In naam van de Koning

vonnis

ROTTERDAM COURT
Trade and port team

Case number / role number: C/10/632146 / HA ZA 22-67

Judgment in incident of Dec. 14, 2022

in the matter of

the private limited liability company
DMARC ADVISOR B.V. (at the time of the subpoena named DMARC1AN EUROPE B.V.),
Based in Dordrecht,■
plaintiff in the main action,
defendant in the incident of Inc,
defendant in Draegen's incident,
attorney at law Mr. A.P. Meijboom in Amsterdam,

at

1. the company under foreign law
DMARCIAN INC,
based in Brevard, North Carolina, United States,
defendant,
incidental plaintiff,
attorney at law Mr. T.S. Jansen in Amsterdam,
2. **TIMOTHY GEORGE DRAEGEN,**
residing in Brevard, North Carolina, United States,
defendant,
incidental plaintiff,
attorney at law Mr. P.A. Josephus Jitta in Amsterdam.

The parties will hereinafter be referred to as dmarcian Europe, dmarcian Inc. and Draegen.

1. The procedure

1.1. The course of the proceedings is evidenced by:
- the subpoena dated October 11, 2021, with exhibits 1 through 67;
- the cross-claim containing pleas of lack of jurisdiction and inadmissibility, also containing a subsidiary request for the arrest of dmarcian Inc., with exhibits 1 and 2;
- the cross-claim containing pleas of lack of jurisdiction and inadmissibility, also containing a subsidiary request for the arrest of Draegen;

- the statement of reply in dmarcian Europe's incident, with exhibits 68 to 70;
- the June 13, 2022 call for oral argument;
- the August 25, 2022 session agenda;
- dmarcian Europe's deed filing additional exhibits, with exhibits 71 through 75;
- the deed of production of dmarcian Inc., with exhibits 3 through 9;
- dmarcian Inc.'s deed of production, with production 10;
- the oral hearing on September 14, 2022;
- dmarcian Europe's pleading notes;
- the pleading notes of dmarcian Inc;
- Draegen's pleading notes.

1.2. Finally, judgment was rendered in the incidents.

2. The facts

2.1. dmarcian Europe was founded on March 21, 2013 and was initially called Mailmerk B.V. The Digital Xpedition Holding BV. (hereinafter TDX) was the sole shareholder and director of dmarcian Europe until July 2018. The shares of TDX are held, through their personal holdings, by Messrs. M. Groeneweg and H.J. Kalkman.

2.2. dmarcian Inc. was founded on Sept. 19, 2014. Draegen is a shareholder of dmarcian Inc.

2.3. dmarcian Europe and dmarcian Inc. are engaged in providing email address identity security products and services.

2.4. dmarcian Europe and dmarcian Inc. entered into an oral agreement in January 2016 regarding the use and distribution of the dmarcian software developed by dmarcian Inc. ("the Software"). Under this agreement, dmarcian Europe received a license to use the software and was allowed to sell it in Europe, Russia and Africa. In exchange, dmarcian Inc. (and/or Draegen) received an option right to a majority interest in dmarcian Europe.

2.5. In practice, the software was offered as a SaaS (Software as a Service) service accessible through the website dmarcian.com which dmarcian Inc. and dmarcian Europe jointly used. Potential customers were redirected to dmarcian Europe through this site if the customer was from Europe, Russia or Africa. Other customers were redirected to dmarcian Inc.

2.6. In July 2018, Draegen exercised the option right granted to dmarcian Inc. and/or him and obtained 50.01% of the shares in dmarcian Europe.

2.7. dmarcian Europe holds 100% of the shares in dmarcian Bulgaria EOOD (hereinafter: dmarcian Bulgaria). From mid-2018 (further) development of the software (also) took place by dmarcian Europe and dmarcian Bulgaria. From November 2019 only the thus adapted and extended version of the software will be available.

2.8. Groeneweg sent an email, with attachment, to Draegen on Dec. 4, 2019. That email stated, 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 other instances than the EU instance. This document describes a solution for the above problem as well. "

The attachment contains a document that contains the contents of what Groeneweg says were agreements made between dmarcian Europe and dmarcian Inc. in 2016. The document further states that the issue mentioned in the email can be resolved by the granting of a perpetual license by dmarcian Europe to dmarcian Inc. in exchange for certain share transfers.

2.9. Draegen responded to Groeneweg's proposals with emails dated December 4 and 6, 2019. In them, 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 1 can support. " and *"The initial terms described around January 22, 2016 are either wrong or inaccurate*" and finally that errors in Groeneweg's document *"have raised serious redflags"* as well as *"issues that cannot be ignored."*

2.10. On December 6, 2019, dmarcian Inc. blocked dmarcian Europe's access to common systems. This "blackout" was lifted after 48 hours.

2.11. By e-mail dated July 3, 2020, Draegen requested that a shareholders' meeting of dmarcian Europe be convened, with on the agenda the proposal to remove TDX as a director and appoint another company to be designated by Draegen as a director.

2.12. The shareholder meeting of dmarcian Europe was scheduled for August 13, 2020. TDX subsequently initiated inquiry proceedings against dmarcian Europe before the Enterprise Chamber of the Amsterdam Court of Appeal, after which the shareholder meeting was rescheduled. Draegen joined the OK proceedings as an interested party.

2.13. The Enterprise Chamber's September 7, 2020 order considered, among other things, the following:

"(...)

2.5TDX and Draegen are arguing about the agreements made to the cooperation in 2016 between dmarcian Europe and dmarcian, Inc./ Draegen are based on. According to TDX, on January 22, 2016, dmarcian Europe, dmarcian, Inc., TDX and Draegen entered into an oral agreement on which their cooperation was based. According to Draegen, the parties have always considered the December 2016 email correspondence between him and Groeneweg about formalizing their cooperation, in which Draegen sent documents for signature (which were not signed}, to be

as the basis of their cooperation. In any case, it is established between the parties that they agreed in 2016 at least:
- That dmarcian Europe is licensed to use and sell software originating from dmarcian, Inc;
- That dmarcian Europe is responsible for selling that software (and providing associated services) to customers in Europe, Russia and Africa;
- That dmarcian, Inc. and or Draegen were able to purchase the majority shareholding in dmarcian Europe in exchange for a payment of €1.
(...)

3.*4The Enterprise Chamber considers the following. The controversy over intellectual property rights on the software(applications) developed by dmarcian Europe.(and dmarcian Bulgaria) is at the heart of the dispute between the parties. TDX argues that these software(applications) are separate from the software developed by dmarcian Inc. such that their intellectual property belongs to dmarcian Europe. The ability of dmarcian Inc. to use and sell this software (applications) should be based on a license to be granted by dmarcian Europe, according to TDX. On the other hand, Draegen argues that the software developed by dmarcian Europe (and dmarcian Bulgaria) comprises no more than additional features for improved use of the software originating from dmarcian Inc. so that the intellectual property thereof also belongs to dmarcian Inc. The Enterprise Chamber first notes that for the legal assessment of that dispute only the ordinary civil court has jurisdiction. However, the Enterprise Chamber notes that this dispute is disruptive for the business of dmarcian Europe; the development and sale of software is its core business and the cooperation with dmarcian Inc. is a necessary condition for this. Nevertheless, this cooperation has not been sufficiently regulated by the parties, neither in general, nor to take the intellectual property rights on software (applications) developed and to be developed and (the scope of) the licenses to be granted in connection therewith in particular. There are no unambiguously recorded agreements about this, with the result that the current discussion about this has put the cooperation at risk, which forms a serious obstacle to the business operations of dmarcian Europe. In the opinion of the Enterprise Chamber, the existence of the aforementioned situation provides sufficient valid reasons to doubt that dmarcian Europe is conducting its policy and business properly. The Enterprise Chamber will, as requested by both TDX and Draegen, order an investigation into the policy and course of duties of dmarcian Europe from January 1, 2016 to August 20, 2020*

3.5 With the parties, the Enterprise Chamber considers that in view of the situation of dmarcian Europe necessary to appoint by way of immediate provision a third party as director of dmarcian Europe with a casting vote, who is independently authorized to represent dmarcian Europe. This director can count it among his duties to try to obtain clarity about the question where the intellectual property on the software (applications) developed by dmarcian Europe (and dmarcian Burgaria) lies, or at least to make sufficiently clear agreements about this with dmarcian Inc. and to record these. The Enterprise Chamber also sees reason to transfer the shares in dmarcian Europe - with the exception of one share of each of the shareholders - by title of management to an administrator to be appointed by it.

(...)

3.9The Enterprise Chamber will reserve the appointment of an investigator for the time being so that it can be considered whether a resolution of the dispute can already be achieved by the immediate provisions to be made. Any of the parties or the director or manager appointed by the Enterprise Chamber may at any time request the Enterprise Chamber to appoint the investigator.(...) "

2.14. By order dated September 10, 2020, the Enterprise Chamber appointed Mr. H.J.M. Harmeling as director of dmarcian Europe and Mr. Y. Borrius as administrator of all shares less one per shareholder.

2.15. On September 14, 2020, dmarcian Inc. granted dmarcian Europe access to blocked its systems again. After several days, access to the most essential systems was restored...

2.16. By letter dated Jan. 22, 2021, dmarcian Inc. notified dmarcian Europe that it wished to terminate its cooperation with dmarcian Europe as of Feb. 1, 2021, and that it would no longer provide dmarcian Europe with access to its systems as of that date unless dmarcian Europe transferred its copyright in the new software to dmarcian Inc. in exchange for a license under which dEurope ceded 80% of its revenue from the sale of the software to dmarcian Inc.

2.17. On Jan. 22, 2021, dmarcian Inc. again blocked dmarcian Europe's access to its systems. dmarcian Europe no longer has (direct) access to the data of the vast majority of its customers.

2.18. A few minutes after the letter referred to in 2.16 was sent, Draegen, by letter sent by e-mail to dmarcian Europe, invoked Article 4 of the "exit agreement" entered into by Draegen and TDX in 2018 on the occasion of Draegen's acquisition of the controlling interest in dmarcian Europe. Under this provision, each shareholder has the right to terminate the cooperation between the shareholders by making an offer for 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. Draegen made its offer to TDX under the resolutive condition that dmarcian Europe agrees to the demands of dmarcian Inc. included in the letter dated Jan. 22, 2021.

2.19. On Jan. 27, 2021, Harmeling requested the Enterprise Chamber to appoint an investigator in order to investigate the investigation into the case at dmarcian Europe between Jan. 1, 2016 to Aug. 20, 2020 to start the policy pursued. The Enterprise Chamber then appointed an investigator.

2.20. dmarcian Europe served a summons on dmarcian Inc. and Draegen on Jan. 29, 2021, to appear on Feb. 1, 2021, before the preliminary injunction judge of this court. On that day, the case was heard, followed by a default judgment the same day. In it, dmarcian Inc. was ordered, by way of order, to comply with the agreement existing between the parties during the investigation ordered by the Enterprise Chamber and was prohibited from terminating the agreement during that period. Dmarcian Inc was further ordered to lift the blockade of (the employees of) dmarcian Europe to the Saas platform. Draegen was ordered to refrain from any act that interferes with the business operations of dmarcian Europe, all pending clarification of the content and scope of the license agreement between dmarcian Europe and dmarcian Inc. and the ownership of the IP rights to the software. The default judgment was improved on Feb. 2, 2021.

2.21. dmarcian Europe served and sent the default judgment to Draegen and dmarcian Inc. It also e-mailed the default judgment to the Dutch lawyers of dmarcian Inc and Draegen.

2.22. Draegen signed a statement on Feb. 9, 2021, declaring (thereby) his retirement as CEO, President, CFO and Treasurer of dmarcian Inc.

2.23. Harmeling repeatedly requested dmarcian Inc. to end the blocking. These summonses were not complied with by dmarcian Inc. dmarcian Europe subsequently placed the files (including the jointly developed software) necessary to continue conducting its business on a separate *instance*.

2.24. dmarcian Inc. commenced proceedings in the United States on March 12, 2021.
v. dmarcian Europe before the District Court of the Western District of North Carolina, Asheville Division (hereinafter District Court WDNC) .

2.25. By subpoena dated April 6, 2021, dmarcian Inc. appealed the above-mentioned default judgment dated February 1, 2021, of the preliminary injunction judge of this court.

2.26. By judgment dated April 23, 2021, of the District Court of Noord-Holland, sitting in Haarlem, the preliminary injunction judge ordered Fernandes, an employee of dmarcian Europe until December 31, 2019, and Van der Laan, who performed activities for dmarcian Inc. as of February 2021, among others:

"within five days after service of this judgment, to provide in writing to DME (dmarcian Europe, opm. rb) (...) upon simultaneous submission of relevant copies of correspondence, offers, invoices and license agreements, the names, addresses and contact information of all natural or legal persons from Europe, Africa and Russia with whom they have or have had contact as of January 22, 2021, with respect to use of Dmarcian software, including the purchase, renewal and renewal of said software;"

2.27. On April 30, 2021, the attorney for Fernandes and Van der Laan notified the attorney for dmarcian Europe that his clients were immediately denied access to dmarcian Inc.'s IT systems on April 23, 2021.

2.28. In the aforementioned opposition proceedings, the interim relief judge of this court rendered judgment on May 31, 2021. In this judgment, the interim relief judge ruled as follows as far as relevant (dmarcian Europe is referred to in this judgment as DME and dmarcian Inc. as Inc.):

5.1. Annuls parts 3.1. and 3.3. of the judgment entered between the parties by the Interim Injunction Judge of this court by default under case and roll number C/10/612223 / KG ZA 21-63 on February 1, 2021 and corrected by restorative judgment of February 2, 2021, and reinstated;

5.2. orders Inc., within 24 hours of 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 exercise of its business activities until the agreement existing between the parties has been validly terminated, subject to the condition that DME will remit to Inc. 20% of the revenues from the sale of the software on a monthly basis from June 1, 2021;

5.3. otherwise upholds the default judgment;

5.4. Orders Inc to pay DME a penalty of €20,000.00 for each day or part thereof that it fails to comply with the principal order given in section 5.2. of this judgment after service of this judgment, until a maximum of €500,000.00 is reached;

5.5. condemns Draegen to refrain from doing any act itself or through a company it manages, explicitly including Inc, that interferes with DME's business operations, until or as a result of the investigation ordered by the Enterprise Chamber, or as a result of a court judgment on the merits, there is clarity on the content and scope of the license agreement provided to DME and the ownership of the IP rights dmarcian software;

5.6. Orders Draegen to pay DME a penalty of € 20,000.00 for each day or part thereof that it fails to comply with the principal order given in section 5.5. of this judgment after service of this judgment, until a maximum of € 500,000.00 is reached.

2.29. The May 31, 2022 summary judgment has been appealed.

2.30. Between (some of) the parties and their shareholders, several other procedures..

3. The claimed in the main action

3.1. dmarcian Europe demands that the court, to the extent possible by a judgment to be declared provisionally enforceable:

1. for right declares that:
   a. the 2016 Agreement between dmarcian Europe and dmarcian Inc. (the "Agreement") provides, inter alia, that dmarcian Inc. has granted to dmarcian Europe the perpetual, exclusive right to distribute the Software in Europe, Africa and Russia without any further compensation being payable by dmarcian Europe to dmarcian Inc;
   b. dmarcian Inc. is required to remit to dmarcian Europe the credit card payments of customers from Europe, Africa and Russia processed by dmarcian Inc. as of 2016 and account for them in this regard;
   c. the termination of the Agreement by dmarcian Inc. on Jan. 22, 2021, or Feb. 1, 2021, or Feb. 10, 2021 occurred without legal basis and therefore has no effect;
   d. dmarcian Inc. is culpably failing to perform its obligations under the Agreement to dmarcian Europe, or that it is acting unlawfully, by acquiring customers in Europe, Africa and/or Russia since January 22, 2021, whether or not by inducing existing customers of dmarcian Europe to enter into an agreement with dmarcian Inc. and that dmarcian Inc. and Draegen are jointly and severally liable for the damages that dmarcian Europe has suffered and is suffering as a result; and
   e. the first, second and third blocking by dmarcian Inc. of access by dmarcian Europe and its employees to the shared computer systems

referred to in the body of this subpoena qualify as a breach of the Agreement or that they are unlawful toward dmarcian Europe, and that dmarcian Inc. and Draegen are jointly and severally liable v for all damages suffered and to be suffered by dmarcian Europe as a result thereof;

2. Declares by right that: .
   a. the Agreement contains no obligation to retain the copyright in the items listed in paragraph
      6.32 of the subpoena to transfer to dmarcian Inc. the computer programs ("Features") referred to in paragraph 6.32 of the subpoena and to the parts of the software code of the Software, version 2.0, referred to in paragraph 6.33 of the subpoena, as a result of which dmarcian Europe is the copyright owner in the matter;
   b. the Agreement contains no obligation to transfer to dmarcian Inc. the jointly held joint copyright in the parts of the code of the Software, version 2.0, referred to in paragraph 6.34 of the subpoena, as a result of which dmarcian Europe is the copyright owner in the matter;

3. for right declares that:
   a. dmarcian Inc. for failure to comply with the judgments of the judge in preliminary relief proceedings of the Rotterdam District Court of February 1, 2021 and May 3 1, 2021 - whether or not upheld on appeal - forfeited penalty payments in the amount of € 1,000.000,--, or an amount to be determined by the court in good justice, which amount it must pay to dmarcian Europe within 14 days after the judgment to be rendered on this matter, failing which it will owe the statutory commercial interest pursuant to Section 6:119a of the Dutch Civil Code on the outstanding amount from the day that payment should have been made until the day of full payment;
   b. Draegen for failure to comply with the judgments of the preliminary relief judge in the Rotterdam District Court of February 1, 2021 and May 31, 2021 - whether or not upheld on appeal - has forfeited penalty payments in the amount of € 1,000.000,-, or an amount to be determined by the court in good justice, which amount he must pay to dmarcian Europe within 14 days after the judgment to be rendered on this matter, failing which he will owe commercial interest from that day onwards on the outstanding amount pursuant to Section 6:119a of the Dutch Civil Code;

4. orders dmarcian Inc. and Draegen to compensate dmarcian Europe for the damage that dmarcian Europe has suffered and will suffer as a result of the attributable shortcoming in the fulfillment of the agreement between dmarcian Inc. and dmarcian Europe and the unlawful actions of dmarcian Inc. and Draegen, as referred to above under 1, to be made up by state and to be settled according to law;

5. orders dmarcian Inc. to render, within 30 days of the judgment to be rendered in this matter, in writing and itemized, with submission of copies from its records, to the attorney for dmarcian Europe - Mr. A.P. Meijboom of Kennedy Van der Laan N.V., e-mail alfred.meijboom@kvdl.com - an account of all credit card payments received by it from clients from Europe,

Africa and Russia from 2016 up to and including the day of accountability under penalty of a penalty of €100,000 for each day that it does not, or does not fully, comply with this injunction, and simultaneously repay these credit card payments to dmarcian Europe, failing which, from the day on which payment should have been made up to the day of full payment, the statutory commercial interest pursuant to Section 6:119a of the Dutch Civil Code shall be due on the outstanding amount;

6. with effect from the date of the judgment to be rendered hereunder, to divide, pursuant to Section 3:178 of the Dutch Civil Code, the community of dmarcian Inc. and dmarcian Europe in respect of computer programs in which they hold common copyright, so that each of the parties has full copyright to reproduce and disclose these computer programs as they see fit in all countries of the world, or in a manner to be determined by the court in good justice, and to stipulate that the judgment in which the division takes place replaces the deed as referred to in Section 2 subsection 3 of the Copyright Act;

7. order dmarcian Inc. to pay the costs of the proceedings, half of which will be full costs of the proceedings pursuant to Section 1019h Rv, and the post-judgment costs, all costs to be increased by statutory interest from the date of the judgment to be rendered in this matter until the day of payment in full.

3.2. The contentions relied upon by dmarcian Europe in support of these claims are discussed in more detail below in the assessment in the incidents, insofar as they are relevant thereto.

4. The dispute in the incident-

the incident of dmarcian Inc.

4.1. dmarcian Inc. demands that the court, to the extent possible by a judgment to be declared provisionally enforceable:

1. declares itself incompetent to take from the claims of dmarcian Europe fair;
2. Declare dmarcian Europe inadmissible in its claims; .
3. stay consideration of these proceedings until a final decision is issued by the United States court;
4. order dmarcian Europe to pay the legal costs and post-trial expenses.

4.2. dmarcian Europe moved to dismiss the claim, ordering dmarcian Inc. to pay the costs of the proceedings by a judgment to be declared provisionally enforceable.

4.3. The parties' contentions are discussed in more detail below in the assessment, insofar as they are relevant to it.

Draegen's incident

4.4. Draegen demands that the court, to the extent possible by a judgment to be declared provisionally enforceable:

1. declares itself incompetent to hear DME's claims;
2. declares dmarcian Europe inadmissible in its claims;
3. stay consideration of these proceedings until the United States District Court (USDC) issues a final decision;
4. order dmarcian Europe to pay the legal costs and post-trial expenses.

4.5. dmarcian Europe moved that the cross-claims be dismissed, with an order that dmarcian Inc. pay the costs of the proceedings by a judgment to be declared provisionally enforceable.

4.6. The parties' contentions are discussed in more detail below in the assessment, insofar as they are relevant to it.

5. The assessment in all incidents

the incidental claim of dmarcian Inc. for a declaration of inadmissibility of dmarcian Europe

5.1. To this incidental claim, dmarcian Inc. - in brief - that dmarcian Europe no longer has an interest in its claims.

5.2. Occasional proceedings do not lend themselves well to assessing a party's interest in its claims in the main action. In principle, a dispute about this belongs in the main action, because it is too much related to the substance of the case. This case is not so obvious that an exception to that principle is appropriate. This incidental claim shall therefore be dismissed (whereby dismissal shall include declaring inadmissible dmarcian Inc. in this incidental claim to declare dmarcian Europe inadmissible).

Draegen's incidental claim for inadmissibility of dmarcian Europe

5.3. According to Draegen, the subpoena is void for the reasons stated below in r.o. 5.4 and therefore dmarcian Europe is inadmissible in its claims against Draegen in the main action.

5.4. His argument that the summons is null and void relates to claims 1d, 1e and 4 mentioned above under 3.1. According to Draegen, dmarcian Europe, in violation of Article 111 paragraph 2 opening words under d of the Dutch Code of Civil Procedure, failed to state in the summons the (legal) grounds for its alleged unlawfulness on the one hand and for the joint and several liability of Draegen on the other hand.

5.5. What Draegen Beer is actually doing, especially since he is not claiming annulment of the summons but a declaration of inadmissibility, is arguing that claims 1d, 1e and 4 mentioned above under 3.1 should be dismissed because of dmarcian Europe's failure to comply with its obligation to present evidence. A dispute about this belongs in the main proceedings, not in incidental proceedings, because it is too much related to the substance of the case. This incidental claim will therefore be dismissed.

in both jurisdictional incidents

5.6. In the examination to answer the question of whether the court has international jurisdiction (jurisdiction) over dmarcian Inc. and Draegen, the starting point is that Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels Ia-Vo) does not apply, because the defendants are not domiciled in the territory of a Member State of the European Union. Other international regulations on jurisdiction also lack application in the present case. This means that the court's international jurisdiction must be judged according to the rules of Dutch concurrent international jurisdiction law laid down in the Code of Civil Procedure (Rv), Articles 1-13 Rv.

5.7. Since neither dmarcian Inc. nor Draegen is domiciled in the Netherlands, the Dutch court in this case cannot derive its jurisdiction from the main rule of international jurisdiction law that the courts of the country where the defendant is domiciled have jurisdiction.

5.8. Nor was a choice of forum invoked.

5.9. This case has more than one defendant. Therefore, the jurisdiction provision of the first paragraph of Article 7 Rv is relevant:

Article 7 Rv

1. *If, in cases which must be instituted by writ of summons, the Dutch court has jurisdiction over one of the defendants, it shall also have jurisdiction over other defendants involved in the same action, provided that the claims against the various defendants are so connected that reasons of expediency justify joint proceedings.*

Article 7 paragraph 1 Rv is largely derived from Article 6 opening words and under 1, EEX Convention of 27 September 1968 (now Article 8 opening words and under 1, Brussels 1 bis-Vo). This means that the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU or the ECJ) on Article 6 chapeau and subpara 1, EEX Convention (now Article 8 chapeau and subpara 1, Brussels I bis-Vo) is of importance for the interpretation of Article 7 paragraph 1 Rv, unless this case law refers to criteria that are not part of Article 7 paragraph 1 Rv. Regarding the latter, it is the case that Article 7 paragraph 1 Rv differs slightly from Article 6 introductory phrase and point 1 of the EEX Convention (now Article 8 introductory phrase and point 1 of the Brussels I bis Convention) only in terms of the ultimate objective pursued by a joint hearing of the claims against the defendants. While in the case of Article 7(1) Rv this purpose is efficiency, in the case of Article 6(1) EEX Convention (now Article 8(1) Brussels I bis-Vo) this purpose is the prevention of irreconcilable judgments. See under 2.34-2.39 of A-G Vlas' Opinion (ECLI:NL:PHR:2021:1145) to the Supreme Court's Article 81(1) R.O. judgment of June 24, 2022 (ECLI:NL:HR:2022:933).

5.10. Both dmarcian Inc. and Draegen, therefore both defendants in the main action, challenge the jurisdiction of the Dutch court to take cognizance of the against

her/his claims. This means that the Dutch court does not automatically have jurisdiction over (all claims against) one of the defendants in this case. Only after it has been established that the Dutch court in this case has jurisdiction with respect to one of the defendants on the basis of a jurisdiction provision other than Article 7(1) Rv (HR 29 March 2019, ECLI:NL:HR:2019:443), the question whether the Dutch court also has jurisdiction with respect to the other defendant in this case within the meaning of Article 7(1) Rv is relevant.

Whether the court has jurisdiction over *Draegen* as an *anchor defendant* in the context of Section 7(1) Rv must be judged in the jurisdictional incident commenced by Draegen; whether the court has jurisdiction over *dmarcian Inc.* as an *anchor defendant* in the context of Section 7(1) Rv must be judged in the jurisdictional incident commenced by dmarcian Inc.

Multiple claims have been brought against both dmarcian Inc. and Draegen. It is not necessary for the operation of Article 7(1) Rv that the Dutch court has jurisdiction over all claims brought against the anchor defendant. It is sufficient that the Dutch court has jurisdiction with respect to a claim instituted against the anchor defendant, provided, of course, that all claims against the other defendant are sufficiently connected within the meaning of Section 7(1) Rv to that one claim against the anchor defendant.

further in the jurisdictional incident of Draegen

5.1 1 The following of the claims in the main action listed above under 3.1 were (also) brought against Draegen: 1d, 1e, 3b and 4.

5.12. dmarcian Europe bases all of these claims brought against Draegen in tort. To the extent that dmarcian Europe has made contentions assuming a contractual basis, as irrelevant they need not be discussed.

The jurisdiction of the Dutch court with respect to claims based on tort is specifically regulated in Dutch international jurisdiction law in Article 6, opening words and under e, Rv. Article 6, opening words and sub e, Rv reads as follows:■

Article 6 Rv
The Dutch court also has jurisdiction in cases concerning:
[...]
e. obligations in tort, if the harmful event has occurred or may occur in the Netherlands;

5.13. Article 6(e) Rv is derived from Article 5(3) EEX Convention (now Article 7(2) Brussels I bis-Vo). Both provisions focus on the place of *the harmful event*. Based on the case law of the CJEU, as such, both the place of the event causing the damage, the so-called *Handlungsort, and the* place where the damage occurred, the so-called *Erfolgsort,* apply. The plaintiff has the choice whether to summon the defendant before the court of the

Handlungsort than for that of the *Erfolgsort.* See ECJ November 30, 1976, *NJ* 1977/494 *(Bier v. Mines de potasse d'Alsace).*

Already in its summons, dmarcian Europe based the jurisdiction of the Dutch court to hear these claims brought against Draegen in so many words on this rule of jurisdiction and based it on the assertion that in any case the *Erfolgsort* is located in the Netherlands (margin number 8.5 of the summons).

5.14. In Draegen's argument why, according to him, the Dutch court lacks jurisdiction to take cognizance of claims 1d, le, 3b and 4, there are no propositions to be read that the requirements of Section 6 opening words and under e of the Dutch Code of Civil Procedure have not been met because no damage has been suffered in the Netherlands. At the hearing, Draegen (pleading notes, marg. 3.1) even admitted that the court has jurisdiction under Section 6 under e Rv. This means that it must be assumed in the context of this incident that the *Erfolgsort* is located in the Netherlands, so that the Dutch court has jurisdiction pursuant to Section 6 opening words and under e Rv. The reliance on abuse of process will be returned to below.

5.15. In view of the case arising here that the Dutch court has jurisdiction, Draegen appeals primarily to litispenseness.and alternatively to connexion. Draegen bases this appeal on a case, or at least cases, brought by Dmarcian Inc. against dmarcian Europe in the United States before the District Court WDNC in 2021. On this litigation and connexity appeal by Draegen, the court considers the following.

5.16. Draegen's lis pendens appeal must be assessed under the provisions of Article 12 Rv, which reads as follows:

Article 12 Rv
Where a case has been brought before a court of a foreign state and there may be a judgment therein which is capable of recognition and, where applicable, enforcement in the Netherlands, the court of the Netherlands before which a case between the same parties on the same cause of action has subsequently been brought may stay the proceedings until that case has been decided by the court first mentioned. If that judgment is found to be capable of recognition and, where applicable, enforcement in the Netherlands, the Netherlands court shall decline jurisdiction. If the case is one that must be instituted by writ of summons, Article 11 shall apply mutatis mutandis.

Article 12 Rv is largely derived from the lis pendens provision of Article 21 EEX Convention (now Article 29 Brussels I bis-Vo) (*MoT* Parl. Gesch. Rev. Rv, p. 19).

5.17. As is not in dispute between Draegen and dmarcian Europe, Draegen is not a party in the American proceedings at issue here. The requirement of 'the same parties', which forms part of Article 12 of the Dutch Code of Civil Procedure, has therefore not been met, so that Draegen's appeal for lis pendens fails for that reason alone.

5.18. Draegen's connexion appeal also fails. To this end, the court considers the following. Like its predecessors, Brussels I bis-Vo allows a court of an EU member state before which a case was last brought to stay the case in

the case of "related claims," where, unlike in the case of lis pendens, it is not required that those claims involve the same parties. See Article 30 Brussels I bis-Vo. Contrary to Draegen's apparent opinion, this possibility is not part of the Dutch common international law of jurisdiction applicable in this case. This is independent of the fact that, where appropriate, the Dutch court may, for procedural reasons, stay the case in connection with proceedings pending elsewhere; be that as it may, that does not constitute an obligation.

5.19. The Dutch court thus has jurisdiction to hear the claims of dmarcian Europe against Draegen. This court's relative jurisdiction over those claims follows from Article 102 Rv.

5.20. Draegen alleges abuse of process because, in short, jurisdiction is being created in the Dutch courts by suing Draegen, who was chairman of the board until Feb. 9, 2021, but not substantiating the contentions regarding his directors' liability in order to draw dmarcian Inc. away from its court and to be able to sue in .the Dutch courts.
That appeal is dismissed. In the summons, in the description of the facts, the role that Draegen played as a director of dmarcian Inc. and the objections of dmarcian Europe against that role are indeed and extensively discussed. That dmarcian Europe is only concerned about dmarcian Inc. and not (also) about Draegen is, in view of that explanation, very implausible and thus abuse of process has not become plausible either, leaving aside that the threshold for that is high.

Draegen's order for legal costs .

5.21. As the unsuccessful party, Draegen will be ordered to pay the costs of the proceedings in the incidents of Draegen. These costs on the part of dmarcian Europe up to the present judgment are estimated at:

lawyer's salary	€ 1,126.00	(2 points in liquidation rate II)

total€ 1,126.00.

further in the jurisdictional incident of dmarcian Inc.

5.22. To the extent that Draegen is to be regarded as the "anchor defendant" within the meaning of Article 7(1) Rv, it follows from rulings 5.11-5.19 above that the requirement contained in Article 7(1) Rv that the Dutch court has jurisdiction over the anchor defendant by virtue of a rule of jurisdiction other than Article 7(1) Rv has been met (see rulings 5.10 above).

5.23. This raises the question of whether dmarcian Europe's claims against dmarcian Inc. are related to one or more claims against Draegen to such an extent that, in the words of Section 7(1) Rv, *reasons of expediency justify joint treatment.*

5.24. dmarcian Inc. bases its position that the Dutch court has no jurisdiction with respect to dmarcian Inc. under Article 7(1) Rv on only two arguments. One argument is that the claims of dmarcian Europe against Draegen, the anchor defendant, are "manifestly unfounded" (see margin 5.3 of the

pleadings of dmarcian Inc.) This argument is assessed below in rulings 5.25-5.26. The other argument is that the claims against Draegen have tort as their legal basis, while the claims against dmarcian Inc. have (predominantly) a different legal basis, i.e. culpable non-performance (s.e. margin numbers 5.6-5.8 of dmarcian Inc.'s pleadings). This argument is assessed below in r.o. 5.27.

5.25. Coherence within the meaning of Article 7(1) Rv between the claim(s) against the anchor defendant, in this case Draegen, and the claims against dmarcian Inc. cannot be assumed where the claims against the anchor defendant are manifestly hopeless in advance and, for that reason, impossible to grant. Indeed, in that case, there is no reason to believe, in the context of international jurisdiction, that reasons of expediency justify joint treatment. See The Hague Court of Appeal December 18, 2015, ECLI:NL:GHDHA:2015:3587, para. 2.2.

5.26. However, such a case of 'evident hopelessness' does not occur here. After all, it cannot be excluded beforehand that Draegen as director of dmarcian Inc. has personally acted seriously culpable within the meaning of Section 6:162 of the Dutch Civil Code, and as major shareholder of dmarcian Europe has acted in violation of reasonableness and fairness within the meaning of Section 2:8 of the Dutch Civil Code, because he did not allow himself to be guided by the legitimate interests of dmarcian Europe. Thus, as dmarcian Europe claims and substantiated with emails, he took the initiative to block the access of employees of dmarcian Europe to the joint files, including the data of the customers of dmarcian Europe, on three occasions, most recently (on January 22, 2021) final, or at least he has not done enough to prevent such blockages. Moreover, Draegen has disregarded interlocutory judgments while at this point there is nothing to suggest that Draegen has been unable to comply with the judgments in those judgments (of I February 2021 and May 31, 2021). Although the assessment can obviously only follow in the main proceedings, after completion of the party's debate, this is sufficient for the claim not to be considered a priori obviously hopeless.

5.27. Contrary to dmarcian Inc.'s view, the fact that the claims against dmarcian Inc. have a different legal basis than the claims against Draegen also does not prevent the Dutch court's jurisdiction under Article 7(1) Rv. In its jurisprudence the CJEU has ruled that the fact that claims directed against several defendants have a different legal basis does not prevent the application of (the predecessor of) Article 8 (I) Brussels I bis-Vo. See, for example, ECJ October 11, 2007, *NJ* 2008/80 *(Freeport/Arnoldsson)* and ECJ December 1, 2011, *NJ* 2013/66 *(Painer/Standard Verlags).* This applies equally in common Dutch law, since from an efficiency point of view a difference in legal basis does not play a role if, as here, the factual complex is largely the same.

5.28. All, in the opinion of the court, relevant arguments that dmarcian Inc. has put forward in this incident as to why, according to it, the Dutch court does not have jurisdiction under Section 7(1) Rv have been assessed above. As follows from what has been considered above, all these arguments fail. The other arguments raised by dmarcian Inc. in this incident do not give the court any reason for a different opinion. In particular, it is of importance that the efficiency which is the rationale for jurisdiction based on article 7 paragraph 1 Rv benefits from the treatment of all claims against

damarcian Inc, not only those on a delictual basis but also insofar as they have contractual or copyright bases, and the court would not have international jurisdiction to take cognizance outside the case of Article 7(1) Rv. After all, the dispute that divides the parties has several aspects and efficiency is served by allowing all those aspects to be judged together by one court.

5.29. Therefore, pursuant to Article 7(1) Rv, the Dutch court has jurisdiction to hear all claims against dmarcian Inc.

5.30. In view of the present case that the Dutch court has jurisdiction, dmarcian Inc., like Draegen, appeals primarily for litispensability and alternatively for connexity. dmarcian Inc. bases this appeal on cases that dmarcian Inc. brought against dmarcian Europe in the United States in 2021 before the United States District Court for the Western District of North Carolina ("DCWDNC"). For purposes of clarity, the court below first reviews dmarcian Inc.'s connexion appeal and then dmarcian Inc.'s litigation appeal.

5.3 1 The connexion appeal of dmarcian Inc. fails on *mutatis mutandis* the same grounds as set out above in respect of Draegen's incidental claim on this point at paragraph 5.18 above.

litispension
5.32. As to dmarcian Inc.'s litigation appeal, the court considers that only the appeal raised in the present case is relevant.
Litis pendens appeals raised in other cases, such as the interlocutory proceedings before this court, are not presently at issue. That certain summary judgment proceedings before this or any other court were brought earlier than the U.S. proceedings on which dmarcian Inc. bases its lis pendens appeal is immaterial to the present case, contrary to what dmarcian Europe seems to believe.

5.33. The court finds that the "same parties" requirement of Section 12 Rv is satisfied, as dmarcian Europe and dmarcian Inc. are both parties in the present case and in the U.S. proceedings that dmarcian Inc. bases its litigation appeal on.

5.34. The next question is whether the U.S. proceedings underlying dmarcian Inc.'s litigation appeal and the present case have "the same subject matter" within the meaning of Article 12 Rv. This term indicates the purpose of the claims, not requiring complete equality of the claims. Nor is it required that the parties have the same procedural role in each of the two proceedings. See ECJ December 6, 1994, *NJ* 1995/659 *(Tatry v. Maciej Rataj).* Given the diverse nature of the claims brought in the U.S. proceedings, it does not appear plausible to the Court that all of the claims in those proceedings have the same subject matter as the claims brought by dmarcian Europe against dmarcian Inc. in the present case. However, that does not alter the fact that a substantial part of the claims in the U.S. proceedings and a substantial part of the claims in

the present case do have the same subject matter. Therefore, this requirement of Article 12 Rv is also met.

5.35. The next question is whether the American proceedings on which dmarcian Inc. bases its lis pendens appeal were instituted earlier than the present case. If that is not the case, article 12 Rv is not applicable and the lis pendens appeal of dmarcian Inc. fails for that reason alone.

5.36. Since in the present case the day of summons is October 11, 2021, the case is pending from that day pursuant to Section 125(1) Rv.

5.37. During the oral hearing on September 14, 2022, dmarcian Europe explained very concretely and further substantiated with documents that in the U.S. proceedings that dmarcian Inc. bases its lis pendens appeal on to date, only decisions of a provisional nature (injunctive relief) have been rendered and that the court in those proceedings did not commence proceedings on the merits until May 22, 2022. dmarcian Inc. has left this exposition by dmarcian Europe unchallenged and the court assumes that the decisions rendered before May 22, 2022 should be considered preliminary injunctions under the applicable procedural law.

5.38. A procedure for obtaining preliminary relief is not a procedure that is relevant in the present context. After all, part of article 12 Rv is the requirement that in the foreign proceedings a judgment can be given that is susceptible to recognition and, as the case may be, enforcement in the Netherlands. With regard to this requirement, the Court considered that the requirement implies that the foreign judgment must have or be able to acquire res judicata in the Netherlands. Under Dutch civil procedural law, a summary judgment is not subject to res judicata (Supreme Court 16 December 1994, ECLI:NL:HR: 1994:ZC 1583, *NJ* 1995/213 *(Kloes/Fransman)).* The Court is of the opinion that this applies equally, and on the same grounds, to a decision of a foreign court that should be regarded as a preliminary injunction. It is left open whether this also follows from the provisions of Section 10:3 of the Civil Code.

5.39. The fact that, in the U.S. proceeding, it is not a separate legal proceeding but a preliminary stage in the proceedings does not alter the rationale of the rule for
lis pendens precludes consideration of that first stage. After all, that ratio is that if proceedings are pending simultaneously in two jurisdictions that could lead to a decision that could become res judicata, the older proceedings take precedence. The assessment of dmarcian Inc.'s lis pendens appeal is therefore limited to the dispute on the merits that was initiated by the U.S. court on May 22, 2022.

Now that it is clear that these proceedings were instituted before May 22, 2022, the appeal for lis pendens fails. The question can remain open whether and, if so, to what extent Section 12 Rv can be applied if proceedings are pending in a country with which the Netherlands does not have a recognition and/or enforcement regime while it is plausible that the *Gazprombank criteria* can be met (Supreme Court 26 September 2014, ECLI:NL:HR:2014:2838).

5.40. The Dutch court thus has jurisdiction to hear the claims of dmarcian Europe against dmarcian Inc. The relative jurisdiction of this court with respect to those claims follows from Article 109 Rv.

litigation costs order of dmarcian Inc.

5.41. As the unsuccessful party, dmarcian Inc. will be ordered to pay the costs of the proceedings in the incidents of dmarcian Inc. These costs on the part of dmarcian Europe until this judgment are assessed at:

lawyer's salary	€ 1,126.00	(2 points in liquidation rate II)
total€	1,126.00.	

In the main

5.42 In the main action, the case is remanded to the roll for reply by Draegen and dmarcian Inc. any further decision is reserved.

6. The decision

The court

in the incidents of Draegen

6.1. dismisses the claims;

6.2. declares itself competent to hear the claims of dmarcian Europe against Draegen;

6.3. orders Draegen to pay the costs of the proceedings, estimated at € 1,126.00 for dmarcian Europe up to the present judgment;

6.4. Declares this order for costs enforceable;

in the incidents of dmarcian Inc.

6.5. Dismisses the claims; .

6.6. declares itself competent to take cognizance of the claims of dmarcian Europe against dmarcian Inc;

6.7. orders dmarcian Inc. to pay the costs of the proceedings, estimated at € 1,126.00 up to the present judgment on the part of dmarcian Europe;

6.8. Declares this order for costs enforceable;

in the main case against Draegen

6.9. refers the case to the roll of **Feb. 1, 2023,** for reply;

6.10. reserves any further decision;

in the main action against dmarcian Inc.

6.11. refers the case to the roll of **Feb. 1, 2023,** for reply;

6.12. reserves any further decision.

This judgment was rendered by Mr. P.F.G.T. Hofmeijer-Rutten, in the presence of the Registrar Mr. J.F. de Heer, and publicly pronounced on December 14, 2022.

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