Court of Appeal of The Hague
Docket date: 25 March 2014
Case numbers: 200.126.843, 200.126.848

STATEMENT OF DEFENSE IN THE JURISDICTION MOTION IN THE MOTION BY VIRTUE OF SECTION 843a DCCP

in the matter of

1. Eric Barizaa Dooh
residing in Goi, Rivers State, Nigeria,

2. the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

defendants in the jurisdiction motion, plaintiffs in the motion by virtue of Section 843a DCCP, appellants in the main action,

attorney conducting the case:
Ch. Samkalden, LL.M.
attorney of record: W.P. den Hertog, LL.M.

versus:

in case number: 200.126.843:

1. the legal entity organized under the laws of the United Kingdom **Royal Dutch Shell Plc ("RDS")**,
with office in The Hague,
defendant in the motion by virtue of Section 843a DCCP, respondent in the main action,

2. the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd.**

(“SPDC”),
established in Port Harcourt, Rivers State, Nigeria,

plaintiff in the jurisdiction motion, defendant in the motion by virtue of Section 843a DCCP, respondent in the main action,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

in case number: 200.126.848

1. the public limited company **Shell Petroleum N.V. (“SPNV”)**, with registered office in The Hague,

2. the legal entity organized under the laws of the United Kingdom **The “Shell” Transport and Trading Company Ltd. (“Shell Transport”)**,
with registered address in London, United Kingdom,

defendants in the motion by virtue of Section 843a DCCP, respondents in the main action,

attorney: J. de Bie Leuveling Tjeenk, LL.M.

I. Introduction

1. Pending the appeal in this case, Vereniging Milieudefensie and Dooh (hereinafter collectively referred to as Milieudefensie) raised a motion by virtue of Section 843a DCCP. In a defense on appeal in this motion, Shell conducted a substantive defense against the claim to produce documents, in which SPDC also raised a 'motion for the court to decline jurisdiction and transfer the case in the motion'. The Court of Appeal offered the plaintiffs in the motion to produce documents the opportunity to first respond to this jurisdiction motion in the motion to produce documents. Consequently, the defense on appeal in this 'motion-in-motion' focuses on the question regarding whether the Court of Appeal has jurisdiction over the motion to produce documents against SPDC.

2. According to the docket journal, the Court of Appeal not only stayed the case against SPDC (and RDS) for filing a defense on appeal on the part of Milieudefensie et al. in the jurisdiction motion, but stayed the case against Shell Transport and SPNV, as well. However, it is not clear that (first,) a jurisdiction matter is at issue (on appeal) in all cases. Moreover, Shell notes expressly: "The claim of lack of jurisdiction of the Dutch court is only an issue in the case with number 200.126.843 against RDS and SPDC. Thus, the case against the Koninklijke and Shell Transport is not discussed in this chapter."[1] Given that the Court of Appeal stayed all cases for filing a defense in the motion-in-motion, Milieudefensie is filing its defense in all cases, even though Shell did not raise any motion in the case against Shell Transport and SPNV.

3. Milieudefensie takes the position that the international jurisdiction of the Dutch court in the main action is not yet at issue in this 'motion-in-motion'. Its defense - in brief - pursues the following course.

4. The discussion between the parties in the first instance already focused on the issue of jurisdiction; in all phases of those proceedings, Shell questioned the District Court's decision again and again - to no avail. Shell announced that on appeal, it intends to direct grounds for appeal against the jurisdiction assumed by the District Court.[2] Only after Shell has initiated an appeal in the motion against the judgments dated 24 February 2010 and 30 January 2013 and formulated its grounds for appeal against those judgments and after Milieudefensie has been given the opportunity to respond to those grounds for appeal can the Court of Appeal reassess the District Court's jurisdiction decision and the findings

[1] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 64.

[2] In his letter dated 15 January 2014 to the Court of Appeal, attorney J. de Bie Leuveling Tjeenk stated on Shell's behalf: "Superfluously it is noted that in the main action, Shell will take the position that the Dutch court does not have jurisdiction over the claims against SPDC in the main action. In this scope, Shell will put forward one or more grounds for appeal against the District Court's jurisdiction decision."

underlying this decision, within the boundaries of the legal battle on appeal. This is not altered by the fact that the international jurisdiction is a public order issue and for that reason must also be examined *ex officio*, because an *ex officio* examination must also be conducted within the same frameworks - worked out below.

5. Shell's "quid pro quo" line of reasoning regarding jurisdiction in relation to the motion to produce documents does not hold. In contrast to the jurisdiction motion currently initiated by Shell, by its nature, the motion to produce documents pertains to the progress and briefing of the case. Thus, the jurisdiction motion is limited to the jurisdiction regarding the progress and briefing of the case. Milieudefensie's claims by virtue of Section 843a DCCP start from the final judgment of the District Court of The Hague dated 30 January 2013, which has not yet been contested in law for the time being. Given that the Court of Appeal is competent to hear the appeal against that judgment, it is also competent to hear motions that regard the progress of the proceedings on appeal. Moreover, the Court of Appeal will have to be competent itself to reassess the jurisdiction accepted in the first instance.

6. Completely superfluously and as a last alternative, Milieudefensie contends in response to Shell's arguments that the District Court rightly assumed international jurisdiction. The claims against SPDC and RDS are based on the same legal basis, the *tort of negligence*, and the same complex of facts. They pertain to the same event for which both SPDC and RDS are held liable based on negligence. From the viewpoint of efficiency it is justified to decide the claims collectively before the Dutch court. Moreover, if these claims are decided by different courts, this might lead to irreconcilable judgments.

7. Chapters II to VI below pertain to defining the legal questions in the jurisdiction motion in the motion to produce documents. As a last alternative, the international jurisdiction of the Dutch court is addressed substantively in Chapter VII.

II. Shell's jurisdiction defense

8. In its defense on appeal, Shell principally argues that Milieudefensie's claim is inadmissible because it already filed a motion to produce documents in the first instance, which was dismissed. According to Shell, Milieudefensie should put forward its grounds for appeal against the interlocutory judgment in question and it cannot once again file a claim on appeal. Shell continues:

> "Should the Court of Appeal dismiss this inadmissibility defense, Shell also conducts other defenses against the claims to produce documents in this motion. Shell will put forward a number of these other defenses in the main action, as well. This is without prejudice to the fact that the Court of Appeal must already assess these defenses in the scope of this motion,

> because the success of one or more of these defenses (wholly or partially) precludes awarding the claims to produce documents. This applies to the following defenses:
>
> […] the Dutch court does not have jurisdiction over SPDC in this motion."[3]

9. In brief, Shell's jurisdiction defense entails that in the first instance, the District Court wrongly determined that the claims against SPDC and RDS are so connected that reasons of efficiency justify that the claims are collectively decided (by virtue of Section 7 DCCP). In contrast to the District Court's express conclusion in the interlocutory judgment and final judgment, Shell believes that the claim against RDS must be deemed clearly certain to fail and that viewed in this light, the District Court should not have held that it has jurisdiction over the claim against SPDC.

10. Shell argues that its jurisdiction defense is at issue if the Court of Appeal decides that Milieudefensie's claim by virtue of Section 843a DCCP is admissible ("should the Court of Appeal dismiss this inadmissibility defense"). In that case, Shell requests that the Court of Appeal assess its objections in anticipation of Shell's grounds for appeal in the main action, because Shell believes that this defense "precludes awarding the claims to produce documents".[4] According to Shell, in that case "the Court of Appeal is not bound by the findings of the District Court. Were this otherwise, Milieudefensie et al. could not be successful, because the District Court dismissed the (largely identical) claims to produce documents in the first instance".[5]

11. According to Milieudefensie, in contrast to Shell's point of view, in this motion-in-motion raised by Shell, the Court of Appeal cannot assess the admissibility of Milieudefensie's claims in the motion to produce documents or the question regarding whether Milieudefensie's claims should be awarded at all. After all, Shell argues that if Shell's objections are held to be founded, this would have to result in a lack of jurisdiction of the Court of Appeal.

12. If the Court of Appeal has no jurisdiction over the claims in the motion against SPDC, it has no jurisdiction to assess whether Shell's defense - to the effect that essentially, the claim in the motion does not involve a new claim but a disguised appeal - is successful, either. Moreover, if the Court of Appeal does conclude that a disguised appeal is involved, this would have to lead to inadmissibility of Milieudefensie's claims in the motion, in which case the Court of Appeal does not have to assess Shell's jurisdiction defense raised alternatively. On the other hand, if the Court of Appeal concludes that a new claim that does not detract

[3] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 3.
[4] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 3.
[5] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 5.

from the District Court's establishments in the first instance is most certainly involved, Shell's conditional objections do not hold.

13. Finally, Shell points out that the Court of Appeal must assess the international jurisdiction *ex officio*, as well, 'in the scope of this motion'.[6] To substantiate this argument, Shell refers to a ruling of the Supreme Court, in which this international jurisdiction was dealt with – in the main action – on appeal.[7] In this latter ruling the Supreme Court held that in this *ex officio* review, the appellate court continues to be bound by the boundaries of the legal battle on appeal. The ruling mentioned by no means implies that the Court of Appeal should already reconsider the District Court's establishments in the first instance prior to the grounds for appeal. On the contrary, the fact that the appellate court continues to be bound by the boundaries of the legal battle demonstrates that the jurisdiction decision in the first instance only has to be decided by the appellate court in the main action.

III. Relationship international jurisdiction and the motion to produce documents

14. In contrast to Shell in this 'jurisdiction motion-in-motion-to-produce-documents', in its claim by virtue of Section 843a DCCP, Milieudefensie starts from the final judgment of the District Court of The Hague dated 30 January 2013. In its statement in the motion by virtue of Section 843a DCCP, Milieudefensie explained at length why this motion to produce documents involves a new claim.

15. It is an established fact that filing a motion to produce documents on appeal, including after the dismissal of a previous claim that has not (yet) been contested in law, is in any event possible if a new motion is involved – for example if other documents are being claimed, or if the claimed documents serve a different, legitimate interest. The Court of Appeal of The Hague even found that in principle, *the same* claim can be filed again, "even if the claim was dismissed and the motion by virtue of Section 843a DCCP can be initiated at any stage of the proceedings".[8]

16. Thus, the Court of Appeal will have to assess whether the motion to produce documents is a new motion or that – as Shell argues – a disguised appeal is involved. After all, only in the latter case, if Milieudefensie's claims are held admissible, "the Court of Appeal will not be bound by the decisions of the District Court" – and Shell believes that there would be a reason to reconsider the international jurisdiction.[9]

[6] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 5.
[7] HR 18 February 2011, *NJ* 2012, 333.
[8] Court of Appeal of The Hague 29 October 2013, NJF 2014, 14.
[9] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 5.

17. According to Milieudefensie, the Court of Appeal is bound by the District Court's decisions - and its claim by virtue of Section 843a DCCP at issue is in line with the appellate court being bound by the District Court's decisions. Also if the appellate court proceeds with an *ex officio* review of the international jurisdiction, it continues to be bound by the boundaries of the legal battle on appeal defined by the system of the grounds for appeal.[10] This not only applies to the establishment of the facts, but also to the interpretation of the claim and the basis of the claim.[11] Snijders submits the following in this regard in general terms:

> "Thus, the total scope of the appeal is only established after the defense on appeal has been filed. The boundaries of the legal battle on appeal can only be defined based on the notice of appeal, the statement of appeal and the cross appeal contained in the defense on appeal, if any. Thus, it only becomes clear after the defense on appeal whether specific decisions (for example a previous interlocutory judgment) or specific elements of a decision [...] have become final."[12]

18. In its jurisdiction decision dated 24 February 2010, the District Court of The Hague *inter alia* found as follows in respect of SPDC's invocation of abuse of procedural law:

> "The District Court is of the opinion that Dooh et al.'s arguments regarding RDS cannot be designated as fully unsound or certain to fail […]. In this context, the District Court *inter alia* takes into account the fact that according to SPDC, as well, the corporate veil in group relationships may be directly or indirectly pierced, albeit under exceptional circumstances. It has not been sufficiently advanced or demonstrated that facts and circumstances are involved which Dooh et al. knew or should have known were obviously incorrect. For this reason, the District Court dismisses the claim of abuse of procedural law."[13]

19. With regard to the jurisdiction, the District Court found:

> "In the main action, Dooh et al. hold RDS and SDPC liable for the same damage, which also follows from the claim for a joint and several order for RDS and SPDC. This means that the same complex of facts in Nigeria must be assessed in respect of the claims against both RDS and SPDC. The District Court finds that this fact alone demonstrates a connection to such an extent that reasons of efficiency justify a joint hearing of the claims against RDS and SPDC. That all or part of these facts and circumstances did not occur in the Netherlands is not exceptional in Dutch case law and does not lead to a different opinion on sufficient connection and efficiency in the sense of Section 7 DCCP. The foregoing means that the District Court finds that whether or not the claims against RDS and PDC are based on the same legal basis is not a decisive factor, so that it disregards SPDC's argument on this point."[14]

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[10] HR 18 February 2012, *NJ* 2012, 333, opinion Strikwerda. Further, *inter alia*, HR 6 February 2004, *NJ* 2004, 271; HR 30 May 2008, *NJ* 2008, 311, par. 3.2.4; HR 6 February 2004, *NJ* 2004, 271; HR 28 February 1992, *NJ* 1992, 355.
[11] HR 6 February 2004, *NJ* 2004, 271.
[12] Professor H.J. Snijders, LL.M. et al., (2011) *Nederlands burgerlijk procesrecht*, Kluwer, Deventer, p. 310.
[13] District Court of The Hague, judgment in the jurisdiction motion, 24 February 2010, ground 3.3.
[14] District Court of The Hague, judgment in the jurisdiction motion, 24 February 2010, ground 3.6.

The District Court disregarded Shell's argument that a "more stringent" efficiency criterion allegedly applies in applying Section 7 DCCP, just as the arguments that Shell derived from ECJ case law regarding Article 6 (1) of the Brussels Regulation, given that this regulation does not apply directly.

20. In the final ruling dated 30 January 2013, the District Court upheld these conclusions, in which it found as follows:

> "In these proceedings, the claims against RDS could not be designated as clearly certain to fail beforehand, because beforehand it could be defended that under certain circumstances, based on Nigerian law, the parent company of a subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-) subsidiary. After all, this is demonstrated by the decision in *Chandler v. Cape* still to be discussed below. Thus, in the case at issue, the District Court is of the opinion that no abuse of procedural law by Milieudefensie et al. was and is involved."[15]

21. The District Court further dismissed Shell's invocation of analogous application of the *Painer* ruling:

> "First of all, the claims against RDS and SPDC do not have a different legal basis; rather, they have (in part) the same legal basis, i.e. a tort of negligence under Nigerian law. Secondly, for quite some time [...] there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions. This means that the District Court is of the opinion - including in the sense of the *Painer* ruling that was only rendered after the summons - that it was "foreseeable" for SPDC that it might be summoned in the Netherlands together with RDS in connection with the alleged liability for the oil spill near Goi. For this reason, it can be left aside whether or not the rule of law from the *Painer* ruling can be applied fully by analogy to Section 7 DCCP and to the facts in these proceedings before the District Court of The Hague."[16]

22. Shell now argues that if it would not be offered the opportunity to contest these findings before filing its grounds for appeal, Shell's "defense against the claims to produce documents would be limited in an unacceptable manner, because the Court of Appeal would be bound by the District Court's decisions that were to the detriment of Shell". The unacceptability of the procedural law principle is not very clear. Until the parties have filed grounds for appeal, the Court of Appeal is just as bound by the District Court's decisions that were to Milieudefensie's detriment, of course. Milieudefensie's legitimate interest in its motion to produce documents results specifically from those decisions that were to Milieudefensie's detriment. In this context it is further relevant that Shell's defense in the main action is not harmed by the motion to produce documents. After all, a claim to produce documents does not seek to put an end to part of the dispute in any way, but by its nature only pertains to the progress and briefing of the case.[17]

[15] District Court of The Hague 30 January 2013, ground 4.4.
[16] District Court of The Hague 30 January 2013, ground 4.6.
[17] See in this connection more extensively Chapter IV below.

23. The question of whether the District Court rightly arrived at its findings and decisions in its judgments dated 24 February 2010 and 30 January 2013 can only be answered in this appeal after the grounds for appeal have been exchanged.

IV. The jurisdiction of the Court of Appeal in the motion to produce documents

24. The possibility of filing a motion to produce documents on appeal results from Section 208 in conjunction with Section 353 in conjunction with Section 843a DCCP. Based on those sections, a party to legal proceedings can also file motions on appeal, such as claim to produce documents.

25. As – for now – defendant, SPDC is involved in the appeal that Milieudefensie et al. initiated against the judgment of the District Court of The Hague dated 30 January 2013. The Dutch court has jurisdiction over that appeal, because the judgment in the first instance was also rendered by a Dutch court.[18] Given that the Court of Appeal has jurisdiction to hear Milieudefensie's appeal in the case against SPDC, it also has jurisdiction over a motion in the scope of that appeal.

26. By its nature, a motion by virtue of Section 843a DCCP pertains to the progress and briefing of the case and does not seek to put an end to any part of the dispute to be assessed by the court.[19] This starting point is meanwhile widely supported in the case law. See in that connection, *inter alia*, HR 13 July 2012, in which the Supreme Court found that a claim for the submission or surrender of documents by virtue of its previous ruling pertained to the briefing of the case:

> "This is not altered to the extent that the motion is based on Section 843a DCCP. Although this provision in general offers an independent basis for a claim by the party that has a legitimate interest in this, which claim can be filed in individual proceedings or (by way of motion) in pending proceedings (cf. HR * June 2012, LJN BV8510) and for varying purposes, such as obtaining information in connection with (envisaged) negotiations or in view of the conduct of or furnishing evidence in pending or possible proceedings. However, in the event that the claim based on Section 843a DCCP is initiated in pending proceedings in view of the briefing of the case - regardless of whether this is done by means of a summons or a statement - and the court decides on this claim in a separate judgment, this must be deemed to be an interlocutory judgment to which the provisions of Section 337 (2) DCCP apply, and not a final judgment in which the operative part puts an end to the proceedings regarding any part of the claim. After all, the claim in this sense is the legal claim at stake in the proceedings; this does not include claims pertaining to the progress or the briefing of the case, as held in the previously mentioned ruling dated 22 January 2010."[20]

27. This nature of the motion to produce documents means that the claim can be decided independent of the resolution of the dispute in the main action. The Court of Appeal of The Hague also found in that connection that in order to award a

[18] Cf. Snijders et al. (2011), p. 108.
[19] See, *inter alia*, HR 22 January 2010, ECLI:NL:HR:2010:BK1639; Court of Appeal of The Hague 21 December 2010, NJF 2011/94; Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941.
[20] HR 13 July 2012, ECLI:NL:HR:BW3263, par. 3.7.

claim by virtue of Section 843a DCCP, it is not required that the substantive discussion in the main action has been conducted.[21] According to established case law, a claim to produce documents can be filed both in and out of court, thus also if no proceedings are pending,[22] by means of a motion or in independent proceedings,[23] even in interlocutory proceedings next to pending proceedings on the merits.[24]

28. In the case at issue, the claim to produce documents was filed as a motion, prior to the substantive hearing of the appeal. As it substantiated at length, Milieudefensie needs the documents claimed according to the judgment of 30 January 2013 to (further) substantiate its arguments in the appeal. The extent to which Milieudefensie's claim can be awarded is a question that the Court of Appeal can only assess in the motion after a substantive consideration.

29. According to Shell, the Court of Appeal cannot have jurisdiction in the motion to produce documents if it may be demonstrated that there is no jurisdiction in the main action. However, the Court of Appeal's jurisdiction over the appeal – and this motion in the appeal – differs from the international jurisdiction of the court hearing the main action, which is at issue in the main action of this appeal.

30. If Shell's grounds for appeal still to be directed against the jurisdiction assumed by the District Court are declared valid, this cannot lead to a lack of jurisdiction of the Court of Appeal, either, but will result in the Court of Appeal setting aside the District Court's judgment for that reason. See also Snijders in this regard:

> "Where the appellate court cannot transfer a case, it should nevertheless be aware of the consequences of a declaration of lack of jurisdiction on appeal. Suppose that an arbitral tribunal has jurisdiction and the court in the first instance nevertheless held that it had jurisdiction and substantively assessed the case, a declaration of lack of jurisdiction on appeal alone would be counterproductive. In that case, the appellate court must set aside the ruling in the first instance and instead decide that the ordinary court has no jurisdiction over the case. In this context, it should be borne in mind that the appellate court is always competent to decide the question regarding whether it will transfer the case, just as it is always competent to assess its own jurisdiction […]."[25]

31. Thus, the Court of Appeal has jurisdiction over the motion by virtue of Section 843a DCCP, irrespective of its assessment of the international jurisdiction of the Dutch court in the main action.

V. Boundaries of the jurisdiction motion in a motion

[21] Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, re 3.5.
[22] HR 8 June 2012, LJN BV8510 and HR 13 July 2012, LJN BW3263.
[23] HR 6 October 2006, LJN AX7774.
[24] HR 8 February 2013, LJN BY6111, see further Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, re 3.5.
[25] Snijders and Wendels, *Civiel Appel*, 2009, pp. 240-241.

32. Superfluously, Milieudefensie notes that a substantive assessment of Shell's jurisdiction defense would be in breach of due process at this stage of the proceedings. The parties expressly announced that they will still formulate their grounds for appeal in the main action.[26] Those grounds for appeal will form the frameworks of the legal battle in the appeal. As long as the boundaries of that legal battle have not been defined, the Court of Appeal cannot render a final ruling regarding (part of) the very dispute that has to be decided on in that appeal.

33. This principle is also embedded in the case law. In proceedings before the Amsterdam Court of Appeal, a motion for inadmissibility was filed, because the plaintiff in that motion believed that the claim in the main action could not possibly be awarded. The Court of Appeal found:

> "The starting point must be that in principle, a motion that is raised in the course of the proceedings is not suitable for obtaining a decision as a result of which an end is made (in the instance in question) to one or more elements of the dispute to be assessed by the court based on a substantive assessment of the arguments posited by both parties. Demanding such a decision by way of a motion qualifies as a failure to recognize the requirements of due process, so that it stands to reason that a motion with such an unacceptable purpose is declared inadmissible."[27]

34. The Court of Appeal of The Hague considered in another case that "in principle, a motion as referred to in Section 208 DCCP [should] pertain to a procedural complication that requires the court's involvement of a nature other than the settlement of substantive points in dispute; in principle, such a motion must pertain to the progress or briefing of the case".[28]

35. In contrast to the motion by virtue of Section 843a DCCP, which by its nature regards the progress and briefing of the case, the 'jurisdiction motion' that Shell raised regards the settlement of substantive points in dispute. After all, to substantiate its defense Shell also contests the facts and grounds on which the District Court based its jurisdiction decision, such as the finding that liability of the parent company is possible under Nigerian law. The Court of Appeal cannot rule on that jurisdiction defense without at the same time addressing this underlying forming of opinion.

[26] See *inter alia* note 2 above, and the statement in the motion to produce documents of 10 September 2013, par. 7.
[27] Amsterdam Court of Appeal, 11 January 2011, ECLI:NL:GHAMS:2011:BP3548.
[28] The Hague Court of Appeal 23 July 2013, ECLI:NL:GHDA:2013:2643, 19.

VI. International jurisdiction of the Dutch court

VI.1 Introduction

36. It may be clear that according to Milieudefensie, a substantive assessment of Shell's arguments regarding the international jurisdiction of the Dutch court is currently not in order. To this end, Shell will first have to file its grounds for appeal in the cross-appeal it must still initiate. Should the Court of Appeal nevertheless designate Shell's defenses as grounds for appeal in advance, Milieudefensie requests that the Court of Appeal offers Milieudefensie the opportunity to respond to those grounds for appeal separately.

37. Only in the event that despite the above, the Court of Appeal deems it necessary to give a substantive response to Shell's arguments in the current 'motion-in-motion', below – completely superfluously – will Milieudefensie briefly explain why Shell's claims are unsuccessful. Milieudefensie believes first and foremost that even if the Court of Appeal feels that it must assess the jurisdiction decision of the District Court of The Hague at this stage, this cannot lead to lack of jurisdiction of the Court of Appeal - not in the main action and not in this motion for a briefing of the case.[29]

38. The jurisdiction of the Dutch court in the main action is based on Section 7 (1) DCCP. By virtue of this section, the Dutch court that has jurisdiction over a defendant also has jurisdiction over other defendants involved in the proceedings, provided that the claims against the various defendants are so connected that reasons of efficiency justify that these claims are decided collectively. The jurisdiction of the Dutch court over RDS, the Koninklijke and Shell Transport (hereinafter collectively also: 'the parent company') is not at issue in these proceedings.

39. The cases at issue involve an oil spill from an SPDC pipeline near the village of Goi in Nigeria. This oil spill seriously damaged the environment as well as Dooh's land and ponds. Milieudefensie argued and substantiated that both SPDC and the parent company are liable for this damage. SPDC failed to conduct proper maintenance of the pipeline and took insufficient measures to prevent sabotage. The parent company also failed to take measures, even though it was aware of the risks that SPDC took and interfered in many facets of SPDC's business operations. As a result of this negligence on the part of SPDC and the parent company, the oil spill that caused damage could occur and they are jointly and severally held liable for this.

40. After the District Court of The Hague had determined in an interlocutory judgment dated 14 September 2011 that Nigerian law applies to the case,

[29] See also Chapter IV above.

Milieudefensie further substantiated its arguments under Nigerian law. Under Nigerian law, a party is liable based on a *tort of negligence* if that party breached a duty of care he was under and this resulted in damage. This legal basis is the same in the case against RDS and in the case against SPDC. In addition, the assessment of this question must be based on the same factual framework. For example, in these proceedings Shell has consistently emphasized that to establish whether a party is under a duty of care, it is relevant whether the damage was caused by defective materials or through the acts of third parties.

41. The District Court concluded that in the case at issue, SPDC and RDS are held liable for the same damage and that the claims are based on the same complex of facts.[30] The District Court further established that the legal basis of the claims against SPDC and RDS is the same, i.e. the *tort of negligence*.[31] The District Court held more in particular that an operator may also have a duty of care to limit the risk of sabotage of a specific oil pipeline or oil facility in the event of sabotage, as well.[32] Moreover, the District Court held that under special circumstances, a parent company may be required to prevent its (sub-) subsidiary from inflicting damage on third parties through its business operations.[33] The District Court also felt that it was 'foreseeable' for SPDC that it might be summoned in the Netherlands together with RDS in connection with the alleged liability for the oil spill near Goi.[34,35] Until grounds for appeal have been put forward against the findings of the District Court of The Hague in the final judgment of 30 January 2013, these findings are established in law, even if – despite the above arguments in the current motion – the Court of Appeal were to proceed with an assessment of the international jurisdiction in the main action. This starting point also applies for findings regarding the legal basis of the claims.[36] It follows from this that in conformance with the District Court's judgment, if the Court of Appeal currently were to (re-) assess the international jurisdiction of the Dutch court, the Court of Appeal must assume that the claims are based on the same legal basis and that they pertain to the same damage and harmful event, which means that the same factual framework must be assessed. In addition, the Court of Appeal must start from the District Court's finding that under Nigerian law, both SPDC and RDS can be held liable for this damage – and thus that no 'obvious insufficiency' of the claim against RDS is involved.

[30] District Court of The Hague, judgment in the jurisdiction motion, 24 February 2010, as well as the judgment dated 30 January 2013.
[31] District Court of The Hague, 30 January 2013, ground 4.6.
[32] District Court of The Hague, 30 January 2013, ground 4.46.
[33] District Court of The Hague, 30 January 2013, grounds 4.31 and 4.33.
[34] The District Court left aside whether this criterion that is derived from Article 6 (1) of the Brussels Regulation applies at all (ground 4.6).
[35] The passages in which the District Court of The Hague sets out why the Dutch court has international jurisdiction based on Section 7 DCCP have already been partially quoted in par. 17-21 above.
[36] See HR 6 February 2004, *NJ* 2004, 271.

Milieudefensie is of the opinion that these establishments can only lead to the conclusion that for reasons of efficiency, the claims must be collectively decided.

42. Even if the Court of Appeal bases its jurisdiction on the assessment in the first instance, the conclusion must be that the Dutch court has jurisdiction by virtue of Section 7 (1) DCCP. Milieudefensie will briefly respond to the most important arguments that Shell advances in this regard. As already argued, those arguments can only be reviewed if the scope of the legal battle on appeal has been defined. Thus, the question regarding whether the Dutch court rightly assumed that it has international jurisdiction in the main action must be dealt with when the grounds for appeal are assessed. The parties expressly indicated that they did not intend their documents in the motion to qualify as grounds for appeal. Milieudefensie will only be able to conduct a defense fully directed against this when it responds to those grounds for appeal.

VI.2 Starting points in the application of Section 7 DCCP

43. According to Shell, a number of points of view must be considered in the application of Section 7 (1) DCCP, taking into account the interest of the state, on the one hand, and the interests of the parties to the proceedings, on the other.[37] To this end, Shell extensively quotes from Strikwerda´s *Inleiding tot het Nederlandse Internationaal Privaatrecht* (Introduction to Dutch international private law), to subsequently conclude that it is not in the interest of the state to "contribute to the administration of justice" in the case in which SPDC is a defendant. However, this conclusion is not supported by the passages mentioned. The 'points of view' referred to by Strikwerda are not interests that the author believes (should) constitute the basis for (working out) Section 7 (1) DCCP, but are the result of a comparison of existing systems of international jurisdiction rules.[38] The only justified conclusion is that these points of view are also expressed in the Dutch jurisdiction rules, namely in the system of jurisdiction provisions of the Dutch Code of Civil Procedure.

44. The Dutch legislator opted to explicitly specify the cases in which the Dutch court has international jurisdiction, as in the situation described in Section 7 (1) DCCP. In addition, the Dutch legislator explicitly chose not to give the court the possibility of *not* accepting that jurisdiction if it believes that a different forum

[37] Defense on appeal of Shell, par. 69: "Like the other elements of the Dutch jurisdiction rules, Section 7 (1) DCCP is based on concrete "points of view" that regard "interests of the state, on the one hand, and interests of the parties to the proceedings, on the other". If these points of view are not taken into account, the jurisdiction rules of Section 7 (1) DCCP would become too broad."

[38] "A comparison of the different systems of international jurisdiction rules produces a number of general points of view; it is pointed out that these can be worked out in rather different ways in jurisdiction rules". Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 2012, p. 213.

would be more suitable.[39] The implementation of the current limitative system of jurisdiction grounds eliminated the need for a *forum non conveniens* restriction:

> "In view of the limitative set-up of the first part, the legislator […] felt that in the current rules, there is no need whatsoever for a *forum non conveniens* provision. According to the legislator, this means that the Dutch court that has jurisdiction based on one of the provisions of the first part cannot reject this jurisdiction based on the fact that the case has insufficient connection with the jurisdiction of the Netherlands."[40]

45. The same starting point is embedded in the Brussels Convention and the current Brussels Regulation, and expressed in the ECJ's case law on this convention and this regulation.[41] Thus, the District Court of The Hague rightly concluded:

> "However, the *forum non conveniens* restriction no longer plays any role in today's international private law."[42]

46. Milieudefensie further contests the accuracy of Shell's 'restrictive' interpretation of the scope of Section 7 (1) DCCP, which according to Shell results less frequently in claims being collectively decided than Article 6(1) of the Brussels Regulation.[43] This interpretation is not supported by the case law or literature, or by (the parliamentary history of) the law. The legislator incorporated the ECJ case law regarding Article 6(1) of the Brussels Regulation in Section 7 DCCP.[44] Thus, this case law may be helpful in interpreting the latter section. However, it cannot be inferred from the establishment and development of Section 7 DCCP that the legislator envisaged a more limited interpretation of the jurisdiction rules. On the contrary, in the Explanatory Memorandum to the introduction of the current Section 7 DCCP, the government states:

> "The national rules regarding conferring jurisdiction have a somewhat broader scope in general, which is by no means prohibited by the conventions mentioned. In this respect, the national legislator should not be too frugal: if the conventions do not apply, in principle, it must be possible to obtain a title in the Netherlands."[45]

47. This is also expressed in the text of the law. Shell rightfully notes that in contrast to the Brussels Regulation, Section 7 DCCP does not stipulate the requirement

[39] Section 4 (3) preamble and (b) is an exception to this for applications to provide for custody and right of access.
[40] Text & Comments Code of Civil Procedure, 2012, comment 8 of the introductory comments to Book 1, Title 1, Part 1.
[41] *Inter alia* ECJ 1 March 2005, *Owusu/Jackson*, point 38: "Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine".
[42] District Court of The Hague, 30 January 2013, ground 4.7.
[43] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 82, 83.
[44] Explanatory Memorandum, Review of procedural law for civil matters, in particular the manner of litigating in the first instance, TK 1999-2000, 26855, no. 3, p. 37.
[45] Explanatory Memorandum, Review of procedural law for civil matters, in particular the manner of litigating in the first instance, TK 1999-2000, 26855, no. 3, p. 25.

that one of the defendants is domiciled in the Netherlands. In addition, the legislator opted not to follow the terminology developed by the ECJ, but to use the broader wording of 'reasons of efficiency', derived from Supreme Court case law. The Explanatory Memorandum further demonstrates that Section 7 DCCP is also based on reasons of procedural efficiency.[46]

VI.3 The same factual framework

48. The claims on account of *negligence* against RDS and SPDC are based on the same damage that was caused by the same oil spills. Thus, the claims against these two defendants in the main action are based on the same complex of facts. This means that there is such a connection that reasons of efficiency justify that the claims against RDS and SPDC are collectively decided. This was also confirmed by the District Court in its judgments dated 24 February 2010 and 30 January 2013.

49. In respect of both claims, the factual framework to be assessed focuses on the question regarding how the oil spill near Goi occurred, what action was taken to prevent and limit the damage caused by that oil spill and to remediate the land and ponds, and what damage resulted from the oil spill. For the question regarding liability of RDS this is the same as for SPDC, although a number of additional questions play a role in the latter case, such as the extent to which RDS was aware of or could have been aware of the risks taken by SPDC and whether RDS was in the habit of intervening in the operations of its subsidiary.

50. Shell's argument that RDS is not involved in the operations of SPDC and that no factual connection can be involved for that reason[47] anticipates its substantive defense and is inappropriate in this motion. In the first instance, the District Court felt that this argument was unconvincing. In response to Shell's grounds for appeal and defenses, Milieudefensie will advance a substantive challenge of these arguments – within the boundaries of the legal battle on appeal. The same applies to the argument that RDS was not SPDC's parent company at the time the oil spill occurred and can allegedly not be held liable for negligence in the remediation.[48] Moreover, there is not only a connection between the claims against RDS and SPDC, but also between the claims against SPDC, Shell Transport and Shell Petroleum. All claims are based on the same complex of facts and regard the same oil spills and the same damage. The Court of Appeal consolidated the cases in the docket for a reason.

[46] Explanatory Memorandum, Review of procedural law for civil matters, in particular the manner of litigating in the first instance, TK 1999-2000, 26855, no. 3, p. 37.
[47] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, Chapter 6.5.
[48] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 118-119.

VI.4 The same legal basis

51. Application of Section 7 (1) DCCP or Article 6(1) of the Brussels Regulation does not require that claims have the same legal basis. The ECJ explicitly determined this in respect of the Brussels Regulation in *Freeport/Arnoldsson*.[49] In the recent *Sapir* case, the ECJ further found:

> This identical nature exists even though the legal basis relied on in support of the claim against the eleventh defendant in the main proceedings is different from that on which the action brought against the first 10 defendants is based. As the Advocate General stated, in point 99 of her Opinion, all of the claims relied on in the various actions in the main proceedings are directed at the same interest, namely the repayment of the erroneously transferred surplus amount.[50] [emphasis added by attorney]

52. However, in the case against RDS and SPDC, the claims have *the same* legal basis, i.e. *negligence*, resulting in the oil spill at issue and the damage that resulted from this.

53. For more specific details of the legal basis of its claims, Milieudefensie refers to its arguments in the motion by virtue of Section 843a DCCP. It is obvious that whether or not a defendant violated a duty of care it was under will have to be assessed separately for each defendant. The same is done for a Dutch tort (*onrechtmatige daad*). Thus, the fact that according to Shell, the existence of a duty of care is not a subject of discussion in the case against SPDC but is in the case against RDS[51] does not change the legal basis of the claims.

VI.5 Efficiency

54. Under Section 7 DCCP, collectively deciding claims must be justified for reasons of efficiency. According to Milieudefensie, the fact that RDS and SPDC are held liable on the same legal basis for the same damage, for which the same complex of facts must be assessed, constitutes sufficient reason to assume that a collective hearing is justified for reasons of efficiency. This was also the conclusion of the District Court of The Hague in its judgments dated 24 February 2010 and 30 January 2013. The District Court rightly found that the fact that all or part of the circumstances on which the claims against RDS and SPDC are based did not occur in the Netherlands is not exceptional and does not detract at all from the efficiency of a collective hearing.[52]

55. In the scope of the efficiency to be assessed, with reference to case law regarding Article 6 of the Brussels Regulation, it is frequently reviewed whether there is a

[49] ECJ 11 October 2007, case no. C-98/06, *NJ* 2008, 80, point 54.
[50] Case C-645/11 Sapir, 11 April 2013.
[51] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 125.
[52] Judgment in the jurisdiction motion of 30 December 2009, Oguru et al. vs. Shell, ground 3.6.

risk of irreconcilable judgments if the claims are decided separately.[53] If the claims against RDS and SPDC would be reviewed separately, this gives rise to the risk that different judges arrive at different opinions regarding the same factual and legal situation. For example, the court will first have to render a decision regarding the cause of the oil spill, both for the claim against RDS and for the claim against SPDC. After all, Shell argues that to assume liability, at a minimum this oil spill must have been caused by defective materials, because actions by third parties allegedly rule out liability. If the cases are not decided collectively, it is possible that two courts reach a different conclusion in respect of the circumstances that led to the damage. In addition, the court will have to assess whether the individual parties were negligent in allowing that cause to occur. According to the criteria of *Chandler v. Cape*, the actions of the subsidiary (in addition to those of the parent company) play an important role in assessing liability of the parent company. One of the questions that must be asked in this context is, for example, whether the parent company was aware of the fact that the subsidiary accepted certain risks. Thus, the answer to the question regarding what RDS should have done also depends on the answer to the question regarding what SPDC did. Different court decisions can contain a different opinion regarding the extent and admissibility of those risks, resulting in divergence in respect of the same facts and the same legal framework. In short, there is an actual risk of irreconcilable judgments if the cases are not decided collectively.

56. Shell further argues that the Dutch court should declare a lack of jurisdiction over SPDC the moment it is established that the claims against RDS are insufficient.[54] This can in no way be inferred from Section 7 DCCP, nor is this compatible with the objective of that section. Only after the court has found that it has jurisdiction, can it form a substantive opinion – save for exceptional situations – regarding the admissibility of a claim. If the mere rejection of that claim would mean that in respect of the other defendant, the proceedings would have to be conducted again in another jurisdiction, by definition this is not in the interest of the (procedural) efficiency.[55] After all, the starting point of Section 7 DCCP that in the event of related claims, from the viewpoint of efficiency, the Dutch court may have jurisdiction over defendants for which this would not otherwise be the case, means that there is a chance that the court will only award the claim against this other defendant.

57. We find the same starting points in the case law regarding Article 6(1) of the Brussels Regulation. According to established ECJ case law, the assessment of the question regarding whether a sufficient connection exists between the claims

[53] *Inter alia* Amsterdam Court of Appeal, 1 April 2008, JBPR 2009, 17; ECJ 27 September 1988, *NJ* 1990, 425, *Kalfelis*.
[54] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 101.
[55] In the Explanatory Memorandum to the implementation of Section 7 DCCP, the government also explicitly referred to reasons of procedural efficiency. See also Chapter VI.2 above.

must be conducted according to the time at which the claims are filed.[56] In *Reisch Montage*, the ECJ further found that the application of Article 6(1) of the Brussels Regulation does not depend on the consequences of domestic applicable law. A court that has jurisdiction by virtue of Article 6(1) of the Brussels Regulation also has jurisdiction if that claim is already found inadmissible based on domestic law by the time the claim is filed in relation to the first defendant.[57] The court also has jurisdiction if that claim subsequently becomes null and void. Advocate General Ruiz-Jarabo Colomer explains in his opinion:

> "Finally, if a claimant, either by withdrawal or discontinuance, abandons his claim against the party who is domiciled in the jurisdiction of the court seised of the proceedings under Article 6(1), the principle of *perpetuatio jurisdictionis* precludes the alteration of international jurisdiction with the result that the proceedings continue to be heard by the same court. That rule applies where someone summoned to appear in the proceedings is excluded for other reasons.[58] [emphasis added by attorney]

58. Thus, neither Section 7 (1) DCCP nor (case law regarding) the Brussels Regulation offers any support for the opinion that the Dutch court would nevertheless lack jurisdiction if it dismisses the claims against RDS.

VI.6 Assumed insufficiency of the claim against RDS

59. Shell's argument that the claim against RDS is (was) allegedly 'clearly certain to fail' lacks each and every basis in light of the proceedings in the first instance and the judgments of the District Court of The Hague. Moreover, both Shell and Milieudefensie announced that they will also direct grounds for appeal against the application of applicable Nigerian law. From the viewpoint of concentrating the procedural discussion and due process on appeal, it would be unacceptable if – in anticipation of those grounds for appeal and defenses, which pertain to the central issue of the proceedings – the Court of Appeal would already assume that the Dutch court lacks jurisdiction in the main action.

60. It was already briefly noted above that it follows from ECJ case law that the domestic court should not take a claim's chances of success into account in assessing its jurisdiction by virtue of Article 6(1) of the Brussels Regulation. The same applies based on Section 7 (1) DCCP. In *Reisch Montage*, the ECJ found:

> 30. Consequently, since it is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.

[56] ECJ 27 September 1988, *NJ* 1990, 425, *Kalfelis*.
[57] ECJ 13 July 2006, *Reisch Montage*, C-103/05.
[58] Opinion of Advocate General Ruiz-Jarabo Colomer dated 16 March 2006, *Reisch Montage*, C-103/05.

> 31. In those circumstances, Article 6(1) of Regulation No 44/2001 may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant. [59]

61. In his opinion, Advocate General Ruiz-Jarabo Colomer substantiated this starting point as follows:

> "First, before confirming the validity of the procedural connection, the court must establish that it has jurisdiction, which is not dependent on the admissibility of the action or on a substantive examination of the main issue of the case, namely the viability of the claim."

62. Completely superfluously, Milieudefensie adds the following to this. Both in the interlocutory judgment dated 24 February 2010 and in the final judgment dated 30 January 2013, the District Court of The Hague responded to Shell's argument that the claim regarding RDS must allegedly be deemed to be obviously insufficient. In both cases, the District Court concluded that this is not the case. In the final judgment dated 30 January 2013, the District Court extensively addressed the case of *Chandler v. Cape* and the District Court reviewed whether the criteria for liability of a parent company set out in *Chandler v. Cape* had been satisfied. As Milieudefensie already announced in its statement in the motion, on appeal it will direct grounds for appeal against the District Court's finding that in the case at issue, no *negligence* on the part of the parent company was involved.[60] Be that as it may, the decision in *Chandler v. Cape* – as well as the final judgment of the District Court – demonstrates conclusively that under Nigerian law, a parent company may be liable if it fails to intervene in the operations of its subsidiary. In that case, no *lifting the corporate veil* is involved, because the parent company is deemed responsible for its own omissions.[61]

63. Thus, the court will have to review whether the principles of *Chandler v. Cape* apply and whether in the case at issue, as well, the parent company must be held liable. To this end, the factual circumstances must be weighed, for example to answer the question asked in *Chandler v. Cape* regarding whether the parent company intervened more often and whether it was aware of or should have been aware of the risks that were being taken. The District Court assesses these criteria extensively in grounds 4.33 to 4.39 of its judgment dated 30 January 2013. After all, without a further review it is not possible to determine whether in the case at issue, as well, the parent company can be held liable. For this reason alone,

[59] ECJ 13 July 2006, *Reisch Montage*, C-103/05. See also the Advocate General's opinion, 14 March 2006, par. 32.
[60] Shell also announced that it will direct grounds for appeal against the application of Nigerian law in the main action. Milieudefensie believes that it would thwart due process if, in anticipation of those grounds for appeal and defenses, which regard the central issue of the proceedings, the Court of Appeal would already assume that the Dutch court has no jurisdiction.
[61] Thus, Shell's comments regarding *lifting the corporate veil* are irrelevant (defense on appeal, par. 87-90).

Milieudefensie believes that no 'obvious insufficiency' of the basis of the claim against RDS can be involved.

64. In this context it is irrelevant that – as Shell argues – Nigerian case law allegedly does not include any example of a case involving the exact same situation as the one in the case at issue. Naturally, each case is distinguished by its own details and circumstances. There will not be two cases that are exactly the same. The case of *Chandler v. Cape* offers the most specific leads for the claim against RDS, but is not the only case from which liability of the parent company can be inferred. This may also be demonstrated by the extensive discussion of relevant case law in the first instance that preceded the Court of Appeal's ruling in *Chandler v. Cape.* Moreover, it is typical of the *common law* system that – in the absence of a statutory provision – the court will have to apply principles of existing case law to a new situation. In his *Tort law* handbook, Tony Weir notes the following in this context:

> "Whereas in a Statute every word is law, the precise words of judges are not law at all, but merely an indication of it. […] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (obiter dicta). The aim is to ascertain the rule (the *ratio decidendi*) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand."[62]

65. The Dutch court that applies *common law* rules cannot apply them differently than an English or Nigerian court – and will thus have to examine which principles must be derived from the case law. After all, this follows from the *common law* system, in which the legal rules are not (all) embedded in laws, but are largely formed by judges. Shell wrongfully suggests that with such a work method, the Dutch court would be guilty of unacceptable formation of law.[63] A Dutch court will also have to assess based on *common law* whether the starting points developed in the case law apply in a specific case.[64] The Dutch court is perfectly able to do so without subsequently excessively expanding those principles. Moreover, the conclusion was not fundamentally different if the case at issue would involve a *civil law* system. The suggestion that allegedly, there is no Nigerian ruling that pertains exactly to the situation at issue and that this allegedly implies that liability of the parent company is impossible under Nigerian law is in all cases too far-fetched and untenable.

VI.7 Foreseeability

[62] Tony Weir, *An introduction to Tort Law*, Oxford University Press 2006, p. 8.
[63] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 90-100.
[64] See further the motion by virtue of Section 843a DCCP and Rob Weir's opinion, Exhibit [x].

66. Milieudefensie takes the position that the criterion of foreseeability for SPDC that it might be summoned in the Netherlands does not play a separate role in relation to Section 7 DCCP. The interests of foreseeability and legal certainty mentioned by Shell have already been taken into account in the criteria of Section 7 – in particular the requirement of connection and efficiency. Nor can a general foreseeability criterion be derived from the judgment of the District Court of Amsterdam dated 23 October 2013, which Shell uses as its starting point.[65]

67. The *Painer* judgment of the ECJ from 2011 cited by Shell pertains to Article 6(1) of the Brussels Regulation, which does not apply to the case at issue.[66] It cannot be inferred from this judgment that the ECJ attaches a general requirement of foreseeability to Article 6(1) of the Brussels Regulation. In *Painer*, the ECJ found as follows:

> 80. However, in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001 (see, to that effect, Freeport, paragraph 41).
>
> 81. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see, to that effect, Freeport, paragraph 47).[67]

68. The Court of Appeal attaches the condition of foreseeability to the situation in which the claims filed against the different defendants have different legal bases. In so doing, the Court of Appeal did not adopt the proposed answer of Advocate General Trstenjak to the question referred for a preliminary ruling. The Advocate General's findings from which Shell believes it can infer that a foreseeability criterion precedes the question regarding whether factual connection exists lack relevance, given that the Court of Appeal did not follow the Advocate General in this. [68]

69. Moreover and completely superfluously, Milieudefensie believes that there can be no doubt that SPDC could most certainly foresee that it would be sued in the Netherlands. After all, the Netherlands is not a random location, but the place where SPDC's parent company is established. For years, interested parties and NGOs have called both SPDC and RDS to account for the consequences of the

[65] ECLI:NL:RBAMS:2013:7936. The District Court refers to the interests of foreseeability and legal certainty, but to assess its jurisdiction does not conduct any foreseeability review. This case did not involve the same factual or legal basis of the claims. The District Court did not assess at all whether or not it was foreseeable for the foreign party that he would be summoned in the Netherlands.
[66] ECJ 11 December 2011, *Painer* (C-145/10).
[67] Id.
[68] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 110 -114.

Nigeria policy. The District Court of The Hague – explicitly leaving aside the fact regarding whether that criterion even applies – also felt that it was foreseeable for SPDC that it might be summoned in the Netherlands. In that connection, the District Court referred to the international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions.[69] This development is described in greater detail in the thesis of Enneking and in a later article that she wrote.[70]

70. SPDC is not required to have examined these scientific articles to be aware of the trend mentioned above. Even apart from this broader international trend, SPDC could have reasonably estimated the chances that it might be summoned in the Netherlands. In view of the national and international pressure on SPDC and the parent company on account of Shell's acts and omissions in Nigeria, SPDC could foresee that it might be sued on this account, together with and in the jurisdiction of its parent company. In 1996, Shell was already sued before the *United States District Court* on account of violations of human rights in Nigeria.[71] Shell's competitor in Nigeria, Chevron Texaco, was also sued in the home country of the parent company, the United States, for violations of human rights in Nigeria.[72] RDS and SPDC are also involved in legal proceedings in the United Kingdom, where RDS has its registered office, on account of negligence in allowing oil spills to occur near the village of Bodo in Nigeria.[73]

VI.8 No abuse of procedural law

71. Shell's invocation of (the absence of jurisdiction as the result of) abuse of procedural law must be dismissed, as well.

72. First of all, Milieudefensie points out that Shell's suggestion that as a result of abuse of procedural law, the Dutch court does not have jurisdiction over SPDC is incorrect.[74] On the contrary, the ECJ case law referred to above demonstrates that Article 6(1) of the Brussels Regulation even applies if a claim that is certain to fail is filed against the defendant who is domiciled in the state of the seised court. Nor does the case law require that it is established that the claim is not filed for

[69] District Court of The Hague, 30 January 2013, ground 4.6, with reference to Enneking in NJB 2010, pp. 400-406.
[70] Liesbeth Enneking, Foreign Direct Liability and Beyond, Utrecht 201; reference is made especially to the cases mentioned in Chapter 3. See further also: NJB 2013, 607, *Zorgplichten van Multinationals in Nederland*.
[71] In the end, the case of *Ken Saro-Wiwa* was settled for a considerable amount. This was followed later by the case of *Kiobel* against Shell regarding the same factual circumstances, also in New York.
[72] *Bowoto v. Chevron Texaco* (no. 09-15641 D.C. No.3:99-cv-02506-SI).
[73] In this case, SPDC accepted the jurisdiction of the English court.
[74] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 142-143.

the sole purpose of creating jurisdiction in respect of another defendant.[75] Neither of these cases is at issue here.

73. Milieudefensie explained in the above that in light of the proceedings in the first instance and the findings of the District Court in its judgment dated 30 January 2013, it cannot currently be concluded that the claim against RDS is obviously insufficient, or that Milieudefensie abused procedural law. The (re-)assessment of the possible admissibility of the claim against RDS must be conducted within the boundaries of the appeal defined by the grounds for appeal.

74. Superfluously, Milieudefensie further substantiated why Shell's argument that the claim against RDS is allegedly (obviously) insufficient is incorrect. To this end, Milieudefensie refers to what it already noted in Chapter VII.7 above.

75. Milieudefensie further contests the accuracy of Shell's suggestion that the Court of Appeal should allegedly start from a broader interpretation of abuse of procedural law if access to the court is available in another country.[76] According to Shell, it is irrelevant whether the plaintiffs knew or should have realized that their claim was totally defective. Shell believes that "according to objective standards", Milieudefensie abuses procedural law by "filing claims against RDS without a proper basis in the applicable law".[77] This extraordinarily broad interpretation of abuse of procedural law is completely untenable in the (international) legal practice and goes against the starting point used in the case law that abuse of procedural law can only be involved in exceptional cases.[78] Moreover, the proposed interpretation is in breach of the principle of legal certainty embedded in the Code of Civil Procedure and the Brussels Regulation. This principle underlies the limitative list of jurisdiction grounds in which the *forum non conveniens* restriction was abandoned.[79] The review of whether the Dutch court has jurisdiction must be conducted solely based on the applicable statutory provision. It is incompatible with these starting points that – as the occasion arises – the court can nevertheless assume a lack of jurisdiction by means of a broader interpretation of abuse of the right to bring proceedings, because proceedings can still be initiated abroad – as Shell argues. Superfluously, it is noted that it is irrelevant which review is used in order to conclude that Milieudefensie did not abuse procedural law.

VII. Conclusion

[75] *Freeport/Arnoldson*, ECJ 11 October 2007, Case no. C-98/06, *NJ* 2008, 80, point 54.
[76] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 141-142.
[77] Shell's defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 138.
[78] *Inter alia* HR 29 June 2007, *NJ* 2007, 353; see also the District Court of The Hague in the jurisdiction motion in the first instance, grounds 3.2-3.3.
[79] See Chapter VII.2 above.

Milieudefensie et al. conclude in the ‘jurisdiction motion in the motion by virtue of Section 843a DCCP’ that Shell’s or at least SPDC’s motion must be dismissed, with an order for Shell or at least SPDC to pay the costs of the motion.

Attorney