

# The “Event Giving Rise to the Damage” under Art. 7 Rome II Regulation in CO<sub>2</sub> Reduction Claims - A breakthrough an empty Shell?

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In this article, we critically assess the question of where to locate the “event giving rise to the damage” under Art. 7 Rome II in CO<sub>2</sub> reduction claims. This controversial - but often overlooked - question has recently been given new grounds for discussion in the much discussed “*Milieudéfensie et al. v. Shell*” case before the Dutch district court in The Hague. In this judgment, the court had to determine the law applicable to an NGO’s climate reduction claim against *Royal Dutch Shell*. The court ruled that Dutch law was applicable as the law of the place where the damage occurred under Art. 4 (1) Rome II and the law of the event giving rise to the damage under Art. 7 Rome II as the place where the business decision was made, *i.e.*, at the Dutch headquarters. Since according to the district court both options - the place of the event where the damage occurred and the event giving rise to the damage - pointed to Dutch law, this question was ultimately not decisive.

However, we argue that it is worth taking a closer look at the question of where to locate the event giving rise to the damage for two reasons: First, in doing so, the court has departed from the practice of interpreting the event giving rise to the damage under Art. 7 Rome II in jurisprudence and scholarship to date. Second, we propose another approach that we deem to be more appropriate regarding the general principles of proximity and legal certainty in choice of law.

## 1. *Shell* - the judgment that set the ball rolling (again)

The Dutch environmental NGO *Milieudéfensie* and others, which had standing under Dutch law before national courts for the protection of environmental damage claims, made a claim against the *Shell* group’s parent company based in

the Netherlands with the aim of obliging *Shell* to reduce its CO<sub>2</sub> emissions. According to the plaintiffs, *Shell's* CO<sub>2</sub> emissions constituted an unlawful act. The Dutch district court agreed with this line of reasoning, assuming tortious responsibility of *Shell* for having breached its duty of care. The court construed the duty of care as an overall assessment of *Shell's* obligations by, among other things, international standards like the UN Guiding Principles of Human Rights Responsibilities of Businesses, the right to respect for the private and family life under Art. 8 ECHR of the residents of the Wadden region, *Shell's* control over the group's CO<sub>2</sub> emissions, and the state's and society's climate responsibility etc. This led the district court to ruling in favor of the plaintiffs and ordering *Shell* to reduce its greenhouse gas emissions by 45% compared to 2019.

In terms of the applicable law, the court ruled that Dutch law was applicable to the claim. The court based its choice of law analysis on Art. 7 Rome II as the relevant provision. Under Art. 7 Rome II, the plaintiff can choose to apply the law of the event giving rise to the damage rather than the law of the place where the damage occurred as per the general rule in Art. 4 (1) Rome II. The court started its analysis by stating that "climate change, whether dangerous or otherwise, due to CO<sub>2</sub> emissions constitutes environmental damage in the sense of Article 7 Rome II", thus accepting without further contemplation the substantive scope of application of Art. 7 Rome II.

The court went on to find that the adoption of the business policy, as asserted by the plaintiffs, was in fact "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". The court thereby declined *Shell's* argument that *Milieudefensie's* choice pointed to the law of the place where the actual CO<sub>2</sub> emissions occurred, which would lead to a myriad of legal systems due to the many different locations of emitting plants operated by *Shell*.

## 2. The enigma that is "the event giving rise to the damage" to date

This line of reasoning marks a shift in the way "the event giving rise to the damage" in the sense of Art. 7 Rome II has been interpreted thus far. To date, there have been four main approaches: A broad approach, a narrower one, one that locates the event giving rise to the damage at the focal point of several

places, and one that allows the plaintiff to choose between several laws of events which gave rise to the damage.

(1.) The Dutch district court's location of the event giving rise to the damage fits into the broad approach. Under this broad approach, the place where the business decision is made to adopt a policy can qualify as a relevant event giving rise to the damage. As a result, this place will usually be that of the effective headquarters of the group. On the one hand, this may lead to a high standard of environmental protection as prescribed by recital 25 of the Rome II Regulation, as was the case before the Dutch district court, which applied the general tort clause Art. 6:162 BW. On the other hand, this may go against the practice of identifying a *physical* action which *directly* leads to the damage in question, rather than a purely internal process, such as the adoption of a business policy.

(2.) Pursuant to a narrower approach, the place where the direct cause of the violation of the legal interest was set shall be the event giving rise to the damage. In the case of CO<sub>2</sub> reduction claims, like *Milieudefensie et al. v. Shell*, that place would be located (only) at the location of the emitting plants. This approach - while dogmatically stringent - may make it harder to determine responsibility in climate actions as it cannot necessarily be determined which plant led to the environmental damage, but rather the emission as a whole results in air pollution.

(3.) Therefore, some scholars are in favor of a focal point approach, according to which the event giving rise to the damage would be located at the place which led to the damage in the most predominant way by choosing one focal point out of several events that may have given rise to the damage. This approach is in line with the prevailing opinion regarding jurisdiction in international environmental damage claims under Art. 7 Nr. 2 Brussels I-bis Regulation. In practice, however, it may sometimes prove difficult to identify one focal point out of several locations of emitting plants.

(4.) Lastly, one could permit the victim to choose between the laws of several places where the events giving rise to the damage took place. However, if the victim were given the option of choosing a law, for example, of a place that was only loosely connected to the emissions and resulting damages, Art. 7 Rome II may lead to significantly less predictability.

3. Four-step-test: A possible way forward?

Bearing in mind these legal considerations, we propose the following interpretation of the event giving rise to the damage under Art. 7 Rome II:

First, as a starting point, the laws of the emitting plants which *directly* lead to the damage should be considered. However, in order to adequately mirror the legal and the factual situations, the laws of the emitting plants should only be given effect insofar as they are responsible for the total damage.

If there are several emitting plants, some of which are more responsible for greenhouse gas emissions than others, these laws should only be invoked under Art. 7 Rome II for the *portion of their responsibility regarding the entire claim*. This leads to a *mosaic approach* as adopted by the CJEU in terms of jurisdiction for claims of personality rights. This would give an exact picture of contributions to the environmental damage in question and would be reflected in the applicable law.

Second, in order not to give effect to a myriad of legal systems, this mosaic approach should be slightly moderated in the sense that courts are given the opportunity to make estimations of proportions of liability in order not to impose rigid calculation methods. For example, if a company operates emitting plants all over the world, the court should be able to roughly define the proportions of each plant's contribution, so as to prevent potentially a hundred legal systems from coming into play to account for a percentile of the total emissions.

Third, as a fall-back mechanism, should the court not be able to accurately determine each plant's own percentage of responsibility for the total climate output, the court should identify the central place of action in terms of the company's environmental tort responsibility. This will usually be at the location of the emitting plant which emits the most CO<sub>2</sub> for the longest period of time, and which has the most direct impact on the environmental damage resulting from climate change as proclaimed in the statement of claim.

Fourth, only as a *last resort*, should it not be possible to calculate the contributions to the pollution of each emitting plant, and to identify one central place of action out of several emitting plants, the event giving rise to the damage under Art. 7 Rome II should be located at the place where the *business decisions* are taken.

This proposal is discussed in further detail in the upcoming Volume 24 of the Yearbook of Private International Law.