ORIGINAL

Judgment

DISTRICT COURT OF AMSTERDAM

Private Law Sector

Judgment of 27 July 2022

In the cases with case numbers / cause-list numbers:

C/13/639718 / HA ZA 17-1255
C/13/640200 / HA ZA 17-1345
C/13/645758 / HA ZA 18-325
C/13/649757 / HA ZA 18-617
C/13/651492 / HA ZA 18-738
C/13/656143 / HA ZA 18-1077
C/13/656293 / HA ZA 18-1097
C/13/656508 / HA ZA 18-1118
C/13/658179 / HA ZA 18-1231
C/13/659129 / HA ZA 18-1330
C/13/659995 / HA ZA 19-34
C/13/661078 / HA ZA 19-127
C/13/661079 / HA ZA 19-128
C/13/661080 / HA ZA 19-129
C/13/672474 / HA ZA 19-993

of

1. **RETAIL CARTEL DAMAGE CLAIMS S.A.**,
a legal entity incorporated under foreign law
with its registered office in Luxembourg, Luxembourg,
Claimant in case C/13/639718 / HA ZA 17-1255,
hereinafter referred to as "**CDC**",
lawyers: J.A. Mohlmann and M.R. Fidder, practising in Utrecht, the Netherlands,

2. **CHAPELTON B.V.**,
a private company with limited liability
with its registered office in Amsterdam, the Netherlands,
Claimant in case C/13/640200 / HA ZA 17-1345,
hereinafter referred to as "**Chapelton**",
lawyers: M.H.J. van Maanen and J. de Jong, practising in The Hague, the Netherlands,

3. **STICHTING TRUCKS CARTEL COMPENSATION**,
a foundation
with its registered office at Schiphol Airport, the Netherlands,
Claimant in cases C/13/645758 / HA ZA 18-325, C/13/651492 / HA ZA 18-738 and C/13/659995 / HA ZA 19-34,
hereinafter referred to as "**STCC**",
lawyers: J. van den Brande and J.T. Verheij, practising in Rotterdam, the Netherlands,

4. **KONING & DRENTH B.V.**,
a private company with limited liability
with its registered office in Beerta, the Netherlands,
5. **JVB TRANSPORT B.V.**,
a private company with limited liability
with its registered office in Bosschenhoofd, the Netherlands,
6. **HILVERSUMSE VERHUISSERVICE**,
a general partnership
with its registered office in Hilversum, the Netherlands,
7. **NOOTEBOOM TRANSPORT B.V.**,
a private company with limited liability
with its registered office in Maasland, the Netherlands,
8. **AUTOMOBIELBEDRIJF VIANEN B.V.**,
a private company with limited liability
with its registered office in Vianen, the Netherlands,
9. **TRANSPORTBEDRIJF BLOTENBURG B.V.**,
a private company with limited liability
with its registered office in Lunteren, the Netherlands,
10. **JAN WILLEM TIMMERMANS HANDEL EN TRANSPORT**,
a sole trader
with his registered office in Veen, the Netherlands,
Claimants in case C/13/649757 / HA ZA 18-617,
hereinafter jointly referred to as "**Koning & Drenth**",
lawyer: A.L. Appelman, practising in Zwolle, the Netherlands,

11. **STEF S.A.**, a legal entity incorporated under foreign law,
and 91 other legal entities
with their registered offices in Paris, France,
Claimants in case C/13/656143 / HA ZA 18-1077,
hereinafter jointly referred to as "**STEF**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

12. **BALTRANS ÁRUFUVAROZÁSI KFT**,
a legal entity incorporated under foreign law
with its registered office in Százhalombatta, Hungary,
13. **ROGER AMSTUTZ TRANSPORTS SA**,
a legal entity incorporated under foreign law
with its registered office in La Tène, Switzerland,
Claimants in case C/13/656293 / HA ZA 18-1097,
hereinafter jointly referred to as "**Baltrans**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

14. **KLACSKA ÁSVÁNYOLAJTERMÉK SZÁLLÍTÁSI KFT.**,
a legal entity incorporated under foreign law
with its registered office in Budapest, Hungary,
Claimant in case C/13/656508 / HA ZA 18-1118,
hereinafter referred to as "**Klacska**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

15. **VIA LOCATION SAS**,
a legal entity incorporated under foreign law
with its registered office in Courbevoie, France,
16. **VL FINANCES SAS**,
a legal entity incorporated under foreign law
with its registered office in Paris, France,
17. **VIA TRUCK LEASE BENELUX SA**,
a legal entity incorporated under foreign law
with its registered office in Woluwe-Saint-Lamert, Belgium,
18. **LOCATION TRANSPORTS BRIOCHINS SAS**,
a legal entity incorporated under foreign law
with its registered office in Paris, France,
Claimants in case C/13/658179 / HA ZA 18-1231,
hereinafter jointly referred to as "**Via Location**",
lawyers: M.J. van Joolingen and M.W.J. Jongmans, practising in 's-Hertogenbosch, the Netherlands,

19. **CARTEL DES CAMIONS B.V.**,
a private company with limited liability
with its registered office in Amsterdam, the Netherlands,
Claimant in case C/13/659129 / HA ZA 18-1330,
hereinafter referred to as "**Cartel des Camions**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

20. **EB TRANS SA**,
a legal entity incorporated under foreign law
with its registered office in Luxembourg, Luxembourg,
Claimant in case C/13/661078 / HA ZA 19-127,
hereinafter referred to as "**EB Trans**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

21. **NLTRUCKKARTEL B.V.**,
a private company with limited liability
with its registered office in Amsterdam, the Netherlands,
Claimant in case C/13/661079 / HA ZA 19-128,
hereinafter referred to as "**NLTruckkartel**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

22. **CARLSBERG DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Hamburg, Germany,
23. **CARLSBERG DEUTSCHLAND LOGISTIK GMBH**,
a legal entity incorporated under foreign law
with its registered office in Hamburg, Germany,
Claimants in case C/13/661080 / HA ZA 19-129,
hereinafter jointly referred to as "**Carlsberg**",
lawyers: E.J. Zippro and R. Meijer, practising in Amsterdam, the Netherlands,

24. **STICHTING ANTITRUST ACTION TRUCK CARTEL**,
a foundation
with its registered office in Utrecht, the Netherlands,
hereinafter referred to as "**SAATC**",
Claimant in case C/13/672474 / HA ZA 19-993,
lawyers: K. Rutten and X.D. van Leeuwen, practising in Utrecht, the Netherlands,

v

1. **DAF TRUCKS N.V.**,
a public limited company
with its registered office in Eindhoven, the Netherlands,
2. **DAF TRUCKS DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Frechen, Germany,
3. **PACCAR INC.**,
a legal entity incorporated under foreign law
with its registered office in Bellevue, Washington, United States of America,
Defendants,
hereinafter jointly referred to as "**DAF**",
lawyers: M.V.E.E. de Monchy and J.K. de Pree, practising in Amsterdam, the Netherlands,

4. **TRATON SE**, formerly known as **MAN SE**,
a legal entity incorporated under foreign law
with its registered office in Munich, Germany,
5. **MAN TRUCK & BUS SE**, formerly known as **MAN TRUCK & BUS AG**,
a legal entity incorporated under foreign law
with its registered office in Munich, Germany,
6. **MAN TRUCK & BUS DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Munich, Germany,
Defendants,
hereinafter jointly referred to as "**MAN**",
lawyer: J.S. Kortmann, C.R.A. Swaak and M.G. Kuijpers, practising in Amsterdam, the Netherlands,

7. **AB VOLVO**,
a legal entity incorporated under foreign law
with its registered office in Gothenburg, Sweden,
8. **VOLVO LASTV AGNAR AB**,
a legal entity incorporated under foreign law
with its registered office in Gothenburg, Sweden,
9. **RENAULT TRUCKS SAS**,
a legal entity incorporated under foreign law
with its registered office in Saint-Priest, France,

10. **VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH**,
a legal entity incorporated under foreign law
with its registered office in Ismaning, Germany,
Defendants,
hereinafter jointly referred to as "**Volvo/Renault**",
lawyers: A. Knigge and H.M. Cornelissen, practising in Amsterdam, the Netherlands,

11. **CNH INDUSTRIAL N.V.**,
a public limited company
with its registered office in Amsterdam, the Netherlands,
12. **STELLANTIS N.V.**, formerly known as **FIAT CHRYSLER AUTOMOBILES N.V.**,
a public limited company
with its registered office in Amsterdam, the Netherlands,
13. **IVECO S.P.A.**,
a legal entity incorporated under foreign law
with its registered office in Turin, Italy,
14. **IVECO MAGIRUS AG**,
a legal entity incorporated under foreign law
with its registered office in Ulm, Germany,
Defendants,
hereinafter jointly referred to as "**CHN/Iveco**",
lawyers: J.H. Lemstra and M.N. van Dam, practising in Amsterdam, the Netherlands,

15. **DAIMLER AG**,
a legal entity incorporated under foreign law
with its registered office in Stuttgart, Germany,
Defendant,
hereinafter referred to as "**Daimler**",
lawyers: W. Heemskerk and E.H. Pijnacker Hordijk, practising in The Hague, the Netherlands,

and

1. **SCANIA AB**,
a legal entity incorporated under foreign law
with its registered office in Södertälje, Sweden,
2. **SCANIA CV AB**,
a legal entity incorporated under foreign law
with its registered office in Södertälje, Sweden,
3. **SCANIA DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Koblenz, Germany,
hereinafter jointly referred to as "**Scania**",
Interveners,
lawyer: C.E. Schillemans, practising in Amsterdam, the Netherlands.

The aforementioned Defendants are not all parties to each individual case.

The Claimants will hereinafter be jointly referred to as the Claimants. The Defendants and joined party Scania will hereinafter be jointly referred to as the Truck Manufacturers.

1. The proceedings

1.1. On 12 May 2021, this Court made a ruling in all cases in the third-party actions raised by the Truck Manufacturers (except Scania).

1.2. Also on 12 May 2021, this Court issued an interlocutory judgment on the merits (ECLI:NL:RBAMS:2021:2391).

1.3. On 17 June 2021, this Court, after hearing the parties' views on the further course of the proceedings, determined that the parties could reply and rejoin on a limited number of issues.

1.4. On 25 August 2021, the Claimants, with the exception of Koning & Drenth, each filed a concurring Reply in all cases. On 25 August 2021, Koning & Drenth filed a Reply separately from the other Claimants.

1.5. On 22 September 2021, this Court issued a judgment in the ancillary proceedings brought by CDC in case C/13/639718 / HA ZA 17-1255 pursuant to Article 843a of the Dutch Code of Civil Procedure ("DCCP") (ECLI:NL:RBAMS:2021:5297).

1.6. On the cause list of 24 November 2021, the Truck Manufacturers filed a "Motion containing the opinion of Prof. Dr. E.E.C. van Damme as a rebuttal to the Harrington & Schinkel report".

1.7. On 5 January 2022, this Court received from MAN a "Motion suspending and resuming proceedings as a result of succession by universal title", with exhibits, in all cases in which it is a Defendant. In it, MAN reported that as a result of a merger resolution, MAN SE had merged, in its capacity as the transferring and also disappearing entity, with TRATON SE as the acquiring entity. TRATON SE had become the legal successor by universal title to MAN SE. Thereupon, the proceedings were suspended on the basis of Article 225(2) DCCP. In accordance with established cause-list policy, the proceedings were immediately resumed with the Registrar identifying TRATON SE as a Defendant. However, in what follows, this Court will continue to use the joint designation of MAN for TRATON SE and the remaining MAN entities.

1.8. On 5 January 2022, the Truck Manufacturers each filed a concurring Rejoinder in all cases.

1.9. On 19 January 2022, Scania filed a motion to join the Defendants in case C/13/672474 / HA ZA 19-993.

1.10. Prior to the hearing on 29 March 2022, the parties submitted the following documents:

on the part of the Claimants:

- a motion by Chapelton in case C/13/640200 / HA ZA 17-1345 accompanied by Exhibits CHAP-0024 and CHAP-0025,
- a motion by Cartel des Camions in case C/13/659129 / HA ZA 18-1330 accompanied by Exhibits CAMI-0043 and CAMI-0044,
- a motion by CDC in case C/13/639718 / HA ZA 17-1255 accompanied by Exhibits CDCR-0058 to CDCR-0063,

on the part of the Truck Manufacturers:
a motion accompanied by Exhibits 43 to 53.

1.11. A record was drawn up of the hearing on 29 March 2022 which, together with the documents referred to in the record, including the written arguments, forms part of the procedural documents.

1.12. Finally, a date was scheduled for judgment in all cases.

2. The further assessment

What this Court needs to assess in this judgment

2.1. After the Truck Manufacturers had filed their joint Statement of Defence and following a hearing, this Court handed down an interlocutory judgment on 12 May 2021 on:

1. the question of the scope of the Commission's Decision of 19 July 2016 (Chapter 4 of the Truck Manufacturers' Statement of Defence),
2. the Truck Manufacturers' defence that the Claimants did not suffer any damage as a result of the Infringement, meaning that referral to the quantum of damage assessment proceedings was not at issue and the claim should be dismissed (Chapter 6 of the Truck Manufacturers' Statement of Defence).

2.2. In view of the step-by-step approach to the cases, this Court then decided to deal with the following issues at the hearing of 29 March 2022:

1. the Truck Manufacturers' defence that the Claimants acting as a claims vehicle had no cause of action (Chapter 3 of the Truck Manufacturers' Statement of Defence),
2. the law applicable to the claims on account of an unlawful act and to the assignments and mandates (Chapters 7 and 8 of the Truck Manufacturers' Statement of Defence),
3. the Truck Manufacturers' defence that the assignments and mandates were invalid (Chapter 9 of the Truck Manufacturers' Statement of Defence).

These are the issues that will be addressed in this judgment.

The Claimants' cause of action

2.3. Some of the Claimants have only submitted claims for the damage they themselves claim to have suffered, in connection with trucks they themselves purchased or otherwise used, or at least for related damage caused by the Infringement (see para. 2.8 of the most recent interlocutory judgment on the merits). Other Claimants have taken the position that they have the authority to recover damages in relation to these claims under an assignment, mandate or power of attorney. They are litigation vehicles Cartel des Camions, NLTruckkartel, CDC, Chapelton, SAATC, STCC and EB Trans (hereinafter also referred to as the "Claims Vehicles").

2.4. The Truck Manufacturers raised as a defence that the Claims Vehicles that used assignment and/or mandate models to collect hundreds of claims from buyers, lessees, and users of trucks (the Underlying Parties) and bring them as a type of class action should be declared to have no cause of action. The Truck Manufacturers acknowledge that use of the assignment or mandate model by professional claims organisations is not prohibited under Dutch law. However, the Truck Manufacturers argued that this does not mean that they can evade the safeguards of the right of class action, as laid down in the Class Actions (Settling of Large-scale Losses or Damage) Act (*Wet afwikkeling massaschade in collectieve actie*, or "WAMCA"). With reference to case law[1] they argued that the veil of assignment or mandate should be pierced. In practice, the Claims Vehicles cannot be distinguished from 3:305a entities, at least not for the Underlying Parties, the vast majority of whom are based outside the Netherlands. The Claims Vehicles, like 3:305a entities, litigate in their own names and act as independent litigants. Like 3:305a entities, they present themselves as professional representatives. The Claims Vehicles have a wide reach, can easily have a large number of claims transferred and are seeking declaratory decisions. The claims of the Claims Vehicles therefore amount to class actions for damages within the meaning of Article 3:305a of the Dutch Civil Code ("DCC"). Article 3:305a DCC would become an empty shell if a litigation vehicle were able to circumvent the safeguards of Article 3:305a DCC by way of an assignment or mandate. Although the WAMCA did not enter into force until 1 January 2020, it should be assumed to have a strong consequential effect, so that the claims of the Claims Vehicles should be assessed against the safeguards of Article 3:305a DCC and the Claims Code. The fact is that the WAMCA reflects standards (as previously laid down in Article 3:305a DCC (old) and the Claims Code), legal beliefs and principles regarding the manner of litigation before the Dutch courts that were generally recognised even *before* the introduction of the WAMCA. These standards, beliefs and principles work their way into the open standards of Dutch law. According to the Truck Manufacturers, the Claims Vehicles do not meet any of the safeguards of the right of class action.

[1] Amsterdam District Court, 30 November 2016, ECLI:NL:RBAMS:2016:7841 and Amsterdam District Court, 18 April 2018, ECLI:NL:RBAMS:2018:2476 (*Trafigura I* and *II*)
Amsterdam District Court, 31 January 2018, ECLI:NL:RBAMS:2018:504 (*Claim Participants B.V. v ABN AMRO*)
The Hague District Court, 13 December 2017, ECLI:NL:RBDHA:2017:14512 (*Loterijverlies.nl B.V. v Staatsloterij*)
The Hague Court of Appeal, 8 October 2019, ECLI:NL:GHDHA:2019:3289 (*Loterijverlies.nl B.V. v Staatsloterij*)
Amsterdam District Court, 19 February 2020, ECLI:NL:RBAMS:2020:1058 (*X v Kite Capital et al.*)

2.5. The Claimants dispute that there is a disguised class action as far as the Claims Vehicles are concerned. According to the Claimants, the Underlying Parties voluntarily and knowingly chose to combine their claims through assignments and mandates. It was a conscious decision on the part of the Underlying Parties to enter into contractual arrangements with the Claimants and thereby dispose of their right of action. And this is the difference with a class action, in which the individual injured party does not exercise his own will.

2.6. This Court notes first and foremost that the WAMCA does not mandatorily prescribe that class actions can only be brought on the basis of Article 3:305a et seq. DCC. The scheme is meant as an extension of existing options. It was created in order to allow large groups of injured parties - each of whom has a relatively small claim and who would therefore be disinclined to bring an action - to institute legal proceedings. In the past, it had proved problematic to combine those claims. Nonetheless, in these proceedings, the Claimants and the Underlying Parties have successfully combined them.

2.7. It is important to note that this case almost exclusively involves professional parties that have purchased a truck. After all, it is hard to imagine consumers purchasing a medium-sized truck. Some of them are trying to get compensation for the alleged damage through one of the Claims Vehicles. It was explained at the hearing that many of the Underlying Parties operate relatively small businesses. Apparently, they have found a method that is workable for them to collectively deal with the problem outlined above that injured parties are often reluctant to initiate proceedings if their damage is relatively small in relation to the expected costs, which method does not include the use of a class action as provided for by law. The fact that this means that the Claims Vehicles do not have to meet the conditions the law imposes on a legal entity wishing to institute a class action as referred to in Article 3:305a DCC (or the former Article 3:305a DCC viewed in conjunction with the Claims Code) does not carry sufficient weight for this Court. Those conditions are primarily designed to protect non-professional injured parties, often consumers. That is less of an issue here. This Court also finds that the case law cited by the Truck Manufacturers does not apply here. Put briefly, all of the relevant cases involve the appearance of a claimant having improperly acquired claims and doubts regarding the legal validity of the alleged authority based on a mandate or assignment. There have been no concrete indications of this here, especially after the Claimants submitted the underlying documentation for their claims following the ‘Duty of Assertion Judgment’.

2.8. In light of the foregoing, the Truck Manufacturers’ contention that a disguised class action must also comply with the safeguards of Article 3:305a DCC if the injured parties made a free choice to otherwise marshal their interests, must be disregarded. This is partly because the Underlying Parties do not necessarily need the legal protection of the WAMCA. A characteristic of a class action is that the representative acts in its own name without concrete instructions from the individual injured parties, which can make it difficult for them to sue the representative. This problem is less of an issue in the legal relationship between the Claims Vehicles and the Underlying Parties because that relationship is laid down in the agreement they entered into with each other, whether by assignment or by mandate. That agreement defines their mutual rights and obligations. If a disagreement arises in that relationship, the Underlying Parties will be able to go to court on that basis.

2.9. Finally, this Court considers it important that this case turns on a cartel that was active well before 15 November 2016, which under the transitional law applicable to the WAMCA would mean that a collective claim would have to be assessed both on its merits and procedurally according to the old law, i.e., the law applicable before 1 January 2020. This would mean that only a declaratory decision can be sought. After all, the old law does not permit collective recovery of damages. Although the claim in this case is only for a referral to quantum of damage assessment proceedings, the Claimants are apparently keen to enter those proceedings collectively. This would not be possible under the old law applicable here and, to that extent, a class action would provide the Claimants with fewer options.

2.10. In conclusion, given that this case involves professional parties that have knowingly entered into an agreement without using the class action instrument as provided for by law, there is no basis for finding that the Claims Vehicles could only bring a claim based on Article 3:305a DCC. The Truck Manufacturers' defence fails. In view of the foregoing - and unlike the Truck Manufacturers - this Court sees no reason to ask preliminary questions.

Law applicable to the claims

2.11. Initially, the Claimants took different positions on the law applicable to the claims they had brought. However, at the hearing on 29 March 2022, all the Claimants (to the extent they had not done so previously) expressly chose Dutch law for all their claims. The Claimants argued that this choice of law resulted in all claims being governed by Dutch law. Events giving rise to damage and occurring after the entry into force of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), i.e. on or after 11 January 2009, are directly subject to Rome II. The event giving rise to damage in this case was the Truck Manufacturers' participation in the Cartel during the 1997-2011 period. Rome II does not apply to events giving rise to damage that occurred prior to 11 January 2009. However, according to the Commission Decision, the Cartel amounts to a single continuous infringement of European competition law, which continued after 11 January 2009. According to the Claimants, the reference point is the moment at which the continuous event giving rise to damage stopped. Reference is made to the judgment of the Dutch Supreme Court of 22 March 2019 (*Zandvoort Car Park*).[2] This means that Rome II applies. Article 6(3)(b) of Rome II allows the Claimants to choose the law of the *lex fori*. The Claimants have done so; they have expressly chosen Dutch law.
To the extent that Rome II does not apply directly, Dutch municipal private international law must be applied. The repealed Unlawful Act (Conflict of Laws) Act (*Wet conflictenrecht onrechtmatige daad*, or "WCOD") does not provide a solution for a situation where competitive conditions were affected simultaneously in several countries by a single infringement of European competition law, each time involving a single claim for damages per injured party. With reference to the judgment of the Amsterdam Court of Appeal of 6 July 2021 (*Aircargo*)[3], the Claimants argued that this gap should here be filled by determining the applicable law in a manner consistent with Article 6(3)(b) Rome II, resulting in a choice for Dutch law.

[2] ECLI:NL:HR:2019:412
[3] ECLI:NL:GHAMS:2021:1940

2.12. The Truck Manufacturers challenge the application of Article 6(3)(b) Rome II. According to them, the vast majority of the claims are subject to Section 4(1) WCOD. Article 6(3)(a) Rome II applies to the remainder. Under both conflict of laws regimes, the Claimants' claims are governed by the market rule: the applicable law is the law of the State whose market is directly affected. Contrary to what the Claimants assume, the asserted obligations to pay damages arose for each transaction separately. The location of the concrete transaction must therefore be considered to determine the applicable law. There is no gap in the WCOD because the market in which competitive conditions have been affected due to the infringing acts can be located in a specific place. In this case, we must connect to the law of the State in which the first buyer of a new truck is located. This means that the first link in the distribution chain is decisive. A choice of law on the basis of Article 6(3)(b) Rome II is therefore not an option, because it has been neither asserted nor shown that application of the market rule would lead to the applicability of several legal systems to an individual claim of an Underlying Party in relation to the individual purchase of one or more trucks.

2.13. In line with the judgment of the Amsterdam Court of Appeal of 6 July 2021 (*Aircargo*)[4], this Court rules as follows. The Commission found that there had been a single and continuous infringement committed by the addressees of the Decision, including the Truck Manufacturers. This single and continuous infringement has injured and caused damage to individual customers, the Claimants argued. In these proceedings, either the customers themselves or a claims vehicle to which they have assigned their claim are seeking compensation for that damage. Since the trucks were generally not purchased directly from the manufacturer, while it was precisely the manufacturer's actions that caused the alleged damage, the claims are in principle claims based on an unlawful act, more specifically claims for damages on the basis of acts of unfair competition. Under Dutch compensation law, an act of unfair competition, e.g. a cartel, causes damage as soon as a transaction is entered into for a price adversely affected by that act.

2.14. According to the Decision, the Cartel period ran from 17 January 1997 to 18 January 2011. The law that applies to the Claimants' claims must be determined on the basis of the rules governing the choice of law regarding unlawful act that applied in the Netherlands at the time. For claims that arose before 11 January 2009, these are the rules of Section 4(1) WCOD, while Article 6(3)(a) Rome II applies to claims that arose after 11 January 2009.

2.15. Section 4(1) WCOD provides that obligations on account of unfair competition are governed by the law of the State on whose territory the act of competition affects competitive conditions. In order to be able to apply Section 4(1) WCOD, it is necessary to examine in which country the act of unfair competition affected the competitive conditions relevant to the injured party. In previous cartel damage cases, the answer to this question generally turned on the place where supply and demand met, i.e. where the agreement was concluded.[5] In this case, it was argued that the Cartel affected the prices for virtually all the trucks manufactured in Europe and offered in the EU. As a result, during the Cartel period it was virtually impossible for customers in the EU to acquire a truck whose price was not affected. It is therefore difficult to make a finding that competition conditions were only affected in places where supply and demand met; those conditions were affected almost everywhere within the EU. This in itself also leads to discussion, as evidenced by the positions taken by the parties.

[4] idem
[5] The Hague District Court, 17 December 2014 (CDC v Shell), ECLI:NL:RBDHA:2014:15722; Amsterdam District Court, 10 May 2017 (*CDC v Kemira*), ECLI:NL:RBAMS:2017:3166.

The fact is that the Truck Manufacturers believe that the law of the State in which the first buyer of a new truck is located should be applied, while the Claimants argued that the law of the place where the injured customer is located should be applied, even if it is not the first buyer. Added to that, the Claimants pointed out that the Cartel may also have resulted in a party actually refraining from purchasing a truck, for example because that customer delayed the purchase until new emissions technologies were available, in which case damage was suffered without a transaction having taken place. Even in that case, it is not readily apparent which law to use in determining the effect on competitive conditions.

2.16. It is also important to note that, as the Court of Appeal also found, the WCOD does not contain exhaustive rules on the international unlawful act. Even during the development of the special rule included in Section 4(1) WCOD for the act of unfair competition, it was recognised that it "does not provide a uniform solution to the situation where the act of unlawful competition affects competitive conditions in the territory of several States" (Parliamentary Papers II, 1998/99, 26 608, no. 3 p. 8). In this Court's opinion, the legislature was unable to foresee the cases at hand here. Indeed, the WCOD did not enter into force until 1 June 2001, while cartel damage claims such as the one at hand were only recognised in case law by the CJEU judgment of 20 September 2001 (*Courage v Crehan*)[6]. They have only been brought before the courts on a large scale since then. For some time now, they have been brought by means of 'claims vehicles' or class actions, resulting in the pooling of claims by claimants from all over the EU. Traditional conflict of law rules often tell the court before which such class actions are brought to apply a multitude of legal systems. In doing so, the conflict of law rules, once intended to designate a single applicable legal system, essentially defeat their own purpose. The possible solutions to this problem conceived by the legislature during the development of the WCOD, i.e. the secondary connection of Section 5 WCOD or a joint choice of law as referred to in Section 6 WCOD - cannot be applied here, either. This presents the court with the question of which criterion it should apply in applying Section 4 WCOD, which, as noted, was never intended to provide an exhaustive rule.

2.17. The EU legislature has now come up with a pragmatic solution to this same problem, insofar as it comes into play under the aforementioned Article 6(3) Rome II (which in this case applies to claims arising after 11 January 2009): a choice by the injured party for the law of the court seised. Article 6(3)(a) Rome II provides, briefly put, that the law applicable to a claim based on an unlawful act arising out of a restriction of competition is the law of the country where the market is, or is likely to be, affected. Article 6(3)(b) Rome II reads as follows:

> When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

6 ECLI:EU:C:2001:465

The possibility of making a choice of law referred to in Article 6(3)(b) Rome II is, however, subject to strict limitations. The right to choose the law (i) applies only when the market is, or is likely to be, affected in more than one country, (ii) applies only when the defendant is sued in the court of his or her domicile, (iii) is limited to the *lex fori*, (iv) provided that the market in that Member State is directly and substantially affected by the restriction of competition. Furthermore, if more than one defendant is sued in that court, (v) the injured party can only opt for the *lex fori* if the restriction of competition on which the claim against each of the defendants is based has also directly and substantially affected the market in the Member State of that court.

2.18. In this case, the Claimants' choice of law satisfies these requirements. The Commission found in the Decision that "the Infringement covered the entire EEA", so that it must be assumed that the Infringement affected the competitive conditions in more than one country. DAF Trucks, CNH Industrial, and Stellantis were sued as defendants in the court of their domicile. The Claimants have chosen Dutch law, the *lex fori*. The Decision has made it sufficiently plausible that competitive conditions in the Netherlands were directly and substantially affected by the restriction of competition. After all, DAF, CNH Industrial and Stellantis were also subjected to high fines. Since they played an important role in the Cartel, the applicability of Dutch law was also sufficiently foreseeable for the other Truck Manufacturers that were sued in the court of Oost-Brabant or Amsterdam. The general requirement that in determining the applicable law it must be borne in mind that there must be some connection between the applicable law and the claims (or the facts forming the basis of the claims) has also been met in the sense that - in the absence of any uniform European private law - Dutch law is one of the obvious legal systems in this case. This leads to the conclusion that the claims for which the applicable law must be assessed on the basis of Article 6(3) Rome II must be assessed according to Dutch law.

2.19. This means that the following applies to those claims for which the WCOD provides the review framework. This Court concurs with the Court of Appeal in the *Aircargo* case that, with due regard to the principle of effectiveness, the law applicable to claims under Section 4 WCOD must be determined in a manner consistent with Article 6(3)(b) Rome II (para. 5.15.3 of the Court of Appeal's judgment in *Aircargo*, in which reference is made to the Dutch Supreme Court's judgment of 8 July 2016 (*Tennet v ABB*)[7]). Therefore, the submissions made in the previous paragraph apply equally to the claims that arose before 1 January 2009. This leads to the conclusion that all the Claimants' claims are governed by Dutch law.

Legal validity of the assignments

2.20. Claims Vehicles CDC, Chapelton, EB Trans, NLTruckkartel and STCC claim principally that they acquired the claims for damages of the Underlying Parties by assignment. The Truck Manufacturers take the position that in order for a claim based fully or partly on assignment to be granted, it must be assessed whether the Claimants in question may exercise the rights pertaining to the original claim of the alleged assignor. They thus raise the question of whether the claim was validly assigned.

2.21. First of all, it is necessary to assess which law applies to this. An assignment is an agreement. In cases involving cross-border aspects, the applicable law is determined by Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), which entered into force on 24 July 2008. Article 10:135 DCC also contains rules on assignment, but since Rome I takes precedence over the Dutch Civil Code as a higher ranking rule, this Court will not address it. Since the Commission's Decision dates from 19 July 2016, it can be safely assumed that all assignments are of a later date, meaning that Rome I covers them. Article 14 Rome I provides the rules for assignment. It makes a distinction between the relationship between assignor and

[7] ECLI:NL:HR:2016:1483

assignee (in this case: the Underlying Parties and the Claims Vehicles), for which the first paragraph provides the rules, and the relationship between them and the debtor (the Truck Manufacturers), for which the second paragraph of Article 14 provides the rules.

2.22. According to Article 14(1) Rome I, the relationship between assignor and assignee is governed by the law of the contract of assignment (the connection to the law applicable to the assignments). The Claimants argued that Dutch law had been chosen in the assignment documentation. The Truck Manufacturers have not disputed this in a reasoned manner. However, the Truck Manufacturers reserve the right to contest the validity of these assignments if it becomes apparent at a later stage of the proceedings that certain assignment agreements deviate from the standard documentation and are therefore governed by any law other than Dutch law after all. Be that as it may, that does not mean that an assessment of the applicable law cannot be made at this point and must wait. The Claimants entered the assignment documentation into the proceedings and the Truck Manufacturers were able to take note of it. Insofar as the Truck Manufacturers wish to put forward a defence on this at a later stage, it must then be assessed whether that is consistent with due process. For now, it must be assumed that Dutch law was chosen when the assignments were made. Under Article 3 Rome I, when there is a choice of law, the law of the contract is determined by that choice. This means that under Article 14(1) Rome I, the assignments are governed by Dutch law in as far as the relationship between the Claims Vehicles and the Underlying Parties is concerned.

2.23. The relationship between the Claims Vehicles and the Underlying Parties, on the one hand, and the Truck Manufacturers, on the other hand, is governed by the law applicable to the claim being assigned (the connection to the law applicable to the claims), according to Article 14(2) Rome I. As found earlier, the claims are based on an unlawful act and were assigned by the Underlying Parties to the Claims Vehicles. The assignment rules in Article 14 Rome I also apply to the assignment of such claims. It has already been established - based on the WCOD and Rome II - that Dutch law applies to the relevant claims based on an unlawful act. Therefore, any assertion by the Truck Manufacturers that the assignments cannot be held against them must be assessed under Dutch law. In this regard, it is important to note that Dutch law does not have a general prohibition on assigning claims for damages based on an unlawful act.

2.24. The Truck Manufacturers argued that they could not raise a defence on the issue of the assignability of the claim until it was determined which law applied to the assignment of the claims. In their view, the applicable law determines (a) the assignability of the claim, (b) the relationship between assignee and debtor, (c) the conditions under which the assignment can be invoked against the debtor, and (d) whether the debtor has been discharged by payment. The Truck Manufacturers argued that they had not yet been able to raise a defence against any of these aspects, because it was unclear which law applied to the assigned claims.

2.25. The following is found in relation to the assignability of the claims. In the interlocutory judgment of 15 May 2019 (the Duty of Assertion Judgment), this Court ordered the Claims Vehicles to provide sufficient substantiation for the assignments (with documents, the assignment documentation). To the extent that they had not already done so, these parties then entered the assignment documentation into the proceedings. It would have been for the Truck Manufacturers to then address the assignability of the claims in their Statement of Defence. Which law applied to the claims was irrelevant to this. This case turns on claims for damages for infringement of European competition law. In their Statement of Defence the Truck Manufacturers signalled that - based on their position regarding the law applicable to the claims - 11 legal systems applied, including the Dutch one.

The Truck Manufacturers did give some examples in their Statement of Defence of foreign rules that might stand in the way of the assignability of the claim under the law of that specific country, but they did not provide any Dutch rules that would do so. As noted earlier, under Dutch law there is no general rule prohibiting the assignment of a claim for damages based on an unlawful act. If the Truck Manufacturers disagreed, it would have been for them to address that. Against that background, this Court sees no reason to offer the Truck Manufacturers the opportunity to do so at this point. This Court proceeds from the assumption that the claims may be assigned.

2.26. The follow-up question of whether the claims based on an unlawful act were actually assigned must, as found above, be assessed under the law applicable to the assignments. This is also Dutch law. What matters here is whether the Claimants may exercise the rights pertaining to the original claim of the alleged assignor. In this regard, the scope of the Claimants' initial duty of assertion must first be established.

2.27. The Claimants relied on Article 3:119(1) DCC. As the possessors of the assigned claims, the Claims Vehicles are presumed to be entitled to the claims they claim to have acquired by assignment. The Truck Manufacturers dispute that the presumption of proof of Article 3:119 DCC applies to rights of action. This Court is of the opinion that the presumption of proof does apply and refers to the judgments of the Amsterdam Court of Appeal of 10 March 2020 in *Aircargo*[8], in which the Court of Appeal ruled that under Dutch law possession may also extend to personal claims, which means that the possessor of a personal claim may also invoke the presumption of proof contained in Article 3:119 DCC. To the extent that the Truck Manufacturers argued to the contrary by placing reliance on the Dutch Supreme Court's judgment of 9 February 1939[9], this Court rejects that contention. This judgment was rendered under the old law and does not relate to the possession of a personal claim.

2.28. Against this background, this Court finds that if the documentation submitted in the case contains per Underlying Party: (i) the assignment agreement (title) and (ii) the deed of assignment and (iii) it is clear that these have been signed/provided by the assignor, it has been sufficiently established that the Claims Vehicles may exercise the rights pertaining to the claims, unless there are concrete indications, which the Truck Manufacturers must submit, that the assignment was nonetheless not legally valid. The point is that the Truck Manufacturers, as *debitor cessus*, and the court must be able to establish from the documentation that the assignor and assignee actually assigned their claim(s). This is as far as the Claimants' initial duty of assertion goes.

2.29. The Truck Manufacturers correctly pointed out that the Claimants must enter the aforementioned documentation into the proceedings in such a way that the Truck Manufacturers and this Court can verify that the Underlying Parties have actually and validly assigned their claim. According to the Truck Manufacturers, the Claimants have failed to do so. They asserted that the documentation submitted was voluminous, poorly searchable and not uniformly ordered. Many Underlying Parties are legal entities whose powers of representation vested in the officers who signed the assignment agreements must be established by articles of association, shareholder resolutions, statements and such.

[8] ECLI:NL:GHAMS:2021:1940
[9] ECLI:NL:HR:1939:32, NJ 1939/865 (*Woldijk v Nijman*)

Those documents are often missing from the case file, and if they are produced, they are often drafted in a foreign language and must be reviewed according to foreign legal systems. In this context, the Truck Manufacturers pointed to a judgment of the 's-Hertogenbosch Court of Appeal of 27 July 2021[10] on the substantiation of authority documentation. In it, the Court of Appeal required an explanation of the data evidenced by the public records and the reasons why these data were consistent with the submitted documentation for the assignments. According to the Truck Manufacturers, this requirement has not been met in this case. The Claimants are therefore litigating in violation of due process and the obligation of an acquirer to provide information to trace the alienator of a thing within three years from his acquisition, they argued.

2.30. This Court finds as follows. The Claimants argued that they did enter the relevant documentation into the proceedings in a structured manner. In their Reply (section 6.2.1.) they offered examples to explain this. The Truck Manufacturers did not provide a reasoned explanation as to why they were nevertheless unable to verify the legal validity of the assignments. In view of the large volume of claims, it may be that it takes the Truck Manufacturers correspondingly more research than in smaller-scale proceedings to form a picture of the assignments, but the mere circumstance that this research takes a lot of work does not make it impossible, nor amount to a violation of due process. The fact that the authority documentation is drafted in a multitude of foreign languages does not alter this. The Truck Manufacturers may be expected to be able to examine documentation in foreign languages - including languages less common than French, German, English, Spanish and Italian - or have it examined, particularly since it is likely that these will always be languages from countries in which they themselves are economically active and where the Underlying Parties purchased their trucks. The Truck Manufacturers may, in turn, be expected to specify which documentation of specific assignments is missing, if they make that contention. Given that this has not happened, the documentation must be assumed to be complete. It is then for the Truck Manufacturers to raise a targeted defence and to dispute, with reasons given, that the assignments are legally valid, e.g. because the assignor was not duly represented or did not want the assignment, or to state that the assignment did not have legal effect for some other reason. They did not do that either. The mere example brought up at the hearing of the *Cartel des Camions* case does not change that finding. While the Truck Manufacturers argued that the example illustrated that they had to guess at the power of representation, that is not a concrete indication that there is something wrong with the power of representation in all or most of the cases.

2.31. This Court will ignore the reliance on the judgment of the 's-Hertogenbosch Court of Appeal. That was a decision on the further course of the proceedings. It is not clear from the judgment why the Court of Appeal issued that instruction. It does not provide this Court with sufficient grounds to deviate from the review framework referred to above in para. 2.23 and rule that the assignee's explanation as instructed by the Court of Appeal must be provided in all cases involving international assignments.

Requirement to specify assignments

2.32. In addition, the Truck Manufacturers argued that some of the assignments lack a valid title. They argued that Article 3:84(2) DCC is therefore not complied with, on the basis of which the claims of the Underlying Parties must be described in sufficiently specific terms. With reference to Chapter 5 of their Statement of Defence, the Truck Manufacturers moreover argued that the requirement of specification was not complied with because the approximately 2,000 folders of assignment documentation submitted by the Claims Vehicles and EB Trans showed that in many cases it was not possible to identify the assigned claims at all. In response, the Claimants argued that the scope of the defence was unclear.

[10] ECLI:NL:GHSHE:2021:2341

The Truck Manufacturers' argument that "a portion of the assignments" lacks a valid title because the assigned claims are "not always" described in sufficiently specific terms in the assignment documentation is, in their view, too general.

2.33. The basic premise of the requirement of specification is that the deed of assignment must contain such information at the time of transfer that it can be used afterwards to determine which claims have been assigned. This question is particularly relevant if it is not or no longer entirely clear between assignor and assignee who is authorised to collect the debt, which is especially relevant if either one becomes insolvent. In its case law, the Dutch Supreme Court interprets the requirement of specification broadly: it is sufficient if it can be determined in retrospect which claims have been assigned. The determination is not intended to protect the debtor, since the latter can invoke the uncertainty exception in the event of uncertainty about to whom payment in full should be made. Against this background, a debtor who asserts that an assignment is not legally valid because the title does not describe the claim in sufficiently specific terms may be expected to specify this defence. The Truck Manufacturers' defence fails to do so. It is neither asserted nor shown which specific assignments are involved and to what extent the claims in those cases fall short of the requirement of specification.

Prohibition on ownership of collateral in relation to assignments

2.34. The Truck Manufacturers argued that the assignments of the Underlying Parties' claims in many cases lacked the intent that the claims should actually become part of the assets of the Claims Vehicles and EB Trans after the assignment. Therefore, to the extent that the assignments are governed by Dutch law, they are in violation of the prohibition on ownership of collateral (Article 3:84(3) DCC). The Truck Manufacturers referred to the judgment of the Amsterdam Court of Appeal of 4 February 2020 in the case *CDC v Kemira*[11]. According to the Truck Manufacturers, the Court of Appeal ruled in that case that an assignment may violate the prohibition on ownership of collateral if it is plausible that: (i) the purchase price does not correspond to the market value of the assigned claims, (ii) the claims represent significant value to the Underlying Parties, which remained with the Underlying Parties even after the assignment, and (iii) the ratio between the purchase price and the value of the claims is material to the nature and validity of the assignment.

2.35. This Court agrees with the Claimants that the Truck Manufacturers' defence is based on a misinterpretation of the *CDC v Kemira* judgment. It does not follow from the Court of Appeal's findings in that case at 3.14.1.1 and 3.14.1.2 that the Court of Appeal had established general criteria for assessing whether an assignment may violate the prohibition on ownership of collateral. It merely specified the extent to which the defendant in that case should have further substantiated its defence for its reliance on violation of the prohibition on ownership of collateral to be successful. And the same holds true here. The Truck Manufacturers merely pointed out - in summary - the considerable difference between the purchase price for the claims and the value they have according to the Claimants, the fact that the Underlying Parties are entitled to 65% to 80% of the proceeds if the claims are granted by this Court, and the fact that even after the sale the value of the claims remained with the Underlying Parties. It has, however, remained unclear why those circumstances lead to a violation of the prohibition on ownership of collateral and would constitute a prohibited transfer for the purpose of security.

[11] ECLI:NL:GHAMS:2020:194

Applicability of priority rules

2.36. The Truck Manufacturers argued that the Underlying Parties had assigned the claims based on an unlawful act to the Claims Vehicles in their country of habitual residence. Therefore, pursuant to Article 9(3) Rome I, the priority rules of the country of habitual residence of the Underlying Parties must be given effect. That article reads - as far as relevant here - as follows:

> 1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. (…)
> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

The question is whether such national priority rules apply and whether they affect the assignments.

English law: champerty and maintenance doctrine

2.37. In their Statement of Defence, the Truck Manufacturers argued that an assignment may be invalid under English law if it violates the rules of 'champerty and maintenance'. These rules prohibit the assignment of a claim to a buyer who does not have a 'legitimate commercial interest' in the claim and who will receive all or part of the compensation if the claim is upheld by the court. Violation of those rules renders the assignment void. The Truck Manufacturers claim that this is the case here. In their Rejoinder, they added that the Claims Vehicles and EB Trans were not assigned a right to a specific amount, but simply a right to bring a claim. Such a 'bare cause of action' cannot possibly be assigned under English law. According to the Truck Manufacturers, these rules do not only apply if the law applicable to the claims is English law. They are rules designed to ensure that the purity and fairness of English law is also guaranteed outside English litigation. Only then can the integrity of the English legal system be fully protected. Therefore, a priority rule exists within the meaning of Article 9(3) Rome I. The same is true of a mandate or power of attorney.

2.38. The Claimants argued against the reliance on the champerty and maintenance doctrine, first, that the Truck Manufacturers had not argued that and why a specific assignment violated the rules of champerty and maintenance. Besides, the defence only addresses the assignment of claims that are allegedly governed by English law. The geographical scope of champerty and maintenance is limited to agreements relating to English litigation. The rules do not apply to proceedings outside England because they are concerned with protecting the integrity of the English legal system. Finally, the Claimants argued that the Truck Manufacturers misinterpreted the rules of champerty and maintenance under English law.

2.39. It is for the Truck Manufacturers to substantiate such reliance on foreign law. In this Court's opinion, they have not sufficiently done so. The starting point is that the discussion is about assignments. An assignment is the transfer of a right of action. That includes substantially more than just "the transfer of the right to bring a claim," as the Truck Manufacturers argued in their Rejoinder. After all, this amounts to litigating in one's own name for another party, which under Dutch law would be a mandate, i.e. a completely different legal concept.

Therefore, the fact that the latter is allegedly not permitted under English law, as the Truck Manufacturers argued, does not mean that the assignments cannot be legally valid. In addition, it is difficult to see why proceedings based on assignments such as the one at issue here should be considered, briefly put, 'frivolous' under English law with the champerty and maintenance doctrine coming into the picture. No adequate explanation of this is given. Finally, the argument put forward only after the Reply that it moreover involves, in short, a priority rule as referred to in Article 9(3) Rome I fails to take into account that this too is a rule which the foreign court - in this case the Dutch court – *can* apply. It is for the party relying on an overriding mandatory provision of the law of the country where the obligation was performed (this could be English law if the assignments were agreed and implemented in England) to explain why English law should be applied here. The final sentence of Article 9(3) Rome I leaves no room for doubt in this respect. It should be remembered that this is a situation where different legal systems are in conflict; against that backdrop, the fact that ignoring the alleged rule might affect the integrity of the English system should be properly substantiated. Such substantiation is absent. The defence will therefore be disregarded for lack of sufficient substantiation.

German law: Rechtsdienstleistungsgesetz

2.40. The Truck Manufacturers argued that, to the extent there are German Underlying Parties, the assignments, litigation orders and mandates are void because they violate the German *Rechtsdienstleistungsgesetz* (RDG). They claimed that this is a priority rule as referred to in Article 9(3) Rome I. According to the Truck Manufacturers, the RDG applies because some of the claims are governed by German law as legal services were performed in Germany. The RDG imposes requirements on collection service providers such as litigation vehicles, among others. First, collection service providers must be listed in the RDG register. Only CDC has an RDG registration. In any event, the assignment and mandate agreements with all other Claims Vehicles are in violation of the RDG and therefore void, according to the Truck Manufacturers. Second, collection service providers must limit their activities to regular out-of-court debt collection services. This means that the Claims Vehicles may not provide collection services that are from the outset aimed at bringing legal actions, even if they have an RDG registration. The Claims Vehicles are acting contrary to this because their activities were from the outset geared towards legal proceedings to collect thousands of heterogeneous claims. Third, collection service providers may not provide services where the interests to be served are conflicting interests. According to the Truck Manufacturers, this requirement is not met either. There is a conflict of interest between the Claims Vehicles and the Underlying Parties, on the one hand, and the Claims Vehicles and the litigation financier, on the other. According to a ruling by the Schleswig *Oberlandesgericht*, a business model that must include the interests of a litigation financier is to the detriment of the Underlying Parties. This is not compatible with the RDG. The same court held that, with thousands of underlying parties, a claimant can never do justice to each individual interest, still according to the Truck Manufacturers.

2.41. The Claimants disputed that the RDG applies and argued that there is no priority rule as referred to in Article 9(1) Rome I. Moreover, Article 9(3) Rome I only deals with priority rules of the country where the obligations arising out of the contract have to be or have been performed. The place of performance must be determined on the basis of the law applicable to the assignments. That is Dutch law. Assignment relates to the purchase of a property right. The Underlying Parties therefore had an obligation to "transfer title" to their claims to the Claims Vehicles. This is done by means of a deed. That is a statement which must have reached the recipient, i.e. the Claims Vehicle, in order to take effect. Because none of the Claims Vehicles are based in Germany, the obligation to transfer title was always performed in a country other than Germany. If the performance were related to the provision of services, the place of performance would still not be in Germany. The Claims Vehicles are located outside of Germany whilst the parties litigate in the Netherlands. No services are therefore provided in Germany. The RDG only applies if the party providing the legal services is permanently and purposefully active in the German market and the services are targeted to Germany.

That is not the case here. In addition, nullity due to violation of the RDG would benefit the Truck Manufacturers, and not the German Underlying Parties, even though the RDG seeks to protect the interests of the litigants. Nullity of the assignments would also mean disruption of the course of legal proceedings in the Netherlands. After all, the assignments are legally valid under Dutch law, but would still be void. The Truck Manufacturers contend that the RDG is intended to protect the interests of the German Underlying Parties. However, it is not for the Truck Manufacturers to guard over those interests and invoke the nullity of the assignments. The nature and the purpose of the RDG, as well as the consequences that would result from applying the RDG, justify not giving effect to the RDG. This is also in line with the Cartel Damages Directive. Indeed, Article 2(4) and Article 7(3) of that Directive expressly recognise that a claim for damages may be brought not only by an injured party but also, for example, by a person acting on behalf of one or more injured parties or by a person who has acquired the claim for damages.
Finally, application of the RDG must also be compatible with the fundamental freedoms of the internal market. The freedom of the German Underlying Parties and the Claims Vehicles would be illusory if the restrictions of the RDG were still to apply as a priority rule thwarting their choice of Dutch law. It is therefore generally accepted in the literature that priority rules restricting free movement can only be applied if there is a justification or other compelling reason in the public interest. That is not the case here. The relevant interests are adequately protected in the Netherlands by the Lawyers Act (*Advocatenwet*), the application of the RDG is neither proportionate nor necessary, and there are fewer prohibitive measures available. In addition, the RDG would only be applied to the German Underlying Parties and not to the other Underlying Parties. Finally, if the interest of a priority rule of the receiving country (Germany) is adequately protected by equivalent rules of the originating country, the priority rule of the receiving country does not have to be observed. This is also the case here. After all, the litigants whom the RDG seeks to protect are already adequately protected from legal services provided by unqualified and untrustworthy persons (which, therefore, is not the case at all) by the Lawyers' Act, still according to the Claimants.

2.42. If it is assumed, hypothetically, that the activities of the Claims Vehicles according to national German law are prohibited in Germany under the RDG, the following applies. The question then is whether a German Underlying Party may enter into an agreement with a legal entity established outside Germany to assign a claim for damages based on an unlawful act. In the given circumstances, it follows from the findings set out above that the legal validity of that assignment should in principle be assessed under Dutch law. It is also established that none of the Claims Vehicles are established in Germany. In view of all this, it would have been appropriate for the Truck Manufacturers to explain why that rule should take precedence, despite the provisions of Section 1(2) of the *Rechtsdienstleistungsgesetz*. That section in fact states the following:

> "Wird eine Rechtsdienstleistung ausschliesslich aus einem anderen Staat heraus gebracht, gilt dieses Gesetz nur, wenn ihr Gegenstand deutsches Recht ist."

In view of this provision, and without any further explanation, which the Truck Manufacturers have not given, it is impossible to see how there could be a priority rule here which would require the Dutch court - which, it should be repeated, has a choice in this matter - to hold that the assignments in question are void under German law. This defence, too, will therefore be disregarded.

German law: assignment contrary to public policy and morality?

2.43. The Truck Manufacturers also raised the defence that the assignment agreements are contrary to public policy and morality under German law. In doing so, they invoked the 18 February 2015 ruling of the Düsseldorf *Oberlandesgericht*. In that case, the Düsseldorf OLG ruled that an assignment agreement is contrary to public policy and morality if the assignment is misused by putting forward a less solvent party - an empty litigation vehicle - as a litigant, thus making recovery of a cost order impossible and the litigation vehicle, in which respect the Underlying Parties have the intention of avoiding having to pay the other party's costs of the proceedings if they are unsuccessful in the proceedings. In this case, only CDC provided security for the costs of the proceedings.

2.44. The Claimants submitted that the Truck Manufacturers had not asserted that and why specific assignment agreements were contrary to public policy and morality. They simply asserted that the Claimants, with the exception of CDC, had not provided security for any cost order. That is incorrect as Chapelton also provided security. In addition, based on the ruling of the Düsseldorf OLG, it must be objectively established that:
(a) the assignee will not be able to satisfy a cost order, while
(b) the assignors would be able to pay a cost order; and
(c) shifting the risk of having to pay the cost order was the main reason for the assignments.
In addition, the Düsseldorf OLG ruled that the subjective requirement of actual knowledge must also be met. This means that it is not sufficient that it was only foreseeable for the assignors and the assignee that the litigation vehicle might not be able to satisfy the cost order. Both the assignors and the assignee(s) must have known (or were grossly negligent by not knowing: "*vorhandene Kenntnis oder grobfahrlässige Unkenntnis*") that the litigation vehicle was actually unable to satisfy a potential cost order.
Neither the objective nor the subjective criteria are met in this case. Finally, under German law, it is decisive that proceedings are actually conducted in Germany, or in a jurisdiction with a similar, very high cost order. The Netherlands is not such a jurisdiction, still according to the Claimants.

2.45. This is correct; in the Netherlands the costs of the proceedings of Article 237 et seq. DCCP are subject to a fixed system in which the lawyer's fees - which usually constitute most of the costs that a party must incur - are determined on the basis of a "court-approved scale of costs". In general, the amounts awarded for this are (far) below the actual lawyer's fees a party has incurred. The Düsseldorf OLG found - as far as relevant here - the following:

> "(...)
>
> 72. Ein Rechtsgeschäft ist nach §138 Abs. 1 BGB nichtig, wenn es nach seinem aus der Zusammenfassung von Inhalt, Beweggrund und Zweck zu entnehmenden Gesamtcharakter mit den guten Sitten nicht vereinbar ist. Dabei sind nicht nur der objektive Inhalt des Geschafts, sondern auch die Umstande, die zu seiner Vornahme geführt haben, und die von den Parteien verfolgten Absichten und Beweggründe zu berücksichtigen. Das Bewusstsein der Sittenwidrigkeit und eine Schädigungsabsicht sind nicht erforderlich; es genügt, wenn der Handelnde die Tatsachen kennt, aus denen sich die Sittenwidrigkeit ergibt, wobei dem gleichsteht, wenn sich jemand bewusst oder grob fahrlässig der Kenntnis erheblicher Tatsachen verschließt. (...) Geht es um zu Lasten von Dritten getroffene Vereinbarungen, setzt sittenwidriges Verhalten voraus, dass beide Vertragsbeteiligten die die Sittenwidrigkeit begründenden Tatsachen kennen bzw. sich der entsprechenden Kenntnis verschließen (...). Ist bei der gebotenen Gesamtschau aller Umstände ein Element besonders ausgeprägt, kann sich bereits allein aus diesem Element die Sittenwidrigkeit ergeben (...).

> 73. Hinsichtlich Forderungsabtretungen sowie Prozessführungsermächtigungen und hiervon ausgehenden Verlagerungen von Prozesskostenerstattungsrisiken hat der Bundesgerichtshof Maßstäbe aufgestellt, um eine den genannten Handlungen womöglich anhaftende Sittenwidrigkeit zu beurteilen. Im Ausgangspunkt ist zu berücksichtigen, dass grundsätzlich kein Beklagter Anspruch darauf hat, von einem zahlungskräftigen Kläger verklagt zu werden (...). Indes dürfen Forderungsabtretungen wie auch Prozessführungsermächtigungen nicht dazu missbraucht werden, den Prozessgegner wie auch den Staat der Möglichkeit zu berauben, ihren Rechtsanspruch auf Erstattung oder Zahlung der Prozesskosten zu verwirklichen (...). Ein solcher Missbrauch ist grundsätzlich anzunehmen, wenn eine unvermögende Partei zur gerichtlichen Durchsetzung von Ansprüchen vorgeschoben wird und dies bezweckt, das Kostenrisiko zu Lasten der beklagten Partei zu vermindern oder auszuschließen; dies kommt namentlich dann in Betracht, wenn der Zedent bzw. der Rechtsträger einen wesentlich besseren finanziellen Rückhalt als der Zessionar bzw. der zur Prozessführung Ermächtigte hat (...).
>
> 74. In zeitlicher Hinsicht kommt es darauf an, ob das zu beurteilende Rechtsgeschäft bei seiner Vornahme sittenwidrig gewesen ist. (...)".

2.46. After this outline of the review framework, the OLG considers in great detail the claimant's financial position in those proceedings at the time of the conclusion of the assignment agreement, concluding that the claimant was in no position to pay any cost order. Both the claimant and the assignor knew this when the assignment agreement was concluded; apparently, a deliberate decision was made to shift the risk of the cost order. None of that is at issue here. Moreover, there are no indications that the Claims Vehicles will not be able to pay any cost order - which will be limited in size due to the court-approved scale of costs system used in the Netherlands. The Trucks Manufacturers' defence fails for this reason alone.

Mandates

2.47. Cartel des Camions, CDC, Chapelton, SAATC, and STCC litigate (whether in the alternative - in the absence of an invalid assignment - or not) on the basis of a litigation order or mandate. The Truck Manufacturers disputed the legal validity of this.

The law applicable to the mandates

2.48. The parties agree that the rules governing the choice of law that are relevant for the mandate follow from the Hague Agency Convention and from Article 10:12 DCC. The law that applies to the relationship between the agent (the Claimants) and the principal (the Underlying Parties) must be determined on the basis of Articles 5 and 6 of the Hague Agency Convention. The Claimants have chosen Dutch law on the basis of Article 5 of the Hague Agency Convention. This is not in dispute between the parties.

2.49. The parties have not chosen a law to govern the legal relationship between the principal (the Underlying Parties) and third parties (in this case, the Truck Manufacturers). In accordance with the general rule of Article 11(1) of the Hague Agency Convention, the existence and extent of the Claimants' authority and the effects of their exercise or purported exercise of their authority are governed by the law of the country in which the Claimant (the agent) had its business establishment at the time of its relevant acts. The parties agree that Chapelton, STCC, SAATC and Cartel des Camions have their business establishment in the Netherlands, so that as far as their mandate agreements are concerned, Dutch law applies to the relationship between the Underlying Parties and the Truck Manufacturers.

CDC

2.50. The Truck Manufacturers argued that CDC has its business establishment in Luxembourg, meaning that Luxembourg law applies. CDC disputed the latter. It relied on Article 11(2)(b) of the Hague Agency Convention, which provides that, by way of derogation from the general rule, the law of the State in which the agent (CDC) has acted must be applied if the third party (one or more Truck Manufacturers) also has its business establishment in that State. CDC asserted that Article 13 of the Hague Agency Convention, on which the Truck Manufacturers relied and under which CDC would be deemed to have acted at the place of its business establishment in Luxembourg, does not apply in that case.

2.51. Briefly put, under the general rule of Article 11(1) of the Hague Agency Convention, the law of the State in which the agent has its business establishment applies. In the case of CDC, that is Luxembourg law. The law of another State would only apply if it has acted in a State in which a third party (in this case a Truck Manufacturer) has its business establishment. It must first be determined whether CDC has acted in the Netherlands. If so, Dutch law would apply to the Truck Manufacturers established in the Netherlands, i.e. DAF and CNH/Iveco. Article 13 of the Convention applies to the question of whether CDC has acted in the Netherlands. The rule in that article prescribes that if the parties communicated by a means of communication such as post or telephone (or otherwise), the agent is deemed to have acted at the place of its habitual residence (in this case Luxembourg). It is therefore for CDC to explain that it actually entered into mandate contracts in the Netherlands. It has not done so. As things stand, it should be assumed that CDC's mandates must be assessed according to Luxembourg law.

2.52. What is more, the Truck Manufacturers also asserted that the mandates submitted by CDC did not comply with Dutch law, more specifically with Article 7:414(1) DCC. Given that the mandates must be assessed according to Luxembourg law, this argument is irrelevant. They have, however, also argued that CDC's mandates are invalid under Luxembourg law. The Truck Manufacturers asserted that under Luxembourg law, a party's request to initiate proceedings is admissible only if that party has a personal and legitimate interest when the claim is issued. A mandate may only be issued to an interest organisation representing a public interest under certain circumstances. However, CDC, as a commercial party, does not meet the requirements for issuing a claim on that basis. It is a commercial party, does not represent a public interest, has no members for whom it acts, and has no legitimate and personal interest in the proceedings it institutes, according to the Truck Manufacturers.

2.53. The Claimants, referring to two opinions by G. Cuniberti, Professor of Private International Law and Comparative Law at Luxembourg University, submitted that Luxembourg law also allows CDC to act as agent for the Underlying Parties.

2.54. For the time being, this Court does not see sufficient ground to settle this debate on questions of Luxembourg law. Indeed, CDC litigates on both an assignment and a mandate basis. From what has been found above, it follows that for the time being there is insufficient ground to assume that the assignments - which must be assessed under Dutch law - are not legally valid. It is true that it cannot be ruled out that in an individual case it may turn out that the assignment is not valid, after which the question will have to be answered as to whether the mandate is legally valid with regard to CDC under Luxembourg law, but that mere possibility does not give this Court sufficient cause to make a general ruling at this point while the facts of the case are not yet established.

RDG as a mandatory rule?

2.55. Finally, with respect to the applicable law, the Truck Manufacturers relied on Article 16 of the Hague Agency Convention. This article provides that effect may also be given to the mandatory rules of any country with which the situation has a significant connection, if and in so far as, under the law of that country, those rules must be applied whatever the law specified by the choice of law rules in the Hague Agency Convention. Therefore, the priority rules from the RDG should also be given effect in the context of mandates, given that the German Underlying Parties have a significant connection with Germany, according to the Truck Manufacturers.

2.56. The Claimants dispute that the RDG applies as a priority rule.

2.57. Again, it does not follow sufficiently from the Truck Manufacturers' contentions that in this international case, in view of the provisions of Section 1(2) of that Act, the RDG is applicable under German law and that it is therefore a mandatory rule under German law. The argument fails.

Legal validity of mandates

Power of representation in mandate agreements

2.58. The Truck Manufacturers moreover asserted that they could not verify whether the Underlying Parties were validly represented when they entered into the mandate agreements. Because they submitted the same arguments as they put forward with regard to the power of representation when entering into the assignment agreements, this Court refers, for the sake of brevity, to its earlier findings on this issue.

Cartel des Camions

2.59. The Truck Manufacturers submitted that the mandates given to Cartel des Camions were invalid. Cartel des Camions issues claims in its own name for the Underlying Parties. However, the mandate agreements state the following:

> "(...) Sous réserve de l'article 2, la Société mandate la Structure, entité juridique qui, conformément à ses statuts, a pour objectif de défendre l'intérêt commun de plusieurs entreprises se trouvant dans une situation similaire ou identique à celle de la Société, afin d'agir en son nom et pour son compte pour le recouvrement des Réclamations, de façon individuelle ou collective, ce qui comprend notamment."

La Société is the Underlying Party, la Structure is Cartel des Camions. It follows from the quoted provision that Cartel des Camions is authorised to act in the name and for the account of the Underlying Party and is therefore not authorised to act in its own name. It is therefore acting in violation of the mandate agreement. Moreover, it does not follow from either the provision quoted above or from any other provision of the mandate agreement that Cartel des Camions (the agent) undertook vis-à-vis the Underlying Party (the principal) to perform legal acts. This means that the requirement of Article 7:414 DCC is not satisfied. There is therefore no valid mandate, so Cartel des Camions' claim should be declared inadmissible, according to the Truck Manufacturers.

2.60. The Claimants argued against this that Cartel des Camions was free to choose whether to act in its own name or in the name of the Underlying Parties. The issue here is what the parties to the mandate agreement intended. The literal text of an agreement is not decisive for its interpretation and purport.

The mere fact that the agreement does not literally state that Cartel des Camions undertook vis-à-vis the relevant Underlying Party to perform legal acts in its own name does not mean that Cartel des Camions was not authorised to do so. Cartel des Camions and the relevant Underlying Parties themselves fully agree that they intended Cartel des Camions to have authority to act not only in the name of those Underlying Parties (the most far-reaching form), but also in its own name (the less far-reaching form). The greater includes the lesser. That is what the parties actually intended. What matters in interpreting this French-language agreement is what the parties actually intended, not what third parties such as the Truck Manufacturers think. Finally, the Claimants argued that the absence of the obligation to act in the mandate agreement does not invalidate that agreement.

2.61. This Court finds first and foremost that in interpreting an agreement such as the one at issue here - in which an instruction is given to another party - it cannot simply be assumed that the party permitted to do the greater is also permitted to do the lesser. This is quite aside from the question of whether acting in another party's name can be considered the 'greater' compared to acting in one's own name in a case where acts are performed for the other party's account. It must be clarified whether Cartel des Camions is acting in its own name with the consent of its principals. Contrary to the Truck Manufacturers' opinion, this does not provide a basis for the opinion that the mandate agreement - which, as found above, must be assessed according to Dutch law - is not legally valid in itself. Cartel des Camions must provide the requested clarification before the final judgment. If it fails to do so, it must be held that it is acting in these proceedings without an adequate mandate from its principals.

Power of attorney for SAATC

2.62. The Truck Manufacturers disputed that SAATC was litigating on the basis of a power of attorney. SAATC claimed that the mandate provided it with the authority to bring claims in its own name for the Underlying Parties. In addition, it also claimed to be authorised to do so by virtue of power of attorney. The Truck Manufacturers asserted that SAATC could not have brought claims partly on the basis of power of attorney, because it only brought claims in its own name.

2.63. The Claimants argued that in para. 2.4 of its summons, SAATC explained that it was authorised to bring the claims of its Underlying Parties on the basis of a power of attorney in addition to being mandated to do so. According to established case law of the Dutch Supreme Court, it is sufficient that the summons shows that the claimant is (also) acting as the authorised representative of a specified grantor. It is clear from the summons that SAATC is (also) acting as an authorised representative for the Underlying Parties specified in Exhibit SAAT-0004 to the summons.

2.64. This Court will disregard the Truck Manufacturers' argument. Where it is not in dispute that SAATC is in any event validly litigating in its own name on the basis of a mandate, it may remain a moot point whether it might also be authorised to act on behalf of the relevant Underlying Parties on the basis of a power of attorney. It is sufficient that it is clear to the Truck Manufacturers from whom the claims for damages brought by SAATC originate.

Finally, the 'pragmatic proposal'.

2.65. That leaves the Truck Manufacturers' contention that it is highly plausible that if an Underlying Party were to be asked whether the assignment it had granted was intended to cause the claim to become part of the assets of the Claims Vehicles and EB Trans after the assignment, the answer would be in the negative. Partly for this reason, they asked this Court to agree to their 'pragmatic proposal' to the effect that they write to the Underlying Parties to ask them to confirm some issues on their own stationery, after which the Truck Manufacturers would be willing to drop some defences against those parties.

2.66. This Court sees no cause to do so. As stated earlier, now that the Claims Vehicles have submitted the underlying documentation, it is for the Truck Manufacturers to set out reasons why litigation cannot be conducted on the basis of the alleged assignments (and mandates). From what has been found above it follows that for now there are no indications that all or entire categories of assignments or mandates should be disregarded. This does not mean that all the assignments or mandates are correct without question. Even at a later stage, it may turn out that in individual cases the claim has not been transferred or that the claim is insufficiently substantiated or turns out not to exist at all. But again, it is for the Truck Manufacturers to submit sufficient assertions for this. They should be sufficiently capable of doing so based on the documentation submitted. To the extent that data is missing or there is doubt about its accuracy, they can choose whether to request further information about it from the other party (possibly in the manner suggested in their pragmatic proposal) or to make a point of this in court. In the latter case, it must be taken into account that ample opportunities to remedy such shortcoming apply or may apply. Against this background, this Court sees no reason to accede to the request made by the Truck Manufacturers in their 'pragmatic proposal'. If it turns out at a later stage of the proceedings that a claim does not exist, the Truck Manufacturers evidently will not be liable for damages.

Continuation

2.67. Having resolved the issues in dispute in this judgment, this Court now wishes to address all remaining issues in dispute and decide on the Claimants' claims (whether referral to quantum of damage assessment proceedings is appropriate). A hearing must be scheduled for this purpose. As previously communicated to the parties, such hearing will be held in the first quarter of 2023. The parties will be asked to provide dates on which they are unable to attend during the first three months of 2023. The case will be referred to the cause list for this purpose.

3. The decision

This Court

3.1. refers the matter to the cause list of **7 September 2022** for a statement of dates on which the parties are unable to attend the hearing,

3.2. stays any further decision.

This judgment is issued by R.A. Dudok van Heel, M.A.M. Vaessen and K.A. Maarschalkerweerd, judges, assisted by J.P.W. Manders, Registrar, and pronounced in open court by P. Vrugt on 27 July 2022.

[signed] [signed]