future date, or at a future time.²² The goods are purchased on the basis that the purchaser will be responsible for removing them from the specified place where they are at the time when the sale is concluded.²³ The purchaser must make all the necessary arrangements for shipment to their destination.²⁴ The purchaser will also be responsible for all the costs thereof, including insuring of the goods.²⁵ In terms of EXW the purchaser is also liable for all risks to the cargo during this period, even though it is not yet under the purchaser's physical control.²⁶ The consequence is that the seller is not held liable at all for any loss or damage to the goods from the moment it leaves the seller's premises.²⁷

Under EXW the sole responsibility rests with the purchaser.²⁸ This puts the purchaser in a very compromising situation, as all of the responsibilities are immediately placed upon him or her.²⁹ However, the liability for possible environmental damage caused by the goods is not mentioned in EXW as the latter only includes liability for loss and damage to the goods themselves.

Delivered at Frontier (DAF), entails that the carriage of the goods is to be arranged by the seller.³⁰ The risk in terms of DAF is transferred from the seller to the purchaser when the goods have been delivered to the purchaser's premises of business, and the liability is transferred from the seller to the purchaser when the goods have been delivered

²¹ Van Niekerk and Schulze *The South African Law of International Trade* 49.

²² Schmitthoff *Schmitthoff's Export Trade* 11.

²³ Schmitthoff *Schmitthoff's Export Trade* 11.

²⁴ Sherlock and Reuid (eds) *International Trade* 192.

²⁵ Hare *Shipping Law* 452.

²⁶ Schmitthoff *Schmitthoff's Export Trade* 11.

²⁷ Hare *Shipping Law* 451.

²⁸ Sherlock and Reuid (eds) *International Trade* 192.

²⁹ Coetzee 2002 *Stellenbosch Law Review* 120.

³⁰ Ramberg *Incoterms 2000* 137.

to the frontier.³¹ The Delivered Ex Ship term (DES) entails that carriage is to be arranged by the seller, while the risk is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser on board the ship.³² The liability in terms of DES is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser on board the ship.³³ Delivered Ex Quay (DEQ) states that carriage of goods is to be arranged by the seller.³⁴ The risk is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser on the quay.³⁵ In terms of DEQ, the liability is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser on the quay.³⁶ Delivery Duty Unpaid (DDU) maintains that the carriage of goods is to be arranged by the seller.³⁷ The risk is transferred from the seller to the purchaser according to DDU when the goods are placed at the disposal of the purchaser.³⁸ The liabilities are transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser.³⁹ The Delivered Duty Paid term (DDP) determines that the carriage of goods is to be arranged also by the seller while the risk is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser at the named place, in the country of importation.⁴⁰ The liability is transferred from the seller to the purchaser according to DDP when the goods are placed at the disposal of the purchaser.⁴¹

³¹ Sherlock and Reuvid (eds) *International Trade* 195. The frontier is defined as the customs border of the adjoining country. This point needs to be stipulated as it may be used for any frontier including country of export.

³² Schmitthoff *Schmitthoff's Export Trade* 56.

³³ Sherlock and Reuvid (eds) *International Trade* 196.

³⁴ Ramberg *Incoterms 2000* 155.

³⁵ Schmitthoff *Schmitthoff's Export Trade* 58.

³⁶ Ramberg *Incoterms 2000* 156.

³⁷ Sherlock and Reuvid (eds) *International Trade* 196.

³⁸ Schmitthoff *Schmitthoff's Export Trade* 58.

³⁹ Ramberg *Incoterms 2000* 163.

⁴⁰ Schmitthoff *Schmitthoff's Export Trade* 58.

⁴¹ Hare *Shipping Law* 456. This places the greatest burden on the seller of all the Incoterms.

From the above it may be deduced that under most of the 'D'-prefixed terms, the seller has more responsibility concerning the goods. This is illustrated by the point that the seller has to arrange the carriage of the goods and the risk, the liability and the cost are transferred when the goods are placed at the disposal of the purchaser.⁴² This places the seller in a compromising situation. The 'D'-prefixed terms of the Incoterms furthermore do not deal with environmental liability.

In the Cost Insurance Freight Incoterm (CIF), the seller contracts to deliver the goods to the purchaser at a destination designated by the purchaser and to pay the insurance premium and the freight cost.⁴³ The risk for loss or damage to the goods under CIF is transferred to the purchaser when the goods pass the ship's rail while loaded onto the ship.⁴⁴ In terms of CIF the costs are transferred at the port of destination.⁴⁵ In the term Cost and Freight (CFR) the carriage of goods is to be arranged by the seller.⁴⁶ The risk of loss or damage to the goods is transferred from the seller to the purchaser when the goods pass the ship's rail.⁴⁷ The liability under CFR is transferred at the port of destination; the purchaser must pay such costs as are not for the seller's account under the contract of carriage.⁴⁸ The term Carriage Paid To (CPT) determines that the carriage of goods is to be arranged by the seller.⁴⁹ The risk of loss or damage to the goods is transferred from the seller to the purchaser the moment that the goods are delivered to the carrier.⁵⁰ The liability is transferred at the named port of destination. The purchaser must pay such costs that are not for the seller's account under the contract of carriage.⁵¹

⁴² The seller is held liable throughout the whole international transport cycle.

⁴³ Hare *Shipping Law* 454.

⁴⁴ Sherlock and Reuid (eds) *International Trade* 194.

⁴⁵ Schmitthoff *Schmitthoff's Export Trade* 33.

⁴⁶ The difference between the CIF and the CFR terms is that in terms of CFR the seller is not obliged to arrange for the insurance of the goods. See *Barlows Tractor & Machinery Co v Oceanair (Transvaal) (Pty) Ltd* 1978 3 SA 175 (A)

⁴⁷ Coetzee 2002 *Stellenbosch Law Review* 121.

⁴⁸ Sherlock and Reuid (eds) *International Trade* 194.

⁴⁹ Coetzee 2002 *Stellenbosch Law Review* 121.

⁵⁰ Ramberg *Incoterms 2000* 123.

⁵¹ Ramberg *Incoterms 2000* 123.

Carriage and Insurance Paid (CIP) entails that the carriage and the insurance are to be arranged by the seller.⁵² The risk of loss or damage to the goods is transferred from the seller to the purchaser when the goods have been delivered to the carrier.⁵³ The costs under CIP are transferred at the place of destination. The purchaser must then pay such costs as are not for the seller's account under the contract of carriage.⁵⁴

Under the "C" terms discussed above, the risk regarding the goods is transferred from the seller to the purchaser either when the goods pass the ship's rail or when the goods are delivered to the carrier. The question that remains is: who carries the risk when these goods cause environmental damage? The "C" terms only refer to the liable party when the goods are damaged and not when environmental damage is caused by the goods.

Free on Board (FOB) maintains that the carriage of goods is to be arranged by the purchaser.⁵⁵ The risk of loss or damage to the goods is transferred from the seller to the purchaser when the goods pass the ship's rail.⁵⁶ Under FOB the liability is transferred from the seller to the purchaser when the goods pass the ship's rail.⁵⁷ The term Free Carrier (FCA) involves that the carriage of goods is to be arranged by the purchaser or by the seller on the purchaser's behalf.⁵⁸ The risk for loss or damage to the goods is transferred from the seller to the purchaser when the goods have been delivered to the carrier at the named place of destination.⁵⁹ Under the FCA term, the liability is transferred from the seller to the purchaser when the goods have been delivered to the named carrier at the named place.⁶⁰ In terms of

⁵² Schmitthoff *Schmitthoff's Export Trade* 61.

⁵³ Dillon and Van Niekerk *South African Maritime Law and Marine Insurance* 198-199.

⁵⁴ Sherlock and Reuvid (eds) *International Trade* 195.

⁵⁵ Van Niekerk and Schulze *The South African Law of International Trade* 49.

⁵⁶ Hare *Shipping Law* 456.

⁵⁷ Dillon and Van Niekerk *South African Maritime Law and Marine Insurance* 192.

⁵⁸ Schmitthoff *Schmitthoff's Export Trade* 60.

⁵⁹ Coetzee 2002 *Stellenbosch Law Review* 120-121.

⁶⁰ Sherlock and Reuvid (eds) *International Trade* 192.

the Free Alongside Ship (FAS) term the risk in case of loss or damage to the goods rests with the purchaser once the goods have been placed alongside the ship that will transport the goods.⁶¹ The liability is transferred under FAS from the seller to the purchaser when the goods have been placed alongside the named ship.⁶²

Under the “F” terms the risk of loss or damage to the goods is transferred from the seller to the purchaser either when the goods pass the ship’s rail or when the goods are delivered to the carrier, or when the goods have been placed alongside the ship.⁶³ The “F” terms also do not refer to environmental liability and only go so far as to determine the liable party.

In light of the foregoing it may be deduced that Incoterms regulate risk aspects that relate to the loss or the damage of the goods, as well as on the logistical aspects that relate to the transport thereof. It appears that, Incoterms do not provide for the transfer of environmental liability risks.⁶⁴

3 Liability for environmental damage

3.1 Environmental liability in South Africa

3.1.1 Environmental liability under statutory law

3.1.1.1 The National Environmental Management Act 107 of 1998

In terms of section 28 of the *National Environmental Management Act* 107 of 1998 (hereafter referred to as NEMA):

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable

⁶¹ Coetzee 2002 *Stellenbosch Law Review* 121.

⁶² Ramberg *Incoterms 2000* 89.

⁶³ Hare *Shipping Law* 450.

⁶⁴ Wessels *Sasol Discussion document* 2.

measures to prevent such pollution or degradation from occurring continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.⁶⁵

An important aspect of this section is that the category of persons it imposes liability on is non-exhaustive, because it refers to “every person”. Section 28(2) goes even further and stipulates three categories of persons - firstly an owner of land or premises, secondly a person in control of land or premises, for example a lessee, and thirdly a person who has a right to use the land or premises on which, or in which, any activity or process is or was performed or undertaken, or any other situation exists, which causes, has caused, or is likely to cause significant pollution or degradation of the environment.⁶⁶ Section 28(3) stipulates certain measures that need to be taken by those persons identified above and “every person” responsible for the incident. These measures include investigating, assessing and evaluating the impact on the environment.⁶⁷ The employees of the persons identified must be informed and educated regarding the environmental risks of their tasks and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment.⁶⁸ The activity or process causing the pollution or degradation must be stopped, modified and controlled.⁶⁹ The movement of pollutants or the causing of degradation must be contained and prevented, while any source of the pollution or degradation must be eliminated.⁷⁰ The effects of the pollution or degradation must then also be remedied.⁷¹ In terms of section 28(4), section 28(6)(b) and section 28(7) the Director-General or Provincial Head of the Department of Environmental Affairs and Tourism may take reasonable measures to remedy the situation, and recover the

⁶⁵ S 28(1) of NEMA.

⁶⁶ Glazewski *Environmental Law* 178.

⁶⁷ S 28(3) of NEMA.

⁶⁸ S 28(3) of NEMA.

⁶⁹ S 28(3) of NEMA.

⁷⁰ S 28(3) of NEMA.

⁷¹ S 28(3) of NEMA.

costs incurred, from a number of stipulated persons including any person who is or was responsible for, or who directly or indirectly contributed to the pollution or degradation or the potential pollution or degradation.⁷² This section also includes the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title.⁷³ The person in control of the land or any person who has or had a right to use the land at the time when the activity or the process is or was performed or undertaken, or the situation came about, or any person who negligently failed to prevent the activity or the process being performed or undertaken or the situation from coming about may also be held liable for the costs incurred.⁷⁴

It becomes clear that all persons including a seller and a purchaser in the transport cycle, must take reasonable measures to prevent any environmental damage from occurring, and they must further exercise a duty of care. Those who fail to comply with this duty may be ordered to pay costs to clean up and repair the environment. In order to escape liability, the polluter is required to prove that reasonable measures have been taken to minimise and rectify the pollution or degradation.⁷⁵

The provisions of section 30 provide for emergency incidents. In section 30 (1)(a) an "incident" is defined as:

an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed.⁷⁶

This definition may include spills during the transportation of goods from the seller to the purchaser, whether the goods are transported by

⁷² Glazewski *Environmental Law* 180.

⁷³ Glazewski *Environmental Law* 180.

⁷⁴ S 28(8)(a)-(d) of NEMA.

⁷⁵ Murungi *Environmental liability* 14.

⁷⁶ S 30(1)(a) of NEMA.

road, rail, air or sea.⁷⁷ Section 30(1)(b) defines the liable party when environmental damage is caused as the “responsible person” and then categorises the term further. Any person responsible for the incident or any person who owns any hazardous substance involved in the incident or both, or any person, who was in control of any hazardous substance involved in the incident at the time of the incident, or any of the two, may be held liable when an incident occurs.⁷⁸

Certain duties and obligations are placed on the liable parties mentioned. The incident must be reported immediately to the Director General of the Department of Environmental Affairs and Tourism (DEAT), the South African Police Service, the relevant fire prevention service, the relevant provincial head or municipality and all persons whose health may be affected by the incident.⁷⁹ The compiled report must contain certain information - including the nature of the incident, any risks posed by the incident, and the toxicity of the substance or by-products released by the incident. Any steps that should be taken in order to avoid or minimise the effects of the incident on public health and the environment must also be mentioned in the report.⁸⁰ The liable parties must then also take certain steps as soon as possible after the incident has occurred. These steps should be taken to minimise the effects of the incident, including effects it may have on the environment and all risks posed by the incident to the health and safety and the property of persons.⁸¹ The steps that should be taken include clean-up procedures and the immediate and the long term effects of the incident on the environment should be determined. The effects on the public health should also be assessed immediately.⁸² In terms of costs incurred by the relevant authority in clean-up costs and all other reasonable measures taken by them to rectify the incident,

⁷⁷ Glazewski *Environmental Law* (2nd ed) 153.

⁷⁸ S 30(1)(b) of NEMA.

⁷⁹ S 30(3)(d)(i)-(iv) of NEMA.

⁸⁰ S 30(3)(a)-(d) of NEMA.

⁸¹ S 30(4)(a)-(d) of NEMA.

⁸² S 30(4)(a)-(d) of NEMA.

the relevant authority is entitled to claim reimbursement from the jointly and separately liable persons.⁸³

For example: goods are being transported from the seller to the purchaser by truck. The goods fall from the truck into a corn field adjacent to the road and the goods, due to their toxic character, cause damage to the farmer's corn field and also contaminates a stream running next to the corn field. In terms of section 30 of the NEMA various parties may be held liable. The person responsible for this incident may be the carrier who might have been negligent by driving recklessly or by not transporting the goods with the necessary precaution, the seller or purchaser may also be liable for not informing the carrier of the nature of the goods. The person who owns any hazardous substance involved in the incident may also be liable, thus if ownership already passed from the seller to the purchaser, the purchaser may be liable or if not, the seller may be liable as owner.⁸⁴ The person who was in control of any hazardous substance involved in the incident at the time of the incident may be liable, the carrier may be liable then as the person in control of the goods when the incident occurred.⁸⁵

It is important to consider that criminal liability in terms of Section 34 of NEMA is imposed on a party where he or she is convicted of an offence.⁸⁶ If the offence caused loss or damage to any organ of state or other person, the state may order such party, convicted of the offence, to compensate all the costs incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing further damage to the environment.⁸⁷ The court may determine the compensation for loss or damage suffered by the person or organ of

⁸³ S 30(7), 30(8) and 30(9) of NEMA.

⁸⁴ For example if ownership passed a EXW Incoterm was most likely used, or if ownership did not pass a C or D term may have been used, see discussion on this in section 2.2.

⁸⁵ S 30(1)(b) of NEMA.

⁸⁶ Glazewski *Environmental Law* (2nd ed) 157.

⁸⁷ S 34(1) of NEMA.

state involved and may also order the liable party to pay all the legal costs involved.⁸⁸

It may be deduced that in terms of NEMA, the responsible persons for environmental damage are held liable for the incidents.⁸⁹ The owner of the hazardous substances may also be held liable for the incident and/or the person in control of that hazardous substance may be held liable for the incident.⁹⁰ The general duty of care and remediation imposed by NEMA must be followed by all the individuals undertaking or planning to undertake anything that may cause environmental damage.⁹¹ Criminal liability may also be imposed on those who cause environmental damage.⁹² Private persons or organs of state may also recover costs incurred from those responsible for the incident.⁹³

3.1.1.2 The *Environmental Conservation Act 73 of 1989*

Section 31A(1) of the *Environmental Conservation Act 73 of 1989* provides that when any person performs any activity or fails to perform any activity and the environment is or may be seriously damaged, endangered or detrimentally effected, the Minister of DEAT, Administrator, local authority or government institution, as the case may be, may direct such person in writing to stop or cease such activity.⁹⁴ The abovementioned bodies may also order the person to take the relevant and suitable steps within a specified time period to eliminate, reduce or prevent the damage, danger or detrimental effect it may have on the environment.⁹⁵ The bodies mentioned in section 31(A)1 may furthermore direct the polluter to rehabilitate, at his or her own expense, any damage caused to the environment as a result of

⁸⁸ S 34(2) and 34(4) of NEMA.

⁸⁹ Murungi *Environmental Liability* 13.

⁹⁰ S 30(1)(b) of NEMA.

⁹¹ S 28 and 30 of NEMA.

⁹² Glazewski *Environmental Law* (2nd ed) 157.

⁹³ S 34 of NEMA.

⁹⁴ S 31(A)1 of the *Environmental Conservation Act 73 of 1989*.

⁹⁵ S 31(A)1 of the *Environmental Conservation Act 73 of 1989*.

his or her activity.⁹⁶ If the polluter fails to take the action as directed, the body concerned may perform the required activity and recover any expenditure from the polluter itself.⁹⁷ A polluter may be ordered to take steps to eliminate, reduce, or prevent damage to the environment and also to rehabilitate any damage caused to the environment. A polluter may therefore be liable for more than just cleaning-up costs.⁹⁸ The duty on the polluters is onerous and may place severe financial implications on them.⁹⁹ The polluter may be ordered to take the relevant steps, if the body is of the opinion that the polluter is performing an activity that may damage the environment.¹⁰⁰ There must be an act or omission, damage and a causal connection between the act and the damage.¹⁰¹ Fault is not required on the part of the polluter before the body concerned may order the relevant steps to be taken.¹⁰² A polluter may be held liable for causing damage to the environment even though there is no fault on his or her part.¹⁰³ The effect of this section includes all the aspects of the environment, such as air, soil and water. In this regard it may overlap with other legislation dealing specifically with, for example, water pollution.¹⁰⁴

When goods are being transported from the seller to the purchaser and environmental damage is caused, the seller and the purchaser may be held liable, even though there may be no fault on their part. They may be directed as polluters to rehabilitate, at their own expense, any damage caused to the environment during the transport of the goods.

⁹⁶ Havenga 1995 *South African Mercantile Law Journal* 197.

⁹⁷ Havenga 1995 *South African Mercantile Law Journal* 197.

⁹⁸ Kidd *Environmental Law* 59.

⁹⁹ Havenga 1995 *South African Mercantile Law Journal* 197.

¹⁰⁰ Glazewski *Environmental Law* (2nd ed) 553.

¹⁰¹ Havenga 1995 *South African Mercantile Law Journal* 197.

¹⁰² Havenga 1995 *South African Mercantile Law Journal* 197.

¹⁰³ Glazewski *Environmental Law* 686.

¹⁰⁴ *National Water Act* 36 of 1998.

