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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 PART III:
APPLICABLE LAW
3 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. Milieudefensie et al. assume the applicability of Dutch law to their claims. Milieudefensie et al. state that RDS's group policy is “at odds with" the global climate change objective and contributes to dangerous climate change. Milieudefensie et al. assert that RDS is acting unlawfully vis-à-vis them due to the enormous dangers that they believe RDS is creating. RDS’s adoption of policy results in climate change and is therefore the event giving rise to the damage, according to Milieudefensie et al.[1]

2. For the assessment of the applicable law, this position taken by Milieudefensie et al. serves as the point of departure. Another question is whether that assertion is factually and legally correct. That is not the case. We will return to this on day 3.

3. The position taken by Milieudefensie et al. with regard to the applicable law is also incorrect. Milieudefensie et al.’s claims are not

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1 Written arguments, the opening arguments (1), 1 December 2020, margin numbers 7-8.

governed only by Dutch law, but by as many legal systems as there are countries where the CO_2 emissions occur that, according to Milieudefensie et al., result in dangerous climate change.

4. Milieudefensie et al. therefore wrongly only substantiated their claims under Dutch law, and not also on the basis of all the other legal systems that also apply to their claims. This means that Milieudefensie et al. have not complied with their obligation to furnish facts, as a result of which their claims fail in their entirety.

2 ARTICLE 7 ROME II REGULATION

5. The question of the applicable law is governed by the Rome II Regulation.

6. Article 7 of the Rome II Regulation provides:

> '*The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*.'

7. And Article 4(1) of the Rome II Regulation provides:

> "*Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*."

8. Pursuant to Article 7 of the Rome II Regulation, the following applies in the event of environmental damage:

   (1) the law of the country where the damage occurs (*Erfolgsort*); or

(2) the law of the country in which the event giving rise to the damage occurred (*Handlungsort)*, if the injured party opts for this.

9. The main rule in the event of environmental damage is therefore application of the law of the *Erfolgsort*. However, the injured party has a unilateral right to opt for the *Handlungsort*. For the record: the right of choice does not go so far that the injured party can designate a *specific* legal system. The injured party can opt for the law of the country where the event giving rise to the damage occurs. It then has to be determined with reference to the *Handlungsort* which law applies to the claims.

10. The law applicable on the basis of the Rome II Regulation governs not only the question of whether unlawful acts were committed, but also, for example, whether and what measures the court could take (such as imposing an order, as sought in this case).[2]

11. In the summons, the claimants exercised the right of choice and opted for the law of the country where the event giving rise to the damage is occurring.[3] An open issue is whether an interest group that institutes a legal claim for the benefit of others on the basis of Article 3:305a DCC can exercise that right of choice. In this case, this question can be left moot because it does not matter whether the NGOs are entitled to a right of choice. This is because both the choice for the law of the *Handlungsort* and the law of the *Erfolgsort* which would apply in the absence of a legally valid choice would result in the applicability of as many legal systems as there are countries in which CO_2 emissions are being given off by Shell and the users of its products.

3 HANDLUNGSORT

12. As stated, Milieudefensie et al. argue that in this case, it is RDS's adoption of policy that constitutes the event giving rise to the damage within the meaning of Article 7 of the Rome II Regulation. This would entail that the *Handlungsort* is located in The Hague (because that is

2 Article 15(d) Rome II Regulation.

3 Margin number 101, Summons.

where RDS has its registered office). Milieudefensie et al. argue on that basis that Dutch law applies. That argument is incorrect.

13. Firstly, in cases in which a party is held liable for damage caused by the acts or omissions of a third party, the place where that third party acted or neglected to act qualifies as the *Handlungsort*. Applied to this case: RDS is being sued for the CO_2 emissions of Shell companies and end-users of Shell products around the world. The *Handlungsort* is in that case the place where those CO_2 emissions occur.

14. With their position, Milieudefensie et al. fail to recognise that the terms in the Rome II Regulation must be interpreted autonomously and uniformly.[4] The fact that, according to Milieudefensie et al., RDS is acting unlawfully under Dutch law because of its policy, which allegedly results in dangerous climate change as a result of the CO_2 emissions of the Shell companies and end-users of Shell products, therefore does not mean that RDS's policy can be considered an 'event giving rise to the damage' in relation to the environmental damage within the meaning of Article 7 of the Rome II Regulation.

15. In the context of environmental damage, the *Handlungsort* is the place where the relevant emissions occur. These emissions are the direct cause of the damage, namely climate change. The place where RDS determines Shell's climate policy cannot be considered the *Handlungsort*. Even if it were factually correct that RDS has the power to ensure lower CO_2 emissions, that circumstance would not mean that The Hague, where RDS is based, would be the *Handlungsort*.

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4 See, for example, CJEU 10 December 2015, ECLI:EU:C:2015:802 (*Florin Lazar v Allianz SpA*), para. 21: *"As a preliminary point, it must be noted, first, that, as regards the interpretation of Article 4(1) of the Rome II Regulation, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (see, to that effect, judgment in Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, paragraph 37). In accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment in Lanigan, C-237/15 PPU, EU:C:2015:474, paragraph 35 and the case-law cited)."*

16. Von Hein confirms that the domicile of the parent company is not the correct point of reference if the damage was caused by an act or omission by a subsidiary:[5]

> "*The 'event' giving rise to the damage has to be understood as any act or omission that caused the damage. Merely preparatory acts are excluded. The seat of a parent company alone does not suffice to localize the event in this country if the acts or omissions must actually be attributed to a subsidiary operating in a different jurisdiction.*"

17. The dangerous climate change on which Milieudefensie et al.'s claims are based was caused by the emissions from (1) end-users of Shell products and (2) the relevant Shell companies that emit CO_2.

18. Milieudefensie et al. essentially assume that every event in the causal chain qualifies as an event giving rise to the damage within the meaning of Article 7 of the Rome II Regulation. This position is incorrect. See Von Hein:[6]

> "*If, however, an act in country A causes an incident in country B which then leads to an environmental damage in country C, it may be submitted that only the final incident causing the damage should be characterized as the decisive 'event' within the meaning of Article 7. One has to concede that extending the victim's right to choose the law of each place of acting would considerably undermine legal predictability.*" (emphasis added, attorneys)

19. In this case, the *legally relevant* cause, in terms of Article 7 of the Rome II Regulation, of the damage asserted by Milieudefensie et al. - worldwide damage caused by global climate change - is the emission of CO_2 by end-users or by the Shell companies concerned. This legally relevant cause therefore implies the application of the law of many countries, not just that of the Netherlands.

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5 J. von Hein, 'Article 7 Environmental Damage', in: G-P. Calliess (ed.), Rome Regulations Commentary, Alphen aan den Rijn: Kluwer Law International 2020, p. 662.

6 Von Hein, op. cit., p. 662.

20. The fact that Milieudefensie et al. did substantiate their claims under Dutch law does not mean that those claims can be awarded in so far as CO_2 emissions in the Netherlands are involved. This is because Milieudefensie et al. have not substantiated that the CO_2 emissions in the Netherlands by Shell and the end-users of its products can in and of themselves result in any climate change, let alone dangerous climate change.

4 ERFOLGSORT

21. The outcome would be no different if Milieudefensie et al. had not opted for the law of the *Handlungsort*. In that case, Milieudefensie et al.'s claims would not be exclusively governed by Dutch law, either. In the absence of a choice for the law of the *Handlungsort*, the law of the *Erfolgsort* applies, as stated. In the event of environmental damage occurring in several countries, as is also the situation in this case according to Milieudefensie et al., the law of all the countries where the damage occurs is applicable. See Von Hein:[7]

> "*In cases of environmental damage spread across more than one state, it follows from the reference to Article 4(1) that the mosaic principle applies as well – that is, each damage is judged according to the law of the country where it was suffered.*"

Also see in this regard:[8]

> "*A minor inconsistency is that Article 4(1) Rome II explicitly provides for the scenario where the indirect consequences of an event giving rise to damages occur in several countries ('country or countries'), but does not mention the not-unusual case where a single event leads to injuries in several states. This scenario is dealt with explicitly only for cartel damage claims in Article 6(3)(b) Rome II (…). Another group of cases in which a single tortious act usually affects more than one country, defamation by mass media, is not subject to the Rome II Regulation (Article 1(2)(g)). For other cases in which several*

7 Von Hein, op. cit., p. 661.
8 Von Hein, op. cit., p. 541.

> *injuries are spread across more than one country, for example, in cases of pure economic loss, the mosaic principle applies – that is, each injury is governed by the law in force at the respective place of injury.*"

22. In a similar sense, see Kramer & Verhagen:[9]

> "*If the action for damages pertains to environmental damage in all these countries, this means that the legal systems of these countries must be applied in a distributive manner."*

23. See also Ibili:[10]

> " *As a result of the main rule of Article 4(1), if damage has occurred in various States, the right of the countries concerned must be applied in a distributive manner."*

24. Milieudefensie et al.'s assertion that "damage in the form of climate change and all ensuing adverse (direct) consequences for people and the environment" also occurs in the Netherlands,[11] misses the mark, therefore. That assertion does not result in the applicability of Dutch law.

25. In supporting the assertion that Dutch law applies, Milieudefensie et al. also cannot successfully invoke Article 4 (2) and (3) of the Rome II Regulation.[12] Article 7 of the Rome II Regulation provides that in the case of environmental damage, Article 4(1) only applies if the law of the *Handlungsort* has not been opted for.[13]

26. Also in the event of application of the law of the *Erfolgsort*, Milieudefensie et al. failed to substantiate its claims under the law of each of the countries where the environmental damage occurs. In that case, too, the claims would have to be denied because Milieudefensie et al. have not complied with their obligation to furnish facts.

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9 Asser/Kramer & Verhagen 10-III (2015), no. 1053.
10 GS Onrechtmatige daad, Article 4 Rome II, note 1.
11 Article 15(d) Rome II Regulation.
12 Margin number 103, Summons.
13 Margin numbers 323-324, Statement of Defence.

27. These comments on the law that applies if the *Erfolgsort* were used as the reference point are superfluous of course. Because of the choice of law made by Milieudefensie et al. in the summons, the application of Article 4(1) of the Rome II Regulation is not relevant.

5 DECISION

28. The result achieved on the basis of private international law is satisfactory. After all, this case concerns unlawful act claims that are directed at environmental damage allegedly caused by Shell's worldwide activities and that are intended to bring about global consequences. It would be odd if such claims were exclusively governed by Dutch law. Nor is that the case, therefore.

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Attorneys