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International Climate Litigation against Companies: Issues of Applicable Law

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Abstract: In the context of climate litigation, actions have been filed both against States, for their inaction in combating climate change, and against companies, to compel them to reduce their greenhouse gas emissions. The latter fall within the scope of private law and may raise issues of private international law when the situation involves any element of internationality. In EU Member states, the applicable law in such cases is determined using Art. 7 of the Rome II Regulation, which governs environmental damage and includes damage caused by climate change. The application of Art. 7, which enshrines the rule of ubiquity, raises the issue of locating the place of the event giving rise to the damage and the damage itself. The place of acting of the tortfeasor may be understood as the location where the emissions are generated. As an additional alternative, the event could also be placed where an insufficient corporate policy to mitigate climate change is adopted. The damage in these cases occurs globally, and this, together with the cause-effect rupture between action and harm, raises doubts about whether the law of damage is an appropriate solution. Completing the system, Art. 17 of the Rome II Regulation allows consideration of the rules of safety and conduct of the country where the liable party acted. This provision helps protect the legitimate expectations of operators who have adjusted their emissions to a license, but it may also undermine the victim's right to choose the applicable law.

Keywords: International climate litigation, conflict of laws, Art. 7 Rome II Regulation, place of the event giving rise to the damage; place of the damage; rules of safety and conduct.

(A) INTERNATIONAL CLIMATE CHANGE CLAIMS AND PRIVATE LAW

Climate change is one of today's major public concerns. Many, like the British naturalist David Attenborough, believe that we are facing "a man-made disaster of global scale" which, if we do not act, could lead to the "collapse of our civilisations and the extinction of much of the natural world".[1] The data is alarming, as measurements taken since the period 1850-1900 show that international action is not producing the desired results.[2] The "ideal" limit of 1.5 degrees Celsius of temperature increase foreseen in the Paris Agreement[3] has already been exceeded on several occasions, albeit temporarily, and

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1 Remarks by David Attenborough at the opening ceremony of COP24 United Nations Climate Change Conference (Poland 2018): *Transcript of People's Seat Address by Sir David Attenborough at COP24*, https://unfccc.int/documents/185211

2 The Intergovernmental Panel on Climate Change (IPCC) has been warning about global warming and its consequences since 2018. See IPCC, *Climate change 2023. Synthesis Report.* [Core Writing Team, H. Lee and J. Romero (eds.)], (IPCC, Geneva, 2023), esp. at 4-6 [doi: 10.59327/IPCC/AR6-9789291691647].

3 Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016), 3156 *UNTS* 79. This Agreement aims to limit global warming to below two degrees compared to pre-industrial levels, but preferably no more than 1.5 degrees.

we are increasingly facing phenomena resulting from global warming, such as extreme storms, droughts or floods, which cause severe damage to people and their property.[4]

The worsening of the situation has been attributed both to states, for their omissions in implementing regulations, and to companies that emit greenhouse gases (GHG), which are the main driver of climate change. In this context, individuals and communities have been trying for years to reverse the situation through a wave of "international climate actions" against states and corporations.[5] The "vertical" actions against the inactivity of states in combating climate change have led to such relevant and well-known decisions as that of the Dutch Supreme Court in the *Urgenda* case[6], or the ECHR judgment in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland.*[7] Alongside these, individuals, NGOs, and associations defending collective interests are filing an increasing number of "horizontal climate actions"[8] against the companies responsible for CO_2 emissions, particularly those listed by the *Carbon Major* database[9] as the world's largest emitters. These actions are based on private law and generally rely on tort law[10], although they often also invoke the Paris Agreement and human rights regulations, particularly the ECHR. The claims are intricately linked to the public debate on global warming, more so than to their actual ability to mitigate climate change or to redress the damage caused by it.[11]

Lawsuits against companies can be grouped into two categories: climate protection actions and climate liability actions.[12] In protection actions, the aim is for the company to reduce its emissions and thus minimize its impact on climate change. A notable example is the *Milieudefensie* case, filed before Dutch courts, which sought to have Royal Dutch Shell (RDS) ordered to progressively reduce its emissions. The claim was based on Dutch tort law and the group's inaction in achieving the Paris Agreement targets. The Hague District Court Judgment of 26 May 2021 sets an important precedent by ordering RDS to reduce its CO_2 emissions by 45% by 2030, compared to 2019 levels, through the

4 On the consequences of climate change in Europe and the world: https://climate.ec.europa.eu/climate-change/consequences-climate-change_en

5 A list of cases, created and updated by Sabin Center for Climate Change Law can be found at https://climatecasechart.com/, site providing two databases of climate change litigation: US Climate Change Litigation and Global Climate Change Litigation.

6 Judgment of Dutch Supreme Court of 20 December 2019, *Urgenda*, case 19/00135, ECLI:NL:HR:2019:2007. The Court ordered the Dutch State to reduce its greenhouse gas emissions by 25% compared to 1990 by 2020.

7 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 53600/20, ECHR (9 of April 2024). This judgment recognizes the right of individuals to effective protection by the State against the adverse effects of climate change on their lives, based on Art. 8 ECHR.

8 M.P. Weller/M. Tran differentiate between vertical and horizontal actions ("Climate Litigation against companies", *Climate Action* (2022) 1-17, at 2-3 [doi:10.1007/s44168-022-00013-6]).

9 https://carbonmajors.org/index.html. Currently, 122 companies are considered responsible for 72% of global CO_2 emissions from fossil fuels and cement.

10 M.P. Weller/M. Tran, *supra* n. 8, at 3.

11 E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II: enjeux et perspectives", 3 *Revue de Droit international d'Assas* (2020) 109-138, at 109

12 S.H. Braun, S. Isenburg, J. Kress, "Transformation through harmonization. The potential of a climate liability Directive to strengthen climate protection", 5 *Themis Annual Journal* (2023) 138 155, at 148.

group's corporate policies.[13] On the other hand, liability actions focus on preventing or compensating for damages suffered by individuals as a result of climate change. A model for this is the lawsuit filed by Peruvian farmer Saúl Lliuya against the German energy company RWE, which is still pending before the Higher Regional Court of Hamm. The plaintiff is seeking the German electricity giant's financial participation in the cost of constructing a dam to protect his home in Peru from a potential overflow of Lake Palcacocha because of glacial melt.[14]

Climate actions against corporations may present an element of internationality, either because the victim suffers the damage in a place different from where the company operates, or because claims are directed against a transnational corporate group operating in multiple states. In this context, the purpose of the following pages are some brief reflections on the difficulties raised by determining the applicable law in these cases. The analysis is based on actions brought before the courts of the European Union. Therefore, the basis of the study will be the rules of the Regulation on the law applicable to non-contractual obligations (Rome II)[15]. The first issue they raise is to what extent global warming or climate damage can be considered an "environmental damage" within the meaning of Art. 7 of the Regulation. Next, the rule of ubiquity established in the provision will be dealt with, specifying how the place of the event and of the damage can be understood in these cases. Finally, some ideas will be added on the effect that the "rules of safety and conduct" provided for in Art. 17 Rome II may have in these cases, particularly when the responsible company has a permit for CO2 emissions.

(B) DAMAGE INCLUDED IN AND EXCLUDED FROM ART. 7 ROME II REGULATION

Art. 7 Rome II Regulation establishes a rule for "environmental damage", which acts as an exception to Art. 4 and in the absence of an unlikely choice of law by the parties

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13 Judgment of The Hague District Court of 26 May 2021, *Milieudefensie et al. v. Royal Dutch Shell*, C/09/571932/HA ZA 19-379, ECLI:NL:RBDHA:2021:5337. The judgment has been appealed, although it is enforceable from the moment it was delivered. The lawsuit was filed in April 2019 before the Dutch courts by the environmental group Milieudefensie, along with other NGOs, and more than 17,000 citizens. The claim was directed against Royal Dutch Shell, the parent company of the Shell group, incorporated under the laws of England and Wales and headquartered in The Hague. The plaintiffs argued that Shell's contribution to climate change violated its duty of care under Book 6, section 162 of the Dutch Civil Code, as well as human rights obligations, particularly Articles 2 and 8 ECHR.

14 Https://rwe.climatecase.org/en. RWE is being claimed to cover 0.47% of the cost of construction, as the company is responsible for the emission of this percentage of global greenhouse gases, according to the *Carbon Majors Database Report of 2017* (https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf). Initially, the claim was dismissed by the Judgment of the Essen Regional Court of 15 December 2016, as. 2 O 285/15, ECLI:DE:LGE:2016:1215.2O285.15.00 (unofficial English translation: https://rwe.climatecase.org/sites/default/files/2022-10/28.11.2016%20Plaintiff%20Written%20submission.pdf). The Court found that a linear causal link between emissions and the consequences of climate change could not be established. After the judgment was appealed, the Oberlandesgericht allowed the case to proceed to the evidentiary phase. A prompt decision is expected after the court visited Huaraz to gather evidence and the expert report was submitted to the Court.

15 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), OJ 2007 L 199/40

(Art. 14). The application of Art. 7 obviously requires that the case falls within the material scope of the Rome II Regulation. This shall apply to "non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to (...) administrative matters or to the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*)" (Art. 1). This rule means the exclusion of climate litigation against states. Actions brought by individuals or NGOs against public authorities for their inaction in combating climate change do not fall within private law, as the state's role as guarantor of environmental protection is carried out in the field of public law. The implementation or non-implementation of the necessary measures to reduce emissions and GHG cannot be considered a management activity, but rather part of the policies adopted in the exercise of the state public power.

Art. 7 provides for the law applicable "to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage". This provision, therefore, applies to two categories of damage traditionally distinguished by doctrine:[16] environmental damage *stricto sensu* or "pure" ecological damage, caused to the environment as such, and private damage to persons or property as a result of the former, also known as "collateral" damage.[17] Environmental damage is defined in recital 24 as an "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource of the public, or impairment of the variability among living organisms".

In the light of the above, the question is whether the changes that CO_2 emissions produce in the atmosphere can be considered as environmental damage. Climate change can be seen, rather than as a damage in itself, as something that might cause damage, so it could be debated whether climate actions involve the environmental damage required by Art. 7 Rome II.[18] In our opinion, the answer should be affirmative. There is an environmental damage whether measures are claimed to combat global warming itself (climate protection actions), and whether the claim focuses on damage to people or property as a consequence of climate change (climate liability actions) even if there is not a previous ecological damage to a natural resource different from the atmosphere. Regarding the first type of actions, we consider the statement of the District Court of The Hague in the *Milieudefensie* case to be correct, which understands that "the parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II".[19] The Court views environmental damage not as the actual pollution, but as global warming itself caused by anthropogenic CO_2 emissions.[20] As for actions claiming individual damages as a consequence of climate change (climate liability

16 E. Álvarez-Armas, «La aplicabilidad especial del Derecho Medioambiental Europeo, su interacción con la norma de conflicto europea en materia de daños al medio ambiente: apuntes preliminares», 13 *AEDIPR* (2013) 381-421, at 386.

17 A.L. Calvo Caravaca/J. Carrascosa González, *Las obligaciones extracontractuales en Derecho internacional privado. El Reglamento "Roma II"* (Comares, Granada, 2008), at 162.

18 On this controversy: M. Lehmann/F. Eichel, "Globaler Klimawandel and Internationales Privatrecht", 83 *RabelsZ* (2019-1) 77-110, at 94.

19 Judgment of The Hague District Court of 26 May 2021, section 4.3.2.

20 M.P. Weller/M. Tran, *supra* n. 8, at 6

actions), the majority opinion consider it sufficient that the damage to the person or property results from the interference of some natural resource.[21] It is enough that an environmental pathway is affected, without the need for a prior detrimental change in a natural resource.[22] Therefore, in our view, global warming can be considered as ecological damage. It should be noted that the 2004 Directive on Environmental liability,[23] which serves as a guide to interpret recital 24,[24] allows to understand that individual damage derived from an alteration of the atmosphere is included, since the atmosphere is a "natural habitat" within the meaning of art. 2 (1) of the Directive.[25] Along these lines, the statement of claim in the *Saul Lliuya* case assumes that the adverse change is the increase of greenhouse gases in the atmosphere itself, without prejudice to the fact that this, in turn, contributes to changes in natural resources and may produce material damage.[26]

Although most climate litigation deals, in whole or in part, with future damage, this does not preclude the application of the Rome II Regulation. Its Art. 2 (3) (b) clarifies that "damage shall include damage that is likely to occur", so the rules of the Regulation also apply if the action is of a preventive nature, or if the claimant's claim is associated with potential future damage resulting from climate change. Whether the action seeks compensation or the persons applying for an injunction aim to prevent the damage, the applicable law is determined in accordance with Art. 7 Rome II.[27]

(C) THE LAW APPLICABLE TO CLIMATE ACTION

(1) The rule of ubiquity

Art. 7 of the Rome II Regulation indicates that "The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4 (1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred". This provision establishes the so-called "rule of ubiquity" and grants the

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21 D. Iglesias Márquez, "Climate litigation against *carbon majors* in home states: insights from a business and human rights perspective", 37 *REEI* (2019) 1-37, at 25.

22 M. Lehmann/F. Eichel, *supra* n. 18, at 94.

23 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56.

24 J. Von Hein, "Article 7. Environmental damage", in G.P. Calliess/M. Renner (Eds.), *Rome Regulations: commentary* (3rd ed., Wolters Kluwer, 2020) 462, at. 467.

25 M. Lehmann/F. Eichel, *supra* n. 18, at. 94.

26 "The emission attributable to the respondent are already causing an "adverse change" through the increase of greenhouse gas concentrations in the atmosphere. Additionally they contribute to a change in the aggregate state of the glacial ice above Lake Palcacocha, which in turn leads to the change in the lake's water level and the resulting hazard. An environmental damage in the meaning of Art. 7 Rome II is given; furthermore (impending) material damages exist due to that damage" (Unofficial English translation of the statement of claim filed in November 2015: https://rwe.climatecase.org/sites/default/files/2022-10/23.11.2015%20Plainitff%20Claim.pdf)

27 M. Bogdan/M. Heller, "Article 7", in U. Magnus/P. Mankowski (eds.), *European Commentaries on Private International Law. Volume 3 Rome II Regulation – Commentary* (Dr. Otto Schmidt, Köln, 2019) 287, at 290; Th. Kadner Graziano, "The law applicable to Cross-border damage to the environment: A commentary on article 7 of the Rome Regulation", 9 *Yearbook of Private International Law* (2007) 71-86, at 76.

victim more favorable treatment than that generally provided by Art. 4 Rome II, which focuses on the law of the damage.[28] The victim's right of choice is justified, according to recital 25, by the principles of protection of nature set out in Art. 191 TFEU: "a high level of Protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage". In this way, the rule is not so much an expression of sympathy towards the weaker party, as an economic choice aimed at making polluters internalize the cost of the negative environmental impact of their activities, thus making the polluter pays principle effective.[29] The rule serves to pressure companies to implement environmental standards comparable to those of the EU in their transnational activities, contributing to the reduction of GHGs and the achievement of European emission control targets.[30]

In international climate litigation, Art. 7 Rome II has been used both by requesting the application of the law of the event giving rise to the damage and the law of the damage. In the *Milieudefensie* case, the plaintiff opts for Dutch law as the law of the place of the event, just as in the *Saul Lliuya* case, where the plaintiff requests the application of German law, since RWE operates in Germany.[31] However, the Belgian law of the place of damage has been chosen in the lawsuit filed by the Belgian farmer *Hugues Falys* against Total in March 2024 before the Belgian courts.[32]

The main challenge in applying Art. 7 of the Rome II Regulation to international climate litigation lies in determining the meaning of "country in which the damage occurs" and "country in which the event giving rise to the damage occurred". In climate actions, the complex chain of events and consequences makes it difficult to determine such places, as both the cause of global warming and its effects are global in nature. The process starts with the emission of greenhouse gases, mainly product of industrial

[28] According to Art. 4 (1): "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur". This rule applies only when the person claimed liable and the person sustaining damage do not have their habitual residence in the same state: in this case, Art.4 (2) leads to the law of their common habitual residence. Both connections are subject to the escape clause of Art. 4 (3) of the Regulation.

[29] J. Von Hein, *supra* n. 24, at 464.

[30] D. Iglesias Márquez, *supra* n. 21, at 27.

[31] The complaint states that this is a typical distance tort, where the place of the event is Germany, where RWE emits, and the damage is suffered in Peru, where the plaintiff's property is located and at risk of being flooded as a consequence of glacial melting. The Judgment of the Regional Court of Essen of 15 December 2016 bases its dismissal on German law, without the question of applicable law being raised again throughout the proceedings.

[32] https://www.thefarmercase.be/ and https://climatecasechart.com/non-us-case/hugues-falys-fian-greenpeace-ligue-des-droits-humains-v-totalenergies-the-farmer-case/. In this case, the plaintiff claims that the French energy company Total should be ordered to adopt an appropriate climate transition plan, and to phase out GHG emissions and oil and gas production. The farmer alleges in his non-contractual claim that the extreme weather events of recent years (such as droughts and violent storms) have caused him direct economic losses, forcing him to limit his crops and livestock.

activity.[33] The gases accumulate in the atmosphere and their non-degradable excess is absorbed by natural resources, such as the earth's surface or water, as well as by the atmosphere. As a result, weather patterns gradually change, and global temperatures progressively increase. As global warming intensifies, extreme weather events, deadly heat waves, droughts, floods, and other occurrences that harm people's health or property become more frequent. In this chain, as it may be noticed, there is no single emitter responsible for the gases, and the damage occurs globally. Moreover, harm to individuals' health or property is not a direct consequence of emissions but comes after two environmental assets have been previously affected: first, the atmosphere, and then the earth's surface, as a result of drought, rising sea levels or melting glaciers or poles, for instance.[34]

(2) Determination of the place of the event giving rise to the damage

In the complex process of climate change, several options are possible when determining the location of the generating event. Firstly, the cause of the damage could be thought of as greenhouse gas emissions, located at the site of the emitting installation.[35] A second possibility is to understand the place of the event as the location where the company adopts its corporate policy on emissions, when it has not reduced these in the appropriate proportion to curb climate change. Both approaches have been put forward in the *Milieudefensie* case: for the plaintiff, the triggering event was the corporate policy determined by RDS in the Netherlands for the Shell group, but the corporation considered the actual CO_2 emissions as the event giving rise to the damage.[36]

On the one hand, GHG emissions may perfectly well be considered the source of the damage. In this case, choosing the law of the causal act implies a fragmentation of the law applicable, as a company or corporate group could emit greenhouse gases from different countries. When there are multiple locations of the event, the starting point is that the law of the place where each event occurs should apply to the liability arising from each of them, without the escape clause being invoked under Art. 7 Rome II.[37] Thus, in the *Milieudefensie* case, the defendant argued that choosing the law of the event led to the applicability of a large number of legal systems, as RDS's emissions were carried out in different countries around the world.[38] The same idea could have been invoked in

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33 https://climate.ec.europa.eu/climate-change/causes-climate-change_en. A minority of GHG are produced naturally, e.g., following volcanic eruptions, or fluctuations in solar radiation or the earth's orbit.

34 M. Lehmann/F. Eichel, *supra* n. 18, at 79.

35 J. Von Hein considers that omissions should be placed where the source of danger is located, e.g., where the plant emitting the toxic gases is situated (*supra* n. 24, at 472)

36 Judgment of The Hague District Court of 26 May 2021, section 4.3.2.

37 J. von Hein, *supra* n. 24, at 472. When several tortfeasors act in different countries, claims against each of them must be based on the law of the place where their action actually took place; but the answer might change if a single defendant is claimed to be responsible for several events in different countries (e.g. in several factories operated by the same company). In this case, M. Bogdan/M. Hellner have suggested that "it might be reasonable to apply to the whole damage" the law of the place where an event occurs that is "manifestly the principal cause of the damage". These authors acknowledge, however, that it is doubtful whether Art. 7 Rome II allows such a solution (*supra* n. 27, at 295-296).

38 Judgment of The Hague District Court of 26 May 2021, section 4.3.2. and 4.3.5. As the Court indicates, "it is not in dispute that the CO_2 Emissions for which Milieudefensie at al. hold RDS liable occur all over the

Saul Lliuya as well: in this case, German law is being applied as claimed by the plaintiff as *lex loci actus*, but the statement of claim pointed out that two thirds of RWE's GHG emissions were produced in Germany, so a distributive application of the laws of the countries from which the remaining emissions originate could have been envisaged. [39]

On the other hand, it is also reasonable to consider the location of the event as the place where the corporate policy responsible for the damage is adopted. This possibility has long been suggested in environmental matters, as an additional alternative to the law of the place where the polluting act takes place.[40] The idea has been admitted in the *Milieudefensie* judgment, even though RDS indicated that corporate policy is a preparatory act that falls outside Art. 7 Rome II. It is traditionally required that the event giving rise to the damage directly causes the damage, excluding preparatory acts when determining the place of the event. [41] However, based on the distinctive elements of environmental damage and the principle of nature protection, the District Court of The Hague considered that the adoption of the Shell group's corporate policy is an independent cause of the damage that may contribute to environmental damage. [42] The Court's response seems to us to be correct. The company's policy is itself responsible for contributing to climate change. This solution also allows a single law to comprehensively determine the obligations of the entire corporate group and is suitable from the perspective of foreseeability: a company may expect to be subject to the law of the country where it adopts its emissions-related policy.

(3) Determination of the place of damage

When the victim does not base his claim on the law of the event, then according to Article 7, "the law determined pursuant to Article 4 (1)" applies, that is, the law of the place where the damage occurs. Within the framework of Article 4(1) of the Rome

world and contribute to the climate change in the Netherlands and the Wadden region".

[39] E. Álvarez-Armas, "Le contentieux international privé...", *supra* n. 11, at 114-115. According to this author, probably this question was not raised in order to avoid further complicating an already complex legal situation.

[40] L. Carballo Piñeiro, "Litigación internacional y daños al medio ambiente", 1 *Revista Ítalo-Español de Derecho Procesal* (2018), 65-88, at 85. Taking into account the place of decisión-making is also suggested by C. Otero García-Castrillón, "El Derecho Internacional Privado de la Unión Europea en la determinación de la responsabilidad civil por daños al medio ambiente", *Anuario Hispano Luso Americano de Derecho* internacional (2013) 367-400, at 391-392, and N. Magallón Elósegui, "El Reglamento Roma II y la ley aplicable a la responsabilidad civil derivada de actos contrarias a derechos humanos realizados por empresas en sus actividades transfronterizas", 22 *AEDIPR (2022) 203-235, at 224*

[41] J. Von Hein, *supra* n. 24, at 472 regarding the applicable law. On international jurisdiction, see M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación Internacional* (2nd ed., Civitas, Madrid, 2007), at 191, and A.L. Calvo Caravaca/J. Carrascosa González, "Ilícitos a distancia y daños patrimoniales directos: Del caso *Minas de Potasa de Alsacia* (1976) al caso *Volkswagen* (2020)", in J. Ataz López/J.A.A Cobacho Gómez (Coords.), *Cuestiones clásicas y actuales del Derecho de daños: Estudios en homenaje al profesor Dr. Roca Guillamón* (Aranzadi, Cizur Menor, 2021) 987, at 1005.

[42] Judgment of The Hague District Court of 26 May 2021, section 4.3.3 and 4.3.6. The Court quotes J. Von Hein, who, regarding the chain of acts, considers that a generous approach fits the principle of environmental protection: "One has to concede that extending the victim's right to choose the law of each place of acting would considerably undermine legal predictability. On the other hand, such a generous approach would fit the favor naturae underlying Article 7" (*supra* n. 24, at 473).

II Regulation, this is considered "irrespective of the country or countries in which the indirect consequences of that event occur", so that "the law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively" (recital 17). The place of damage is, therefore, where a specific personal injury or damage to property is sustained. Material damage is located where the property or asset is injured. Damage to an intangible good may be considered to occur at the place where the right is infringed: if the damage concerns the interest in enjoying an atmosphere unaffected by global warming, it is suffered where it should be enjoyed or where health is adversely affected[43].

In the context of international climate litigation, the application of the law of damage is not always the best solution. On the one hand, damages are suffered globally, insofar as climate change is a global problem. The combined CO_2 emissions of individual states contribute globally to rising temperatures, which in turn cause adverse phenomena and damage everywhere in the world. This implies that Art. 4 (1) might lead to a wide variety of applicable laws[44] under the mosaic theory.[45]

On the other hand, and this seems more serious to us, the law of damage may lead to inadequate results from the perspective of predictability. We are not exactly thinking of operators not being able to foresee where the consequences of their actions will occur. In today's world it could rather be argued that companies should be aware that their CO_2 emissions might cause damage anywhere in the world.[46] The point is that individual damages are decoupled from the place of action[47] so that the law of damage is potentially that of any country in the world. Damages cannot be immediately and monocausally attributed to an action of the defendant but are the result of general global warming; consequently, there is not a direct link between the action and the place of the damage. This not only complicates the establishment of the causal link and the person liable, but also calls into question the results to which the rules of private international law lead.[48] In the *Saul Lliuya* case, for example, if the law of damage had been chosen, Peruvian law would have been applied to assess actions carried out by the defendant primarily in Europe, which, only when combined with the actions of many other companies around the world, explain the risk of the Palcacocha glacier lake overflowing. In this

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43 A direct damage to an intangible good, such as the interest in enjoying a healthy environment, occurs where the right is injured, i.e., where the healthy environment was enjoyed, or where health is damaged: L. García Álvarez/D. Iglesias Márquez, "La regla de la ubicuidad y la responsabilidad ambiental corporativa", in M.C. Marullo/F.J. Zamora Cabot (Coord.), *Empresas y Derechos Humanos. Temas actuales* (Editoriale Scientifica, Italy, 2018) 115, at 149.

44 H. van Loon, "Strategic Climate Litigation in the Dutch Courts: a source of inspiration for NGO`s elsewhere?", 66 *Auc Iuridica* (2020) 69-84, at 80, [doi:10.14712/23366478.2020.32]

45 When interpretating the law of damage under Art. 7, the solutions established for Art. 4.1 Rome II apply. That includes the mosaic theory: J. Von Hein, *supra* n. 24, at 472.

46 It has been a few years since Th. Kadner Graziano, *supra* n. 27, at 73 considered that "in a period in which we are becoming increasingly aware of the effects of global warming, foreseeability is no longer an issue in environmental damage claims".

47 M. Lehmann/ F. Eichel, *supra* n. 18, at 90, on international jurisdiction.

48 *Ibid*., at 80

context, it has to be assessed whether it is appropriate to apply a law that is not always directly related to the defendant's actions. Especially in view of the material results it may lead to. Through a flexible interpretation of causality, the law of the place where damage occurred could make companies that limit their actions and the scope of their activity to European territory liable for damage in third countries[49]. The law of harm also might require the cessation of an activity that national law has authorized after properly weighing all its implications.

Art. 7 of the Rome II Regulation does not establish exceptions based on the lack of foreseeability. The rule apparently assumes that despite the distance, predictability is always present.[50] It has already been pointed out that the provision is not subject to the escape clause, so the application of the law where the damage occurs cannot be excluded under it on the ground that it is not foreseeable for the tortfeasor.[51]

(D) RULES OF SAFETY AND CONDUCT

The system is completed by Art. 17 of the Rome II Regulation. In order to mitigate some of the negative effects of the law of the damage and to contribute to a climate of foreseeability for the defendant, this allows for the consideration of administrative rules of safety and conduct of the country where the responsible party operates. The provision is highly controversial and raises a multitude of issues in the field of climate actions. In particular, the question arises as to whether Art. 17 can justify an exemption or limitation of liability for an operator who has complied with safety or behavioral rules or had a license for their actions, when the law of damage is applicable and sets stricter standards.

The scope of Art. 17 of the Rome II Regulation is limited by the wording of the provision itself. The rules of safety and conduct shall be taken into account "as a matter of fact" and "in so far is appropriate". That is, these rules are not applied, but taken into account, and they are considered factual, not legal elements. Their role is to provide part of the context in which the liability must be judged, but they are not the only element.[52] The provision, therefore, is not a rule of applicable law,[53] so it should not frustrate the application of the governing law of liability, which should always be the key in resolving the case. Accordingly, Art. 17 should not undermine the application of Art. 7 in climate litigation: although the former provision was conceived by the drafters of the Regulation as an instrument to help the tortfeasor, the victim should not be forgotten, nor the *favor naturae* principle that inspires the regulation of environmental damage. Thus, it has been pointed out that Art. 17 cannot be interpreted in a way that contradicts the spirit of

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49 *Ibid*., at 96-97.

50 S.C. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity", 56 *Am. J. Comp. Law* (2008), at 38. The electronic version available at https://ssrn.com/abstract=1031803 is used, and the page numbering corresponds to that version.

51 J. Von Hein, *supra* n. 24, at. 472.

52 A. Dickinson, *The Rome II Regulation. The law applicable to non-contractual obligations* (Oxford University Press, 2008), at 640

53 *Ibid*., at 640

art. 7 and the polluter pays principle.[54] On the other hand, it also seems fair to consider the operator's confidence that their conduct is lawful if it complies with the rules of conduct of the country of operation, especially if it conforms to an authorization granted after weighing both the environmental impacts of the emissions and the benefits of the activity for the common good.[55]

Reconciling the interest at stake is not easy; hence, quite different doctrinal solutions have been proposed. On the one hand, in order to avoid compromising the victim's freedom of choice under Art. 7 Rome II, it has been suggested to close the possible use of Art. 17 in favour of the polluter and adopt a conservative position on the role of authorizations and foreign public law.[56] A second proposal seeks an interpretation that balances the interplay of Art. 17 and 7 based on the principle of foreseeability. On this basis, the polluter should not take refuge in Art. 17 if he has been aware of the impact of his action in the country of potential damage; but he could invoke the legality of his action when he could not foresee the effects of his action in other states.[57] This approach may be appropriate in the context of neighboring relations, where the perpetrator may or may not have foreseen whether their actions would cause damage in another state. However, in climate litigation, the harmful effects of emissions on global temperature are known to materialize globally, thus predictability exists.

On the other hand, the EU emissions trading system (EU ETS), articulated around Directive 2003/87,[58] deserves additional consideration. It regulates the greenhouse gas emission rights of companies in the EU Member States through an allocation and trading system. A limited number of emission allowances are put into circulation by the system, which can be bought and sold by participants. The emission limits authorized by the system clearly imply an increase of CO2 in the atmosphere, which will contribute to climate change. However, it is assumed that when issuing the authorizations, the various economic and environmental interests have been adequately weighed. With this in mind, the system does not make much sense if the exercise of rights leads to actions for damages.[59] Based on the idea that Art. 17 Rome II is not well adapted to the peculiarities of the ETS, it has recently been proposed to consider that Directive 2003/87 contains an implicit unilateral conflict rule that allows ETS allowances to circulate throughout the EU, including the possible exemption from civil liability in force in the State issuing the allowance.[60]

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54 S.C. Symeonides, *supra* n. 50, at 41-42.

55 Following M. Lehmann/F. Eichel, in climate change claims, it is presumed that the applicant relied on the state granting the authorization to have comprehensively assessed the environmental effects of the emissions and the benefits of the activity for the common good, *supra* n. 18, at 100.

56 E. Álvarez-Armas, "Le contentieux international privé...", *supra n. 11, at 130-131.*

57 M. Lehmann/F. Eichel, *supra* n. 18, at 100. M. Bogdan/M. Hellner, *supra* n. 27, at 297 consider likewise that it would not be appropriate to exonerate the company from liability for the consequences of its activities when it knew or ought to have known that they are inadequate.

58 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32.

59 M. Lehmann/F. Eichel, *supra* n. 18, at 103-104.

60 M. Pasqua, "Authorisations to Emit Greenhouse Gases A Conflict-of-Laws Perspective", 3 *The Italian Review of International and Comparative Law* (2023) 409-429

The Hague District Court in *Milieudefensie* case has based its decision on the idea that Art. 17 RRII extends to permits[61] and has accorded compensatory effect to RDS emissions certificate trading included in the EU ETS. According to the Court, these authorizations were granted after adequately weighting all interests at stake, so that RDS does not have an additional reduction obligation in relation to emissions within the ETS. However, the compensatory effect of the ETS does not reach the large number of RDS emissions which the Court considers not to be covered by the system.[62] On the other hand, the Court does not grant compensatory effect to the operating permits for oil and gas extraction. Consequently, these permits do not diminish RDS's obligation to reduce emissions, as the Court does not consider it evident that CO2 emissions played a significant role in the granting of these licenses.[63]

(E) FINAL ASSESSMENT

International climate litigation does not appear to be a passing trend; rather, it is expected to continue growing in importance. Many of the actions are still pending before the Courts, so we will have to wait for future judgments to assess how the various issues raised are resolved in practice. From the perspective of private international law, the rule of Art. 7 is adequate to determine the law applicable to international climate actions, although only the practice of the courts will allow us to assess the problems posed by its interaction with Art. 17. However, a mere conflict rule does not eliminate the inherent difficulties of climate litigation at the national law level. Article 7 Rome II is of little use if the applicable substantive law does not allow for the establishment of the causal link or the overcoming of the independent legal personality of subsidiaries.[64] The situation could improve with the new Directive on Due Diligence[65], which could help create uniform standards and make it easier to hold companies liable for non-compliance with their climate obligations. In this context, let us hope that the measures adopted, as well as the climate actions may help prevent a future that appears both bleak and too warm

61 The Judgment of The Hague District Court of 26 May 2021 uses the rules of safety and conduct to assess the defendant's compliance with the unwritten duty of care provided for in the Book 6, section 162 of Dutch Civil Code (section 4.4.2 and 4.4.44)

62 The Hague District Court Judgment of 26 May 2021, section 4.4.45-4.4.47. The ETS only covers the Shell group's activities in the European Union, and concerns Scope 1 allowances (direct emissions by the company from sources it owns or controls) (section 4.4.45).

63 The Hague District Court Judgment of 26 May 2021, Section 4.4.48

64 D. Iglesias Márquez, *supra* n., at 26: The effective application of conflict-of-law rules requires the presence of substantive rules that make it possible to determine that the damages caused by transnational corporate activities are the result of the activities of parent companies and other entities that exercise control over subsidiaries operating in third States.

65 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 1760