

Dutch Supreme Court Refers Questions on Article 5(3) Brussels I Regulation

Hoge Raad, 4 April 2008, *Zuid-Chemie/Philippo's Mineralenfabriek* Nr. C06/310HR (link is to decision in Dutch).

On Friday 4 April, the Dutch Supreme Court (Hoge Raad) made a preliminary reference to the ECJ, with regard to the interpretation of article 5(3) of Regulation 44/2001 (jurisdiction in matters relating to tort). What follows is a short description of the facts as they emerge from the Supreme Court's decision and a provisional translation of the referred questions.

In July 2000, Zuid-Chemie, a producer of fertilizers in Sas van Gent (NL), bought two cargoes of 'micromix' from HCI Chemicals Benelux in Rotterdam (NL). HCI, who were unable to produce this micromix on their own, ordered the product from Filippo's, in Essen (Belgium), and delivered all necessary ingredients bar one at Filippo's factory. In consultation with HCI, Filippo's bought the missing ingredient (zinc sulphate) from a company called Poortershaven, established in Rotterdam (NL). Filippo's produced the micromix at her factory in Essen, where Zuid-Chemie took delivery. Zuid-Chemie, subsequently, used the micromix in multiple cargoes of fertilizer-products, some of which were sold to (foreign) buyers. It has become clear since then that the zinc sulphate obtained from Poortershaven was contaminated with cadmium, as a result of which the produced fertilizer is unusable. Zuid-Chemie has claimed damages in tort from Filippo's in the District Court (Rechtbank) in Middelburg (NL) . Filippo's alleged delict ("onrechtmatige daad") consists of having produced a product that has caused damage in the course of its normal use.

Philippo's argues that the Dutch court does not have jurisdiction, because in its view *the place of delivery of the contaminated micromix* - in Essen (Belgium) - should be regarded as 'the place where the harmful event occurred' (art. 5(3) Brussels I Regulation). Zuid-Chemie argues that the place where the harmful event occurred is *the place where different components (including the contaminated micromix) were mixed into the final product*, which was at its

factory in Sas van Gent (NL).

At first instance, the District Court noted that ‘the place where the harmful event occurred’ could be both the ‘*Handlungsort*’ and the ‘*Erfolgort*’ (both terms used in the Dutch text, as is common in Dutch decisions), and concluded that Essen was the place where Zuid-Chemie suffered initial damage (“initiële schade”) because that was the place where the contaminated micromix was delivered *ex works*. The Court of Appeal in The Hague (Gerechtshof ‘s-Gravenhage) has upheld this decision, noting that the place of production of the contaminated micromix (Essen) should be regarded as the ‘*Handlungsort*’.

In his Opinion in the Case (of 1 February 2008), Advocate General Strikwerda, observed that the ECJ had not yet pronounced itself on the question of whether “the distinction between ‘*Handlungsort*’ and ‘*Erfolgort*’ is limited to situations involving a tortious act which leads to physical damage to persons or property” and whether, “in the case of tortious acts which cause non-physical damage and purely economic loss no such distinction should be made, even where this damage is the direct (initial) consequence of the damage-causing act (“schadebrengende feit”)” (par. 14).

Following the suggestion of the Advocate General, the Supreme Court, in its decision of 4 April 2008, referred to the ECJ the following questions:

1. In the case of a tortious act as alleged by Zuid-Chemie, what damage should be regarded as the initial damage resulting from this act: the damage resulting from the delivery of the defective product, or the damage resulting in the course of the normal use for which this product was intended?
2. In case the latter option is correct: may the place where this damage occurs be regarded as ‘the place where the harmful event occurs’ only where the damage consists of physical damage to persons or property, or is this allowed also when (for the time being) merely economic loss has been suffered?