

Rechtbank Den Haag, Judgment of 26 March 2021: Milieudefensie et al. v. Royal Dutch Shell

The *Rechtbank Den Haag*, by judgment of 26 March 2021 – *Milieudefensie et al. v. Royal Dutch Shell*, ordered RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO₂ emissions into the atmosphere due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.

This landmark case relies, inter alia, on the following choice of law analysis:

4.3.

Applicable law

4.3.1. *Milieudefensie et al.* principally make a choice of law within the meaning of Article 7 Rome II³⁵, which according to *Milieudefensie et al.* leads to the applicability of Dutch law. Insofar as the choice of law of Article 7 Rome II does not lead to the applicability of Dutch law, *Milieudefensie et al.* claim in the alternative that the applicable law must be determined based on the general rule of Article 4 paragraph 1 Rome II. According to *Milieudefensie et al.*, this general rule also leads to the applicability of Dutch law.

4.3.2. Article 7 Rome II determines that 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 the general rule of Article 4 paragraph 1 Rome II, 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. The parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO₂ emissions constitutes environmental damage in the sense of Article 7 Rome II. They are divided on the question what should be seen as an

'event giving rise to the damage' in the sense of this provision. Milieudefensie et al. allege that this is the corporate policy as determined for the Shell group by RDS in the Netherlands, whereby her choice of law leads to the applicability of Dutch law. RDS asserts that the event giving rise to the damage are the actual CO2 emissions, whereby the choice of law of Milieudefensie et al. leads to the applicability of a myriad of legal systems.

4.3.3.

The choice as laid down in Article 7 Rome II is justified with a reference to Article 1919 TFEU (Article 174 TEC), which prescribes a high level of protection.³⁶ Both Milieudefensie et al. and RDS refer to the handbook by Von Hein. The complete entry for event giving rise to the damage in the sense of Article 7 Rome II reads as follows:

"Where events giving rise to environmental damage occur in several states, it is not possible to invoke the escape clause (Article 4(3)) in order to concentrate the applicable law with regard to a single act. Thus, the plaintiff may opt for different laws as far as acts by multiple tortfeasors acting in various states are concerned. 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 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 act would considerably undermine legal predictability. On the other hand, such generous approach would fit the favor naturae underlying Article 7. Since the tortfeasor may be sued in country A under Article 7 no. 2 Brussels Ibis, extending the victim's option will also facilitate proceedings." ³⁷

4.3.4.

The Court of Justice of the European Union (CJEU) has made no declaration on the 'event giving rise to the damage' in the sense of Article 7 Rome II. The court sees insufficient basis in the interpretation of this provision to seek a link with the CJEU rulings as cited by the parties on other principles of liability, some of which are subject in Rome II to specific choice-of-law rules (intellectual property rights, unlawful competition, and product liability and prospectus liability).³⁸ Nor does the court see a basis to seek a link with the case law cited by RDS, in which it was determined that a purely internal decision cannot be designated as an injurious

The published corporate policy that RDS draws up for the Shell group, which was also discussed with the shareholders, and to which the claims of Milieudefensie et al. pertain, cannot be equated with this. The court also sees insufficient grounds to seek a link with the cases cited by RDS, in which parent companies were called to account for non-intervention in subsidiaries.⁴⁰ A parallel with the law applicable to a participant in an unlawfully committed act perpetrated in concert (product liability) does not hold water due to the below-mentioned characteristics of the responsibility as regards environmental damage and imminent environmental damage, as raised in this case.

4.3.5. An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO₂ and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase. It is not in dispute that the CO₂ emissions for which Milieudefensie et al. hold RDS liable occur all over the world and contribute to climate change in the Netherlands and the Wadden region (see also below under 4.4 (2)). These CO₂ emissions only cause environmental damage and imminent environmental damage in conjunction with other emissions of CO₂ and other greenhouse gases for Dutch residents and the inhabitants of the Wadden region. Not only are CO₂ emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO₂ emissions. The underlying thought is that every contribution towards a reduction of CO₂ emissions may be of importance. The court is of the opinion that these distinctive aspects of responsibility for environmental damage and imminent environmental damage must be included in the answer to the question what in this case should be understood as ‘event giving rise to the damage’ in the sense of Article 7 Rome II.

4.3.6.

Milieudefensie et al. hold RDS liable in its capacity as policy-setting entity of the Shell group (see below under 4.4. (1.)). RDS does contest that its corporate policy for the Shell group is of may be of influence on the Shell group’s CO₂ emissions. However, RDS pleads for a restricted interpretation of the concept ‘event giving rise to the damage’ in the application of Article 7 Rome II. In its view, its

corporate policy is a preparatory act that falls outside the scope of this article because in the opinion of RDS, the mere adoption of a policy does not cause damage.

The court holds that this approach is too narrow, not in line with the characteristics of responsibility for environmental damage and imminent environmental damage nor with the concept of protection underlying the choice of law in Article 7 Rome II. Although Article 7 Rome II refers to an ‘event giving rise to the damage’, i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS’ adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region.

4.3.7. Superfluously, the court considers that the conditional choice of law of Milieudefensie et al. is in line with the concept of protection underlying Article 7 Rome II, and that the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law.

The full text of the English version of the judgment is available [here](#).