vonnis

RECHTBANK ROTTERDAM

Team handel en haven

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

Judgment of December 20, 2023

in the matter of

the private limited liability company
DMARC ADVISOR B.V. (at the time of the subpoena named DMARCIAN EUROPE B.V.),
based in Dordrecht,
plaintiff,
advocaat mr. A.P. Meijboom in Amsterdam,

against

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

The parties will hereinafter be referred to as dBV, dlnc and Draegen.

1. The further procedure

1.1. The course of the proceedings is evidenced by:
The incidental judgment of December 14, 2022, and the underlying pieces;
dlnc's reply brief of l February 2023 with exhibits 11 to 120;
Draegen's statement of reply dated l February 2023 with exhibits 1 to
'
- the deed submission production ove1'zichten of dlnc dated February 8, 2023; the session agenda dated June 9, 2023;
the minutes of oral proceedings of July 5, 2023 and the documents referred to therein;
- dBV's pleading notes;
- dInc's pleading notes;

the written statement of S. Draegen, read by her at oral argument;
Draegen's pleading notes;
-the letters from d BV and dInc dated 17 augustiis 2023 in response to the official report, which are part of the file.

1.2. Finally, judgment was rendered.

2. The case in brief

This is a conflict between two companies offering *sofüvare as ci service* (and the former founder/director of one of those two companies). The two companies have worked together in the past. How the then-current agreement should be viewed is in dispute, as is whether this agreement can be terminated. The parties both wish to continue offering software to customers. The plaintiff party, based in the Netherlands, believes that both companies have copyrights on (most of) the software and, at its core, seeks a solution whereby both parties can continue to trade the software, possibly with a division of the world into territories. The defendant party, based in the US, disagrees. It believes it is the sole owner of the software, and vilts that it is therefore the only one allowed to determine who can offer the service. The dispute has run very high. Problems are also being pi oced in the US. In those proceedings, the American company is the plaintiff, and the Dutch company is the defendant.

3. The facts

In the incidental judgment of December 14, 2022, some established facts were enumerated. The court stays with that and wants to supplement this enumeration with facts that have since also been established, so the following facts are now assumed.

3.1. d BV was incorporated on March 21, 2013 and was initially called Mailmerk B.V. The Digital Xpedition Holding B.V. (hlerna: TDX) was the sole shareholder and director of dBV until July 2018. The shares of TDX are held, through their personal holdings, by Messrs. M. Groeneweg and H,J. Kalkman.

3.2. dlnc was incorporated on September 19, 2014. Di aegen is shareholder' of dInc and was initially also a director.

3.3. dBV and dInc are engaged in providing email address identity protection products and services. Companies using the service thereby prevent identity fraud such as *spoofing*.

3.4. dBV and dInc entered into an oral agreement in January 2016 regarding the use and distribution of the dmarcian software developed by dlnc ("the software"). Under this agreement, dBV received a license to use the software and was allowed to sell it (i.e., give paying customers access to the SaaS environment) in Europe, Russia and Africa. In exchange

In return, dlnc (and/or Draegen) received, among other things, an option right to a majority stake in dBV.

3.5. In practice, the software was offered as a SaaS *(Sofüvcire eis a -Yervfce)* service that could be accessed through the Web site under the URL dmarcian.com. dInc and dBV both offered the service through this URL. Potential customers located (based on their IP address) in Europe, Russia or Africa were directed to dBV through this site. dBV then closed the sales transaction and collected the periodic fees. Customers located in other territories were redirected to dlnc, or to other dInc affiliates such as Dmarcian Asia Pacific Pty Ltd.

3.6. In July 2018, Draegen exercised the option right granted to dlnc and/or him and obtained 50.01% of the shares in dBV.

3.7. dBV holds 100% of the shares in dmarcian Bulgaria EOOD (hereinafter dmarcian Bulgaria). As of mid-2018, with the knowledge of dlnc, (further) development of the software (also) took place by dBV and dmarcian Bulgaria. dBV kept dlnc periodically informed about dmarcian Bulgaria' s progress. dlnc was able to follow dmarcian Bulgaria's progress, as the parties involved communicated with each other about it. As of November 20.19, only the thus modified and extended version of the software is available.

3.8. Groeneweg gestiirtrd an email, with attachment, to Draegen on Dec. 4, 2019. That email stated, among other things:

*"(...) The Jocunient **Jescribes** the curt en! sitiicition that sofuvat-e ovvnecl by Jniarcian Europe BV cnn't be sold by clmat-cian, Inc. nor Dinarcian Asia Pcicific Pty Ltcl to ciistoinei-s as thet-e's no license agreement in plcice to do so. Before this problem is solve J new software incliiJing but not liiiiiteJ to DMA RC clelegation ccin't go live on other instcinces them the EU instcince. This clociittient describes o cletailecl solution for the cibove pi-obletn os well. .....( )"*

The attachment contains a document containing the contents of the agreements, according to Groeneweg, reached between dBV and dlnc during 2016. The document further states that the problem mentioned in the email can be resolved by dBV providing an eeiiwigdiir license to dInc in exchange for certain share transfers.

3.9. Draegen responded to Groeneweg's proposals with emails dated Dec. 4 and 6, 20.19. In them, he wrote, among other things:

"(...) I agree we'11 neecl o ficerisfng *agreement to be put into plaice. tVithoiit going into cletciils over etnail, it tncikes sense to refiect the perpetual **nnJ** exclusive **license** that Europe BV has eisjoyeJ. (.....) The proposecl solution (...) isn't something I can support. (...)"* and *"(....) The initial terms clescribeJ around 22 Jciniiary 2016 ore either vvi-ong or- inaccurate (....)"* and finally that passages in the document by Groeneweg *"have raisecl serious heel flags"* as well as *"issues that connot be ignoreJ"*.

3.10. On December 6, 2019, dInc blocked dBV's access to shared systems. On that day, Draegen informed all dmarcian employees worldwide during an online *all hands meeting*:

"(...) Right now, I vvecu- tsvo hcits. The CEO of the US legal entity, ancl the tticijority owner of the Dutch BV. LVith itiy CEO hat on, I have to pi'otect the assets of the US coinpciny, incliicling inteflectiicil pt oper t j. (...) I have to pt otect //ie *pt oper ty of the company, anal neecl to inteipi et the letter cis an attempt to replace existing terms with new ones. tYe 're now in a legcil line bo (...) BV employee nccess hers to be siispenclecl cincl pt etty much everything i'elcitecl to i esoiit-ces proviclecl to the BV by the US eiltity has to be sitspenJecl (...)".*

This "blackout" lifted after 48 hours xveer.

3.11. Draegen, by email dated July 3, 2020, requested that a shareholders' meeting of d BV 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.

3.12. dBV's shareholder meeting was scheduled for August 13, 2020. Prior to that, TDX initiated an inquiry procedure tegeli d BV at the Enterprise Chamber of the Amsterdam Court of Appeal, waamaa the shareholder hoiidei sve1'geting was rescheduled. Draegen joined the OK proceedings as an interested party.

3.13. The order of the Under iiemingskamer dated September 7, 2020 considered, inter alia, the following (the names of p'irties have been replaced, for readability, by the designations used in this judgment):

"(...) 3. 4 The On'lei-netningskoiner ovei-i vc-c-gt 'fls as follows. The contt overse over le intellectual eigencloiiiiis rights to Je Joor clBV (and 'luuil ci In Biilgat-ia) ontsvikkelcle softf" v e(applications) constitutes ele core vern the ge.s'c'hil tiissen pat-ties. I'D.k" .argues clot cleo-e softsvat-e(tipplications) is/are separate/stann von cle clooi- dlnc ont' vikl'elJe softsvore, :-o'hmig 'lat ele intellectiiele eigencloin cl iarvan cicin clBV toekoint. Acm the may gel'i iiiken and sell vun Je-e softsvore(cipplications) clooi cllnc Jient a clooi clBV to grant licenlic- terri gr onclslag le lie, nlcliis TDX. Dcicv opposite states Draegen clat ele cloor clBV (en clmarci in Biilgat ici) ontv ikkelcle softsvcii e not itieei- oitivcit clan acinviillencle fecitiii es for- fat-belet'cl gebi iiik vem ele of Jlnc cifkoitistig softsvni'e, -oclat ele intellectual eigenJoiti clcicavan evetleeils at cllnc bemtst. The Onclet netiiingskcuner states vooi'op clat for *Je jiit'icliscl1e beooi-cleling vern clcit dispute slecllts ele gmvone burgei'ly t-echter is competentcl. However, ele OnJei nememaniei can constotei-en clat Kit dispute is oilisvrichtencl for ele onclernem ent. von clBV,' hei ontsvikkelen* and *sell vem softsvni'e is hacir corte business eu ele sciitieniverking not cllilc is clacirvooi'* a *noocl:-ok for vvnca ele. Desonclcinks is ele:-e sciitienvvet king nocll in the milgemeetl, nor ter -oke* vort *ele intellectiiele eigencloitisi'echten on onuvikf'elcle* eif *to be unüvikked softsi'cii'e(applications) and (ele* neil *vijclte of) ele in vei'banrl clcicil ttiee vei'leencle/ to refine licenses in the bij>-oncler, clooi- pcii-ties volcloen Je get egelcl. Hiet ovei' iet no uncliiicliggend ofspi'nken voorhanclen, itiet cils consequence clcit ele snmensverking has come at risk cloor ele hiiiclige clisciissie clciarovei-, which constitutes a sei ieii:-e belenunei-ing for ele beclriyJ.svoering of clBV. Nciol- llet oorcleel vern ele Onclerneiningsknmer levei't het bestaan von voornoemcle sititcitie volcloencle gegroncle i'eclenen op om te tsvijfelen acin a juisl beleicl and a jiiiste course of :-aken vais clBV. The Onclernetti ingsknttiei- -al, as by :-o'vel TDX 'ils Dt aegen is vet- ocht, an onclei'-oek gelosten ncicir the beleiJ and Je gang vern --ciken vern PIBV, and vvel vcinaf 1 jcinitcv i 2016 until August 20, 2020.*

_t.5 lfe/ *pot-tijen de Ondernetitingskaitier vindt het niet het oog oog op ele toestancl van WIBV nooclzakelijk ont ont bij wij-e vcin immediate voor i e n i n g een clercle tot bestuurder van clBV met cloorslaggevencle stetti te benoem, clie clie die zelfstanclig bevoegd is dBV te vertegenwoordigt. I think it is part of my job to try to find a clear answer to the question of intellectual property rights.*

eigencloni on ele cloot- clB k" (and cltnca-cicin Burgciria) ontsvikkelJe softsvcu e(applications) relies, at least Jacirover not cllnc volcloencle cliiiclelijke afspt aken and lay the:-e vcist. .(....)"

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

3.15. On September 14, 2020, dInc again blocked dBV's access to its systems. After several days, access to the most essential systems was restored.

3.16. By letter dated January 22, 2021, dlnc notified dBV that it wishes to terminate its cooperation with dBV as of February 1, 2021, and that it will no longer provide dBV with access to its systems as of that date, unless dBV assigns its copyright in the new software to dlnc, in exchange for a license under which dBV, as licensee, will have to cede 80% of its revenue from the sale of the dmarcian software to dlnc.

3.17. On January 22, 2021, dlnc again blocked dBV's access to its systems. dBV no longer has (direct) access to the data of the vast majority of its customers.

3.18. A few minutes after the letter referred to in 3.16 was sent, Draegen, by letter sent by email to dBV, invoked Article 4 of the e.Tik *cigreenient* entered into by Draegen and TDX in 2018 on the occasion of Draegen's acquisition of the controlling interest in d BV. 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 other shareholder has the obligation to buy the first shareholder ilit. Draegen made its offer to TDX under the resolutive condition that dBV would agree to dInc's demands contained in the letter dated January 22, 2021 mentioned above.

3.19. dBV served a summons on dlnc and Draegen on January 29, 2021, to appear before the preliminary injunction judge of this court on l February 2021. On that day, the case was heard, and a default judgment was rendered the same day. In that judgment, dlnc was ordered, as an orderly measure, to comply with the existing agreement between the parties during the investigation ordered by the Disputes Chamber, but was prohibited from terminating the agreement during that period . dlnc was further ordered to lift the 'blockade of (the employees of) dBV to the SaaS platform. Draegen was ordered to refrain from any action that impedes dBV's business operations, pending clarification of the content and scope of the license agreement between dBV and dlnc and the ownership of the IP rights to the soMvare. The default judgment was improved on February 2, 2021.

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

3.21. The OR-appointed dBV director Harmeling requested dInc several times to end the blockade. These summonses were not complied with by dlnc.

d BV then placed the files (including the jointly developed software) needed to continue running its business on a separate *instcince*.

3.22. dlnc commenced proceedings against d BV on March 12, 2021 in the United States District Court of the Western District of North Carolina, Asheville Division (hereinafter District Court).

3.23. By subpoena dated April 6, 2021, d Inc filed an opposition to the above-mentioned default judgment dated February 1, 202 l by the preliminary injunction judge of this court.

3.24. In the aforementioned opposition proceedings, the interim relief judge of this court rendered judgment on May 31, 2021. ln this judgment, to the extent relevant, the interim relief judge ordered dInc to lift the blockades, on pain of a penalty payment, upheld the default judgment and prohibited Draegen from obstructing dBV's actions until the OR r u l e d .

3.25. In a dispute between Draegen eli TDX and dBV regarding the delivery of the shares, the interim relief judge of this court, in a judgment dated August 3, 2021, ordered Draegen, in summary, to levei'ing his shares to TDX. Meanwhile, on July 19, 2022, the Hague Court of Appeal rendered its judgment on appeal. The Court of Appeal upheld the judgment in summary proceedings and, insofar as relevant and concisely, considered that it i s t o b e e x p e c t e d that in proceedings on the merits it will also be ruled that Draegen was obliged to transfer the shares.

3.26. The investigator appointed by the OR at Haimeling's request i s s u e d a report. This report reads, insofar as relevant, as follows (for readability, the party names have been changed to the names as used in this judgment):

"(...) 7.23. (...) Fixed agrees clvii 'le itieeste afspi'aken between clInc and WIBV are not vostgeleg in a getekencle accordkoitist 1. However, between pot'tijen and cllnc is niel (no longer) in dispute Jat Groeneweg and Di'oegen on or around Jan 22, 2016 iitonJelinge cifsprciken have gemciakt over ele sotiien'vei kiilg between clBV and cllnc. (...)
7.24. Between parties stoat inmiclclels vcist Jcit in elk gevcil cifspi aken -are gemacikt lussen cllnc and clBV over (1) ':le ver l'oop clooi- dBV of ele softsvcii e in Europe, Riislcincl and Afi'ika (....),' (2) ele vei'cleling vcin ele revenue clcicirult (...), and (3) laten hecht von Draegen of cllnc on eun meei-clut lleiclscioilcleel in WIB V (...). Vooi'ts :-are agreements geitiaakt between clInc and clBV and/or BeLeon, Brilger in, Mensuremoil (...1 over- ele development of ele softsvcit e (...).
7.25. In clit rappoi't ivorclen also ele ondei-ivei'pen behcinclelcl ivcicirover pcirtiyen tre/ *have spi'okei1, m'toa give unchiicl agreements. Het griet clem om ele IP rights on ele softsvcii'e (...), ele vel obligation to t r a n s f e r IP rights (...) and ele totstanclkoiing of a joint oilJerneitiing (...).*

7.69 In the oncler oek no agreement was submitted:1 on the basis ofJ ivaciivcin BeLean, Biilgciria or JBV which -ou have obliged haca to transfer any IP rights (aiiteursi'echt) on ele softsv'ire to cllnc. Also in ele coi'responclence between dInc and clBV there is no explicit obligation to ovet-Jt cicht of the aiifeiirsrech/ *to cllnc. (...)*

7.225. It is Bencicb-iikt that it is iiiteinclelijk acin ele civil court to decide whether certain sofüvare bijJragen autewsrechtelijk Stijn beschertncl. Considering all the facts and otnstanigheJes mentioned above, it is assumed in the framework' of Uit onderzoek voot'alsogog assumed cht the bijclragen to ele sofnvai e, originating from (inecleiverkers vcin) cllnc, BeLean, Biilgca ia

and clBV ( ) a crecitive performance bchel:-en that for aiitem srecht beschet-ming in ciailinel king

7.256 Moreover, now that Drciegen has not further underboiiivJ iv'aar why from this (or tiit any anJei-onclet part vnn Je e-tnails of 7 and 8 clecember 2016) it follows that dBV is -ou -are obliged to cli-agen its IP rights to Je sofüvcu e to Jlnc, the conclusion cht the parties have not agreed clat dBV to transfer its IP rights Jiencle to Jlnc. (...)"

Regarding the December 4, 20.19 email mentioned in 3.8 (and its implications), the researcher concludes, among other things:

"(...) 9.4 Because the parties d i d not clear their mutual rights and obligations in a detailed written a g r e e m e n t, there was a risk that a conflict would arise about the interpretation of the agreements (which were often made in mono or silently fivefold), which did occur. Steele iti liet licht van de-e flawed (sclii-iftelijke) protection vnn Je rights of JBV has TDX achtercifge -ien taken a great risk with Je on behalf of WIBV (and partly on behalf of -ich:-elf) at bi iefvcin 3/4 cleceitiber 2019 geclane vooi stellen (...). It gacit clem viet name out ele - not previously made in -such words - dBV's claim to ele IE rec'hten on 'new sofHvca e' and the proposal to (continue to) gacin as tsvee af-onclei ly on':lernemployments oncler cleo-elfcle ncicim, which nfiveek of the aspiration name a ge amenal company ('gfobal company ').
9.5. Ge:-ien Je:-e facts and oinstancligheclen it is op -ich not vers onclerlijk dnt ele letter of 3/J cleceniber 2019 Drciegen/cllnc (onaangenaom) surprised and Jat cl'iarJoor the confidence of clInc in the satiation itiet and ele intentions of ':lBV is acingested (...). The clisciission about ele IP i'rights on ele software - clie to clon hitherto not with -many words wes wes fedcl vvercl at once sharpened. The actions of clInc in response to and following ele letter of 3/4 cleceitiber 2019 have caused clBV to mnken high costs to ele continu'ity of its
iv'aarboi gen and <-ich against cllnc, tetzvijl Jie hanclelingen have inflicted serious damage on clBV, clie still voort':tuur t (...). Above all, the interplay of ele:-e letter and ele reaction of cllnc has led to Je vooi't:-etting von c!e samenivet-king being jeopardized and Je:-e iiiteinclelijk Je facto is beëinJigcl.
9.6. Thereby 'orclt naJi iikkeliyk aangeteJ Jat ele i eaction of Jlnc no oil bl ief - waat-onclet the nieerttinlen shutting down ':lBV from Your ge:-cinienic systems and actions to take over ele customers of JBV' - ele oncler-oeker clispi oportioneel voorkotiien, i n contraJ to ele bestcianJe cooperation practice and ele ovei eenkoittst between parties and cleels unlawful (...). Thereby it is also vcin importance clat ele cicinsprcicik of clBV on certainJe IP rights to the sofüi 'tre in jm-iclisch op:-icht for a cleel vei-clecligboai was (...).
9.7. The:-e honclelingen von cllnc and clacii-iiit vooi-Nloeiencle costs and schacle "ciren claarniee not or manu' ten clele beautiful: ienable when TDz¥ ele bi ief "an 3/4 cleceinber 2019 me:i oncl (...).

9.9. Hel is cuinnetnelijk clat Droegen with cuin requesting vcin an A k "A, with the main agen':lapiint being the resignation of TDz¥ and ele appointment of Vision lVancigeinent Europe B. k". as
bestuta cler, willie achieve clat dBV subsequently hacu IP rights to ele softsvore out not to dlnc -ou over-threaten. 1/e/ *Jie appointment :-on also ele way free :-are otn to transfer the klcintenbestancl vcin JBV naai- cllnc, -as Jlnc naJei heaven ner ele closure of clBV vcin ele ge--joint systems gecleeltelijk gereciliseercl (...).*
9.10. Now that ele for the dismissal cloor Draegen's argifments are not sufficient J r y u , Draegen trough the request of the AGM apparently intended (exclusively) t o customers the belcing of Jlnc. It w a s judged plausible that by doing so, Drciegen acted in conflict with art. 2:8 B IV, in which it is stipulated that (also) those who a r e involved in a legal person under the law and the articles of association (such as shareholders), shall behave towards each other in accordance with the provisions of the articles of association.
t eclelijkheicl and fairheicl ivorclt gevorclercl.

9. 1 I. Outlet' itseer not the clrievouclige cif closure of Je gen-ciinenic systems has Jlnc attempted to clruk on clBV ont haru IE i'echten. man d l n c over. Daca mee has dInc also in toeneinenele mate (consciously) harmed nan WIB V. (.....)
9. 12. The hcinJelen of Drciegen cils CEO von cllnc in cifsliiiten vcin clBV wn ele ge-ciinenlijke systemen tnoet also clen be beschoitivcl in verbcincl with -his position cils ineerclerheiclsoancleelhoiiclei of *WIBV. It is ele vrcicig whether Drciegen in clie howclcinigheicl has gehcindelcl ovei-only ele reclelijkheicl* and *billiykheicl vcin cii-t. 2.'8 BtY, now that he has gehanclelcl in strijcl ttiethe venilootschapbelong, consistc!e in bevoi cleren von the bestenclige success of Je onclei neitiing. Indeed, the closure becli'eigt ele agreed cooperation with cllnc, clie according to ele decision of the OK is a "necessary vooi-ivcicirJe" for the continued existence and success* of *dBV. ( )*

9.126. (...) i'vIecle ge- given the fact dnt (...) cllnc ivenste clat dBV hcuir IE rights to the softsvcu e out not ann cllnc :-ou ovei 'li 'tgen, clan therefore is plausible clat Droegen friet the resignation of TD V and the appointment vcin ï "ision iYlctncigement Europe B. 1!. as boardclei- primarily aiming at cllnc's interest. Dacit-n'i i vet.s iuuners ele path free ont cle director' to insti tiet and realize the envisagedcle transfer of laf *rights vous dDV tcin cllnc. 1YIc-t ele appointment of Vision Management Europe B. V. to bestuurclc-i': ou also ele way free -ijn to clrcigen laten klantenbestanJ of WIBV duur cllnc, -as clInc has tried to t-ealize naclei'l1cincl iiic-l ele closure of cleo ge--joint systems (...). Dacirrnee :-ou 'le hcisis for Je continui!teit of ele onJei'neining to clBV have been deprived, omelet Jie itiimers bestcictt ail cle sale of Je sofüvcii e and bijbehorencle Jienstverlening. (...)'"*

3.27. After e incl 21)2 l the immediate provisions were lifted, the OK t o o k a final decision on November 14, 2022. This decision was based in large p a r t on the report referred to under 3.26 above, in so far as currently relevant (for the sake of readability, the party names have been changed to those used in this judgment):

"(....) 3.7 The onclc-i'--uc-kei' constciteet t clai Groeneweg and Dt aegen in their oytreclen no diiiclelijk onclerscheicl have made !ii.:.sen 11tin hat'inigl1eJen as (inclirect) ann'leelhoiiclei' and besttuu'cle+ . (...)

4.9 The Onderneitiingskcimei' is of ooi'cleel clat ele gait of -aken at clBV, and with naiite ele gecli'agingen von Draegen -as clie appear from the onclei -oeksvei-slag, in onclerling vet'bnncl and saitienhciilg ben-ien, in ele given oitistanJiglleclen !cinbeleicl oplevei t. The i eciction vnn Drciegeil on Je e-mail vciil 3/4 Jecembei 2019, ivocii in Groeneweg vooi'stellen heel geclcinil om koitien tot licelltieovereenkonisteil fec' *voorbereicling of the vooi' 12 clecember 2019 geploncle overfeg between clBV* and *cllnc (....), wes muclc- in view of ele in ele loop clei'jcii'en arisen satiienivei- between parties, biiitenpropoi'tional. Den oncliticle/ijkheicl clie wars arise ovei- who i eclltheb bencle wars on ele lE- rights of ele (development of ele) sofGvcire, is can heicle pcii ties to blame. Vnstacit cht Di lie -itself also not hall ge:-organ for a goecle vcist of Je afsprctken between WIB V and clInc,' not in :-are howJaniglleiJ vcm CEO vcm cllnc at ele supports of ele onclernings and evenni in lii eclio 2018, at tijcle vcin Stijn toetrecling cils cicincleelhoiiclet vcin clBV. The onclei -oekei concliicleei-t clcit pcii t parties have not agreed cht clBV hnar IP rights cliencle to di-agen acin cllnc (...). Although ele determination as to who is entitledcle of ele sofGvcire ontsvikkeling is tel- judgement of ele ordinary civil court, the onclei -oeksverslcig does show sufficiently Jat ele acinsprnak vcin dBV on certaincle IP rights to ele sofüvare in December 2019 in jiu'idic op-icht in ieclei case for a cleel vet-Jecligbciar was (...).*

4.10 Instead of You dialogue ovei ele proposals from TDX can go on the already planned to Jeelhouc!ers consultation of 12 Jeceinber 2019, Draegen in response to ele deliberate e-mail clie appointment af-egcl (...), oniti iclJellijk ele confrontation sought and thereby a:-ij Jig measures taken Jie schoclelijk ivai'en vooi clBV and Je driven by her ondet neming. The onclet -oeket

states vcist clnl retrospectively be-ien is not steeJs diiiclly whether Drciegen has hcinclelcl in <-his capacity of board clericl of ':lInc or (also) as aancIeelhoiiJei- vrin rlB k" to Jat Groeneiï eg and De aegen did not acinge a strict separatIon between their i-espective roles (...). Well core ivorJen veststellenelJ clctt Drciegen tijclens ele oll hemels meeting of 6 Jecember 2019, to which he also cleelncim as onncleelhoiicler of 'HBV, opposite -ovvel ele employees of cllnc as clie of clB t" has claimed J that dBV --ich ':le IP rights on software are trying to appropricle.' it was, after all, --ocils the oncler:-oeker establishes, to "conversation probeizverpen for Je geplancle bespt-eking of 12 cleceniber 2019. Of a 'cliefstal ', :-oike Draegen stelcle, was (...) no sprcike " (...). Drciegen has Jacirbij ge':lreigJ not afsfuiting dBV (and its employees) from Je ge:-atnenal computer systems and clBV subsequently actually disconnected from clie. for ele onclernettiing essential systems (...). That lantste Jeecl he in -his capacity as CEO of cllnc. Vercler has Draegen ervoot gen-ot gel clat (a) cIInc took over management of the website from a vverknetiier of dBV Jie the website in consultation with cllnc hacl buildJ, (b) Je hosting of ele website, clie was on Jergebr eight at a NeJerlanclse serviceprovicler, was moved nacii- a U.S. serviceprovicler, (c) to all oncl parts of Your source code of ele sofüvare ele text "PI operiy of rlmorcian, Inc." ivercl added and (cl) appointed Jones 'vercl as clirector ofsofüvcire, a position oil Joaivoot- not existingJ, with the powerclheirl to give instructions arm ele sofuvcire only ikkekuirs of dBV and dmorcian Btilgnria (...). With Jee-e four acts and with -his misrepresentation of -tasks during clBV's ele toespt-aok for clBV's staff, Di-aegen wrongfully intervened directly, not in -iydestellitig vati liet bestiita- vcm JBV, in ele beclriyfsvoering of clBV, for the benefit of cllnc and for no':lele vcin clBV. Zocloencle, Drciegen has gehanclelcl as de facto director of clBV, in violation of cirticle 2. 8 B tY for the purpose of --ovvel dBV as co-shareholder TDX.

4.11 On July 3, 2020, after an unsuccessful consultation on an iitinnal settlement, Draegen in -his how Janigheicl as cianclehouclei- of ':lBV was requested to call a cilgeneral meeting with ols main agenclopiints the resignation of TDX as boardJer win WIBV and the appointment of an ocm dlnc affiliated p'ii-tij as a decisuurJer instead of TDX. The oncler-oeker has not considered ele arguments cliegen claorvooi- has acingeJng claorvooi- and has considered it plausible that Draegen's primary objective in dismissing TDX and ele appointing k "ision Nlancigenient as a board cler of dBV is to clienen the belcing of 'linc to -oc!oencle Your IP rights win JBV unvoiicly and oen not acin her to be ovei clrogen (...). That argument convinces. Deur komt bij Jat Drciegen enkele clcigen Jacii-nn - op 6Jii/i 2020, *en cliis voor afgaancl erenJe te hoiiclen algemene vergnclering - ann the staff win clBV has meecleelcl clat TDX cils bestuurcler of JBV ivorrlt ontsl'igen and ï "ision KÏcincigement ele new bestuurclei ivorclt. With that booJschap can the pet-staff he has again erroneously acted cils de facto bestuurcler of JBV, not tet:ijclestefling vcin the statutory e bestiiw.*

'4. 12 A cicindeelhoitder no ag ag in ':le exercise of :-his i rights in principle -take his own belailg as riclltsnoer, ii ciai-when the ciancleelhoii':Ier :-ich ivel must cb-agen by what cloor ele i edelijklleicl,and fairness:1 ivot ':lt gevergcl (Article 2:8 BW). tVat the t edelijkheid A fairlleicl require, hatlgt cifvcin the onlstcinJcircumstances of the case. For example, on an iiteerJerheiclsacin parthoiiJer a --(...). Aboveclien Inag an anncleelhoiicler in Je exercise of :-his rights the interest of Je vennootschcip in principle not neglected, -o follows from article 2.8 B IV. One of ele circumstances relevant here is that Draegen, in addition to being a director of Jeelhoiu:Ier win clBV, is also CEO of levet supplier Jlnc. The core of *ele cooperation between JBV and cllnc was that JBV sold and (re)developed ele software, while the parties discussed gciancle 'eg to arrive at one joint global compciny, whereby, according to the on Jen-oeker, it w a s often unclear in which capacity Draegen and Groeneweg hanclelclen (...). This context determines how Draegen should be perceived as a shareholder of CLBV and requires him to show the necessary care towards dBV and those who are involved in dBV.*
h'tur onclernment 2- his involved could be expected. The request to convene a general meeting did not include as items on the agenda the resignation of TDX as a director of dBV and the appointment of a party affiliated with ':lInc as a director in its place, after the parties - for the time being in vain - have

haclclen onclei-han Jeld over Je IE rights, followed:1 cloor ele tiieclecleling to the staff of ':lBV - even beforeclat ':le general vergaclering ivei":1 hoticlen - cht TDX dismissed ivorclt, --under cht clciar sleekhoiiclencle arguments for 'vciren, not as an apparent cloel to bring about that clBV's IP-i'rights be transferred to dInc for no --oiiJen, is contrary to Je mooi' Drciegen as
No eerclerheiclsaancleelhotu:let' on grorid of ar ticle 2.'8 B tV towards JBV and TDX to be observed -or gviilJigheicl.

4. 13 In conclusion-elfcle kciJer core Draegens conduct cils bestuurcler of Jlnc as oittschreven in -J. l oncler (ii) - ele first closure - not separate ivot den ge-ten from :-his role as itieei'clerheiclsaandeelhoiicler of clBV. Dt'aegen whole it in -his power to exclude JBV erf from ele for haai,- business footing crucial conipiitet systems and has Jcit geJcicin not the improper cv'giun ent clcit dBV -ich rights try ele to appropriate at the expense of cllnc. Draegen hee]i, nicht the factual lcun laying of clBV - the gen-joint onclernettiing of Drtiegen and TD ¥ - in plctctts free *ele discussion with TD ¥riem to gacin on the for 12 clecetitber 2019 geplcinJe consultation, cle helcuigc-n of dBV veroncicht-ciamd. Against ele cichtergroncl of ele aarcl of ele santeniverking, clic- ctction was -o unreclable, clat he felt vcin that mcichtsmiJclel - putting the systems on --ww t -set - hcicl c/ic-iie/i* le *onthoiiJen.*

d.1'4 (...) Duiclelijk is that Dt aegen also nci the intervention by ele Onclernem ingskcitnei with cleo-e actions, clie -iyn to qualify nls a magsgreep, w r o n g l y , because in slrijcl with Je on him cils Itieet clerlleiclscicmcleelhoticler of clBV on groncl vcin ctrticle 2.'8 B IV riistencle -orgviilcligheiclsobligations, the belcings of dInc has lciten prevalei and above ele interests vcin clBV and /faar *stakeholder s.*

4.21 The Onclei'nem nem ingskainei' is, in view of the foregoingcle von oorcleel Jat ele gang von -aken at dBV with regard to have gehrek aan "ostlegging of the IP rights vvelisivcicir attests to incorrect beleicl, macii clcit this c!e let'ilificcitie ivanhelei'l niel can ch agen. Rather, it follows from the oncler=-oeksvei-slog' Plat for- Je betrokf'c-i1 purl ijen, TDX and i z-ij'l.\ et1 cllnc and Di nine ancler:-ijcls, cleo 'yspi aken on maincl lines "el hel'lc-i ivaren and 'hit geleii i ati them the urgency has feltcl oil afspi'aken a JiiiJig to be established. Du! is --c-c-ker nchtei'iif ge-ien has been an incorrect in.estimation, moat vcin a hanclelen in strijdcl inet elementaii'e beginselc ri form *goecl onclei nemc-rschop is no sproke. This also applies to Your e-m oil von 3/4 clecein ber 2019, "ooi'at inet nnine vcin helnng is cht* that *e-moil also found ele iiitnocliging to meet in ovei leg and clat TD ¥ ele clisproportional i-eaction vcin Di'ciegen not have to pre:-ien.*

Conclusion
-/..?-/ The conclusion is flat from,h. et on Jet--oeksvei'slag is shown win ivanbeleicl vcin JBV, -oals 11(before ')i1 let 4.9 toll and French fries 4. 14 omschi even. Drciegen is for clcit ivcinbeleicl vercii1tsvooi'clelijk. The ver:-oek
vt/ri *clBV:-al vvot clen toegeii e-en. (...)"*

3.28. The summary judgment of May 31, 2021, and the judgment of opposition rendered thereon were appealed. The court has since set aside that judgment. That judgment of May 23, 2023 implies as far as currently relevant (with the party names changed to those used in this judgment):

"(...) -4. I n ele iitoncleling on appeal dated September 15, 2022, Gr oeneweg,
'oil is an indirect shareholder in TD V, declared dal dBV after the blockade on 22 jnnuai i 2021 succeededJ i n setting up its own platform - ele.in rov. (...) referred to as 'instance' - that clefinally went on the air on 8 maai t 2021, that i:IBV then,started miguLing its customers to oil instance (which c o s t a lot of money) and dcit clie migration ininiJdels is completed, wciardooi JBV

rllnc now no longer has noclig. Ncimens clBV is cloor mr iVeijbooin on tlie tnonclical treatment vercler verklciard i:lat after the blockage, which =-orgcle that clBV could no longer access anything, a lot of energy was put into setting up Jet own platform and clcit at the same timecl entered into a jiiriclical ti aject out *with an oi":lemaati'egel to oblige cllnc to provide accesscing. In (...) has ':lB k' opgemct-kt Jat -ij has managed to keep its head above 'vatet-, :-ij it thanks-ij its own efforts and great financial sacrifices.*

4. 2 From Je--e statements, it follows clat dBV has no fullJoenJe (spoecleisen':1) interest in ele with hactr claims A, Al, B and C requested provisional measures at this time.

4.3 For the purpose *of vorclering E oorcleelt the court as follows about ele situation at tijcle von het ver-et judgment. On Je Jattim of Jat verdict (3 l May 2021) wes the proprietary platform vcin JBV already ger iiime tij'l vollooicl and wes cle niigi-ntie of clamps has been going on for almost three ritaanden. The legal process had been initiated as an 'extra'. Under elec:-e circumstances it cannot, in the opinion of the court - with hindsight - be said that at the time of the verdict ele Jaarin, before the application of the measures taken by you in forms A, B and C were still necessary, dBV hall on 'ele ':latin1*
After all, a large part of the disadvantageous consequences of the blockade had already been removed by a court ruling, even then there was no longer a sufficient interest in the voter listings. Whether the costs of the measures taken by WIBV to prevent ele schide can be recovered from the cllnc (Article 6, 96 clause 2a of the Civil Code) is a question that will have to be dealt with in a court case on the merits regarding the will of the cllnc to prevent ele schide. It follows from the foregoingcle Jcit Je voort-ieningenrechter ele in the default judgment toegeive -and vorJei-ingen A, B and *C* fn *the ver:-et judgment should not (as far as vorclering B bett'eft.' Jeels) have been allowed to stand:1. On the basis of the fat cuttings judgment --are Plus no chu ongsommences verbeitrcl. Reecl.s hiei'on runs into vorclering E.*

J.4. (...) -his eleclelen by Di aegen to TDV gelevei'cl on September 8, 2021. (...)

4.5 (... .) WIBV [has] *not explained that in ':le Joor TDzV rem Draegen betacilcle priys for redelivery vcin ele aanclelen in JBV (€ 446. 134,72), cle i"cica-cIe of ele cif purchase vcin a eetiivigclurenJe license vcin the cllnc -softsv ore wes vei'cIiscoiiteerJ. Anclers clati clBV seems to iiienen (....), from the fact clcit ':le-e teriiglevei price, clooi Je operation vcin article 4 EA, was gebciseercl on ele pt ice which was then still nr eerclerheiJscuinclehoiiJei Draegen eet Jer ha':1 geboclen on the niinclerheicl package (49.99%) vcin TDX could not vvorclen orgeleicl clcit clciorin a counterperformance for' the rifurchase of the licensei rights is included. Serious account must therefore be taken 'v orclen gehoiiclen clcit the genoeincle redemption word':le niel in Je terugleverpt-iys ii requirement ver Jisconteei":1. And ivcinneer clit is not the case, clan the balance in Je agreement - clie is a long-runningJe diui agreement - is since clie tei'iig delivery iindcimentally disturbedcl and is (thus) ann series u:-e doubt on Jei vehemently whether in a bodempi'ocedm e is :-al (l'iinnen) i"orclen judged that cllnc is still hoiiclen to hciar obligations from that agreement now. For year-to-year stretching or clerncial measures is at ele-e stancl of =-ciken to the earJeel vcin the court a placits. (...)*

4.7 The vorJeringen of clBV -iyn, resiiming, at clit moment not toe'vijsbciar and were not so at the time of the ver--et judgment. (. . .)"

3.29. dBV appealed this judgment to the Supreme Court.

3.30. An *order* dated June 27, 2023 from the US Judge (Chief United States District Judge) to the District Court, with affidavit translation submitted on July 3, 2023 includes, among other things:

"(...) in the Amei-ikaaisse law, a civil pi oceJm e ciangee is ciied with ele inJieiling vcin a coittplciint (conclusion of claim). Feel. R. Civ. 3, There bestacit no sclleiJing between ele kortgeclingpi ocecliire and ele bocleniproce':lure. In c!e conclusion vcin claim stcicin ele vorcleringen set forth for which ele plaintiff seeks a judgment in gi-oncle vet-:-. Feel. R. Civ. P. 8(a)(2). ïVcinneer a civil pc ocecliii e be Jt cinn brought, chen plaintiff- as onclei-cleel Jaciircin can vt agen a preliminary proceeding. In order to oncler Aitierikaons right to request a provisional or temporal voot:-iening. verkriygen, client ele plaintiff' to demonstrate clat it ivaarschijnlijk Jcit they win ten groncle sail. A kortgecling-itting core :-even vvorclen satnengevoegcl not a rechts=-itting over' the boJein-aak. See FeJ. R. Civ. P.65('i)(2).
Regardless of whether ei thus oiti a preliminary injunction ivorclt gevi'ciagcl it is cliis the filing of clë coniplciint clie nanr Amei'ikcicins t-really determines whether a boclettipt oceJw e ols first is acingebi-ocht. The conip/aint contains c!e voi cleringen iiiteenge -et ivaai on ele Court can give a finalcl judgment, and claciroin it is ele incliening vcm ele cotnplciint ivacirniee ele bodemprocecliire in an Amerikcicins law clcling is Jt commenced. (...)
(2) The proceedings on the merits in ele Amei-ik'icinse :-aak has commenced with Je incliening win ele Coitiplaint on 12 mciort 2021 and Je to this contradictlecle fat-clarifications of DIII RC Aclvisor opposite ele Rechtbank Rotterclcim -are utterly univacir,
(3) In ele on 12 iiiaai t 2021 ingecliende Amerikaanse -aak ivei-Jen vorcleringen instelcl ivcicirin ele eigencloiii on aiitewsi-echt en ele voor'v'inrc!en of ele contt-acts of parties onomivonclen to ele orcle !ei-clen gestefcl. HierJoor seems to have a bepcialde overlcip -in onclet-iverpen tmtsen ele Aniei ikacinse -cuik and Je -acik oil is pending before' 'le Rechtbank Rottei clem. DlvIA RC Advisoi "s verklciring cian Je Rechtbcink Rotterclani clcit ele Amei'ikannse -cuik exclude J scllenclations of Anierikcinns copyright and nierkenrecht actnvoc-i't and no inbreiikuuikencle hcinclclelingen outside ele Vei'ei1igcle States is volsti'ekt on'vacir,' and
(-4) The cloor ele Anierikacinse i'ecl1ter gegc-ven provisional pre-operation did not limit ele application far ele Copyright Act to iiitsluitencl inbi c-itkmakencle hanclelingen within ele Vet-enigcle Starts and got exti atei t-itoricile application, did clo"" han Jelingen of DlvM RC Aclvisor in Eiii'opa and elclers clacir also onclei- fell," and DIvIA RC A dvisoi 's opposing ver klcii- cations to this against ele Rechtbank Rottei clem -iJn utterly onivcior. (...)"

3.31. In the US proceedings, a timetable has now been set in which by October 2G23 Mediation sun should have taken place, through the filing of a specific *ino/ioii,* and the commencement of oral argument in the main case *(tricil)* is scheduled from March 11, 2024. Furthermore, dBV is required in those proceedings to submit the source code and related dociiments fin the software currently used by it in the context of
From *cli.scovery.*

4. The further review

4.1. The court previously assumed jurisdiction over the claim. By judgment of December 14, 2022, the court also ruled on the lis pendens appeal of Draegen and of dlnc, to be assessed with respect to each of them under the provisions of Section 12 Rv. In this regard it considered:

"(...) 5.35 Ann Je orale is Jan still Je vt aag whether ele Atnerikacinse procedure that dlnc to haan litispenclclcig appeal gronclslcig is eerJer nanhangig is gem nakt core the onclerhovous -acik. Is i:laf

not the case, dcin inist at t Article 12 Rv applies and Jlnc reecls' litispenclence appeal fails for Jie reason.

5.36 Aange:-ieri in Je onclerhavi - branch cils the day of summons 1 l October 2021 is to apply, ele:-e =-aak on gr oncl of article 125 liefl Rv from clie clag is pending.

5.37 Tíjclens cle inondeling of 1-4 septenlber 2022, the JBV very concretely iiiteenge et and with stiikken nacler oncler oncler built ':lat in the Amet ikaanse proce lure that elInc underlies hcicir litíspenclencebei oep to heJen iiitsliiitent decisions of provisional aarJ (preliminary pre-judgments) -have been given and that the court in those proceedings did not commence cle ground-aak until May 22, 2022. Jlnc has ne:-e iiiteen-etting of dBV left unüvisted and cle court assumes nit Jat ple decisions prior to May 22, 2022 should be considered ivorclii- the applicable procedural law as provisional pre-judgments. (...)

Now that cliiidelijk is Jat de-e procecliire eet Jer 'pending Jan May 22, 2022, the litispencleniie appeal fails. (...)"

Meanwhile, an Order of the District Court is available, quoted in part at para. 3.30, from which, in brief, it appears that under the procedural law of the United States, the proceedings on the merits there are pending on March 12, 2021, and that under that procedural law it is possible to submit certain claims for injunctive relief *(niotion for stinimary injiinction)* on that occasion, within the then already pending proceedings on the merits.

4.2. dlnc therefore asks the court to reverse its decision not to stay the case, due to lis pendens. dBV opposes.

4.3. The court does not reverse its decision where Draegen is concerned. The circumstance that Draegen is not a party to the U.S. proceedings is immei s an independent ground for deeming Section 12 Rv inapplicable.

4.4. The court does reverse its decision where the case against dInc is concerned. To this end, the following reasons are relevant. Based on the District Court's communications, it must be assumed as a given that, contrary to the court's earlier assumption, the proceedings there commenced earlier than these proceedings. This is explained as follows. It comes down to whether on March 12, 2021, sp1'ake, as the District Court previously assumed, of the commencement of proceedings seeking interim relief which, by their nature, cannot lead to a decision that can acquire res judicata and then in the Netherlands enforceable, or just to initiate proceedings that may lead to such a decision. From the District Court's explanation, it must be concluded that on the basis of that preliminary procedural document, it will be possible to make decisions that are not provisional in nature in a judgment on the merits, which can become res judicata. Although there is no enforcement treaty between the U.S. and the Netherlands, it must be assumed that a judgment to be rendered by the District Court will presumably meet the criteria set forth in the Gazprombank judgment of the Supreme Court (HR 26 September 2014, ECLI:NL:HR:2014:2838).
After all, there is an independent government judge who considers himself competent on plausible grounds, where both parties are heard and where, moreover, there is sufficient guarantees of due process apply. That means, that a judgment to be rendered by that court in the Netherlands, as it now appears, will most likely be in

will be eligible for a quasi-exequatur, i.e. a judgment based on article 43 1 paragraph 2 Rv. The HR's post-hearing judgment of September 29, 2023, published under ECLI:NL:HR:2023: 1266, confirms this. (The court notes that the extensive attention paid to this print at the hearing, where the AG's conclusion was already available, did not make it necessary to give the parties another separate opportunity to comment on that judgment).

4.5. In the US proceedings, as far as the essential points in dispute regarding IP rights to the soMvare are concerned, the same points in dispute are at issue as in these proceedings; the positions there are more or less the mirror image of the positions here. The fact that more is claimed in these proceedings does not detract from this. So in this case, if both proceedings are continued, the situation threatens to arise that, on the crucial points of the ownership of IP rights and the originality of the source code, there are two enforceable court decisions in the Netherlands that are (entirely or partially) incompatible with each other. This is the situation that Article 12 Rv aims to prevent.

4.6. In addition, this procediil e riiet ready for issuing a final judgment against dInc. Further research is needed for that. Investigations are now underway in the US. The investigation of the source code, which is planned there at relatively short notice and may even have been carried out by now, is in any case also useful and possibly even necessary for the present proceedings. d BV has no legally respectable interest in dlnc (and also itself) having to incur double costs to have that investigation carried out both in the United States and in the Netherlands, whether or not with the help of experts. Finally, if the schedule referred to in 3.3l is followed, judgment will probably be rendered in the U.S. proceedings e ind 2024. That is, taking into account the expected necessary further pl'oceslialidelingeli in these proceedings, probably earlier than final judgment can be rendered in this case.

4.7. In view of this, the proceedings between dBV and dlnc will be stayed until judgment is rendered in the US. Thereafter, the parties may, with insertion of that judgment, continue the procedrlre here if they, or at least one of them, deem(s) it advisable.

The claim against Draegen

4.8. d BV accuses Di aegen of a tort committed by him in person. In particular, it relies{ on the three established blockades and the verse|ag of the OK investigator, whose conclusions were largely followed by the OK in tsaar decision. The OK ruled that Draegen impermissibly allowed the interests of dInc to prevail over the interests of dBV, which Draegen, in his capacity as shareholder, had an equal duty to represent.

4.9. Draegen argues that the findings and conclusions of an OK investigation report such as the present one, which was prepared for a different purpose and in a different context, should not simply be regarded as established facts by the civil court. Draegen further argues that based on the largely established facts between the parties, it is clear that Draegen acted in his capacity as a director of dlnc and to protect dInc's interests as he saw them, and that he was free to do so. If those blockades were unlawful it is dlnc dle acted unlawfully; after all, it, as a legal person, can only act through natural persons, its director in the first

place. d BV has not asserted enough to support the conclusion that there is external bestiiurder liability of Draegen in person here, Draegen said.

4.10. The court ruled as follows. Based on the facts, it is clear that the blockades were unlawful against d BV. After all, those blockades in any case led to result that d BV could no longer perform its work and lost contact with haai' customers - temporarily. For the first blockage, this sudden blockage was in violation of the then existing agreement between dBV and dlnc, it was clear to dlnc that it would cause damage to d BV, and it intended such damage. TDX's letter of December 4, 2019 was no justification for this. Although that letter made it clear that TDX was claiming (IP) rights that dInc believed did not exist (or, if they did exist, belonged to dlnc), the blockade in response was disproportionate, as evidenced and explained in detail in the research report (see ro.
3.26). Contrary to Draegen's opinion, the iapport has free evidential value in these proceedings; although the investigator was appointed by the OR to investigate mismanagement (and not in the context of a possible unlawful act), this does not affect the observations and observations made by the investigator during his investigation, during which he had access to a great deal of material. His legal valuations are irrelevant in this regard; what matters are the facts. Given the facts enumerated in the report, the blockade was disproportionate and therefore unlawful, also in the court's opinion.

4.11. Indeed, at the time of the eeiste blockade, there was no concrete reason to believe that TDX was going to enforce the IP rights that d BV considered its (indirect) property or otherwise take action against other dmarcian entities. The December 4, 2019 letter as such also did not deprive dlnc of any rights, so that the situation described by Draegen as "theft" (at least: appropriation of IP rights), was not at issue. That letter exposed an important difference of opinion regarding the IP rights, but the parties could have consulted on that at the time. That consultation could have taken place, for example, at the already scheduled shareholders' meeting. There were no irreversible actions by d BV or TDX that required an immediate drastic reaction by dlnc, nor were they announced.
The second and third blockade were also unlawful; they amounted to an abuse of the actual power that Draegen then possessed, as director of dInc. Those blockades ivat'en exclusively meant to secure the belaligen of dlnc. Draegen does not contradict the latter either; he merely believes that he was "forced" to do so by the sitrtation, and that he was also entitled to do so in his capacity as dlnc director.

4.12. Since this involved acts by Draegen in his capacity as a director of dlnc, the starting point is that only the company, dlnc, is liable for the resulting damage. Under special circumstances, in addition to liability of that company, there is also room for liability of a director of the company. For such liability to be accepted, however, it is required that that director, given all the circumstances, can be personally blamed. (ECLI:NL:HR:2006:AZ0758, NJ 2006/659 (Ontvanger/Roelofsen), later confirmed several times).
dBV's contentions must be understood to mean that Draegen acted unlawfully vis-à-vis it, since, as its shareholder (pursuant to Section 2:8 of the Dutch Civil Code), it was obliged, vis-à-vis

dBV, to respect dBV's interests and, in any case, not to damage them. By using his opportunities as a director of dlnc to apply the blockades, he did damage those interests. On that basis, it seeks under Ie a declaratory judgment and ondet 4 an order that Draegen pay damages, to be made out by state.

4.13. The court finds that this position of Draegen as a shareholder must be taken into account in the consideration referred to under 4.12. The threshold for directors' liability is therefore met. It has neither been argued nor shown that Draegen promoted his personal interests or interests other than those of dInc or that he profited from this in private, as Draegen rightly argues. That, however, does not disqualify him. After all, it is in not taking into account the interests of dBV, of which he was a shareholder, but in letting - exclusively - the interests of dlnc prevail and in that context deliberately causing damage to d BV that the ei nst personal reproach lies. That is unlawful under Dutch law, ivaai to Draegen should dog himself as a shareholder in a Dutch BV. Even if in due course it should turn out that dlnc is right where the dispute regarding IP rights is concerned, those blockades, which caused dBV damage, were disproportionate and therefore unlawful, on the grounds mentioned above.

4.14. This means that against Draegen vordei'in3 Ie and 4 are assignable. In order to avoid procedural complications and ou that li ict can be ruled out that the decision on the IP rights may be of importance3 for' ele sweetheart, the court will not give a partial judgment now, but will aaliliotldeli the case.

In the case against both gedaap-den

4.15. Any further decision is stayed.

5. The decision

The court

in the case against Draegen

5.1. reserves any further decision; in the

case against dInc

5.2. refers the case to the parking roll in aRvance of the decisions in the US proceedings;

5.3. reserves any further decision.

This judgment was rendered by Mr. P.F.G.T. Hofmeijer-Rritten, Mr. W.J.M. Diekman and Mr. D.E. Stols, in the presence of the Registrar, and publicly pronounced on December 20, 2023.

106/2502/3605/1977

For photocopy in accordance with issued as

'lawyer

The Clerk,