

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

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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 |

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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.

3.1.1.3 The *National Water Act 36 of 1998*

In terms of environmental damage that occurs in the form of water pollution, sections 19 and 20 of the *National Water Act 36 of 1998* are relevant. Section 19 contains pollution prevention measures and section 20 contains control measures for emergency incidents.¹⁰⁵ Section 19 places a general obligation on a range of persons. These general obligations include taking all the reasonable measures to prevent any pollution from occurring, continuing or recurring.¹⁰⁶ The range of persons referred to above includes land owners, the person in control of land or the person who occupies, or has the right to use the land on which any activity or process is being performed or was performed or undertaken.¹⁰⁷ It also includes any other situation that exists, and which causes, has already caused or is likely to cause pollution of a water resource.¹⁰⁸ The measures to be taken include the ceasing, modifying, or controlling of any act or process causing pollution.¹⁰⁹ The measures also include compliance with any prescribed waste disposal standard or management practice.¹¹⁰ The movement of pollutants must be contained or prevented and any source of the pollution must be eliminated.¹¹¹ The measures also include the remedying of effects of the pollution and the remedying of the effects of any disturbance to the bed and banks of a water course.¹¹² The persons who must take the abovementioned measures also have a duty to take all the reasonable measures to prevent pollution, regardless of when or how the pollution came about. The persons may accordingly be directed to take all the reasonable measures specified by the relevant body before a stipulated time and date.¹¹³ If they fail to do so the body may take the measures it

¹⁰⁵ Barnard *Environmental Law for All* 275.

¹⁰⁶ S 19(1) of the *National Water Act 36 of 1998*.

¹⁰⁷ S 19(1) of the *National Water Act 36 of 1998*.

¹⁰⁸ S 19(1) of the *National Water Act 36 of 1998*.

¹⁰⁹ S 19(2) of the *National Water Act 36 of 1998*.

¹¹⁰ S 19(2) of the *National Water Act 36 of 1998*.

¹¹¹ S 19(2) of the *National Water Act 36 of 1998*.

¹¹² S 19(2) of the *National Water Act 36 of 1998*.

¹¹³ S 19(3) of the *National Water Act 36 of 1998*.

considers necessary to remedy the situation and recover the costs from them jointly and severally.¹¹⁴ Such persons may include any person who is, or was responsible for, or who directly or indirectly contributed to the pollution or the potential pollution.¹¹⁵ The owner of the land at the time when the pollution or the potential for pollution occurred, and that owner's successor in title may also be included.¹¹⁶ The person in control of the land or any person who has a right to use the land at the time when either the activity or the process is or was performed or undertaken or when the situation came about is also included. Any person who negligently failed to prevent either the activity or the process being performed or undertaken or the situation from coming about may also be included.¹¹⁷ Strict liability is imposed on the persons indicated above, because if they fail to take all the reasonable measures, a range of duties and consequences is invoked upon them.¹¹⁸

Section 20 refers to emergency water pollution incidents. This section broadens the potential for liability, regarding responsible persons.¹¹⁹ In section 20(2) the "responsible person" is defined as:

any person who is responsible for the incident; owns the substance involved in the incident; or was in control of the substance involved in the incident at the time of the incident.¹²⁰

The following example may illustrate the scope of the abovementioned definition. While goods are being transported from the seller to the purchaser and as the train crosses a bridge over a river, the goods fall from the train. The goods fall into the river and due to their toxic character, contaminates the water.¹²¹

¹¹⁴ S 19(4) and 19(5) of the *National Water Act* 36 of 1998.

¹¹⁵ S 19(4) and 19(5) of the *National Water Act* 36 of 1998.

¹¹⁶ S 19(4) and 19(5) of the *National Water Act* 36 of 1998.

¹¹⁷ S 19(5)(d) of the *National Water Act* 36 of 1998.

¹¹⁸ Glazewski *Environmental Law* (2nd ed) 624.

¹¹⁹ Barnard *Environmental Law for All* 275.

¹²⁰ Murungi *Environmental liability* 16.

¹²¹ Glazewski *Environmental Law* (2nd ed) 626.

The liable parties for the environmental damage may then include the following categories: the party responsible for the incident this party may be the seller, who may not have informed the carrier of the toxic character and potential for harm that it could cause. The carrier may also be held liable, for instance if the carrier knew about the noxious character of the goods and did not make provision for preventing potential harm. If the purchaser already owns the goods, ownership has already been transferred. Then the purchaser may be held liable as owner of the goods. If ownership was not transferred then the seller may be held liable as owner.¹²² The carrier may also be held liable as the party who was in control of the goods at the time of the incident.¹²³

The definition of an “incident” is very comprehensive. An incident is defined as an incident or accident in which a substance pollutes, or has the potential to pollute a water resource; or has, or is likely to have a detrimental effect on a water resource.¹²⁴ This section of the *National Water Act* 36 of 1998 imposes strict liability on any responsible person, as it is triggered when there is actual pollution, a threat of pollution, or any actual or possible detrimental effect on a water course.¹²⁵ The responsible body may recover all the reasonable costs incurred, from every person who is jointly and severally liable.¹²⁶

¹²² 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.

¹²³ Glazewski illustrates the wideness of this definition by referring to an example of a petrol service station. A petrol service station has an owner, a lessee, and underground storage tanks containing petrol owned by a fuel supply company. If a leak contaminates the ground water, the persons potentially liable include the owner, the lessee (being in control of the substance) and the petrol company (being the owner of the substance). Glazewski further stipulates that a contractor working on the premises could also be included if he was responsible for the incident. Glazewski *Environmental Law* (2nd ed) 625.

¹²⁴ S 20(1) of the *National Water Act* 36 of 1998.

¹²⁵ Glazewski *Environmental Law* (2nd ed) 626.

¹²⁶ S 20(7) of the *National Water Act* 36 of 1998.

3.1.1.4 The *Hazardous Substances Act* 15 of 1973

Under the *Hazardous Substances Act* 15 of 1973 a person may be held criminally liable, when he or she contravenes the regulations of the Act providing for labelling, packaging, transportation, storage¹²⁷ and disposal requirements,¹²⁸ regarding hazardous chemical substances. The Act is administered by the Department of National Health and it aims to control hazardous substances.¹²⁹ Although this Act does not primarily concern itself with pollution and environmental damage,¹³⁰ it does provide in terms of section 29(1) for the prohibition and control of the importation, manufacture, sale, use, operation, application, modification, disposal or dumping of such substances and products.¹³¹

3.1.2 *Environmental liability under common law*

If no specific legal rule or statute provides for liability for environmental damage, remedies provided for by common law may be relevant.¹³² Liability for environmental damage may then be found in the law of delict, and all the requirements of a delict must be met before delictual damages may be successfully claimed from the polluter.¹³³ The requirements of a delict are difficult to prove in the case of pollution damages and various obstacles have to be cleared before a claimant will succeed with a claim.¹³⁴

¹²⁷ Reg. 19 of the *Hazardous Substances Act* 15 of 1973.

¹²⁸ Reg. 20 and 21 of the *Hazardous Substances Act* 15 of 1973.

¹²⁹ Glazewski *Environmental Law* (2nd ed) 573.

¹³⁰ Glazewski *Environmental Law* (2nd ed) 573.

¹³¹ Kidd *Environmental Law* 141.

¹³² Havenga 1995 *South African Mercantile Law Journal* 191; see also Neethling, Potgieter and Visser *Delict* 8-9.

¹³³ Kidd *Environmental Law* 126.

¹³⁴ Prozesky-Kuschke 2001 *South African Law Journal* 497.

The first requirement to constitute a delict is that an act or conduct must cause harm to another.¹³⁵ In the pollution context the spillage of hazardous or noxious substances would be a *prima facie* compliance with this requirement.¹³⁶

The second requirement is wrongfulness, since an act that causes harm to another, is in itself insufficient to establish delictual liability.¹³⁷ Liability will arise only if harm was caused in a wrongful manner.¹³⁸ The term wrongfulness depends on the legal conviction of the community. Hence an act is legally wrongful if it violates the legal duty to take care and/or results in an unjustified infringement of the legally protected interests of another.¹³⁹ An act or omission which violates a statutory provision and causes the plaintiff damage is *prima facie* wrongful.¹⁴⁰

The third requirement is fault. This refers to general blameworthiness or the reprehensible state of mind of someone who acted wrongfully and may take the form of either intention (*dolus*) or negligence (*culpa*).¹⁴¹ In terms then of environmental damage or pollution the question could typically be whether the person acted negligently when the hazardous substances were spilled.¹⁴² There must accordingly

¹³⁵ Glazewski *Environmental Law* (2nd ed) 536; Neethling, Potgieter and Visser *Delict* 27-257 all five elements of a delict will have to be proved; Act/conduct or omission, wrongfulness, fault, damage and causation.

¹³⁶ Glazewski *Environmental Law* (2nd ed) 536. Havenga 1995 *South African Mercantile Law Journal* 192. It is difficult sometimes to determine who caused the pollution, especially where more than one polluter could be involved, or more than one person could be held liable. S 2(1) of the *Apportionment of Damages Act* 34 of 1965 may then be applicable, as it makes provision where more than one person is liable for the same loss.

¹³⁷ Havenga 1995 *South African Mercantile Law Journal* 192.

¹³⁸ Prozesky-Kuschke 2001 *Journal of South African Law* 498.

¹³⁹ Kidd *Environmental law* 126. In *Vertappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D) the local authority dumped the town's waste into a disused quarry adjoining the applicant's property without the necessary permit under the *Environmental Conservation Act* 73 of 1989, the court found that this conduct was unlawful and thus wrongful.

¹⁴⁰ Glazewski *Environmental Law* (2nd ed) 538.

¹⁴¹ Glazewski *Environmental Law* (2nd ed) 540.

¹⁴² Glazewski *Environmental Law* (2nd ed) 540.

then be a wrongful intentional or negligent act or omission on the part of the defendant.¹⁴³

The fourth requirement for delictual liability is causation.¹⁴⁴ Factual causation is the most problematic to prove in pollution or environmental damage cases, especially where gradual pollution is caused over a long period of time and where environmental damage manifests itself, in a place other than that in which the initial pollution was caused.¹⁴⁵ Legal causation is used to limit liability based only on factual causation.¹⁴⁶ There must be a causal nexus between the conduct and the damage.¹⁴⁷

The fifth requirement is damage or loss.¹⁴⁸ A major problem when dealing with delictual liability in terms of environmental damage is that damage to the environment does not necessarily cause damage directly to a person or his patrimony.¹⁴⁹ The damage suffered may constitute pure economic loss, which could be claimed with a delictual remedy.¹⁵⁰ However, problems could exist where pure economic loss arises from damage to a thing or object such as a mountain or a river.¹⁵¹ The courts follow a cautious approach in order to prevent indeterminate liability, as this may become unmanageable in some environmental liability cases.¹⁵² Moreover, as Glazewski explains, even though it might be difficult to assess with precision the quantum of damages to be awarded, the courts would not relieve the wrongdoer of the necessity to pay damages, if the plaintiff has

¹⁴³ Kidd *Environmental Law* 126.

¹⁴⁴ Kidd *Environmental Law* 126.

¹⁴⁵ Prozesky-Kuschke 2001 *Journal of South African Law* 498. For example, where hazardous substances are spilled in a stream, which floats into a river and the environmental damage is manifested in the river.

¹⁴⁶ Prozesky-Kuschke 2001 *Journal of South African Law* 498.

¹⁴⁷ Havenga 1995 *South African Mercantile Law Journal* 194.

¹⁴⁸ Kidd *Environmental Law* 126.

¹⁴⁹ Prozesky-Kuschke 2001 *Journal of South African Law* 499.

¹⁵⁰ Glazewski *Environmental Law* (2nd ed) 543.

¹⁵¹ Prozesky-Kuschke 2001 *Journal of South African Law* 499.

¹⁵² Kotze *South African Yearbook of International Law* 171-192.

produced all the evidence, which he or she may reasonably have produced.¹⁵³

It may then be deduced that in terms of the common law provisions and more specifically the law of delict a seller or purchaser in the transport cycle may be held liable to compensate for environmental damages inflicted while the goods are being transported.

3.2 Principles of environmental law

The Expert Group on Environmental Law of the World Commission on Environment and Development (WCED 1987), developed an ambitious set of twenty-two proposed legal principles for environmental protection and sustainable development.¹⁵⁴ These principles are grouped into general principles, rights, and responsibilities; general principles, rights and obligations concerning trans-boundary natural resources and environmental interferences; and principles for state responsibility and the peaceful settlement of disputes. Most of these principles, although they originated in the highly influential 'Brundtland Report' never found their way into law.¹⁵⁵ However, some of these environmental principles that are also applicable to environmental liability, have a fairly high degree of consensus. These include: the preventive principle, the precautionary principle, the cradle-to-grave principle¹⁵⁶ and the polluter pays principle.¹⁵⁷ These principles are provided for in section 2 of NEMA.

¹⁵³ Glazewski *Environmental Law* (2nd ed) 544.

¹⁵⁴ Wilkinson *Environment and Law* 103.

¹⁵⁵ Wilkinson *Environment and Law* 103.

¹⁵⁶ Short *Environmental Law in a Nutshell* 37.

¹⁵⁷ Oosthuizen 1998 *South African Journal of Environmental Law and Policy* 356. The polluter pays principle was initially implemented by the Organization for Economic Co-Operation and Development in 1972, its aim was to encourage the rational use of scarce environmental resources and avoiding distortions in international trade. At the United Nations Conference on the Human Environment held in Stockholm on the 16th of June 1973, it was demanded that acceptance of responsibility for environmental pollution and protection, should not only be borne by governments, but should also be borne by citizens, communities, enterprises and institutions at every sphere. See Murungi *Environmental Liability* 17.

The preventive principle is the notion that states, corporations, or individuals have, in certain circumstances, an obligation to take steps to avoid causing certain types of environmental damage to the environment, including the environment beyond their own territory or property.¹⁵⁸ The preventive principle is reflected in the following phrases in section 2 of NEMA: The disturbance of ecosystems and loss of biological diversity are to be avoided or minimised and remedied.¹⁵⁹ The principle states that the disturbance of the landscape and the nation's cultural heritage is to be avoided and where it cannot be altogether avoided, it should be minimised and remedied.¹⁶⁰ It is also reflected in the precept that the negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, they are to be minimised and remedied.¹⁶¹

The precautionary principle comprises the need to recognise that harm to the environment could be irreversible, and therefore it is more favourable to avoid any possible harm to the environment than to try to remedy it later.¹⁶² An example that would demonstrate this principle is that it is safer to transport a chemical with all necessary precautions against spills even if it has not yet been proved that it is harmless. The precautionary principle is also provided for in NEMA in the phrase that a risk averse and cautious approach is to be applied, which must take into account the limits of current knowledge concerning the consequences of decisions and actions that need to be taken.¹⁶³

The polluter pays principle has been defined in Principles 13 and 14 of the Rio Declaration.¹⁶⁴ States are urged to incorporate the polluter pays principle into their national legislation, to ensure that costs for

¹⁵⁸ Wilkinson *Environment and Law* 104.

¹⁵⁹ S 2(4)(a)(i) of NEMA.

¹⁶⁰ S 2(4)(a)(iii) of NEMA.

¹⁶¹ S 2(4)(a)(viii) of NEMA.

¹⁶² Kidd *Environmental Law* 130.

¹⁶³ S 2(4)(a)(vii) of NEMA.

¹⁶⁴ Rio Declaration, Rio De Janeiro, 13th of June 1992.

environmental damage are internalised, so that the polluter bears the costs and not the consumers and the state.¹⁶⁵ The polluter pays principle is thus a principle of liability that, whenever possible, the polluter should pay for the restoration, compensation and future prevention of environmental damage that followed or follows out of his or her acts.¹⁶⁶ The polluter pays principle is also reflected in a provision in section 2 of NEMA. This provision states that those responsible for harming the environment must bear the costs of remedying the pollution, environmental degradation and consequent adverse health effects the harm caused. The responsible party must also pay the costs involved in the prevention, controlling and minimising of any further pollution, environmental damage or adverse health effects that may have been caused.¹⁶⁷

Another environmental principle is the cradle-to-grave principle. This principle establishes a regulatory approach to the management of hazardous or polluting substances and products, from their creation to destruction or permanent disposal.¹⁶⁸ The cradle-to-grave principle encompasses the total life cycle of the specified substance. This principle should be applied to reduce or to eradicate pollution at all stages of production, instead of concentrating only on cleaning up operations at the “end of the pipe”.¹⁶⁹ Part of this life cycle is the transportation of the product from the seller to the purchaser.

It may be deduced from the above that statutory provisions are in place in South African environmental law to provide for the environmental liability of parties who are responsible or who may be held accountable for environmental damage. Environmental principles are also enshrined in section 2 of NEMA that reflects on the environmental liability of parties responsible for environmental

¹⁶⁵ Kramer *Environmental Law* 97.

¹⁶⁶ Short *Environmental Law in a Nutshell* 40.

¹⁶⁷ S 2(4)(p) of NEMA. See also S 28 of NEMA discussed above.

¹⁶⁸ Short *Environmental Law in a Nutshell* 40.

¹⁶⁹ Kidd *Environmental Law* 122.

damage. Furthermore, common law provisions provide that a seller or purchaser in the transport cycle may be held liable in terms of the law of delict to compensate for environmental damages inflicted while the goods were transported.

It is evident that South African law provides for a comprehensive set of liability rules relating to environmental damage. It may then be necessary to determine whether these liability rules as discussed above would assist with determining environmental liability in Incoterms.

4 Environmental liability under the Incoterms

4.1 Proposals for incorporation of environmental liability into Incoterms

Environmental damage that is caused during the transport cycle may still be problematic even with national legislation and common law principles that impose environmental liability on those who cause environmental damage during the cycle. The problem is that there are numerous parties who may be held liable. The seller, the purchaser, the carrier, or the person responsible for the incident may be held liable under statutory and common law provisions as discussed in paragraph 3 above. It may then be of sufficient use to investigate other possibilities to determine the liable parties, as it may become problematic when an incident of environmental damage actually occurs.

It may be necessary to redraft the Incoterms in order to make specific provision for environmental liability in case of environmental damage. This redrafting should be done by the ICC or other relevant international monitoring organisations. This redrafting of the Incoterms may be illustrated in the following examples:

In terms of the EXW Incoterm the risk and responsibility are transferred from the seller to the purchaser when the cargo is made available on the ground at the 'works' at, or on the agreed future date, or at a future time.¹⁷⁰ The purchaser is responsible for all the costs including the insurance of the goods.¹⁷¹ In terms of EXW the purchaser is liable for all risks to the cargo during this period, even though the cargo is not yet under the purchaser's physical control.¹⁷² The seller is not liable at all for any loss or damage to the goods from the moment they leave the seller's premises. It may then also be determined in EXW that environmental liability is also transferred from the seller to the purchaser from the moment the goods leave the seller's premises.

In terms of the D-terms, the DES term will be used as an example. DES maintains that the carriage of goods 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.¹⁷³ The liability according to DES is transferred from the seller to the purchaser also when the goods are placed at the disposal of the purchaser on board the ship.¹⁷⁴ Environmental liability may be transferred also in terms of the DES Incoterm by determining that environmental liability is transferred from the seller to the purchaser when the goods are placed at the disposal of the purchaser on board the ship.

In terms of the C-terms, the CIF term will be used to illustrate how environmental liability may be determined by Incoterms. In terms of CIF, the costs in terms of CIF are transferred at the port of destination. The transfer of environmental liability between the seller and the purchaser may then be linked to the transfer of the risk for

¹⁷⁰ Schmitthoff *Schmitthoff's Export Trade* 11.

¹⁷¹ Hare *Shipping Law* 452.

¹⁷² Schmitthoff *Schmitthoff's Export Trade* 11.

¹⁷³ Schmitthoff *Schmitthoff's Export Trade* 56.

¹⁷⁴ Sherlock and Reuvid (eds) *International Trade* 196.

loss or damage to the goods which occurs when the goods pass the ship's rail when loaded.¹⁷⁵

In terms of the F-terms, the FOB will be used as an example. In FOB 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.¹⁷⁶ It may then be included in the FOB term that all environmental liability is also transferred from the seller to the purchaser when the goods pass the ship's rail.

4.2 A critical analysis

The above examples may be problematic in South African terms. In the first instance a problem arises due to the transfer of ownership of the goods. In terms of section 30(1) of NEMA and section 20(2) of the *National Water Act* 36 of 1998 the owner of the substance or the hazardous substance which caused the environmental damage may be held liable.¹⁷⁷ It is then important for the Incoterms to also be able to determine when ownership was transferred. Risk is ordinarily transferred before ownership which in turn is transferred before the goods are in fact received by the purchaser. In terms of South African law the transfer of risk and the transfer of ownership do not necessarily coincide with each other. This is, for example, the case where goods have to be transported over a long distance. There is a very real possibility that the purchaser and owner of the goods, although not yet in possession of them, already bears the risk of loss or damage.¹⁷⁸ Ownership is only transferred on delivery of the bill of lading against acceptance of the requisite bill of exchange or due payment of the contract price.¹⁷⁹

¹⁷⁵ Sherlock and Reuid (eds) *International Trade* 194.

¹⁷⁶ Hare *Shipping Law* 456.

¹⁷⁷ S 30(1) of NEMA.

¹⁷⁸ Van Niekerk and Schulze *The South African Law of International Trade* 57.

¹⁷⁹ Kahn E *et al Law of Sale and Lease* 42.

The position in English law under FOB and CIF contracts are as follows.¹⁸⁰ When property passes in an FOB contract the property passes *prima facie* to the purchaser upon shipment. In a CIF, contract, the inference may be rebutted and the moment the property passes may be postponed, for instance where the seller deals with the bill of lading in such a manner as to show that he did not intend to appropriate the goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they are for payment in cash or by acceptance of a bill of exchange.¹⁸¹ The Court further concluded in *Lendlease Finance v Corporacion De Mercadoda Agricola And Others* 1976 4 SA 464 (A) that the English decisions, insofar as they may be relevant, confirmed the view that according to the principles of the South African law, no ownership would be transferred upon shipment, despite the fact that the contract may be FOB. The English law principle indicates that the transfer of ownership under an FOB contract may be postponed by the seller, taking the bill of lading to his own order.¹⁸²

The problem the above scenario entails is that a person may be held liable for environmental damage caused by goods which he or she have never seen or never acquired as property. Ownership may also have been transferred, but in terms of the Incoterms the seller may still carry the risk for loss or damage to the goods while not being held liable for the environmental damage the goods may have caused. That could become problematic and cause more serious problems in the transport cycle between a purchaser and seller.

The seller and purchaser's liability for loss or damage to the goods is decided by the Incoterms. The environmental liability of the seller and the purchaser may be imposed by common law. Common law

¹⁸⁰ Halsbury explains; *Lendlease Finance (PTY) Ltd v Corporacion De Mercadoda Agricola And Others* 1976 4 SA 464 (A) 496B–496C.

¹⁸¹ *Lendlease Finance (PTY) Ltd v Corporacion De Mercadoda Agricola And Others* 1976 4 SA 464 (A) 496B–496C.

¹⁸² *Lendlease Finance (PTY) Ltd v Corporacion De Mercadoda Agricola And Others* 1976 4 SA 464 (A) 496B–496C.

provides that the seller or purchaser in the transport cycle may be held liable in terms of the law of delict to compensate environmental damages inflicted while the goods are being transported. All the requirements of a delict as set out in paragraph 3 must hence be met before delictual damages may be successfully claimed from persons when environmental damage has been caused during the transport cycle.¹⁸³

The environmental principles, some of which are present in section 2 of NEMA, may also be used in order to make provision for environmental liability in Incoterms. The polluter pays principle is a principle of liability and indicates that, whenever possible, the polluter should pay for the restoration, compensation and future prevention of environmental damage that followed or follows out of his or her acts.¹⁸⁴ The polluter pays principle, when made applicable to the Incoterms, may determine that the party responsible must accept the liability for the environmental damage he or she caused. For example, it may be that the seller did not provide for the environmental damage that occurred, since he did not inform the carrier of the hazardous character of the substances it transported. The purchaser may also be held liable if he or she did not transport the hazardous substances to his or premises with the necessary care. It may also be that both the seller and the purchaser could be held liable for the environmental damage caused by the product. They have financial gain in the enterprise of transporting the goods from the seller to the purchaser, thus the costs need to be internalised. Both parties may then be seen as polluters who must bear the costs of the polluting act.

¹⁸³ It may be problematic to establish the liability. If it is, in the first instance, the carrier who acted, wrongfulness will arise only if the harm was caused in a wrongful manner and then fault must also be present when an unlawful act was committed. Factual causation and damage or loss must then also be proven. In environmental damage the quantum of damages and the rule of pure economic loss cause obstacles to the claimants. Refer to chapter 3 for discussion.

¹⁸⁴ Oosthuizen 1998 *South African Journal of Environmental Law and Policy* 356.

It becomes clear that the polluter pays principle is vague and imprecise, and implementing this principle into Incoterms may cause more problems.¹⁸⁵ The problems may include lengthy court cases to determine which party would carry the costs involved. If one party were to bear all the costs he or she may find it a lengthy and costly situation to enforce claims against the other liable parties. Another problem may still be to determine the real polluter as the blameworthy conduct might only lie with one party and not the other parties involved.

The cradle-to-grave principle establishes a regulatory approach to the management of hazardous or polluting substances, from their creation to their destruction or permanent disposal.¹⁸⁶ This principle, when made applicable to the Incoterms, may also involve that the seller be held liable if environmental damage is caused by the goods, even when the goods have been transported to the purchaser. The seller should regulate and manage the goods in its life cycle by making provision to ensure that the goods are also handled with the necessary caution applicable to the character and nature of the goods.¹⁸⁷

The precautionary principle comprises on the need to recognise that harm to the environment may be irreversible, and therefore it is better to avoid any possible harm to the environment than to try to remedy it later.¹⁸⁸ This principle places a responsibility on the seller, as well as on the purchaser, to recognise the fact that in transporting the goods from the seller to the purchaser, irreversible harm may be caused to the environment. The seller and the purchaser must take measures to avoid the harm rather than to try and remedy it later.¹⁸⁹

¹⁸⁵ See Kramer *Environmental Law* 97.

¹⁸⁶ Short *Environmental Law in a Nutshell* 40.

¹⁸⁷ Short *Environmental Law in a Nutshell* 40.

¹⁸⁸ Kidd *Environmental law* 130.

¹⁸⁹ Kidd *Environmental law* 130.

The preventive principle is the notion that bestows on states, corporations, or individuals, in certain circumstances, an obligation to take steps to avoid causing certain types of damage to the environment, including the environment beyond their own territory or property.¹⁹⁰ The seller and the purchaser are also obliged in terms of the preventive principle, to make provisions to ensure that when the goods are transported from the premises of the seller to the premises indicated by the purchaser, environmental damage is not caused in the process.

It may be deduced from the above that the environmental principles, if made applicable to the Incoterms, do provide specific valuable regulatory help for parties to determine environmental responsibilities and liabilities and to determine with whom those responsibilities lie. The principles do not, however, implicitly identify or regulate the environmental liability of the seller or the purchaser.¹⁹¹

Environmental liability could be regulated explicitly in the sales agreement by the seller and the purchaser. The “sanctity of contract rule” implies that courts must value the autonomy of the contractual parties. The parties to a contract must be free to choose the terms and the loom of their agreement for themselves.¹⁹²

This, however, does not give parties absolute freedom of contract as explained in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) by Smalberger AJ. Contracts which are:

...clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic

¹⁹⁰ Wilkinson *Environment and law* 104.

¹⁹¹ Kramer *Environmental Law* 126.

¹⁹² Innes CJ in *Wells v South African Alumenite Co* 1927 AD 69 at 73, commenting on the enforceability of a particularly oppressive contract held that: ‘No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them.’

expedience ought to be regarded as being *contra bonos mores* or in opposition to public policy.¹⁹³

Public policy thus represents the legal convictions of the community. It represents the most cherished values held by society.¹⁹⁴ In the law of contract, however, public policy seems to obtain its own meaning.¹⁹⁵ Innes CJ in *Wells v South African Alumenite Company* 1927 captures the core of public policy in contract law when he states that:

If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by our courts of justice.¹⁹⁶

Thus the “sanctity of contract” rule became the embodiment of public policy in contract law.¹⁹⁷ Parties may then contractually decide who should be the party to bear environmental liability at a given period of the transport cycle. In order to decide on environmental liability in a sales agreement, parties may then institute an indemnity clause which indemnifies the one party from all liability towards any environmental damage.¹⁹⁸

The following example might resemble such a clause in a contract¹⁹⁹:

The Seller warrants that it/he/she foresees no existing facts or circumstances that are likely to result in the purchaser being required by law at any time in the future to clean up at its/his/her cost, any hazardous substance causing pollution or environmental degradation

¹⁹³ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

¹⁹⁴ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

¹⁹⁵ Hopkins K 2003 HYPERLINK

<http://www.derebus.org.za/archives/2003Aug/articles/billofrights.htm>. 26 July.

¹⁹⁶ *Wells v South African Alumenite Co* 1927 AD 69.

¹⁹⁷ Hopkins K 2003 HYPERLINK

<http://www.derebus.org.za/archives/2003Aug/articles/billofrights.htm>. 26 July.

¹⁹⁸ An indemnity may be defined as an agreement in which the promisor enters into an original contract to make good loss which the promisee may suffer. See in this regard also, Nengome *Marine Cargo Insurance and Indemnity* 22.

¹⁹⁹ This was adapted and redrafted from: Brauteseth NL *Butterworths Forms and Precedents* HYPERLINK

[http://www2win4.puk.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=MyLNB:10.1048/Enu](http://www2win4.puk.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=MyLNB:10.1048/Enu) 2 June.

resulting from the transportation of the goods from the seller to the buyer.

For the purpose of this clause,

“pollution” means any discharge, transport, emission, release, leakage, spillage, escape or disposal of a hazardous substance; and
“hazardous substance” means any substance which, either alone or in combination with any other substance may cause injury or ill health to or death of human beings, or cause degradation to the environment, and includes any hazardous, poisonous, dangerous, noxious or toxic substances, pollutants or wastes which have an adverse effect on the composition, resilience or productivity of natural or managed eco-systems or materials useful to people, or will have such an effect in the future.

The seller indemnifies the purchaser and holds the purchaser harmless against all loss or damage which the purchaser may sustain from any breach of the warranty in clause 1 above, and undertakes to pay on demand to the purchaser whatever sums shall have been incurred or have to be incurred by the purchaser as a consequence thereof, including any and all claims, costs, damages, expenses (together with reasonable professional fees incurred), losses, liabilities, including without limitation liability to third parties, fines or penalties suffered or incurred by the purchaser as a direct consequence of or in connection with any civil or criminal proceedings relating thereto.²⁰⁰

In a standard warranty which incorporates an indemnity for environmental liabilities, as illustrated above, the seller indemnifies the purchaser of all possible environmental liabilities. The environmental liability is then regulated as such that only one party may remain liable when environmental damage occurs.

5 Conclusion

From the research done in this study, it becomes apparent that environmental liability is not provided for under the Incoterms. Due to the wide range of hazardous and noxious substances transported during the transport cycle, a threat may be posed to the environment. It is important to determine with certainty which party or parties may be held liable for environmental damage, in order to determine who must bear the costs to rectify and rehabilitate the affected areas.

²⁰⁰ This example may then be a clause incorporated with Incoterms in a contract between the seller and the purchaser.

South African law holds that the seller or the purchaser may be held liable and that both might be held liable simultaneously in some cases.²⁰¹ The South African environmental liability laws, provide national legislation and common law provisions that determine the liability of the parties, but it still does not provide satisfactory answers concerning who the liable party is in case of environmental liability between the seller and the purchaser in an Incoterm sales agreement.²⁰² The environmental principles only regulate the responsibilities of parties, but do not explicitly determine who the liable party is if environmental damage does occur.

Lastly, it is then acknowledged that the issue of liability is fundamental to the success for achieving sustainable development and pollution prevention. All the legal provisions pertaining to this matter must be easily construed with certainty, and not left open to multiple interpretations. This could even save time and money in the litigation process.

It is therefore proposed that an explicit indemnity clause be included in all contracts based on Incoterms that establish environmental liability between the seller and the purchaser. It is furthermore hoped that this research may contribute to more environmentally sustainable practices in international trade.

²⁰¹ S 30 of NEMA and S 20 of the *National Water Act* 36 of 1998, see discussion in paragraph 3.1.1. In case of both being held liable see chapter 3.1.2 the *Apportionment of Damages Act* 34 of 1965 it makes provision where more than one person is held liable for the same loss.

²⁰² Problems like determining when ownership passed as discussed in the beginning of chapter 4, Incoterms only regulate the transfer of risk for loss or damage to the goods as discussed in chapter 2.

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