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DE BRAUW BLACKSTONE WESTBROEK

District Court of The Hague
Hearings on 1, 3, 15 and 17 December 2020
Case number: C/09/571932 19/379

PLEADING NOTES: APPLICABLE LAW (CONTINUED)
15 DECEMBER 2020
of *mr.* J. de Bie Leuveling Tjeenk, *mr.* N.H. van den Biggelaar and *mr.* D. Horeman

in the case of:

MILIEUDEFENSIE ET AL. versus
ROYAL DUTCH SHELL PLC

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1 INTRODUCTION

1. The parties agree that the law applicable to Milieudefensie et al.'s claims must be determined on the basis of Article 7 of the Rome II Regulation. That article pertains to damage consisting of physical environmental impairment. See the preamble under 24 of the Rome II Regulation:

> *"'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms."*

2. The event giving rise to the damage within the meaning of Article 7 of the Rome II Regulation must be considered to be the event giving rise to this adverse change or impairment. These are the CO_2 emissions for which Milieudefensie et al. hold RDS responsible.

3. In the 1989 *Benckiser* judgment,[1] the Supreme Court ruled on the law applicable to a claim against Benckiser who was accused of complicity in an unlawful act by another party. This case concerned the determination of the applicable law based on Dutch general private international law as it applied prior to the entry into force of the Unlawful Act (Conflict of Laws) Act, i.e. based on the *lex locus delicti*. This judgment retains its relevance to the interpretation of the term 'event giving rise to the damage' in the Rome II Regulation, because the interpretation of that term also concerns the determination of the *locus delicti*, more specifically the *Handlungsort*.

4. Benckiser produced citric acid in its plant in Germany, in which production process cyanide-containing waste gypsum was released. Cyanide is a substance that was considered the most serious category of pollutants in the Chemical Waste Substances Act in force at that time. Benckiser was looking for a cheap landfill site to dispose of the waste gypsum and came into contact with a person referred to in the published judgment as X and who acted on behalf of the Dutch company Bos Bouwstoffen. Benckiser concluded an agreement with Bos Bouwstoffen pursuant to which it supplied the waste gypsum to Bos Bouwstoffen for a relatively low sum, which it would reprocess for use in construction. It later turned out that Bos Bouwstoffen had dumped the waste gypsum at various locations in the Netherlands in violation of the law, resulting in an unlawful act.

5. In preliminary relief proceedings, a number of Dutch parties, including the State, sought an order for Bos Bouwstoffen, X and Benckiser to remove the waste gypsum from the Netherlands. The Court of Appeal also assessed the claim against German company Benckiser in accordance with Dutch law and held that Benckiser had acted unlawfully due to complicity in an unlawful act by Bos Bouwstoffen and X. Benckiser lodged an appeal in cassation, which included the complaint that its conduct – including entering into the agreement with Bos Bouwstoffen, sending the waste gypsum, conducting a conversation and writing a letter – had taken place in Germany and

1 Supreme Court 14 April 1989, *NJ* 1990, 712 annotated by CJHB and JCS.

the Court of Appeal should therefore have applied German law. The Supreme Court rejected this complaint:[2]

> "*The complaint set out in ground X that the Court of Appeal should have assessed the question of unlawfulness not according to Dutch law but according to German law also fails. The facts taken as the point of departure by the Court of Appeal entail that Benckiser acted unlawfully as a participant in an unlawful act committed by X and Bos Bouwstoffen, which took place in the Netherlands, and that the acts of which Benckiser is accused, even if these largely took place in Germany, culminated in the Netherlands in such manner that the situation was brought about there, the termination of which is sought by the present claim."*

The Supreme Court therefore ruled that even if certain conduct by Benckiser had taken place in Germany, the claim against Benckiser was governed by Dutch law because the acts of which Benckiser is accused had culminated in the Netherlands.

6. Milieudefensie et al. assert that the group policy pursued by RDS is the event giving rise to the damage. Leaving aside the fact that this assertion lacks the necessary factual and legal basis, RDS' policy does not in itself lead to damage. The conduct of which RDS is accused – in the words of the Supreme Court – culminated in the CO_2 emissions of the Shell companies and end-users of Shell products around the world. For that reason, the claims are not exclusively governed by Dutch law.

7. It has been repeatedly confirmed in (European) case law that if there is physical damage, the location of the event giving rise to the damage must be determined on the basis of the location where that event physically occurred. For example, in the case that led to the judgment in *Franse Kalimijnen*,[3] reference was made to the place where the physical discharge of waste salt had taken place, in *Zuid-Chemie*[4] reference was made to the location where a polluted batch of micromix

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2 Supreme Court 14 April 1989, *NJ* 1990, 712 annotated by CJHB and JCS, para. 4.7.

3 ECJ 30 November 1976, no. 21/76, *NJ* 1977 /494.

4 CJEU 16 July 2009, ECLI:EU:C:2009:475.

was produced, and more recently, in *Vfk/Volkswagen*[5] reference was made to the location where the manipulated vehicles were manufactured.

8. Finally, see De Boer's case note for the *Marinari* judgment of the Court of Justice, in which – within the context of the jurisdiction rule of the Brussels I Regulation – he also refers to the location of the physical cause of the damage:[6]

> "*As a rule of thumb, it may be presumed that Article 5(3) of the Brussels I Regulation only pertains to the physical result of harmful acts, and, to that I add with regard to the Handlungsort, probably also to the physical cause of the damage*."

2 THE CHOICE OF MILIEUDEFENSIE ET AL. FOR THE HANDLUNGSORT RESULTS IN THE APPLICATION OF MANY LEGAL SYSTEMS

9. Milieudefensie et al. invoke, inter alia, three CJEU judgments that also pertain to the jurisdiction rule of Article 5(3) Brussels I Regulation, from which it allegedly follows that "*the term event giving rise to the damage can also include policy*."[7] None of those three judgments can support its argument. RDS will briefly explain this.

10. Firstly, Milieudefensie et al. rely on the CJEU's judgment in *Kolassa/Barclays Bank*. This case involves prospectus liability. Kolassa, an Austrian national, summoned Barclays Bank, established in England, to appear before the Austrian court for the provision of misleading statements in the prospectus drafted by Barclays Bank. The finding relied on by Milieudefensie et al. is that "*there is no information in the case-file to show that the decisions regarding the arrangements for the investments proposed by Barclays Bank and the contents of the relevant prospectuses were taken in the Member State in which the investor is domiciled or that those prospectuses were*

5 CJEU 9 July 2020, ECLI:EU:C:2020:534.

6 Case note Th.M de Boer for ECJ 19-09-1995, ECLI:EU:C:1995:289, NJ 1997 (*Marinari*), no. 3.

7 Written arguments 3 Milieudefensie et al., heading above margin number 64.

originally drafted and distributed anywhere other than the Member State in which Barclays Bank has its seat."[8]

11. It is unclear what support Milieudefensie et al. believe they can derive from this judgment. The case pertains to an entirely different case than environmental damage, namely compensation of purely financial loss based on prospectus liability. That is a relevant difference. When there is environmental damage, and certainly in this case, there will generally be damage resulting from physical emissions. That is why the location of the event giving rise to the damage is set at the location of the emission.

12. The fact that the CJEU referred to "decisions" in *Kolassa/Barclays Bank* does not mean that this is a relevant precedent. The CJEU merely found that the decisions had not taken place in Austria either. That does not mean that if that had been the case, the Austrian court would have had jurisdiction because the harmful event occurred there. Moreover, the finding does not pertain to decisions made by a parent company with regard to the conduct of subsidiaries. This concerns decisions made by the bank with regard to the prospectus it had drafted and distributed.

13. Secondly, Milieudefensie et al. rely on the CJEU's judgments in *Pez Hedjuk* and *Nintendo*. This reliance also fails. As both cases involve infringement, there is no relationship with the case against RDS.

14. Milieudefensie et al. assert that it follows from *Pez Hejduk* that "*the location of a decision (giving rise to damage) can qualify as Handlungsort*."[9] That is not the case. That case involved infringement of copyright (and neighbouring rights) because photographs had been posted on a website without the author's permission. The CJEU ruled in this respect:[10]

> "*24. <u>In a situation such as that at issue in the main proceedings</u>, in which the alleged tort consists in the infringement of copyright or rights related to copyright by the placing of certain*

8 CJEU 28 January 2015, ECLI:EU:C:2015:37, NJ 2015/332 annotated by L. Strikwerda, no. 53.
9 Written arguments 3 Milieudefensie et al., margin number 68.
10 CJEU 22 January 2015, ECLI:EU:C:2015:28 (*Pez Hejduk*), paras. 24-25

> *photographs online on a website without the photographer's consent, the activation of the process for the technical display of the photographs on that website must be regarded as the causal event. The event giving rise to a possible infringement of copyright therefore lies in the actions of the owner of that site (see, by analogy, judgment in Wintersteiger, C-523/10, EU:C:2012:220, paragraphs 34 and 35)*.
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> *25. In a case such as that in the main proceedings, the acts or omissions liable to constitute such an infringement may be localised only at the place where EnergieAgentur has its seat, since that is where the company took* ***and carried out*** *the decision to place photographs online on a particular website. It is undisputed that that seat is not in the Member State from which the present reference is made."* (emphasis added by attorneys)

15. This judgment therefore does not support Milieudefensie et al.'s position at all. According to the CJEU, the activation of the process for the technical display of the photographs must be considered, which, still according to the CJEU, is where the decision was taken *and carried out*.

16. Moreover, here too the CJEU's finding does not pertain to decisions made by a parent company with regard to the conduct of subsidiaries. This involves decisions made by the infringing party itself.

17. The Nintendo case pertained to infringement of a Community design and centred around the term "country in which the act of infringement was committed" within the meaning of Article 8(2) of the Rome II Regulation. The infringing parties summoned were a French (parent) and a German (subsidiary) entity. The French entity manufactured and sold the infringing products directly to consumers in France, Belgium and Luxembourg, and – with a view to resale – also to the German subsidiary. The German subsidiary sold those products to consumers in Germany and Austria via its website. The CJEU ruled:[11]

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11 CJEU 27 September 2017, ECLI:EU:C:2017:724 (*Nintendo*), para. 103.

> "*In the light of those objectives, where the same defendant is accused of various acts of infringement falling under the concept of 'use' within the meaning of Article 19(1) of Regulation No 6/2002 in various Member States, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened*." (emphasis added by attorneys)

18. In that case, the CJEU thus ruled that where there are various infringing acts by the same defendant, in that case "*the making, offering, putting on the market, importing, exporting and stocking for those purposes of the goods they sell or, on the other hand, of the use of images of goods*[12]," the place where the original infringing act was performed must be considered. It therefore does not follow from this that RDS' reasoning that all countries are *Handlungsort* because the emissions take place all around the world is a reasoning that the CJEU by definition rejects.[13] Nor does it follow from this that even if the emissions themselves could qualify as infringing acts, it follows from this judgment that there can still be only one *Handlungsort* that is decisive for the law applicable to the case.[14]

19. The conclusion is therefore that in this case, the *Handlungsort* is located in the places where the physical emissions occur, which means that the choice of Milieudefensie et al. for the *Handlungsort* results in the applicability of many legal systems.

3 MILIEUDEFENSIE'S (ALTERNATIVE) ASSERTIONS REGARDING THE ERFOLGSORT

20. The right of choice of Article 7 of the Rome II Regulation does not extend so far that the claimant may designate a specific legal system.

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12 CJEU 27 September 2017, ECLI:EU:C:2017:724 (*Nintendo*), para. 87.

13 Written arguments 3 Milieudefensie et al., margin number 67.

14 Written arguments 3 Milieudefensie et al., margin number 68.

Milieudefensie et al. therefore cannot opt for Dutch law. In this context, see Strikwerda:[15]

> "*The intention of Article 7 Rome II is to favour the environment. The unilateral right of choice granted to the victims of environmental pollution by Article 7 benefits the environment, as it is obvious that the victims, given the choice between application of the law of the 'Handlungsort' or that of the 'Erfolgsort', will prefer application of the law that, on balance, results in the highest amount of damages, and that will usually also be the law that offers the highest level of environmental protection. This is usually the case, but not always, as the victims can also make their choice dependent on which law best suits them from a procedural strategy perspective, for example in connection with how the allocation of the burden of proof, causality, or qualitative liability is organised, and that does not necessarily have to be the law that offers the highest level of environmental protection. Besides, the victims can make a mistake, especially in cases where there is little difference between the law of the 'Handlungsort' and the law of the 'Erfolgsort' in terms of level of protection, but which have organised the protection under civil liability law in a different way. In any event, the court is bound by the choice made by the victims and may not assess whether the law chosen is 'the better law' from the perspective of environmental protection*."

21. Milieudefensie et al. opted for the law of the *Handlungsort*. That it did so on the assumption that that choice would result in the applicability of Dutch law does not mean that its choice was a conditional one. Milieudefensie et al. also cannot revoke its choice of law in so far as it does not result in Dutch law. A choice of law once made cannot be revoked. Moreover, that would also amount to an impermissible choice of law for Dutch law.

22. In so far as the District Court nevertheless sees cause to apply the law of the *Erfolgsort*, this also does not result in the applicability of

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15 L. Strikwerda, *Een zwakke stee in "Rome II": de conflictregel voor aansprakelijkheid wegens milieuschade*, in: M.G. Faure & T. Hartlief (red.), *De Spier-bundel. De agenda van het aansprakelijkheidsrecht*, Deventer: Kluwer 2016, pp. 153-154.

exclusively Dutch law. Certainly, Milieudefensie et al. have failed to assert sufficient facts to change this. In view of the principle of joinder of parties, Milieudefensie et al. will have to substantiate for each claimant that the *Erfolgsort* is exclusively located in the Netherlands.

23. The private claimants have not substantiated that their claims are exclusively governed by Dutch law. Nor are they governed by Dutch law. The private claimants include not only claimants residing in the Netherlands, but also in Belgium, Germany and even Australia. Moreover, the current residence of the claimants is not the decisive factor for applicable law. The harmful effects of the current and future CO_2 emissions for which Milieudefensie et al. hold RDS responsible, will not occur until decades from now. Part of the claims also explicitly only pertain to the future. At this time, it cannot be determined where the private claimants will reside at that time and where they will suffer the harmful effects of CO_2 emissions.

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Attorneys

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