

Balanced, pragmatic and fast: the Netherlands remains an attractive jurisdiction for follow-on cartel damage claims

Overview recent Dutch case-law on cartel damage claims

Executive summary

For several years the Netherlands has been amongst the most important [jurisdictions](#) in the European Union for cartel damage claims. Recent judgments illustrate that Dutch civil courts on the one hand adopt a pragmatic approach that allows parties to litigate relatively efficiently (*Equilib/KLM*), while on the other hand make sufficient provisions for procedural safeguards, e.g. by ensuring that both sides are heard (*TenneT/ABB*). Civil courts also pay sufficient attention to the specific characteristics of the individual case in establishing whether they have jurisdiction in multinational cartel damage cases. The Court of The Hague, for instance, found that it had jurisdiction to hear and decide on the claims against all the defendants in the paraffin wax cartel (*CDC/Shell et al.*), because the various claims were sufficiently connected. In the lift cartel (*Stichting Elevator Claim/Kone*) on the other hand, the Rotterdam Court did not believe that such a close connection existed. The main reason for that finding was that, unlike in the paraffin wax cartel, national cartels were involved. In this overview, we will discuss the cases referred to above in more detail.

Gas Insulated Switchgear cartel: passing-on defence not yet resolved

On 16 January 2013 the Arnhem Court adopted its judgment in the case [TenneT/ABB](#). This judgment received quite some attention since it was the first case in which a court dealt with the passing-on defence. In its judgment the Arnhem Court rejected the passing-on defence as it deemed sufficiently probable that the plaintiff (TenneT) suffered damages from the gas insulated switchgear [cartel](#). However, in its [judgment of 10 April 2013](#) the Court of Appeal of Arnhem-Leeuwarden suspended this decision. The Court of Appeal found that the Arnhem Court should have been more reticent in disallowing the passing-on defence, since the defendant, ABB, had not yet had an opportunity to respond to an economic report on which the disallowance of the passing-on defence was largely based. The Court of Appeal found that “a proper debate on the passing-on defence” had therefore not yet been conducted. For that reason the Court of Appeal found that ABB *et al.* had a compelling interest in first obtaining a ruling on the passing-on defence “before being forced in the assessment of loss proceedings to submit detailed and costly expert reports, which may prove to be of little use and

may give rise to new costs if a different ruling were issued on the passing-on defence on appeal.”

Paraffin wax cartel: Shell used as “anchor defendant” to establish jurisdiction of the Dutch court

On 1 May 2013 the Court of The Hague adopted its [judgment](#) in the case *CDC/Shell et al.* In this judgment, the Court first assesses whether it has jurisdiction to hear and decide on the action for damages. The basis of that assessment is the [Council Regulation 44/2001](#) (the “Brussels I Regulation”). The Court found that it had jurisdiction on the grounds of Article 2 of the Brussels I Regulation to hear and decide on the claims filed against Shell Petroleum N.V. because that legal entity has its registered office in the Netherlands. The other parties had been summoned to appear in the proceedings on the grounds of Article 6 of the Brussels I Regulation. That article sets out a special jurisdiction ground. If there is more than one defendant, a claimant may institute the proceedings before the court of the place of domicile of one of the defendants, “provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (...)”. Article 6 of the Brussels I Regulation is therefore intended to prevent irreconcilable judgments in separate proceedings.

In the Court’s opinion the conditions for application of Article 6 of the Brussels I Regulation had been met because the claims against all the defendants in the principal proceedings relate to the question regarding the civil-law consequences of the Community competition-law liability established in the Commission’s cartel decision. The Court therefore found that the claims filed against all the defendants in the principal proceedings were sufficiently closely connected.

The Court then addressed the implications of the judgment of the European Court of Justice in [Masterfoods](#). This judgment pertains to preventing a national court from passing a judgment that conflicts with a not yet final decision of the European Commission. All the defendants in the proceedings in question relied on that judgment and requested that the proceedings be deferred until the European Commission’s decision in the cartel proceedings was final.



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According to the Court it follows from the Masterfoods judgment that “*if the settlement of the dispute before a national court depends on the validity of the Commission’s Decision, a national court that is considering on the grounds of doubt regarding that validity to pass a judgment that conflicts with that Decision must defer judgment until a final decision has been issued by the Community judicial authorities on the reliance on voidness of the Decision (...)*”.

However, the Court disallowed the reliance on the Masterfoods defence because, also in light of the status of the proceedings, the Court was not (or not yet) considering issuing a judgment that conflicted with the Commission’s Decision. The Community duty to work together loyally therefore does not (or not yet) necessitate a staying of the principal proceedings. The Court also referred in that context to the efficiency principle to which the Court of Justice drew attention in the [Courage/Crehan](#) case. In the Court’s opinion that principle would be unacceptably thwarted if the mere fact that an appeal has been filed against the Decision meant that a statement of defence may not be filed until the Decision has become final.

Esso and Shell requested the Court to exercise the discretionary power provided by Article 28 of the Brussels I Regulation to stay the proceedings if related actions are pending in the courts of different Member States. The cases involved were filed by other purchasers of paraffin wax before the Chancery Division of the High Court of Justice in London, United Kingdom, on 29 July 2009 and 30 September 2011. That defence was also disallowed by the Court of The Hague, in light of the early stage of the two proceedings, in which no substantive defence had been filed yet.

Air cargo cartel: Court of Appeal formulates stricter requirements for application of the Masterfoods doctrine

In its [judgment](#) of 24 September 2013 in *Equilib/KLM* et al. the Court of Appeal dealt with the question whether a national court has jurisdiction to hear and decide on a civil follow-on action for damages if the [cartel decision](#) of the European Commission is still being litigated before the European Union judiciary. Equilib claimed compensation of loss on behalf of a number of victims of the (alleged) air cargo cartel. In the first instance one of the (alleged) participants in the air cargo cartel, KLM, requested that the proceedings before the national court be stayed until the Commission’s cartel decision in question was final. The Amsterdam Court did indeed rule in its [judgment](#) of 7 March 2012 that the civil action for damages should be stayed. On appeal, Equilib requested the Amsterdam Court of Appeal to set aside this decision. The Amsterdam Court of Appeal subscribed to Equilib’s opinion that the Masterfoods judgment did not necessitate the staying of the proceedings.

In its judgment of 24 September 2013 the Court of Appeal considered that it follows from the Masterfoods judgment that a national court is free to decide whether it will suspend the proceedings in order to await a final decision on the request to set aside the judgment, or will request the Court of Justice to issue a preliminary ruling. The Court of Appeal interpreted this to mean that the staying of national proceedings is required only insofar as the national proceedings relate to factual or legal questions the answer to which depends on the validity of the Commission’s decision. A staying of the proceedings furthermore requires reasonable doubt about the validity of the Commission’s Decision.

On this ground the Court of Appeal found that if one party relies on a Decision of the Commission to support its claims, it is up to the other party (the party requesting a stay) to dispute the validity of the Decision by (i) proving that it has filed a timely appeal; (ii) explaining that it is reasonably opposing the Commission’s Decision; and (iii) explaining the defences that it wishes to file in the proceedings, so that the national court can decide on that basis whether and, if so, to what extent the assessment of those defences depends on the validity of the Commission’s Decision.

The Court of Appeal then found that KLM would first have to file a statement of defence in order to meet the conditions in (i) to (iii), before it could be established whether and to what extent the proceedings should be stayed. The Court of Appeal therefore ruled that the Court’s judgment in first instance could not be upheld. In its judgments of [7 January](#) and [4 February](#) 2014 in related cases (*East West Debt/KLM et Al.* and *KLM et al./Lufthansa et Al. (indemnification proceedings)*), the Court of Appeal confirmed this approach.

Lift cartel: no full jurisdiction Dutch court due to the lack of a close connection between national cartels

In the follow-on action resulting from the [lift cartel](#), victims affiliated in *Stichting Elevator Cartel Claim* experienced the limits of the jurisdiction of the Dutch courts. This is apparent from a judgment of the Rotterdam Court of [17 July 2013](#). The background of the proceedings is the [Decision](#) of the European Commission in which Kone, Otis, Schindler and ThyssenKrup were fined for their participation in a cartel. In the decision four separate breaches were established that related to the national markets for lifts in the Netherlands, Belgium, Luxembourg and Germany. The Dutch foundation Elevator Cartel Claim filed claims against the ultimate parent companies of Kone and ThyssenKrup and against the national subsidiaries that were directly involved in the breaches according to the Commission’s decision.

The Court first of all found that it had jurisdiction to decide on the claims against ThyssenKrup’s Dutch subsidiary (since it



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is domiciled within the territory of the Rotterdam Court) and against Kone's Dutch subsidiary (since Kone had not disputed the jurisdiction of the Rotterdam Court).

The Court then addressed the question whether it had jurisdiction under Article 6 of the Brussels I Regulation in the proceedings against the defendants domiciled in other EU Member States. With regard to the non-Dutch subsidiaries of ThyssenKrupp and Kone, the Court answered that question in the negative. According to the Court, the assessment of the risk of irreconcilable judgments within the meaning of Article 6 of the Brussels I Regulation requires the existence of the same factual situation. However, that was not the case in the Court's opinion, because the Commission's decision was based on four national cartels.

Moreover, it is apparent from the Commission's decision that the practices of the (alleged) participants in the cartel differ in respect of (i) the manner in which the participants eliminated the competition; (ii) the periods and the duration of the agreements made; and (iii) the specific products and services that constitute the market in question on which the competition was eliminated. In the Court's opinion the same factual situation was therefore not involved. The Rotterdam court therefore concluded that it only had jurisdiction as to the Dutch cartel.

In the Court's opinion the case also did not involve the same legal situation within the meaning of Article 6 of the Brussels I Regulation. The Court assumed, for instance, that there might be differences between the EU Member States involved in the field of joint and several liability and group liability, and also in matters regarding damages. In the Court's opinion the risk of irreconcilable judgments was therefore not such that the adjudication of all the claims, including those against all the defendants domiciled outside the Netherlands, by one and the same court was justified or necessary. In view hereof the Rotterdam Court decided that it only had jurisdiction to decide on the follow-on claims relating to the Dutch cartel.

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