

# JUDGMENT

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## COURT OF ROTTERDAM

Trade and Port Team

case number / case list number: C/10/616075 / KG ZA 21-249

### **Judgment in Opposition in Interim Injunction Proceedings dated 31 May 2021**

in the matter of

the private company with limited liability **DMARCIAN EUROPE B.V.**,  
having its registered office in Dordrecht,  
claimant, defendant in the opposition,  
attorneys: *mrs.* V. van Druenen and A.P. Meijboom in Amsterdam,

versus

1. the legal entity incorporated under foreign law **DMARCIAN INC.**,  
having its registered office in Brevard, North Carolina, United States of America,  
defendant, claimant in the opposition,  
attorney: *mr.* T.S. Jansen in Amsterdam,

1. **TIMOTHY GEORGE DRAEGEN**,  
residing in Brevard, North Carolina, United States of America,  
defendant, claimant in the opposition,  
attorneys: *mrs.* P.A. Josephus Jitta and F. Henke in Amsterdam,

Below the parties will be referred to as DME, Inc and Draegen.

#### **1. The Proceedings**

1.1. The course of the proceedings is apparent from:

- the preliminary writ of summons dated 29 January 2021 and the Exhibits 1 through 19 of DME;
- the Default Judgment rendered between the parties of 1 February 2021, corrected by the corrected judgment of 2 February 2021 (to be referred to below as the “Default Judgment”);
- the notice of objection of Inc of 6 April 2021;
- the notice of objection of Draegen of 6 April 2021, with Exhibits 1 through 12;
- the additional exhibits 13 through 19 submitted by letter of 6 May 2021 from Draegen;
- the motion submitting exhibits 1 through 4 of Inc dated 6 May 2021;
- the motion for a change of claim of DME of 7 May 2021;
- the motion submitting additional exhibits 20 through 43 of DME dated 7 May 2021;
- the motion submitting additional exhibits of Inc dated 7 May 2021;
- the additional Exhibit 44 of DME;
- the oral hearing which took place on 10 May 2021;
- the written pleadings of DME;
- the written pleadings of Inc;
- the written pleadings of Draegen.

1.2. Pronouncement of judgment was fixed for today.

## **2. The Facts**

2.1. DME was founded on 21 March 2013 and was initially named Mailmerk B.V. The Digital Xpedition Holding B.V. ("TDX") was sole shareholder and director of DME until July 2018. The shares of TDX are held by Mr. M. Groeneweg ("Groeneweg") and Mr. H.J. Kalkman ("Kalkman"), via their personal holdings.

2.2. Inc was incorporated on 19 September 2014. Draegen is shareholder of Inc.

2.3. DME and Inc engage in the supply of products and services in the field of securing the identity of e-mail addresses.

2.4. In January 2016, DME and Inc concluded a verbal agreement for the use and distribution of the dmarcian software (the "Software") developed by Inc. Under this agreement, DME received a license for the use of the Software and was allowed to sell the Software in Europe, Russia and Africa. In exchange for this, Inc (and/or Draegen) received an option right to a majority stake in DME.

2.5. In practice, the Software is offered as SaaS (Software as a Service), a service that is accessible via the website dmarcian.com that Inc and DME jointly use. Potential customers are forwarded to DME via this site, if the customers are based in Europe, Russia or Africa. Other customers are forwarded to Inc.

2.6. In July 2018, Draegen exercised the option right that was awarded to Inc and/or him and obtained 50.01% of the shares in DME.

2.7. DME holds 100% of the shares in dmarcian Bulgaria EOOD ("dmarcian Bulgaria"). Starting from mid-2018, (further) development of the Software (also) took place by DME and dmarcian Bulgaria. Since November 2019, only the thus adapted and extended version of the Software is still available.

2.8. On 4 December 2019 Groeneweg sent Draegen an e-mail with attachment. This e-mail contains the following text:

*"This document describes the current situation that software owned by dmarcian Europe BV can't be sold by dmarcian, Inc. nor Dmarcian Asia Pacific Pty Ltd to customers as there's no license agreement in place to do so. Before this problem is solved new software including but not limited to DMARC delegation can't go live on other instances than the EU instance. This document describes a solution for the above problem as well."*

The attachment contains a document that represents the substance of the arrangements made in 2016 between DME and Inc, according to Groeneweg. It also says in this document that the problem mentioned in the e-mail can be solved by providing a perpetual license by DME to Inc in exchange for certain share transfers.

2.9. Draegen replied to the proposal of Groeneweg with emails of 4 and 6 December 2019. He wrote, among other things:

*"I agree we'll be needing to put a licensing agreement to be put into place. Without going into details over email, it makes sense to reflect the perpetual and exclusive license that Europe BV has enjoyed (. ..) The propose solution (. ..) isn't something I can support." and "The initial terms described around 22 January 2016 are either wrong or inaccurate", and finally that errors in the document of Groeneweg "have raised serious red flags" and "issues that cannot be ignored".*

2.10. On 6 December 2019, Inc blocked DME's access to the joint systems. This "black-out" was lifted again after 48 hours.

2.11. By e-mail of 3 July 2020, Draegen asked to convene a shareholders' meeting of DME and to put on the agenda the proposal to dismiss TDX as a director and to appoint another company, to be designated by Draegen, as director.

2.12. The meeting of shareholders of DME was scheduled on 13 August 2020. TDX then brought inquiry proceedings before the Enterprise Chamber of the Court of Appeal of Amsterdam, whereupon the meeting of shareholders was adjourned. Draegen joined in the Enterprise Chamber proceedings as an interested party.

2.13. In the decision of the Enterprise Chamber of 7 September 2020, the following was considered, among other things:

*"(. ..)*

2.5 *TDX and Draegen have a dispute about the arrangements on which the collaboration between dmarcian Europe and dmarcian, inc./Draegen was based in 2016. In the opinion of TDX, dmarcian Europe, dmarcian, Inc ., TDX and Draegen concluded a verbal agreement on 22 January 2016 on which their collaboration is based. According to Draegen, the parties always regarded the e-mail correspondence in December 2016 between him and Groeneweg about formalizing their collaboration, in which Draegen sent documents for signing (which were not signed), as the basis of their collaboration. In any case, it is an established fact between the parties that they agreed at least the following in 2016:*

- that dmarcian Europe has a license for the use and the sale of the software originating from dmarcian Inc.;*
- that dmarcian Europe is responsible for the sale of that software (and the provision of associated services) to customers in Europe, Russia and Africa;*
- that in exchange for this, dmarcian, Inc. and/or Draegen were able to buy the majority interest in dmarcian Europe against payment of €1.*

*(...)*

3.4 *The Enterprise Section considers the following. The controversy about the intellectual property rights to the software (applications) developed by dmarcian Europe (and dmarcian Bulgaria) is the heart of the dispute between the parties. TDX argues that this/these software (applications) is/are separate from the software developed by dmarcian Inc. so that the intellectual property thereof is vested in dmarcian Europe. TDX argues that the permission to use and sell this software (applications) by dmarcian Inc. must be based on a license to be granted by dmarcian Europe. Draegen, on the other hand, argues that the software developed by dmarcian Europe (and dmarcian Bulgaria) is no more than additional features for improved use of the software originating from dmarcian Inc., so that the intellectual property thereof is also vested in dmarcian Inc.. The Enterprise Chamber puts first and foremost that only the regular civil courts are competent to make a legal adjudication of this dispute. However, the Enterprise Chamber can conclude that this dispute is disruptive to the enterprise of dmarcian Europe; developing and selling software is its core business and the collaboration with dmarcian Inc. is a necessary condition for this. Nevertheless, this collaboration has not been sufficiently regulated by the parties, neither in general, nor in particular with regard to the intellectual property rights to the software (applications) developed and to be developed and (the*

*scope of) the licenses granted/to be granted in connection therewith. There are no unequivocal recorded arrangements available; as a result, the collaboration has become jeopardized by the current debate about it, which is a serious obstacle to the business operations of dmarcian Europe. In the opinion of the Enterprise Chamber, the existence of said situation constitutes enough valid reasons to doubt a correct policy and correct course of affairs at dmarcian Europe. As both TDX and Draegen have requested, the Enterprise Chamber will order an investigation into the policy and course of affairs at dmarcian Europe, from 1 January 2016 until 20 August 2020.*

3.5 *The Enterprise Chamber agrees with the parties that it is necessary, in light of the situation of dmarcian Europe, by way of immediate remedy, to appoint a third party as director of dmarcian Europe with a decisive vote, who has the independent authority to represent dmarcian Europe. This director can consider it part of his task to try and obtain clarity on the question where the intellectual property to the software (applications) developed by dmarcian Europe (and dmarcian Bulgaria) lies, or to make sufficiently clear arrangements about this with dmarcian Inc. and to record these arrangements. The Enterprise Chamber also sees reason to transfer the shares in dmarcian Europe – with the exception of one share of each of the shareholders - to a nominee to be appointed by it.*

(...)

3.9 *For the time being, the Enterprise Chamber will stay the appointment of an investigator, so that it can be considered whether the immediate remedy to be provided can already give rise to a resolution of the dispute. Either party or the director or nominee appointed by the Enterprise Chamber may request the Enterprise Chamber at any time to appoint the investigator (...)"*

2.14. In a decision of 10 September 2020, the Enterprise Chamber designated *mr. H.J.M. Harmeling* ("Harmeling") as director of DME and *mr. Y. Borrius* ("Borrius") as nominee of all shares minus one per shareholder.

2.15. On 14 September 2020, Inc blocked DME's access to the joint systems again. The access to the most essential systems was restored after a few days.

2.16. By letter of 22 January 2021, Inc informed DME that it wishes to terminate the collaboration as of 1 February 2021 and that from that date onwards it will no longer grant DME access to its systems, unless DME will transfer its copyright to the new software to Inc in exchange for a license under which it will surrender 80% of its income from the sales of the software to Inc.

2.17. On 22 January 2021, Inc blocked DME's access to its systems again. DME has no (direct) access anymore to the data of the major part of its customers.

2.18. A few minutes after dispatch of the letter referred to in 2.16, in a letter sent to DME by e-mail, Draegen relied on Article 4 of the "exit agreement" that Draegen and TDX concluded in 2018 on the occasion of Draegen's acquisition of the majority stake in DME. Under this article, each shareholder has the right to terminate the collaboration between the shareholders by making a bid for the shares of the other shareholder. If the other shareholder does not accept this bid, that shareholder will be obliged to buy the first shareholder out. Draegen made his bid to TDX on the condition subsequent that DME would agree to the demands of Inc as stated in the letter of 22 January 2021.

2.19. On 27 January 2021, Harmeling requested the Enterprise Chamber to appoint an investigator to start the investigation into the policy conducted by DME between 1 January 2016 and 20 August 2020. The Enterprise Chamber appointed an investigator.

2.20. DME summoned Inc and Draegen on 29 January 2021 to appear on 1 February 2021 before the judge in interim injunction proceedings of this Court. The case was heard that day, and a Default Judgment was rendered that same day. In it Inc was ordered, as a disciplinary measure, to perform the agreement existing between the parties during the investigation ordered by the Enterprise Chamber, and Inc was prohibited from terminating that agreement

during that period. Inc was also ordered to lift the blockade of DME (and its employees) to the Saas platform. Draegen was ordered to refrain from any act that hinders the business operations of DME, in anticipation of clarity on the substance and scope of the license agreement between DME and Inc and the property of IP rights to the Software. The Default Judgment was corrected on 2 February 2021.

2.21. DME had the Default Judgment served on and sent to Draegen and Inc. It also sent the Default Judgment by e-mail to the Dutch attorneys of Inc and Draegen.

2.22. On 9 February 2021, Draegen signed a statement in which he declared to step down as CEO, President, CFO and Treasurer of Inc.

2.23. Harmeling requested Inc repeatedly to put an end to the blockade. Inc has not complied with these demands. Subsequently, DME has placed the files (including the software that was developed jointly) that are necessary to keep its business running on a separate “instance”.

2.24. During the oral hearing in these interim injunction proceedings on 10 May 2021, DME had no (full) access to the software. At some time after 1 February 2021, Mr. A.A. Fernandes (“Fernandes”) and Mr. B.P. van der Laan (“Van der Laan”) started serving European customers for Inc. At that time, these customers were not forwarded to DME via the website anymore.

2.25. By judgment of 23 April 2021 of the Court of Noord-Holland, hearing location Haarlem, the judge in interim injunction proceedings ordered Fernandes – who was an employee of DME until 31 December 2019 – and Van der Laan, who performed activities for Inc from February 2021 onwards, *inter alia*:

*"within five days after service of this judgment to provide DME in writing (...) whilst simultaneously submitting relevant copies of correspondence, quotations, invoices and license agreements, with the names, addresses and contact details of all natural persons or legal persons from Europe, Africa and Russia with whom they have or have had contact since 22 January 2021 about the use of Dmarcian software, including the purchase, extension and renewal of said software;"*

2.26. On 30 April 2021, the attorney of Fernandes and Van der Laan informed the attorney of DME that his clients had been denied access to the IT systems of Inc immediately.

2.27. The investigation by the investigator appointed by the Enterprise Chamber had not yet been completed at the time of the oral hearing of these interim injunction proceedings on 10 May 2021.

### **3. The Dispute**

#### *The original claim and the Default Judgment*

3.1. By writ of summons of 29 January 2021 DME claimed that may it please the Court, by judgment, declared to be provisionally enforceable:

#### With regard to Inc:

1. (a) principally: To order Inc to perform the existing agreement between the parties in full, until it is legally terminated;  
(b) alternatively: as a disciplinary measure (i) to order Inc to maintain the status quo for the duration of the investigation ordered by the Enterprise Chamber and to perform the existing agreement between the parties in full during that period, and (ii) to prohibit Inc from terminating the existing agreement between the parties during that period;

2. To order Inc to lift the blockade of (the employees of) DME to the SaaS platform and to the (computer) systems required for the performance of its business operations immediately, and to keep it lifted, until the agreement existing between the parties will have been terminated legally;
3. To order Inc to pay a penalty of €50,000 per day on which it does not or not fully comply with the claims under 1 and 2.

With regard to Draegen:

4. To order Draegen to refrain from any action undertaken by himself or through a company managed by him, expressly including Inc., which impedes the business operations of DME, until or as a result of the investigation ordered by the Enterprise Chamber, or as a result of a judgment on the merits, clarity has been created about the contents and scope of the license agreement granted to DME and the ownership of the copyright to the Software;
5. To order Draegen to pay a penalty of €50,000 per day on which it does not or not fully comply with the claims under 4;

With regard to Inc and Draegen:

6. to order Inc and Draegen to pay the costs of the proceedings and the subsequent costs, plus the statutory interest as of the date of the judgment until the date when payment is made in full.

3.2. DME has based its claims on the position that the agreement existing between the parties qualifies as a continuing performance agreement for unlimited time. Principally, the parties have not agreed on a termination arrangement and the agreement cannot be terminated. Alternatively, the agreement can only be terminated if there are sufficiently serious reasons for this and/or if a specific notice period is observed, or the notice of termination is accompanied by the offer to pay compensation or damages. There is no such serious reason here. It is important that the business operations of the parties are closely intertwined and that the commercialization of the software is DME's core business. Its business depends on it that the license and the distribution rights it has obtained under the agreement continue to exist, and that the access to the systems is maintained. Termination of the agreement will result in the bankruptcy of DME. In addition, DME has made considerable investments in the development of the Software, which have not been charged on to Inc. In any case, DME is co-copyright holder to the current version of the Software. Inc has no interest whatsoever that can be respected in the (immediate) termination of the agreement. The only reason for termination is that Inc can get hold of the copyrights to the Software that way. Furthermore, DME has taken the position that Inc is acting unlawfully by terminating the agreement. By acting accordingly, Inc is profiting from the violation of standards by Draegen vis-à-vis DME. As a shareholder of DME, Draegen was obliged to – among others – DME to maintain the status quo during the investigation of the Enterprise Chamber and it has violated this obligation. Given the coherence between the acts of Inc and those of Draegen, DME has an interest in it that Draegen too will be prohibited from performing any further (unlawful) acts that aim to prejudice DME in favor of Inc.

3.3. The following court order was pronounced by (corrected) Default Judgment of 1 February 2021:

*“The Court in interim injunction proceedings:*

- 3.1. *grants leave to proceed in default against the defendants who failed to appear;*
- 3.2. *orders dmarcian Inc., as a disciplinary measure, during the investigation ordered by the Enterprise Chamber, to perform the agreement existing between the parties and prohibits it from terminating that agreement during that period;*

3.3. *orders dmarcian Inc. within 24 hours after service of this judgment, to lift the blockade of (the employees of) dmarcian Europe to the SaaS platform and the (computer) systems required for the execution of its business activities and to keep it lifted until the existing agreement between the parties has been legally terminated;*

3.4. *orders dmarcian Inc. to pay a penalty of €20,000 to dmarcian Europe for each day or part of a day on which it fails to comply with the main order issued in 3.2 and 3.3., until a maximum of €500,000 is reached;*

3.5. *orders Draegen to refrain from any action undertaken by himself or through a company managed by him, expressly including dmarcian Inc., which impedes the business operations of dmarcian Europe, until or as a result of the investigation ordered by the Enterprise Section, or as a result of a judgment on the merits, clarity has been created about the contents and scope of the license agreement granted to dmarcian Europe and the ownership of the IP rights to the dmarcian software;*

3.6. *orders Draegen to pay a penalty to dmarcian Europe of €20,000 for each day or part of a day that it fails to comply with the main order pronounced in operative part 3.4, until a maximum of €500,000 is reached;*

3.7. *orders dmarcian Inc. and Draegen, jointly and severally, to pay the costs of the proceedings, estimated to date at €1,408.81 on the part of dmarcian Europe, plus the statutory interest as referred to in Section 6:119 DCC on this amount starting fourteen days after service of this judgment until the day of full payment;*

3.8. *orders dmarcian Inc. and Draegen, jointly and severally, to pay the costs incurred after this judgment, estimated at €163.00 for the attorney's fees, to be increased, on condition that dmarcian Inc. and Draegen have not complied with the judgment within 14 days after notice was given and service was subsequently effected, by an amount of €85.00 for attorney's fees and the costs of serving notice of the judgment, and to be increased by the statutory interest as referred to in Section 6:119 DCC on the subsequent costs starting fourteen days after service of this judgment until the date of payment;*

3.9. *declares this judgment provisionally enforceable up to here,*

3.10. *dismisses all other claims.*

3.4. In the motion for a change of claim, DME stated that Inc and Draegen are not complying with the Default Judgment and that the operations of DME have stagnated because customers and staff no longer have access to the data that are necessary for rendering the usual services. By their continuous breach of the judgment, both Inc and Draegen have forfeited the maximum amount of penalty payments. DME therefore has an interest in a few new court orders being pronounced, besides the upholding of the judgment. DME now claims that it may please the Court in interim injunction proceedings, by judgment, provisionally enforceable:

With regard to Inc:

1. To uphold the judgement of 1 February 2021;
2. To order Inc within five days after service of this judgment to provide DME's attorney in writing, whilst simultaneously submitting relevant copies of correspondence, quotations, invoices and license agreements, with the names, addresses and contact details of all natural persons or legal persons from Europe, Africa and Russia with whom representatives of Inc, including but not limited to A. Fernandes and B.P. Van der Laan, have or have had contact since 22 January 2021 about the use of the Software, including the purchase, extension and renewal of said software, on pain of a penalty;

3. To order Inc. to pay a penalty of €20,000 to DME for each day or part of a day when it fails to comply with the main order issued in 3.2 and 3.3. of the judgment dated 1 February 2021;
4. To order Inc to pay to DME €500,000 for the penalties forfeited by it under the judgment of 1 February 2021 to date, plus the statutory interest.

With regard to Draegen:

5. To uphold the judgment of 1 February 2021;
6. To order Draegen to pay a penalty to DME of €20,000 for each day or part of a day that it fails to comply with the main order pronounced in operative part 3.5. of the judgment dated 1 February 2021;
7. to order Draegen to pay €500,000 to DME for the penalties forfeited by him under the judgment of 1 February 2021 to date, plus the statutory interest;
8. If and as far as the claim under 7 will not be awarded, to order Draegen to refrain from any action undertaken by himself or through a company managed by him or under his de facto control, expressly including Inc, which impedes the business operations of DME, until either as a result of the investigation ordered by the Enterprise Chamber, or as a result of a judgment on the merits, clarity has been created about the contents and scope of the license agreement granted to DME and the ownership of the IP rights to the Software.

With regard to Inc and Draegen:

9. to order Inc and Draegen jointly and severally to pay the costs of the proceedings and the subsequent costs, plus the statutory interest as of the date of the judgment until the date when payment is made in full.

*The claim in opposition of Inc and the grounds for it*

3.5. Inc opposed the Default Judgment by subpoena of 6 April 2021. Inc claims that the Court in interim injunction proceedings, by judgment, provisionally enforceable:

1. set aside the Default Judgment of 1 February 2021 and rule that Inc is relieved from the order that was pronounced against it in default of appearance;
2. declare the claims of DME inadmissible or deny these claims;
3. order DME to pay the costs of the proceedings in both instances, plus the subsequent costs, increased by the statutory interest if the subsequent costs have not been paid within fourteen days from service of this judgment.

3.6. Inc bases its claims on the position that the Dutch court is incompetent to hear the claims of DME. Performance of any court orders should take place in the United States, where Inc has its registered office and performs its business activities. Inc is not active (and has not been active) in the Netherlands and its platform is not running (on a server) in the Netherlands. In the absence of jurisdiction pursuant to Section 6 under a of the Code of Civil Procedure ("CCP"), no competence to take preservation measures or provisional measures can be derived from Section 13 CCP. No jurisdiction can be derived from Section 7 CCP either. The court in interim injunction proceedings also has no jurisdiction over Draegen. The claims were only instituted to use Draegen as an anchor defendant and to create jurisdiction over Inc based on Section 7 CCP. There is not sufficient coherence between the claims against Inc and those against Draegen either. If it is held that the Dutch courts do have jurisdiction, the claims of DME must be denied. Inc has granted DME a license, which characterizes the legal relationship between the parties most of all. Pursuant to Article 4 (2) of Regulation (EC) no. 593/2008 (Rome I) it is suspected that the agreement is most closely connected to the United States, the country where Inc – the party required to effect the characteristic performance of the contract – has its central management. This is also where the Software was developed and where it is protected by IP rights. The legal relationship between the parties is therefore governed by US law, under which law the power to terminate the



agreement must be adjudicated. By US law, Inc had the right to terminate the agreement given the non-performance by DME when it comes to the right to further develop the Software. Besides, DME has been trying since 2019 to appropriate Inc's market position in spurious and unlawful ways. Since Inc had the right to terminate the collaboration, there is no legal ground for the alleged claims of DME, and these claims should be denied.

*Draegen's claim in the opposition and the grounds for it*

3.7. Draegen also opposed the Default Judgment by subpoena. He claims that it may please the Court in interim injunction proceedings, by judgment, provisionally enforceable:

1. To declare the opposition well-founded and to set aside the Default Judgment;
2. To declare the claims of DME inadmissible or deny these claims;
3. To relieve Draegen of the order to pay the costs that was pronounced against him by Default Judgment;
4. To order DME to pay the costs of the proceedings in both instances, plus the subsequent costs, increased by the statutory interest if the subsequent costs have not been paid within fourteen days from service of this judgment.

3.8. Draegen bases his claims on the ground that he has only been subpoenaed to create jurisdiction vis-à-vis Inc. As he has not acted unlawfully vis-à-vis DME, no jurisdiction of the Dutch courts and applicability of Dutch law can be derived from this. Since 23 October 2020 Draegen is no longer authorized to act on behalf of Inc vis-à-vis DME, and since 9 February 2021 he is no longer CEO. Draegen cannot be equated to Inc either. Draegen has not acted in violation of the standards of Section 2:8 DCC. He is no longer a major shareholder with controlling interest of Inc either.

3.9. Below, the arguments of the parties will be further discussed, as far as relevant.

#### **4. The Adjudication**

*Opposition*

4.1. The opposition was instituted on time and correctly. This means that the opposition of Inc and Draegen is admissible so far.

### *The competence of the Dutch Court*

4.2. Since Inc and Draegen have their registered office / residence in the United States, and because of their arguments contesting jurisdiction, the Court in interim injunction proceedings has to assess whether it has jurisdiction to hear the dispute.

4.3. With regard to Draegen, the claims of DME are based on obligations from unlawful act. In such cases, the Dutch courts are competent under Section 6 under e CCP if the harmful event has occurred or may occur in the Netherlands. This section relates both to the place where the harmful event has occurred (*Handlungsort*) and to the place where the damage has occurred (*Erfolgsort*). The Court in interim injunction proceedings considers that in this case, there is an (alleged) harmful event of which the *Erfolgsort* is located in the Netherlands. This is the case because that alleged damage – no longer having (full) access to the systems, which causes DME to be mostly cut off from its customers – occurs in the Netherlands, among other places. Moreover, this damage is the final piece of acts of Draegen that started with the first blockade, followed by the attempt to dismiss DME as director, and after this attempt had failed, the message that he was not prepared to any other solution but a transfer of copyrights from DME to Inc on his terms. By acting thus, Draegen is not acting in DME's best interest. The position of Draegen that the accusations against him are unfounded is not decisive in this regard. This position requires a substantial assessment of the claims, which can only be made after jurisdiction has been established. As far as the claims against Draegen are concerned, the Court in interim injunction proceedings is competent pursuant to Section 6 under e CCP.

The decision of the US District Court for the Western District of North Carolina, Asheville Division of 31 March 2021 which Draegen relies on does not change the above considerations. While in a case between Inc and DME – not Draegen – that Court did assume jurisdiction in the scope of a Temporary Restraining Order, it also indicated the following: "*Notwithstanding this abbreviated analysis, this conclusion is without prejudice to the Defendant, submitting a motion pursuant to Federal Rule of Civil Procedure 12(b)(2) that more fully challenges the Court's jurisdiction.*" DME has indeed submitted such a motion and it has not yet been decided on.

4.4. Since there is jurisdiction with regard to Draegen, the Dutch Court is competent pursuant to Section 7 CCP with regard to Inc as well, provided that there is such consistency between the claims against Draegen and Inc that reasons of expediency justify their being heard together. Such consistency exists here. The acts of Inc cannot be regarded separately from the acts of Draegen. Draegen disagreed to the decision of the Enterprise Chamber and was not willing to maintain the status quo – the continuation of the agreement between Inc and DME – pending the investigation of the Enterprise Chamber. Moreover, it was Draegen – who wants to create the impression that he has nothing to say anymore in Inc – who explained the latest blockade of 22 January 2021 during an "*all hands meeting*" for all staff, with the exception of the staff of DME, while furthermore the termination letter of Inc was followed a few minutes later by the reliance of Draegen on the "*exit agreement*". This is indicative of concerted practices. In the provisional opinion of the Court in interim injunction proceedings, the (actual) acts of Inc and Draegen are connected to an important extent. This is not altered by the fact that Inc is not involved in the proceedings before the Enterprise Chamber due to the nexus with Draegen (or his behavior).

### *Applicable law*

4.5. Then, the question as to which law applies is addressed. With regard to Draegen, in light of the 'unlawful act' ground of the claim against him, this will be assessed on the basis of (Article 4 (1)) of the Rome II Regulation (Regulation no. 864/2007), read in coherence with Section 10:159 DCC. In the provisional opinion of the Court, Dutch law applies with regard to

the alleged unlawful acting by Draegen. As has been considered above, it is assumed that the alleged damage occurs in the Netherlands.

4.6. The claim against Inc is based on performance of the agreement. Since the parties have not agreed on a choice of law, the question as to which law applies must be answered on the basis of Regulation (EU) no. 593/2008 (“Rome I Regulation”) in connection with Section 10:154 DCC.

Inc takes the position that there is a license agreement. It can be admitted to Inc that DME (also) speaks of a license (agreement) (granted) in several places in its writ of summons. However, this is not enough to assume that there is a license agreement. DME rightly takes the position that the license is for the purpose of its distribution rights. In this connection, it must be observed that Inc too mentions that DME is generating turnover with the Software. Therefore, the agreement between the parties serves not (only) the use of the Software, but also allows DME to sell the Software to others and to have it used by others. In the Court's provisional opinion, this means that there is (predominantly) a distribution agreement rather than a license agreement. Such an agreement is subject to the law of the country where DME has its habitual residence. This habitual residence is the Netherlands, which makes Dutch law applicable under Article 4 (1) Rome I Regulation.

#### *The claims*

4.7. It must be adjudicated in these proceedings whether the Default Judgment must be fully or partially set aside. More specifically, this concerns the question whether Inc is obliged to perform the agreement with DME and to restore the access of DME to the systems. In addition, it must be adjudicated whether Draegen must refrain from acts that hinder the business operations of DME. Only if there is no ground for a full or partial nullification, the additional claims of DME can be addressed.

4.8. It is put first and foremost in the adjudication that the parties have brought forward many relevant arguments to the adjudication of the claims, but that many of these arguments lack a proper substantiation. In these interim injunction proceedings, little more can be assumed as established about the relationship between the parties and the way they gave substance to it than the Enterprise Chamber did in its decision of 7 September 2020. A long list can be made of what is not established – like the question whether or not there was exclusivity – and cannot be established without furnishing evidence, as will become apparent from what has been set out below. This concerns questions about the substance and performance of the agreement, but also questions about the (de facto) control of Draegen over Inc.

4.9. The heart of the dispute between the parties concerns the Software. Among other things, the dispute concerns the scope and substance of the work on the Software by DME and dmarcian Bulgaria and the costs thereof, and the intellectual property rights to the (further) developed Software.

DME argues that it has written about 60% of the source code of the Software and has spent about €1.4 million on that development. As a result thereof, copyrights have arisen for DME. This means that the use thereof by Inc requires a license, which is not there yet.

Inc, on the other hand, argues that the software developed by DME concerns no more than a limited improvement of the Software on the backside, which improvement does not concern the key components. The work was only carried out in Bulgaria because DME could recruit staff faster and cheaper there. Moreover, the work was done under the supervision of Inc, which did or did not accept the rewritten codes. Given those circumstances, Inc believes that the work of DME did not detract from its IP rights. In this context, Inc relies on the statement of Draegen submitted by Inc.

4.10. With regard to the collaboration between the parties and the intellectual property rights to the Software developed and to be developed or edited and the scope of the licenses

granted/to be granted in connection therewith, no arrangements recorded in writing are available. The Exhibit 8 submitted by Inc is not regarded as such either. It is a statement of Draegen that is not accompanied by a technical substantiation. Moreover, it is provisionally assumed that Draegen has an interest in making a statement for the benefit of Inc, a company with which he was intertwined and maybe still is – not formally, but actually.

Inc also referred to e-mails from 2015 and 2016 in substantiation of its argument that it always had the intention and expectation that the IP rights would always be vested in Inc. The reliance on those documents and expectations ignores the fact that the situation has changed since.

Starting from 2018, DME began developing the Software (further).

Depending on the scope and nature thereof, it may very well be just and right that DME claims an IP right to the part that was developed by it. Inc does seem to acknowledge this with its claim that DME must transfer its copyrights to the Software to Inc (see 2.16.).

But we are not there yet. The (scope of the) contribution of DME and dmarcian Bulgaria to the Software cannot be determined either. This applies both to the substantial/technical contribution – did it concern the functionality or not? – and to the costs involved in this.

4.11. It appears from the above considerations that the legal situation with regard to the intellectual property rights of the current version of the Software cannot yet be fully established. It is far from excluded that eventually, there will be a joint copyright. If there is, the response of Draegen and Inc to DME's bringing up the copyrights in December 2019 must be regarded as exaggerated and wrong. In that case, unlike Inc argues in these interim injunction proceedings, as the dispute on copyright was apparently the only reason for terminating the relationship in January 2021, or from demanding that DME would conclude a new agreement on (more) unfavorable terms (than before), in the Court's provisional opinion there is no question of a valid reason for that termination or for setting that term. It was not yet considered in this provisional opinion that the proceedings before the Enterprise Chamber were not yet finished at that time, and are still not.

4.12. Draegen's position is not clear. There is a lack of clarity both regarding his (in)formal control as a shareholder and regarding a formally possibly no longer existing, but de facto still continuing directorship, in the senses that Draegen determines the actions of Inc.

Draegen argues that he has no decisive voice in the GM of Inc and mentions a share percentage of 38.84 in that context. However, he fails to substantiate this in any way. The same is true for DME, which also fails to substantiate its argument that Draegen has decisive control over Inc. Moreover, Draegen argues that he is no longer competent since 23 October 2020 to act on behalf of Inc (vis-à-vis DME) and that he is no longer CEO and director of Inc since 9 February 2021. Firstly, it is important that DME says about this latter argument that the appointment of Draegen's wife as CEO may not have a statutory basis because so far, there is no evidence of a (legally valid) shareholders' resolution. Whatever one may think of this, there are indications that Draegen de facto still determines what goes on within Inc. He is still mentioned under Corporate on Inc's website, albeit with a different title. In the case against Fernandes and Van der Laan, the Court of Noord-Holland held in interim injunction proceedings: *"The judge in interim injunction proceedings considers it probable that the acting of Dmarcian Inc and Draegen was inspired by the wish to sideline DME completely and to get their hands on the copyright to the newest version of the Dmarcian software that way. The circumstance that the agreement was apparently terminated in response to the conclusion that the interim director of DME did not bow to the wishes of Draegen et al., and although terminated as of 1 February 2021, it was immediately implemented by cutting DME out of the systems on 22 January 2021, sufficiently illustrates this."* and *"In the circumstance that (1) Fernandes and Van der Laan use the attorney who also represented the Draegens during and after the termination of the agreement, (2) both Draegens were always cc'd in the correspondence in February too, and (3) that the written pleadings of this attorney (...) can be read as the argument of Draegen, the Court in interim injunction proceedings sees as many indications that the Draegens are still at the helm together (...)."*

To these considerations it may still be added that Draegen, who claims to have been already

incompetent of acting on behalf of Inc at that time, informed the staff of dmarcian Bulgaria and Inc at the "*all hands meeting*" on 25 January 2021 that the blackout (already realized) was the result of the changed relationship. It can also be added that the termination by Inc and the almost immediate reliance by Draegen on the exit agreement can only be regarded, for the time being, as a concerted action.

Although there are indications, in the provisional opinion of the Court more documents and inquiries are necessary to be able to establish the position of Draegen definitively. Interim injunction proceedings are not suitable for this. In that case it becomes relevant that no evidence has been produced that (and why) at least Draegen cannot await the outcome of the investigation of the Enterprise Chamber.

In this connection, the Court in interim injunction proceedings refers – Inc too – to the instruction given to Harmeling, who has to try and obtain clarity on the question where the intellectual property rights to the software (applications) developed by DME are vested. It seems just and necessary to await this clarity and not to allow any irreversible and harmful actions to be undertaken in the meantime.

4.13. In anticipation of the outcome of the Enterprise Chamber's investigation and of the answering of questions formulated above that the Enterprise Chamber cannot or will not answer, and in order to prevent irreversible situations in advance, immediate intervention is required. This situation is suitable par excellence for imposing a disciplinary measure that does justice to the interests of both parties. The measure to be imposed will in fact undo the effects of the termination, but only temporarily. When determining the scope and conditions of the relief to be provided, the court in interim injunction proceedings takes the following into account. Inc is no longer (fully) performing the agreement. This means that (the employees of) DME have no (full) access anymore to the client systems and are hindered to a great extent in the way in which they can serve European, African and Russian customers. The fact that DME has placed the files (including the software that was developed jointly) that it needs to keep running its business on a separate "instance" does not detract from the interest DME has in its claims. Developing and selling software is the core business of DME and the collaboration with Inc is necessary for this purpose. On the other hand, there is the interest of Inc in receiving a reasonable fee from DME for access to the systems. At the hearing, the parties have stated that a fee of 20% of the income from the sale of the software – to be paid by DME to Inc – is customary. The Court in interim injunction proceedings will therefore order Inc, within 24 hours after service of this judgment, to lift and keep lifted the blockade of (the employees of) DME to the SaaS platform and the (computer) systems required for the performance of its business activities, until the investigation of the Enterprise Chamber has been concluded, or until a judgment in proceedings on the merits has been rendered and has become final and conclusive. The Court in interim injunction proceedings attaches the condition to this that DME will pay a fee of 20% of the income from the sales of the software to Inc, starting from 1 June 2021. As the big stick, and in view of the actual course of affairs since December 2019, the Court in interim injunction proceedings still considers it necessary to impose an order for penalty payments. Besides, the order pronounced in the Default Judgment under 3.2 will be maintained. The "existing agreement" then refers to the agreement that was terminated as formulated by the Enterprise Chamber. To clarify, it is considered that this will consist in any case of the above-mentioned access.

4.14. All this means the following for the judgment that was opposed. Given the change of claim of DME, the claim that was initially instituted under 1a is no longer relevant. DME claims that the judgment be upheld.

Part 3.3. of the Default Judgment will be set aside. This order is pronounced anew, but supplemented in the way as has been contemplated above in 4.13. As far as the meaning of the agreement existing between the parties is concerned, the interpretation is followed that the Enterprise Chamber has provisionally given to it. Practically speaking, this means that customers from Europe, Russia and Africa who come to the website are forwarded to DME in the usual manner.

With regard to Draegen, the judgment can be upheld. For the sake of completeness, it is

contemplated that Draegen must be able to gather sufficiently from this judgment what must be understood by ‘not hindering’.

In all other respects, the Default Judgment will be upheld.

4.15. What remains is an adjudication of the new claims of DME.

The claim under 2 will be denied. For the time being, it is not established that there was exclusivity between the parties. What is more, DME acknowledges that it has placed the files (including the software that was developed jointly) that it needs to keep its business running on a separate “*instance*”. For the time being, it is insufficiently clear as from when and to what extent it has experienced hindrance from the blockade.

Claims 3 and 6 were already included in the adjudication of the Default Judgment above. These claims will also be awarded with regard to the future.

For claims 4 and 7, the Court puts first and foremost that they relate to the penalty payments for which DME already has a title to enforce them with the Default Judgment, as far as DME would believe that penalty payments have been forfeited. As far as Draegen is concerned, DME has already started this enforcement by having the shares of Draegen in DME seized by post-judgment attachment. Incidentally, the Court observes here that where DME takes the position that the status quo must be maintained, it is assumed that DME will therefore refrain from any further enforcement actions for the time being. The Court in interim injunction proceedings also contemplates that the claims imply that a final opinion is asked about these penalty payments being due. Interim injunction proceedings are not suitable for this. This is even more adamant since Inc and Draegen have put forward a defense against the penalty payments having been forfeited. For instance, Inc has submitted documentary evidence that DME has still logged in or has been able to make use of the systems until 4 March 2021. This is not altered by the fact that the order for penalty payments will not be set aside. It will have to be established in proceedings on the merits that, and how many, penalty payments have been forfeited.

#### *The costs of the proceedings*

4.16. In the circumstance that both parties are found against, the Court in interim injunction proceedings sees grounds to set off the costs of the opposition proceedings between them.

## **5. The Decision**

The Court in interim injunction proceedings:

5.1. sets aside the parts 3.1. and 3.3. of the judgment rendered between the parties by the judge in interim injunction proceedings of this Court in default under case and case list number C/10/612223 / KG ZA 21-63 on 1 February 2021 and corrected by the corrected judgment of 2 February 2021, and judging anew:

5.2. orders Inc, within 24 hours after service of this judgment, to lift and keep lifted the blockade of (the employees of) DME to the SaaS platform and the (computer) systems required for the performance of its business activities, until the agreement existing between the parties has been validly terminated, on the condition that DME will pay 20% of the income from the sales of the Software to Inc each month, starting from 1 June 2021;

- 5.3.       upholds the rest of the Default Judgment;
- 5.4.       orders Inc to pay a penalty to DME of €20,000 for each day or part of a day on which it fails to comply with the main order pronounced in part 5.2. of this judgment after service of this judgment, until a maximum of €500,000 is reached;
- 5.5.       orders Draegen to refrain from any action undertaken by himself or through a company managed by him, expressly including Inc, which impedes the business operations of DME, until or as a result of the investigation ordered by the Enterprise Chamber, or as a result of a judgment on the merits, there is clarity about the contents and scope of the license agreement granted to DME and the ownership of the IP rights to the dmarcian software;
- 5.6.       orders Draegen to pay a penalty to DME of €20,000 for each day or part of a day that it fails to comply with the main order pronounced in operative part 5.5. after service of this judgment, until a maximum of €500,000 is reached;
- 5.7.       declares this judgment provisionally enforceable up to here,
- 5.8.       sets off the costs of these opposition proceedings between the parties in the sense that each party shall bear its own costs;
- 5.9.       dismisses all other claims.

This judgment was rendered by Judge P. de Bruin and pronounced in open court on 31 May 2021.