judgment

COURT OF ROTTERDAM

Trade and port team

case number / docket number: C/ 10/638489/ KG ZA 22-393

Judgment in preliminary relief proceedings of 18 July 2022

in the case of

the private limited liability company
DMARC ADVISOR B.V.,
established in Dordrecht,
plaintiff in the main action,
defendant in the incident,
lawyers: mr AP Meijboom and mr V van Druenen in Amsterdam,

versus

1. the company under American law **DMARCIAN INC.,**
2. **SHANNON CRISTINE DRAEGEN,**

having its registered office and principal place of business at Brevard, North Carolina, United States of America,
defendants in the main action,
plaintiffs in the incident,
lawyers: TS Jansen MC Hoeba and J van Hemel in Amsterdam.

The parties are hereinafter referred to as Advisor and Dmarcian et al. Dmarcian et al. are hereinafter referred to separately as Dmarcian and S. Draegen.

1. The proceedings

1.1. The course of the proceedings is evidenced by:
- the summonses of 23 May 2022;
- the 70 exhibits of Advisor;
- the cross-appeal for a plea of lack of competence and the statement of defence;
- the 91 exhibits of Dmarcian et al.;
- the oral procedure on 23 June 2022;
- the defence notes regarding the authority of the Advisor;
- Advisor's written pleadings;
- the speaking notes of Dmarcian et al. on the incident of incompetence;
- the speaking notes of Dmarcian et al.

1.2. Finally, the judgment is set at today's date.

2. The facts

2.1. Advisor was founded on 21 March 2013. It was called Mailmerk B.V. until 15 February 2017 and Dmarcian Europe B.V. until 28 January 2022.The Digital Xpedition Holding B.V. (hereinafter: TDX) was the sole shareholder and director of Advisor until July 2018. The shares of TDX are held, through their personal holding companies, by Messrs M Groeneweg (hereinafter: Groeneweg) and HJ Kalkman (hereinafter: Kalkman).

2.2. Dmarcian was founded on 19 September 2014, with T Draegen as CEO. S Draegen, together with her husband T Draegen, is the majority shareholder in Dmarcian.

2.3. Advisor and Dmarcian are engaged in the provision of products and services in the field of identity security of email addresses.

2.4. In January 2016, Advisor and Dmarcian concluded an oral agreement regarding the use and distribution of the Dmarcian software developed by Dmarcian (hereinafter: the Software). Pursuant to this agreement, Advisor received a licence to use the Software and was allowed to sell (subscriptions to) the Software in Europe, Russia and Africa (hereinafter: the Territory). In return, Dmarcian (and/or T Draegen) received an option right on a majority interest in Advisor.

2.5. In practice, the Software is offered as a SaaS service (Software as a Service), which is accessible through the Dmarcian website (www.Dmarcian.com) that Dmarcian and Advisor use jointly. Potential customers are redirected to Advisor via this website if the customer is from Europe, Russia or Africa. Other customers are redirected to Dmarcian.

2.6. On 13 July 2018, T Draegen exercised the option granted to Dmarcian and/or him and acquired 50.01% of the shares in Advisor. At the same time,
T Draegen and TDX agreed on an 'exit agreement'. Article 4 thereof stipulates that each shareholder has the right to terminate the collaboration between the shareholders by making an offer on the shares of the other shareholder. If the other shareholder does not accept that offer, that shareholder has the obligation to buy out the first shareholder at the same price (per share) that the first shareholder has offered.

2.7. In May 2017, Advisor engaged the Bulgarian company BeLean EOOD (hereinafter: BeLean) to supply two developers for further development of the Software. As of November 2018, the team of Bulgarian programmers has been expanded and housed in the company d arcian Bulgaria EOOD (hereinafter: Dmarcian Bulgaria) founded by Advisor. The further development has led to the Software version 2.0. At the end of 2018, version
1.0 is phased out and from November 2019 only version 2.0 will be available.

2.8. On 4 December 2019, Groeneweg sent an email, with an attachment, to
T Draegen. That email states, among other things:

"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 instances other than the EU instance. This document describes a solution for the above problem as well."

The appendix includes a document that contains the content of the agreements made between the Advisor and Dmarcian in January 2016, according to Groeneweg. The document further states that the problem referred to in the email can be resolved by granting a perpetual licence by Advisor to Dmarcian in exchange for certain share transfers.

2.9. T Draegen responded to Groeneweg's proposals on 4 December 2019. In it, he writes, among other things:

"*I agree we'll need a licensing agreement to be put into place. Without going into details over email, it makes sense to reject the perpetual and exclusive license that Europe BV has enjoyed (. ..) The proposed solution (. ..) isn't something I can support(...)".*

On 6 December 2019, T Draegen addressed a number of *"rather unpleasant surprises"* from the document in an email to Groeneweg, among others. He remarked: *"The initial terms described around 22 January 2016 are either wrong or inaccurate",* after which he gave his view on what was agreed in 2016. The conclusion of his email states that the errors in Groeneweg's document *"have raised serious red flags"* and that the document *"issues that cannot be ignored"* originated.

2.10. On 6 December 2019, Dmarcian blocked Advisor's access to the communal systems. This block was lifted after 48 hours.

2.11. By email of 3 July 2020, T Draegen requested to convene a shareholders' meeting of Advisor, with the agenda including the proposal to dismiss TDX as director and to appoint another company to be designated by T Draegen as director.

2.12. The shareholders meeting of Advisor was scheduled for 13 August 2020. TDX subsequently initiated an inquiry procedure against Advisor at the Enterprise Division of the Amsterdam Court of Appeal, after which the shareholders' meeting was no longer held. T Draegen joined the OR procedure as an interested party.

2.13. By order of 7 September 2020, the Enterprise Divisionordered an investigation into the policy and course of affairs of the Advisor for the period from 1 January 2016 to 20 August 2020. To this end, it considered:

••*(. ..)*

3.4 *The Enterprise Division considers the following. The controversy over intellectual property rights to the software (applications) developed by Dmarcian Europe (and Dmarcian Bulgaria) is at the heart of the dispute between the parties. (...) The Enterprise Division argues first of all that only the ordinary civil court has jurisdiction for the legal assessment of that dispute. However, the Enterprise Division can state that this dispute is disruptive for the company of Dmarcian Europe; the development and sale of software is its core business and the collaboration with Dmarcian Inc. is a necessary prerequisite for this. Nevertheless, this collaboration has not been implemented*

in general, nor with regard to the intellectual property rights to software (applications) developed and to be developed and (the scope of) the licences granted/to be granted in connection therewith, in particular, sufficiently regulated by the parties. There are no unambiguously defined agreements on this subject, with the result that collaboration has been jeopardised by the current discussion on this subject, which constitutes a serious obstacle to the management of Dmarcian Europe. In the opinion of the Enterprise Division, the existence of the aforementioned situation provides sufficient legitimate reasons to doubt the correct policy and course of affairs of Dmarcian Europe. As requested by both TDX and Draegen, the Enterprise Division will order an investigation into the policy and course of affairs of Dmarcian Europe from 1 January 2016 until 20 August 2020.

(...)"

2.14. By order of 10 September 2020, the Enterprise Division appointed HJM Harmeling, LLM (hereinafter: Harmeling) as director of Advisor and Y Borrius, LLM, as manager of all shares minus one per shareholder.

2.15. On 14 September 2020, Dmarcian again blocked Advisor's access to its systems. After a few days, access to the most essential systems was restored.

2.16. In a letter dated 22 January 2021, Dmarcian informed Advisor that it wishes to terminate the collaboration with effect from 1 February 2021 and that it will no longer grant Advisor access to its systems from that date, unless Advisor transfers its copyright to the new software to Dmarcian in exchange for a licence under which it transfers 80% of its income from the sale of the software to Dmarcian.

2.17. On 22 January 2021, Dmarcian again blocked Advisor's access to its systems. Since then, Advisor no longer has (direct) access to the data of the vast majority of its customers.

2.18. In a letter dated 22 January 2021 to TDX, T Draegen invoked Article 4 of the exit agreement agreed between them. In that letter, T Draegen makes an offer to acquire the shares of TDX in Advisor at the price of €445,956.30. T Draegen states as a resolutive condition that Advisor agrees to the requirements of Dmarcian included in the letter as described in 2.16.
In a reply letter dated 19 March 2021, TDX informed T Draegen that it did not accept his offer and that TDX was therefore, pursuant to Article 4 of the exit agreement, deemed to acquire the shares of T Draegen in Advisor at the price of €446,134.72. In the letter, T Draegen is requested to transfer the shares to TDX within one month. On 8 September 2021, T Draegen transferred the shares in Advisor to TDX, paying the aforementioned price. Since then, TDX has again been the sole shareholder of Advisor.

2.19. On 27 January 2021, Harmeling requested the Enterprise Division to appoint an investigator to start the investigation into the policy pursued by Advisor between 1 January 2016 and 20 August 2020. The Enterprise Division appointed mr HW Wefers Bettink (hereinafter: Wefers Bettink) investigator.

2.20. On 29 January 2021, Advisor summoned Dmarcian and T Draegen to appear before the preliminary relief judge of this court on 1 February 2021. On the latter day, the case was dealt with, after which a default judgment was passed on the same day. As a measure of order, Dmarcian is required, during the investigation ordered by the Enterprise Division, to comply with the agreement between the parties and is prohibited from terminating the agreement during that period.
Dmarcian is also required to lift the blocking of (the employees of) Advisor to the SaaS platform. T Draegen is ordered to refrain from any action that impedes the business operations of Advisor, pending clarity about the content and scope of the licence agreement between Advisor and Dmarcian and the ownership of IP rights to the software. The default judgment was corrected on 2 February 2021.

2.21. On 9 February 2021, T Draegen resigned as CEO of Dmarcian and S Draegen was appointed as CEO.

2.22. Harmeling has repeatedly asked Dmarcian to lift the block. Dmarcian has not complied with these demands. Advisor then placed the files (including the jointly developed software) required to continue running its business on a separate 'instance'. This instance went live on 8 March 2021.

2.23. On 6 April 2021, T Draegen and Dmarcian appealed against the default judgment of 1 February 2021. By judgment in opposition of 31 May 2021, Dmarcian is ordered to lift the blocking of Advisor (its employees) on the SaaS platform, on the condition that Advisor pays 20% of the income from the sale of the Software to Dmarcian on a monthly basis from 1 June 2021. Otherwise, the default judgment of 1 February 2021 has been ratified.
On 28 June 2021, Dmarcian lodged an appeal against the opposition decision. Advisor, in turn, filed an interlocutory appeal against (among other things) the judgment of the preliminary relief judge that it must pay a percentage of its income in exchange for fulfilling the agreement and that it could not yet be determined that there was exclusivity. The oral hearing on the appeal is scheduled for 15 September 2022.

2.24. At any time after 1 February 2021, Messrs AA Fernandes (hereinafter: Fernandes) and BP van der Laan (hereinafter: Van der Laan) started serving European customers for Dmarcian. At that time, those customers were no longer redirected to Advisor via the website.

2.25. By judgment of 23 April 2021 (which was supplemented with grounds on 7 May 2021) of the District Court of North Holland, the preliminary relief judges Femandes and Van der Laan, in short, ordered that their activities in the Territory be discontinued, that they not make use of quotations and other business documentation, the design of which is derived from Advisor, that users in the Territory be referred to Advisor and that they declare all users in the Territory with whom they have had contact since 22 January 2021.
Fernandes and Van der Laan appealed against that judgment. The oral hearing is scheduled for 12 October 2022.

2.26. On 30 April 2021, the lawyer of Fernandes and Van der Laan informed the lawyer of Advisor that his clients were immediately denied access to Dmarcian's IT systems, and thus to commercial information, on 23 April 2021. At the bottom of the email message are the names of l l companies and public authorities in the Netherlands and abroad.Fernandes and Van der Laan claim to be able to remember that they
were in contact with these companies from 22 January 2021 with regard to the use of Dmarcian software.

2.27. On 11 October 2021 the Advisor brought proceedings on the merits against Dmarcian and T Draegen. In this, Advisor requests:

l. to declare that:
   a. the agreement of 2016 means, among other things, that Dmarcian has granted Advisor the perpetual, exclusive right to distribute the Software in the Territory without Advisor owing Dmarcian any further compensation for this;
   b. Dmarcian is obliged to transfer the credit card payments from customers from the Territory that Dmarcian has processed from 2016 to Advisor and to render account in this regard;
   c. the termination of the agreement by Dmarcian has taken place without a legal basis and therefore has no effect;
   d. Dmarcian attributably fails to fulfil its obligations under the agreement towards Advisor or acts unlawfully by acquiring customers in the Territory since 22 January 2021 or by inducing existing customers of Advisor to enter into an agreement with Dmarcian, and that Dmarcian and T Draegen are jointly and severally liable for the damage Advisor has suffered and still suffers as a result;
   e. to qualify Dmarcian's three blocks of Advisor's access to the joint computer systems as a failure or that they are unlawful vis-à-vis Advisor, and that Dmarcian and T Draegen are jointly and severally liable for the damage Advisor has suffered and still suffers as a result;
2. to declare that:
   a. Advisor has sole copyright in the computer programs and parts of the software code of the Dmarcian software version 2.0 mentioned in the summons;
   b. Advisor and Dmarcian jointly have copyright to the parts of the software code of the Dmarcian software version 2.0 mentioned in the summons;
3. to declare that:
   a. for failing to comply with the judgments of the preliminary relief judge of 1 February and 31 May 2021 Dmarcian has forfeited penalty payments in the amount of €1,000,000;
   b. due to non-compliance with the judgments of the preliminary relief judge of 1 February and 31 May 2021, T Draegen forfeited penalty payments in the amount of €1,000,000;
4. order Dmarcian and T. Draegen to inform Advisor of the damage that Advisor has suffered and will still suffer as a result of the conduct of Dmarcian and T Draegen as referred to under l.;
5. To order Dmarcian to account for all credit card payments received by it from customers in the Territory from 2016 onwards, subject to a penalty payment;

6. with effect from the date of the judgment pursuant to Article 3:178 of the Dutch Civil Code, to divide the community of Dmarcian and Advisor in respect of computer programs on which they have joint copyright to distribute, so that each of the parties has the full copyright to reproduce and publish these computer programs at its own discretion in all countries of the world;
7. order Dmarcian to pay the costs of the proceedings, half of which are full costs pursuant to Article 1019h of the Dutch Code of Civil Procedures.

In those proceedings, Dmarcian submitted an interlocutory plea of lack of competence and inadmissibility, including a request for arrest in the alternative. The proceedings on the merits is scheduled for 13 September 2022 for oral proceedings in the incident.

2.28. In March 2021, Dmarcian brought proceedings against Advisor before The United States District Court for the Western District of North Carolina Asheville Division (hereinafter: the USDC), including for alleged infringement of Dmarcian's IP rights. In that case (with case number 1:21-cv-00067-MR), several decisions were taken, including the following:

By 'Order and Preliminary Injunction' of 26 May 2021 (doc. 39), the USDC stated Advisor is:

1. prohibited from providing services to customers outside the Territory;
2. to refer these customers to Dmarcian;
3. prohibited to make changes to 'the copyrighted software';
4. prohibited from using the 'Dmarcian' brand, unless the disclaimer specified in the 'Order' is included;
5. prohibited from displaying the trade name 'Dmarcian' on the Advisor website, unless the disclaimer specified in the 'Order' is included;
6. prohibited from switching from Dmarcian to Advisor or to induce customers to change the payment method used;
7. prohibited from speaking out in public about Dmarcian;

and also stipulated that Advisor must provide (sealed) documents relating to its income, expenses and net income to the USDC from the date of the Order.

- By 'Order' of 11 August 2021 (doc. 80), the USDC stated that Advisor is held in civil contempt of the Court's Preliminary Injunction (doc. 39) and:
  1. as of 29 May 2021, forfeits a fine of $5,000 for each day that Advisor uses the domain names of Dmarcian;
  2. must provide a copy of the 'Order' to the judicial authority in any proceedings between the parties in the Netherlands.
- By 'Order' of 11 August 2021 (doc. 81), the USDC amended the Order of 26 May 2021 under 6. in the sense that Advisor is prohibited from inducing customers to change the recipient of their payment from Dmarcian to Advisor and, in so far as the current service provider (Dmarcian or Advisor) of the customer is other than the recipient of the payment for that customer, the party providing services to the customer (Dmarcian or Advisor) is prohibited from unilaterally terminating or otherwise changing it without the express consent of the USDC.
- By 'Memorandum of Decision and Order' of 9 June 2022 (doc. 124), the USDC has determined that Advisor:
  ' l. must pay Dmarcian an amount of $27,712.21 in legal fees;

2. must pay Dmarcian an amount of $335,000 ‘as a sanction for its contemptuous conduct as found in the Court’s August 11, 2021 Order'.

- By 'Order' of 9 June 2022 (doc. 125), the USDC ruled that Advisor had not complied with the order of 26 May 2021 (doc. 39) with regard to the submission of documents and it has determined that Advisor must disclose the identity of all customers who have made payments to Advisor and the income generated from them from 26 May 2021.

2.29. In the meantime, Wefers Bettink has completed the investigation into the policy and course of affairs within Advisor and has submitted his findings in an investigation report. During his research, he was assisted by Mr C Barbiers, an IT expert.

3. The dispute in the incident

3.1. Dmarcian et al. claim in the incident that the preliminary relief judge declares that he is not authorised to take cognisance of the claims in the main action. To that end, they argue that the Dutch court has no jurisdiction to rule on the claims against Dmarcian et al.

3.2. Advisor defends.

3.3. The assertions of the parties will be discussed in more detail below, in so far as relevant.

4. The dispute in the main proceedings

4.1. Advisor requests by judgment, as far as possible immediately enforceable:

1. within 24 hours after the judgment to be rendered in this matter has been sent to it, to prohibit Dmarcian from:

   i. offering and/or licencing and/or causing to be licensed the Software, whether or not as SaaS, to natural persons and/or legal entities in Europe, Africa and/or Russia;
   ii. appointing and/or maintaining natural and/or legal persons for the purpose of acquiring, extending or renewing customers for its software in Europe, Africa and/or Russia;
   iii. making changes to the Software, with the exception of the adjustments necessary to comply with other provisions on the basis of the judgment to be rendered in this case, as well as demonstrable error recovery;
   iv. directing, encouraging or permitting natural and /or legal persons in Europe, Africa and /or Russia to change their counterparty and/or recipient of payment from Advisor to Dmarcian or its group companies, or terminate their contract with Advisor;
   v. modifying or terminating the services of natural and/or legal persons in Europe, Africa and Russia who have a contract with Advisor but still use Dmarcian's SaaS platforms without prior written instruction from Advisor;

vi. making false or defamatory statements about Advisor, its software and its services to third parties;

2. Ordering Dmarcian within five calendar days after the judgment to be rendered in this matter has been sent to it:

i. to block access to its websites and webpages of its SaaS platforms (including but not limited to registration pages such as https://eu.Dmarcian.com/accounts/register) for visitors with IP addresses from Europe, Africa or Russia, and to publish the following clearly legible text on the relevant webpages, without additions, or for the Court to determine a text:

"it looks like you are visiting this website from Europe, Africa or Russia. Please note that Dmarcian, Inc. is not allowed to provide any DMARC related services in Europe, Russia and Africa.
For services in these regions, please contact DMARC Advisor at https//:dmarcadvisor.com"

ii. to remove and keep removed the SaaS platform made available to Cisco customers in Europe, Africa and/or Russia;

iii. send its existing distributors and/or agents and/or representatives a letter for the purpose of acquiring or supplying the Software to customers in Europe, Africa and/or Russia on Dmarcian letterhead with the following content in the font Arial, pitch l 0, line spacing 1.5, without further additions, or for the Court to determine a text:

"In its decision of [datum] 2022, the interim relief judge ("voorzieningsrechter") in the District Court of Rotterdam has ordered our company to cease offering and/or licencing the Dmarcian software, whether or not as SaaS and/or through resellers, agents and/or representatives, to companies in Europe, Africa and/or Russia.

Accordingly, you are no longer permitted to engage in any further activities with respect to the Dmarcian software with respect to parties in Europe, Africa and/or Russia, and the licence of customers in Europe, Africa and/or Russia which they obtained from or through you will lapse. The interim relief judge has ordered us to block the access of such parties in Europe, Africa and/or Russia to the Dmarcian platform no later than five days after the aforementioned court decision. DMARC Advisor (https//:dmarcadvisor.com) is prepared to take over existing licences. Please inform said customers accordingly in writing.
Sincerely
Shannon Draegen, CEO"

with the simultaneous sending of copies of these letters as a PDF to the Advisor's counsel at the email address alfred.meijboom@kvdl.com;

iv. to notify the Advisor's counsel at the email address alfred.meijboom 'û 'l-., dl.com of the names, addresses and contact details of all natural or legal persons from Europe, Africa and Russia with whom Dmarcian, its resellers, agents and/or representatives have been in contact since 22 January 2021 with regard to the use of the Software, including the purchase, renewal and updating of the Software, with simultaneous submission of relevant copies of correspondence, quotations, invoices and licence agreements;

3. to order Dmarcian to fully comply with the agreement with Advisor (including the

exclusivity agreed in that regard);

4. to order Dmarcian to pay a periodic penalty payment of €50,000 per day that it does not, or does not fully, comply with one or more of the prohibitions and provisions of the claims under l. (i.) to vii., 2. (i.) to iv. and under 3.;

5. within 24 hours after the judgment to be rendered in this matter has been sent to her, to order S. Draegen:

    1. to ensure that Dmarcian complies with the judgments passed in this matter under forfeiture of a penalty of €50,000 per day that Dmarcian does not comply with the aforementioned judgments; and
    ii. to refrain from directly or indirectly making untrue or defamatory communications to third parties about Advisor, its software and its services, under forfeiture of a penalty of €50,000 per violation;

6. to order Dmarcian to pay the costs of the proceedings and the subsequent costs, all costs to be increased by statutory interest from the date of the judgment until the day of full payment.

4.2. Dmarcian et al. defends.

4.3. The assertions of the parties will be discussed in more detail below, in so far as relevant.

5. The assessment in the incident

5.1. With regard to the claims against Dmarcian, Advisor states that the Dutch court has jurisdiction on the basis of Article 6a of the Dutch Code of Civil Proceedings. There is a distribution agreement between the parties, where Advisor is responsible for the sale of the Software and the provision of associated services to customers in the Territory, being Europe, Africa and Russia. Advisor provides these services mainly in the Netherlands, from where its employees undertake activities to offer and distribute the Software to customers and where a significant proportion of its (international) customers are located. In so far as the place of performance cannot be determined, the court of the place of residence of the service provider (Advisor) shall have jurisdiction.
In addition, there is jurisdiction pursuant to Article 6 (a) of the Dutch Code of Civil Proceedings. The claims are based on a distribution agreement, the place of performance of which is the Netherlands. In addition, the reverse of the right granted to Advisor is the obligation for Dmarcian to refrain from distributing the software in the Territory.
In addition, the preliminary relief judge has jurisdiction on the basis of Article 6 (e) of the Dutch Code of Civil Proceedings. The claims under 1. under iv. and vi. are based on an unlawful act on the part of Dmarcian. The damaging fact occurs (partly) in the Netherlands.
Article 6 (e) of the Dutch Code of Civil Proceedings also applies in so far as the claims are directed at S. Draegen. The claims are based on unlawful obligations and the damage has occurred or may occur in the Netherlands (the place where the damage occurred), according to Advisor. This also means that jurisdiction also exists pursuant to Article 7 of the Dutch Code of Civil Proceedings.

5.2. Dmarcian et al. are of the opinion that the preliminary relief judge is not authorised to take cognisance of this dispute.
This case does not constitute a distribution agreement or an agreement for the provision of services within the meaning of Article 6a preamble and under b of the Dutch Code of Civil Proceedings. The legal relationship between the parties has the character of a sui generis cooperation, whereby Advisor has obtained the right to use the Dmarcian platform, in the form of a licence, to subsequently serve Dmarcian's customers. The activities of Advisor cannot be regarded as a service within the meaning of Article 6a preamble and under b of the Dutch Code of Civil Proceedings. Advisor also does not pay any monetary compensation for the services provided. Moreover, Article 6a, preamble and point (b) shall not apply because, irrespective of whether the activities qualify as services, no place of performance of those services is specified in the contract. Furthermore, the place of performance is located in the United States (US). The agreement is actually being performed there, since Dmarcian actually manages access to its systems there. Article 6a of the DCCP therefore does not apply.
Article 6 (a) DCCP does not confer jurisdiction because the obligations underlying the contractual legal relationship, and the claims based on that relationship, are not or must not be executed in the Netherlands but in the USA. In so far as the latter may be judged differently, the place of performance cannot be determined unequivocally and must be reverted to the defendant's place of residence. That rule also applies to claim under 1. (iii). Article 26 of the Copyright Act, which forms the basis for that claim, does not contain any special provision on jurisdiction.
The legal basis for the unlawful act on which Advisor bases its claims under 1. (iv.) and (vi.) is only intended to create alternative jurisdiction artificially. In fact, these claims arise from an agreement and, more specifically, the alleged

agreed exclusivity. When that exclusivity is omitted, Dmarcian's conduct clearly does not qualify as unlawful towards Advisor but as competitive. Furthermore, the place of performance is located in the USA, since Dmarcian is established in the USA and carries out its business activities from there. Dmarcian has failed to substantiate that the place where the damage occurred is located in the Netherlands.
The claims against S Draegen have no independent meaning in addition to the claims against Dmarcian. If Dmarcian complies with the assigned claims, no additional order against S Draegen shall be required. Advisor therefore has no interest in this part of its claims, according to Dmarcian et al.

5.3. The preliminary relief judge holds the following. Article 6a of the Dutch Code of Civil Proceedings provides further rules onthe application of Article 6 (a) of the Dutch Code of Civil Proceedings with regard to the 'place of performance of the obligation on which the claim or request is based' referred to therein. Article 6a of the Dutch Code of Civil Proceedings stipulates that for agreements for the provision of services, the place of performance is deemed to be in the Netherlands if the services were provided or should have been provided in the Netherlands according to the agreement.

5.4. In the dispute, the answer to the question whether there is an agreement between the parties for the provision of services and, if so, whether the provision of those services must take place in the Netherlands. It follows from European case law that, for the determination of jurisdiction, the concept of 'services' at least means that the party providing the services performs a certain activity for remuneration and that an exclusive or quasi-exclusive distribution agreement in principle falls under the concept of 'agreement to provide services' (CJEU 8 March 2018, ECLl:EU:C:2018:173, *Saey Home & Garden NV I* Lusavouga-Máquinas*e Acessórios Jndustriais SA,* point 38 to 41).

5.5. To substantiate its assertions with regard to the classification of the agreement between the parties and the rights and obligations arising therefrom, Advisor relies heavily on the investigation report drawn up by Wefers Bettink in the context of the inquiry procedure. Dmarcian et al. argue that this investigation report cannot be relied upon against them as evidence. Dmarcian is not a party to the inquiry procedure and to the report, which was drawn up without its cooperation and is more like a party declaration within the meaning of Article 164 (2) of the Dutch Code of Civil Proceedings. This position of Dmarcian is not accepted. The Investigator has been appointed by the Enterprise Division as an independent and impartial person to conduct an investigation into the policy and course of affairs at Advisor and is bound by the Guidelines for Researchers in Inquiry Procedures (hereinafter: the Guidelines). It has neither been established nor proved that Wefers Bettink acted in violation of the provisions of the Guidelines. The fact that Dmarcian is not formally a party to the inquiry procedure does not alter the fact that the investigator has recognised the dispute between the parties regarding the content of their collaboration and the IP rights to the software and has included these points in the investigation. During that investigation, the investigator conducted interviews with T Draegen (who was director of Dmarcian during the investigation period from 1 January 2016 to 20 August 2020) and another Dmarcian employee, among others. The draft of the investigation report was also submitted to T Draegen to enable him to correct factual inaccuracies. This response is also reflected in the report (see marginal 5.3. of the investigation report). In view of this, Dmarcian cannot reasonably maintain that the investigation was carried out without its knowledge. In addition, it is a detailed study that has taken months, in which the

investigator is assisted by an IT expert. This means that the preliminary relief judge also takes into account the findings from the investigation report in the assessment.

5.6. It has been established that the parties agreed on a (further) collaboration at the beginning of 2016. These agreements are not laid down in a written agreement. Although the parties disagree on essential points about the content and purpose of the collaboration, it is not in dispute that Dmarcian granted a licence to (the legal predecessor of) Advisor in January 2016 to use its software, the name 'Dmarcian' and the Dmarcian platform with the aim of selling subscriptions to the Software and additional services of Dmarcian in Europe, Africa and Russia and to provide those customers with service and support after the sale (see marginal numbers 3.33 to 3.41 of the statement of defence). From this, the preliminary relief judge concludes that the sale of the product of Dmarcian, being a subscription to the Software and the associated services, is the characteristic performance of Advisor. The licence right granted to Advisor to use the Dmarcian platform and the associated services is in support of that performance and subordinate thereto.
This fulfils the requirement of 'activity'. The remuneration to Advisor for the performance of the agreed activities consists of the income of customers from the Territory who subscribe to the Software. Advisor concludes an agreement in its own name with those customers and invoices those customers. In addition, Dmarcian and Advisor discussed a transfer by TDX of 50.0% of the shares in Advisor to Dmarcian. In doing so, Dmarcian would benefit from Advisor's profits from the sale of the subscriptions. This can be regarded as a licence fee paid by Advisor to Dmarcian for the use of Dmarcian's Software and platform. The fact that those shares were ultimately delivered toT Draegen (at that time still the CEO of Dmarcian) instead of Dmarcian had a strategic reason and does not detract from the intention of Dmarcian and Advisor to further consolidate their collaboration. On the basis of all this, it is sufficiently plausible that the agreement between the parties can be qualified as a distribution agreement.

5.7. For the question of whether the parties have agreed exclusivity in the context of the distribution agreement, it is important what they discussed, how they implemented it and what they could expect from each other based on this.

From the correspondence between the parties, in particular that between Groeneweg (on behalf of Advisor) and T Draegen (on behalf of Dmarcian), it can be concluded that Groeneweg quotes several times that the parties have agreed on exclusivity and that T Draegen does not object or question this. He even seems to implicitly acknowledge the alleged exclusivity.
In an email dated 7 December 2016 to T Draegen from Groeneweg, he expressed his wish to formalise the agreements and gave an overview of the agreements that had been made in his view. That overview states, among other things: *"4 Dmarcian Europe is responsible for all customers located in Russia, EU or Africa".* In his response of 8 December 2016, T Draegen states that points 2 to 6 (including point 4) put forward by Groeneweg *"should all be part of an operating agreement".*
In a Slack message of 11 June 2019, Groeneweg shows T Draegen a screenshot from a document he calls *"our EU Agreement"*. The document is an overview of the agreements made by the parties in 2016, according to Groeneweg. This overview

states: *"a. Perpetual and exclusive free license for SaaS Software from Dmarcian inc. to Mailmerk B.V."* and "c. *Mailmerk B.V. becomes Dmarcian Europe B.V. exclusively handling all Dmarcian customersjrom Russia, Europe and Africa".* T Draegen also raised no objections.
On 4 December 2019, in a first response to a message from Groeneweg about a problem with the IP rights of Advisor and a proposal for a solution, T Draegen informed Groeneweg: *"(...) I agree that we'll need a licensing agreement to be put in place. Without going into details about email, it makes sense to reflect the perpetual and exclusive license that Europe BV has enjoyed (...)"*

From January 2016, customers who signed up for the Dmarcian website and who came from the Territory were invariably forwarded by Dmarcian to Advisor, after which those customers concluded an agreement with Advisor for a subscription to the Software.
Only customers in Europe who Dmarcian served before 2016 and customers paying by credit card at the time of subscribing were excluded. In any case, that situation continued until January 2021, when Dmarcian unilaterally terminated the agreement. During this period, Dmarcian did not grant any other company such a (sales) licence.

The correspondence between the parties and the actual execution that the parties have given to the agreement indicate that there is a (largely) exclusive distribution agreement and thus an agreement for the provision of services within the meaning of Article 6a of the Dutch Code of Civil Proceedings.

5.8. Next, it must be assessed whether the services were provided or were to be provided in the Netherlands under the agreement. In the Saey Home & Garden judgment (point 44 and 45), it was held that, where there is more than one place of performance of the agreed services (as at issue here), jurisdiction lies with the courts of the Member State of the place where the services are mainly provided, as evidenced by the provisions of the contract and, in the absence of such provisions, by the actual performance of the contract and, where the place cannot be determined on that basis, the place of residence of the service provider.
There is no agreement between the parties on the place of performance of the services, as Dmarcian also states. It is sufficiently clear that Advisor performed its services mainly from its office in the Netherlands.

5.9. The claims of Advisor against Dmarcian relate to obligations arising from the distribution agreement between the parties. It follows from the above that the preliminary relief judge is authorised to take cognisance of those claims on the basis of Article 6a preamble and under b of the Dutch Code of Civil Proceedings.

The claim under l .iii. is based on the common copyright as referred to in Article 26 of the Copyright Act. This alleged copyright infringement is a form of unlawful act. In the alternative, Advisor also invokes tort for the other claims. In that case, the preliminary relief judge has jurisdiction pursuant to Article 6(e) of the Dutch Code of Civil Procedures. Dmarcian has now appointed Cisco as its distributor for its software. Cisco is based in Amsterdam, which means that the damaging fact is, in at least some part, taking place in the Netherlands. In addition, it is plausible that the place where Advisor's damage occurred is located in the Netherlands.

5.10. Advisor bases its claims against S Draegen on an unlawful act. Assuming this and because it is plausible that the place of success is located in the Netherlands, the preliminary relief judge has jurisdiction on the basis of Article 6 (e) of the Dutch Code of Civil Procedure. Whether S Draegen acted unlawfully vis-à-vis Advisor and whether Advisor has an interest in the claims brought against it are substantive issues that are addressed in the main proceedings.

5.11. The preliminary relief judge is therefore authorised to take cognisance of all claims of Advisor. The interlocutory claim of Dmarcian et al. is dismissed.

6. The assessment in the main proceedings

Article 256 of the Dutch Code of Civil Proceedings

6.1. Dmarcian's appeal to Article 256 of the Dutch Code of Civil Proceedings is dismissed. The facts are sufficiently clear to be able to make a decision on that basis. In addition, the consequences of the provisions to be made are sufficiently clear. In view of the ongoing proceedings on the merits in the USA and in the Netherlands, these provisions also (again) have the character of an order measure.

Applicable Law

6.2. Advisor takes the position that Dutch law applies to the distribution agreement on the basis of Article 4 (1) preamble and under f Rome I (no. 593/2008) in conjunction with Article 10:154 of the Dutch Civil Code, being the country where it has its habitual residence as a distributor.

6.3. Dmarcian et al. believe that American law should be applied to the legal relationship between Advisor and Dmarcian. Advisor has agreed to the Mutual Nondisclosure Agreement drawn up by Dmarcian (hereinafter: MNDA), which includes American law as choice of law. Alternatively, the parties have tacitly chosen American law through the application and use of the Proprietary Information and Inventions Agreement (hereinafter: the PIIA). In the further alternative, Dmarcian invokes Article 4 (2) and (4) Rome 1 respectively.

6.4. It can be established that Dmarcian sent an MNDA to Advisor by email of 7 December 2016. It stipulates that and in what way the parties shall maintain confidentiality towards each other with regard to all confidential information that they will provide to each other. Article 12 provides that the provisions of the MNDA shall be governed by the law of the State of California. The question of whether the MNDA has been agreed between the parties - according to Dmarcian it has, but according to the Advisor it has not - can remain unanswered. The preliminary relief judge finds that Article 12 also provides that the choice of law as formulated in the MNDA is limited to the operation of the conditions in the MNDA. Contrary to general provisions on confidentiality, the MNDA does not contain any references to the (manner of) collaboration between the parties. In so far as the MNDA would already apply between the parties, it has proved insufficient that the parties intended to extend the choice of law stated therein to disputes about the collaboration in

general. Since this is not a dispute with regard to the MNDA, the choice of law stated therein is irrelevant.

6.5. Dmarcian also sent the PIIA to Advisor at the same time as the MNDA. It follows from the introductory text of the email and the content of the PIIA that the PIIA had to be signed by individuals working for Advisor who were involved in the collaboration with Dmarcian. This document was therefore not intended to be signed by Advisor. For that reason alone, the PIIA cannot bind Advisor.

6.6. The further and deeply subsidiary positions of Dmarcian et al. are also overlooked. As already considered in the incident and contrary to the opinion of Dmarcian et al., it is assumed that a distribution agreement has been concluded between the parties. Pursuant to Article 4 (1) preamble and under f Rome I, the distribution agreement is governed by the law of the country where the distributor has its habitual residence, being the Netherlands. Consequently, Article 4 (2) and (4) Rome I do not apply.

6.7. The foregoing means that Dutch law applies to the claims in so far as they are filed under the distribution agreement and against Dmarcian. In so far as the claims are based on tort, Dutch law applies pursuant to Article 4 paragraph I Rome II (no. 864/2007), since it is sufficiently plausible that the alleged damage of Advisor occurs in the Netherlands.

6.8. With regard to the claims against S Draegen, which are based on tort, Dutch law also applies pursuant to Article 4 (1) Rome II.

Performance of the distribution agreement (claim 3.)

6.9. Advisor primarily takes the view that it has concluded a perpetual distribution agreement with Dmarcian that has not been legally terminated by Dmarcian, which means that agreement still continues.
Dmarcian et al. dispute that a perpetual agreement has been agreed. The agreement has, with the termination by Dmarcian, legally ended on 1 February 2021.

6.10. As already considered in 5.6. and 5.7., the preliminary relief judge assumes that the agreements made in 2016 between Dmarcian and Advisor entailed that Dmarcian grants a (largely) exclusive licence to Advisor to sell (subscriptions to) the Software in the Territory and that TDX, as remuneration for this licence and sale right, delivers 50.01% of the shares in Advisor to Dmarcian or T Draegen. TDX (as director and shareholder of Advisor) and T Draegen (as director of Dmarcian at the time) were closely involved in the implementation of the agreements made.

The preliminary relief judge is of the opinion that this does not constitute a non-cancellable agreement, as Advisor argues. TDX and T Draegen entered into an exit agreement upon the transfer of the shares in Advisor by TDX to T Draegen. This suggests that Dmarcian and Advisor considered an end to their collaboration possible. In fact, they have both made use of Article 4 of the exit agreement to take over the shares of the other. In that context

it is plausible that Dmarcian and Advisor, where the communication between them refers to a 'perpetual agreement', meant nothing more than the conclusion of an agreement for an indefinite period of time, without a termination arrangement being provided for. In that case, it follows from the case-law that, pursuant to Article 6:248 (1) of the Dutch Civil Code, the requirements of reasonableness and fairness in connection with the nature and content of the agreement and the circumstances of the case can only mean that termination is only possible if there is a sufficiently compelling reason for this or that a certain notice period must be observed or that the termination must be accompanied by the offer to pay compensation (for damage or otherwise) (Supreme Court 2 February 2018, ECLI:NL: HR:2018:141, *Goglio I* SMQGroup*).*
T Draegen transferred all of his shares in Advisor to TDX on 8 September 2021, which has been the sole shareholder of Advisor since then. As a result, a crucial part of the agreement - the fee to T Draegen or Dmarcian for obtaining the licence and sales right by Advisor - has been eliminated. This means that compliance with the agreement, as it was once concluded, is not possible. Advisor cannot reasonably require Dmarcian to allow it to sell (among other things) Dmarcian's product and furthermore to use the Software and the Dmarcian platform without compensation. In any case, it does not appear anywhere that Advisor believes that and what compensation it owes to Dmarcian. In addition, the USDC's 'Orders' stand in the way of unchanged compliance with the agreements that were once made. In addition, further collaboration would not be logical, given the severely disrupted relationship. It cannot be ruled out that in the proceedings on the merits it is decided that the distribution agreement has since been terminated (18 months after the termination). It must be decided whether Dmarcian should have observed a notice period in the event of termination,
and of what duration, and whether Dmarcian, by not doing so, owes compensation to Advisor. The claim to order Dmarcian to comply fully with the distribution agreement is therefore rejected.

Prohibitions (claim 1.)

6.11. It also follows from the foregoing that Advisor cannot base its claims under 1. on default. Alternatively, Advisor based its claims on an unlawful act within the meaning of Article 6:162 of the Dutch Civil Code. To this end, it argues that Dmarcian (1) approached Advisor's customers in the Territory, who may or may not have been entitled to an extension, in order to persuade them to become Dmarcian's customers, (2) sent invoices to Advisor's customers without Dmarcian having a valid agreement with those customers, (3) concluded a worldwide distribution agreement with Cisco, which now offers the Software to users in the Territory, and (4) established a European entity in Ireland (dmarcian Limited) with the apparent aim of distributing the Software on the European market.

6.12. The preliminary relief judge assumes that the Dmarcian is in principle free to compete with Advisor after the end of the distribution agreement. Nevertheless, the distribution agreement may have a certain post-contractual effect. Additional circumstances may lead to Dmarcian's actions being deemed unlawful, because they are contrary to generally accepted due diligence. In line with the judgment of the Supreme Court of 9 December 1955 (NJ 1956, 157, *Boogaard/Vesta)* , unlawful competition in principle only exists if three requirements are met, namely a)

systematically and substantially dismantling b) Advisor's sustainable flow of business, which Dmarcian helped to build in the context of the collaboration c) with the tools that Dmarcian was given confidential access to by Advisor for this purpose.

6.13. Advisor's assertion that Dmarcian (through partners or itself) actively approaches Advisor's existing customers by email with the objective of taking over the contract with those customers has been sufficiently substantiated by Advisor (see its exhibits 21, 31 to 45 and 47 to 53). Dmarcian has not disputed that in so many words. Dmarcian's defence that it only wanted to inform customers about the expiry of the subscription and that it wanted to prevent customers from being left without email security is incompatible with the text of the messages. The wording clearly shows the purpose of these emails, namely to persuade the customer to switch to Dmarcian. Dmarcian retrieves the data of these customers from its system and is visible to it because Advisor has entered that data into the system and keeps it up-to-date within the framework of the distribution agreement. This makes it sufficiently plausible that Dmarcian systematically and substantially impairs Advisor's sustainable flow of business with the help of knowledge about those customers it has received from Advisor. This practice is considered to be unlawful. The fact that Dmarcian itself has had more of a hand (than Advisor) in compliance no longer being possible plays a role here. Reference is made to the various blocks that it has caused for Advisor and the fact that it has not complied with the judgment of 31 May 2021, in which it was ordered, among other things, to comply with the distribution agreement during the investigation ordered by the Enterprise Division.
The above leads to the opinion that Dmarcian should refrain from approaching and actively recruiting customers that Advisor had and still has on 1 June 2021, including through subcontractors. The claim under i. is granted in the sense that Dmarcian is prohibited from offering and/or licencing the Software, whether or not as SaaS, to customers that Advisor had and still has in the Territory on 1 June 2021. A limitation of this prohibition in time in this judgment is not obvious, in view of all ongoing proceedings of which it is not known when and how they will end. This already results in a limitation in time.

6.14. The appointment of (legal) persons for the recruitment of customers in the Territory, such as the engagement of Cisco and the establishment of a branch in Ireland, is not in itself unlawful. In so far as those (legal) persons approach existing clients of Advisor (as referred to in 6.13.), this is unlawful but that unlawfulness is already covered by the partial assignment of claim i. In the case of a separate allocation of the prohibition requested under
ii. Advisor therefore has no interest.

6.15. With regard to the copyrights on all software, it is not in dispute that the parties initially agreed in 2016 that Dmarcian would be responsible for the management and maintenance of the software. However, as of May 2017, this situation has changed significantly because Dmarcian and Advisor have worked together since then and have each contributed to the further development of the software up to version 2.0. The preliminary relief judge attaches importance to the findings in the investigation report, which was after all drawn up with the help of an independent IT expert. In particular, reference is made to marginals 7.15., 7.16. and 7.56. of the investigation report. It states that the developers of BeLean made a (considerable) contribution to the source code of the

core functionality of versions 1.0 and 2.0 and that the developers of Dmarcian Bulgaria, Kalkman and Seller developed a large part of the features associated with the core functionality between September 2018 and 22 January 2021. The report also describes in detail what has been done. It was found that the developers acted largely independently and made their own creative choices when writing the source code for their contributions to the software.
Dmarcian et al. have not sufficiently defended themselves against this. As in the proceedings that led to the judgment of 31 May 2021, they acknowledge (in any case) that 8 of the 43 components of the Software were developed with the help of developers hired by Advisor. Advisor has disputed their unsubstantiated assertion that the development of the software by the hired developers took place on behalf and under the direction of Dmarcian. The preliminary relief judge therefore considers it sufficiently plausible that a common copyright has arisen. This means that the entire exploitation copyright belongs to the authors jointly. Pursuant to Article 26 of the Copyright Act and Article 3:166
ff. of the Dutch Civil Code, its operation in principle requires the consent of all parties involved. The requested prohibition (under iii.) on Dmarcian to make changes to the Software (without the consent of Advisor), with the exception of the adjustments necessary to comply with other provisions based on this judgment as well as demonstrable error recovery, is granted.

6.16. The claimed prohibition under iv. is granted in the sense that Dmarcian is prohibited from encouraging customers who Advisor had and still has in the Territory on 1 June 2021 to terminate the contract with Advisor. Otherwise, the claim under iv. is already decided in the claim to be awarded i.

6.17. The claim under v. is dismissed. Advisor states that there is a real threat that Dmarcian will block access to the platform from a number of Advisor's customers who are still using Dmarcian's platform. The alleged real threat is neither substantiated nor plausible. A large proportion of these customers are customers who pay by credit card. The parties dispute the question to which party these payments are due, but to date these payments have been received by Dmarcian. It is impossible to see why Dmarcian should deny those customers access to its platform.

6.18. The claim under vi. is also rejected. Apart from the fact that the claim is formulated too broadly and therefore insufficiently determinable, it is not possible to see the individual interest of the Advisor in this claim in the context of the (partial) allocation of other claims.

6.19. The prohibitions to be assigned take effect on the day after the day on which this judgment was sent to Dmarcian.

Orders (claim 2.)

6.20. The claim under v. is dismissed. After all, Dmarcian is permitted to recruit new customers within the Territory. There is no basis to block access to its website for visitors from the Territory in general.

6.21. As already considered under 6.14., Dmarcian is permitted to sell to customers in the Territory, with the exception of contacting and serving Advisor's existing customers as referred to under 6.13.,

through another distributor such as Cisco. Claim ii. is therefore not allowable.

6.22. In light of the award of claim l. parts i., iii. and iv. and the rejection of the other claims, there is no reason for sending the requested letter under 2.iii.

6.23. The preliminary relief judge is of the opinion that Advisor has an (urgent) interest in the award of the claim under iv. On the one hand, it can use the information obtained to determine the extent of the damage suffered by it for the purposes of its claim for damages in the main proceedings, and on the other hand, it can determine whether it can take measures to limit its damage in this respect. The claim under iv. is granted in the sense that Dmarcian is offered to notify the Advisor's lawyer of the names, addresses and contact details of the Advisor's customers, with whom Dmarcian, its resellers, agents and/or representatives have had contact since 22 January 2021 with regard to the use of the Software, with simultaneous submission of relevant copies of correspondence, quotations, invoices and licence agreements. In order to comply with the order, Dmarcian is given a longer period than required.

Penalty payment (claim 4.)

6.24. In view of Dmarcian's - previously evident unwilling attitude, there is reason to impose a periodic penalty payment on the aforementioned prohibitions and orders. The preliminary relief judge seeks to reconcile the amount of this, also in the context of a certain balance between the parties, with the 'Order' of the USDC of 11 August 2021 (doc. 80) (see2.28). The amount of this is set at €5,000 per day that Dmarcian does not or does not fully comply with one or more of the prohibitions or orders. Like the penalty payment in the aforementioned 'Order', this penalty payment is not capped.

The claim against S Draegen *(claim 5.)*

6.25. Advisor believes that S Draegen has personally acted with serious culpability towards Advisor. Dmarcian, under the direction of S Draegen and with her knowledge, ignored the judgments of the court, tried to lure away Advisor's customers and told lies

6.26. The preliminary relief judge is of the opinion that there are (presumed to be) insufficient circumstances that demonstrate the personal culpability of S Draegen. Not all of the circumstances posed by Advisor regarding Dmarcian's conduct have become plausible. Although it has been held that Dmarcian has acted unlawfully towards Advisor in certain respects, this does not necessarily lead to the conclusion that S Draegen deserves a personal and serious blame. S Draegen's mere knowledge of this unlawful act is insufficient for this. The fact that Dmarcian does not comply with the default and opposition judgment of this court is a business decision made by S Draegen, partly motivated by the pending proceedings between the parties, and she cannot be personally blamed for this either.

Procedural costs (claim 6.)

6.27. Since the parties have been mutually unsuccessful on points, the costs of the proceedings are compensated in the sense that each party bears its own costs.

Finally

6.28. During the oral procedure, the question was raised as to whether there is no other way to resolve the parties' dispute than by conducting (presumably years of) legal proceedings in different countries. Although the parties are (or appear to be) in direct opposition, the judge in preliminary relief proceedings has estimated that the key to this could lie in the copyright to the software. Recognition of reciprocal operations and their legal consequences - which are not regulated - can be a starting point for this.

7. The decision

The preliminary relief judge:

in the incident

7.1. dismisses the claim;

in the main proceedings

7.2. prohibits Dmarcian, from the day after the day on which this judgment is sent to it, from offering the Software, whether or not as SaaS, and/or to licence (or have licenced) the Software to customers that Advisor had and still has in the Territory on 1 June 2021;

7.3. prohibits Dmarcian from the day after the day on which this judgment has been sent to it, without the consent of Advisor, from making changes to the Software, with the exception of the adjustments necessary to comply with other provisions under this judgment and demonstrable error correction;

7.4. prohibits Dmarcian, from the day after the day on which this judgment was sent to it, from encouraging customers who Advisor had and still has in the Territory on 1 June 2021 to terminate the contract with Advisor;

7.5. orders Dmarcian, within ten working days after this judgment has been sent to it, to notify Advisor's lawyer of the names, addresses and contact details of Advisor's customers, with whom Dmarcian, its resellers, agents and/or representatives have had contact since 22 January 2021 with regard to the use of the Software, simultaneously submitting relevant copies of correspondence, quotations, invoices and licence agreements;

7.6. orders Dmarcian to pay Advisor a periodic penalty payment of €5,000 for each day or part thereof that it, after service of this judgment, does not comply with one of the judgments passed in 7.2. up to and including 7.5.;

7.7. declares this judgment immediately enforceable;

7.8. compensates the costs of the proceedings in the sense that each party bears its own costs;

7.9. rejects any further or other claims.

This judgment was passed by The Honourable P de Bruin, and pronounced in public on 18 July 2022.

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