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REVIEW

Forum Shopping in the Eu – A Useful Strategy in Corporate Climate Change Litigation?

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1. Introduction

It is 2015 when Peruvian farmer Luciano Lliuya "takes on an energy giant", to paraphrase the many international headlines about the case.[1] Lliuya files a claim in a German court against RWE AG, the German-based energy-multinational. He has a house and land in Huaraz, Peru and claims that his property is threatened by the melting of a nearby glacial lake. The melting is caused by global warming, he argues, for which RWE is partly responsible. To protect his house from flooding, he seeks payment in the amount of €17.000 from RWE, a sum he says is equivalent to RWEs overall contribution to global climate change of 0.47%.[2] The case is unique in many ways. For one, it is testing the boundaries of neighbourliness, evidence and standing. For another: it concerns a non-EU claimant against an EU-based corporate defendant.[3]

Mantovani calls cases like this the "underworld" of climate change litigation, hinting to the emergence of new court strategies whereby climate activists direct their claims against big transnational corporations.[4] The majority of the two thousand-plus climate cases that so far have been filed globally are directed against States, but corporate cases may very well become part of an already wide range of strategies in climate change litigation.[5] Recently, climate change actions against private actors are indeed on the rise, especially targeting fossil fuel and cement companies, being major greenhouse gas emitters.[6] Although these cases have mixed strategies and use a plethora of legal arguments, the majority concerns misleading advertising, followed by cases where corporations are demanded to reduce their emissions of greenhouse gases.[7]

Often plaintiffs in these lawsuits, like Lliuya, live in countries where climate change threatens livelihoods whereas defendants such as RWE are based in countries where the damage caused by climate change has so far been less

1 https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change; https://www.washingtonpost.com/climate-environment/interactive/2022/peru-climate-lawsuit-melting-glacier/; https://www.theenergymix.com/2022/06/01/officials-visit-melting-glaciers-in-peru-in-climate-case-against-german-utility-rwe/

2 For an impression of the facts on the ground in Huaraz, see https://www.youtube.com/watch?v=FqTd-7Bp2Fjc

3 *Lliuya v. RWE AG*, Essen Oberlandesgerich 2 O 285/15. For English translations of the documents exchanged so far in this case, see https://climatecasechArticlecom/non-us-case/lliuya-v-rwe-ag/

4 Montovani (2023).

5 This number is based on the US Climate Litigation Database, maintained by the Sabin Center for Climate Change Law (Columbia University): https://climatecasechArticlecom

6 Still mostly absent from courts in climate-related cases are actors that cause deforestation (for example the agribusiness and the meat industry) and the plastic industry and the shipping industry.

7 This information is based on the US Climate Litigation Database, maintained by the Sabin Center for Climate Change Law (Columbia University): https://climatecasechArticlecom

severe. The EU is historically responsible for a significant part of greenhouse gas emissions. It also has substantial climate ambitions and, being a frontrunner in reducing greenhouse gases, attracts the scrutiny of both its own citizens and those who suffer the consequences elsewhere. In addition to that there were some recent success stories in EU-courts that attracted international attention. All these factors together make the EU an interesting venue for climate change litigation.

Because after all, why did Lliuya choose a German multinational, and not – say – a Chinese or Saudi Arabian multinational? Why did he not sue RWE in the Peruvian courts? Is it perhaps because he knows that the EUs uniform, predictable framework of private international law might help him to get his case started in an EU-court? Is it because he knows (or hopes) that once those hurdles of private international law are taken, the applicable substantive law might work in his favour? Would Lliuya have opted for Germany had he known the outcome of Milieudefensie v. Shell in the Dutch courts[8], being what some call a "spectacular turning point" in corporate climate litigation?[9] And what if he was not just thinking legally, but also took the option of 'failing with benefits' into account? This paper deals with these questions as well as with the 'risk' of Lliuya succeeding and thus triggering a tsunami of similar cases. Is that indeed likely to happen? Will EU courts become the go-to-courts for this type of litigation?[10] How easy or difficult are these horizontal climate cases for non-EU plaintiffs?[11] In other words: does forum shopping in the EU make sense? And how does all this relate to that other traditionally popular venue for transnational litigation, the U.S.?

2. Civil liability as the common denominator

Cases against States have been analysed quite extensively from a comparative perspective, cases against corporate defendants not so much. It is therefore difficult to give a comprehensive overview of their peculiarities, similarities and differences. However, it is safe to say that they all involve some type of extracontractual civil liability aimed at protecting the body, health or property – if only because this type of civil liability is the most plausible ground available for plaintiffs.[12] Lliuya for example claims liability of RWE on the basis of Article 1004 of

8 *Milieudefensie et al. v Royal Dutch Shell*, Rb Den Haag, 26-05-2021, C/09/571932/ HA ZA 19-379 (court-issued English version)

9 Weiler, Tran (2022).

10 Cf. Stefer (2023).

11 As opposed to vertical climate actions; those between private parties and the State. Cf. Stefer (2023).

12 Weiler, Tran (2022).

the German Civil Code, which sees to impairment of property, a provision which is typically applied in disputes between neighbours. Lliuya is trying to construe a global neighbourly relationship between RWE and himself. He claims the removal of the impairment (the impending glacial lake outburst flood caused by greenhouse gas emissions) of his property.

In the French case *Notre Affaire à Tous v. Total* the claim for Total to meet its climate obligations is based on a law that imposes a corporate duty of vigilance.[13] This law of 2017 requires large French companies to establish measures, identify risks and prevent severe impacts on human rights and the environment both from its own activities and from those with whom it has an established commercial relationship. A court can impose a penalty for non-compliance. The law also provides for civil liability. Under the law, harmed individuals can bring a civil lawsuit based on French tort law to seek damages resulting from a company's failure to comply with its vigilance obligations, whereas compliance would have prevented the harm.[14] [15]

In the Dutch case *Milieudefensie v. Royal Dutch Shell* the demand that Shell reduces its greenhouse gas emissions was mainly based on Dutch tort law, which contains an unwritten standard of care, embedded in Article 6: 162 of the Dutch Civil Code.[16] The court interpreted this standard referring to, among other things, obligations under international human rights law, eventually holding Shell liable and ordering a further reduction of greenhouse gas emissions.[17]

Three corporate cases in three different EU-jurisdictions based on three different types of extracontractual liability. It shows that climate claims based on civil liability are diverse and the applicable domestic legal system might affect how to frame them. What they do have in common though, is that they all fall under the material scope of Regulation (EU) 1215/2012 on jurisdiction and the

13 https://climatecasechArticlecom/non-us-case/notre-affaire-a-tous-and-others-v-total/

14 https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

15 Based on what plaintiffs call a "worrying interpretation of the law on duty of vigilance and the provisions on ecological damage" the case was dismissed in the first instance for mainly procedural reasons. Cf. press release, published in English at https://climatecasechArticlecom/wp-content/uploads/non-us-case-documents/2023/20230706_NA_press-release-1.pdf

16 Article 6:162:
– 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. – 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. – 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

17 https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5337, For English translations: https://climatecasechArticlecom/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/

recognition and enforcement of judgments in civil and commercial matters, better known as Brussels I*bis*, and the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, better known as Rome II.

3. Establishing jurisdiction

Establishing jurisdiction of an EU-court in cases such as the abovementioned is relatively straightforward. Article 4 of Brussels I*bis* creates competence for the court of the place of domicile of the defendant, irrespective of domicile of the plaintiff.[18] Alternatively, Article 7 (2) Brussels I*bis*, which specifically sees to environmental damage, allows to sue before the place where the harmful event occurred or is likely to occur. ECJ case law has established that this could either be the place where the damage occurred (place of effect, *erfolgsort*) or the place of the event giving rise to the damage (place of action, *handlungsort*).[19] The latter would probably not create extra opportunities for plaintiffs, as it will in most cases lead to the domicile of the parent company and will thus not differ from the main rule of Article 4. The other alternative though, the place where the damage occurred, has the potential to open a can of worms.

Let us for example take a claim based on the breach of the obligation of a company to reduce greenhouse gas emissions. The court of the company's domicile would be competent to hear the entirety of the alleged damages, whereas under the mosaic-approach the courts of any place where alleged damage is suffered would be competent only in respect of the local damage.[20] This approach was established in other fields with dispersed losses, such as defamation or antitrust rules. Losses from global warming are at least as multi-territorial as those in antitrust or defamation situations, if not more; they are virtually omni-territorial. This would theoretically allow plaintiffs in any jurisdiction of the EU to address the court of that place to decide on the damages that occurred in that place.

At first sight, this is not very relevant for plaintiffs; why would they opt for such an approach if they have the courts of the defendant at their disposal for the full damages? But, just as the mosaic-approach in defamation cases is sometimes abused by certain plaintiffs to silence journalists, NGOs and civil society groups, so can it potentially be abused by climate litigators, suing corporations

18 Case C-142/98 *Group Josi v. UGIC* [2000] ECR I-05925.

19 Case C-21/76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* [1976] ECR 01735.

20 Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA* [1995] ECR I-00415.

in multiple jurisdictions.[21] However, the strategy in these SLAPP[22] cases against journalists and activists to start multiple legal proceedings in multiple jurisdictions is to cause severe financial damage to the defendants. It is a strategy that is much less likely to be sought in climate cases, considering the fact that in climate cases the plaintiffs are the financially weaker party, not the defendants. A more plausible use of this alternative of Article 7 (2) Brussels I*bis* might be not to address *all* possible courts, but just the one where the best result is expected from a substantive law and/or public opinion perspective.

Leaving aside the mosaic-forums for now; as long as the defendant has domicile in the EU, irrespective of domicile or nationality of plaintiff, access to a European forum is guaranteed.[23] The system does not allow the discretionary tool often found in common law systems of forum non conveniens, whereby a court – even though the venue is proper – can decline to exercise its jurisdiction if it deems another court to be more convenient to hear the case.[24] This absence of forum non conveniens distinguishes the EU from the US, that other traditionally popular jurisdiction for foreign plaintiffs.

4. Jurisdiction outside the EU, the case of the U.S.

"As a moth is drawn to the light, so is a litigant drawn to the United States," reads the famous quote by Lord Denning.[25] Regardless whether that is indeed the case – of which no empirical evidence exists[26] – it is useful to have a look at the possibility of a foreign plaintiff bringing a climate damages claim against a U.S. defendant. Is it as easy as Lord Denning seems to assume? Is it easier than in the EU, thus keeping forum shoppers away from the EU, and flock to the U.S. after all?

For a U.S. court to assume jurisdiction in a case of a foreign plaintiff against a U.S.-based defendant, there must be both personal and subject-matter jurisdiction. Personal jurisdiction is the requirement that a given court is competent to hear a case based on minimum contacts of the defendant with the forum. Subject-matter jurisdiction is the requirement that a given court has power to

21 Cf. Borg-Barthet (2021).

22 Strategic Lawsuit Against Public Participation.

23 Domicile is either the place of a company's statutory seat, its central administration or irs principal place of business.

24 Case C-281/02 *Andrew Owusu v. N. B. Jackson* [2005] ECR I-01383.

25 *Smith Kline & French Laboratories Ltd and others v. Bloch*, 13 May 1982, https://vlex.co.uk/vid/smith-kline-french-laboratories-794009737.

26 Whytock (2022).

hear the specific kind of claim that is brought to that court. Personal jurisdiction is assumed when the minimum-contacts requirement has been met: defendant must have minimum contacts with the forum so that the exercise of jurisdiction falls within the notions of fair play substantial justice.[27] Factors taken into account when establishing minimum contacts of a defendant with the forum are things such as the amount, nature and quality of contacts, the interest of that State in providing a forum and the convenience of parties. There is no case law to support this (yet), but with a U.S. greenhouse gas producer as defendant, some if not most of these conditions would probably be met and thus a court could assume personal jurisdiction.[28] As to subject-matter jurisdiction, with a U.S.-based defendant, having its decision making headquarters in the U.S., or greenhouse gases being emitted within the U.S., a court would most likely have no problems establishing subject matter jurisdiction either.[29]

So far, establishing jurisdiction of a U.S. court by a foreign plaintiff does not seem that much different or more difficult than of an EU-court under Article 4 and 7 of Brussels Ibis, albeit the criteria applied are more flexible and open to interpretation on a case-by-case and court-by-court basis. Furthermore, for the past decade or two personal and/or subject-matter jurisdiction are being granted less generously than before.[30] And even if the U.S. court has jurisdiction, a U.S. defendant can raise the defence of forum non conveniens. This is the most fundamental difference with the EU system.

U.S. defendants can argue that an adequate alternative forum for litigation exists elsewhere. And the acceptance of forum non conveniens is on the rise, not because the law changed but because the courts changed their attitude towards it. With this what some call the recent trend of "litigation isolationism" in U.S. courts in mind, things do not necessarily bode well these days for foreign plaintiffs. In 2007, the Supreme Court expanded the availability of forum non conveniens by holding that courts may dismiss a case on forum non conveniens grounds without having first to determine whether they have subject-matter and personal jurisdiction over the claim.[31]

Thus, features that were typically considered to make the U.S. a magnet forum, seem less favourable today than they used to be. It is not clear, for lack of case law, whether this trend of isolationism would extend to climate cases. Recent cases of foreign plaintiffs against U.S. based companies for environmental

27 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1955).

28 Byers (2017).

29 Byers (2017).

30 Whytock (2022), p. 14.

31 Sinochem International Co. Ltd. v. Malaysia International Shipping Corp, 549 U.S. 422 (2007).

harms committed abroad, might be indicative. Over the past years the trend is that U.S. courts are increasingly closing the doors to foreign plaintiffs in these kind of cases.[32] If and how this will apply to foreign plaintiffs in climate cases, remains to be seen. This uncertainty might play a role when strategizing a climate case, and the relative predictability of EU-courts could very well be a plus for forum-shoppers.[33] Unless it involves State-owned enterprises. Then, the situation becomes much less predictable and much blurrier.

5. State-owned enterprises and Brussels I*bis*

RWE, Shell, Total; they are all privately owned companies. Would it make a difference if they were State-owned? After all, there is a wide range of State-owned actors responsible for large amounts of carbon emissions.[34] Looking beyond the 'usual suspects' of the carbon majors based outside the EU, such as Saudi Aramco or Mexico's Pemex, there are many other State-owned enterprises, including ones inside the EU. They might not extract natural resources but are nevertheless directly or indirectly responsible for greenhouse gas emissions, be it telecom, banks, insurance companies, electricity companies or commercial airlines.

Let us take the latter as an example and imagine a hypothetical case where a non-EU citizen sues an EU-based State-owned commercial airline in a civil – tort based – liability case in the court of its domicile, claiming that damaging climate change is partly caused by its activities. Normally, this would qualify as a civil or commercial matter, falling within the material scope of Brussels I*bis.* However, Article 1 (1) states that the regulation "[…] shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)."

What does this mean for our case? Would the rules to establish jurisdiction of Brussel I*bis* apply, or do the airline's activities fall outside its scope, because they are done by a State-owned company? Since the Eurocontrol-case in 1976, the European Court of Justice has consistently defined civil and commercial matters as excluding actions by public authorities acting in the exercise of their powers, i.e., powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.[35]

32 Clagett (1996); Hester (2018).

33 Prévost (2023).

34 Tordo, Tracy, Arfaa (2011); Griffin (2017).

35 Case C-29/76, *LTU v. Eurocontrol* [1976], ECR 1976, p. 1541.

Article 1 (1) Brussels I*bis* is rather confusing. It gives the impression that it is about sovereign immunity, which it is not. The article does *not* deal with the question whether foreign States or entities thereof can be sued in courts of other States. It just deals with the question whether the regulation applies or not. If it does not, establishing jurisdiction returns to domestic rules of civil procedural law of the court seised, including its rules on sovereign immunity. If it does, jurisdiction is established according to the rules of Brussels I*bis.* To illustrate this, let's go back to our fictious example.

The court would first decide whether the airline's activities are *iure imperii.* There are two scenarios. The first is that it does not consider them as acts *iure imperii* and Article 4 Brussels I*bis* applies, leading to its jurisdiction as the court of domicile of the company. From thereon, things will take their normal course: the court will establish applicable law and apply that law. Sovereign immunity would play no further role, as it would not concern a lawsuit in one State against (an entity of) a foreign State.

The second scenario is that the claim does concern *iure imperii* activities. This does not lead to the incompetence of the court either, just to non-applicability of the regulation. The court would then refer to its own rules of civil procedural law, which most probably allows defendant to be sued in its place of domicile, being the natural forum in most jurisdictions. This scenario is similar to the first – and again not a matter of sovereign immunity – and the case would evolve around issues of substantive law of civil liability.

Things become complicated when the airline is sued outside the country of its domicile. For the sake of argument, let's assume this is the Netherlands. Here, things can go in different directions. Practically speaking, the court would probably first establish whether this is a matter of sovereign immunity (assuming the airline would raise that defense.) If so, this is where the case would end and there would be no further dealing with establishing jurisdiction. This is unlikely to happen.

Dutch courts apply the restrictive approach to State immunity, as recently been codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "UN Convention"). Although the UN Convention has not entered into force yet, the Dutch Supreme Court has held that the UN Convention to be a codification of generally accepted standards of international law. The final version of this convention was largely based on the 1991 ILC Draft Articles on Jurisdictional Immunities. In the official commentary to that draft, it is stated that:

> *"[t]he concept of 'agencies or instrumentalities of the State or other entities' could theoretically include State enterprises or other entities established*

by the State performing commercial transactions. For the purposes of the present articles, however, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity..."[36]

Most likely the airline will not be considered a State-entity at all and cannot invoke immunity regardless its activities. Obviously, this does not necessarily apply to other State-run agencies; they might in principle be able to invoke sovereign immunity, in which case the activity at stake will have to be qualified as commercial or not. Pursuant to the UN Convention, immunity of jurisdiction is only applicable if the actions taken by a foreign State are by their nature considered to be the exercise of the foreign State's governmental task. This is not an easy task. It is as Fox says: "The extent to which immunity should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State immunity."[37]

On the one hand, national courts have repeatedly granted State immunity to national fossil fuel companies that act as alter egos of a State. On the other, national courts have refused immunity when the entity has independent control over its own operations.[38] Generally speaking, a State cannot claim immunity of jurisdiction in respect of actions undertaken strictly for commercial purposes between a State and private parties, such as the sale of goods or supply of services. Thus, running an airline or extracting natural resources; one may, or one may not be rewarded with immunity.

Back to our case of the airline, where we now assume that the court would decide that there is no ground for sovereign immunity in the public international law sense. It would then establish whether Brussels I*bis* applies. If there is no immunity in the international sense, then the *iure imperii* exception of Article 1 (1) will most likely not apply either as the ECJ in the Rina-case seems to endorse the – confusing – idea that international law is relevant to define the scope of Brussels I*bis*.[39]

If Brussels I*bis* indeed provides the rules of jurisdiction, then there is only jurisdiction for the Dutch court if (part of) the damages occurred in the Netherlands. As discussed in the previous paragraph this is a long shot. It would come down to the argument that part of the effects of global warming caused by defendant are suffered in the Netherlands, thus bestowing jurisdiction of the

36 Commentary on 1991 Draft ILC Articles, Art: 2, para. (15).

37 Fox (2013).

38 Lorteau (2023), pp. 259-266.

39 Cuniberti (2021).

Dutch courts to decide on those damages. As remarked earlier, it is unlikely that a plaintiff would go down this mosaic-avenue, and courts would probably be reluctant assuming jurisdiction on this basis, as it would come down an open invitation for virtually all plaintiffs in the world. However, until tried and tested (up until the European Court of Justice) it will remain unclear how far Article 7 Brussels I*bis* reaches.

If anything, these theoretical scenarios expose some vulnerabilities of the Brussels I*bis* regulation. For starters, it causes confusion with the inclusion of the concept of acts *iure imperii* and gives the impression that we have to deal with this as if it is an issue of sovereign immunity, which it is not. Decisions whether to grant sovereign immunity or not, are left to the national court, whether that court has jurisdiction on the basis of Brussels I*bis* or otherwise.[40] As such, the inclusion of the concept of acts *iure imperii* into the regulation is unnecessary and confusing. Secondly, the scope of Article 7 and the omni-territorial character of climate damages needs interpretation and clarification.

Still, despite unclarities and uncertainties here and there, jurisdiction is not the toughest hurdle to take for foreign plaintiffs. Taking this hurdle is pointless though, if cases do not stand any chance as to substantive law. An equally important factor in strategizing a corporate climate case in the EU is therefore to take into account what law the court would apply. There is no uniform European tort-law and despite the fact that all member States have comparable basic categories of tortious liability, small differences may have considerable consequences.[41] A plaintiff therefore needs to think beyond establishing jurisdiction as cases may fall flat on their merits.

6. Establishing applicable law

When the case is built on extracontractual liability following from a duty of care, the conflict of law rules of the Rome II regulation apply. Article 4 provides for the main rule: *lex loci damni,* the law of the place where the damage is suffered. Alternatively, there is Article 7. This article specifically deals with environmental harm and offers a claimant the choice between the law of the place where the damage occurred or the law of the event giving rise to the damage (*lex loci delicti commissi),* the latter leading to the law of the place of the central administration of the company. This is indeed how Lliuya argued – and achieved – German to law to be applicable. It is worth quoting his argumentation here:

40 Cuniberti (2021).

41 Spitzer, Burtscher (2017), pp. 137-176.

> "According to Article 4 Rome II the place of the damaging event is the object of reference. This would be Peru. However, Article 4 Rome II is only applicable when no particular point of reference for Article 5-9 Rome II exists. Pursuant to Article 7 Rome II a particular point of reference is the place of the environmental effect:
>
> The material scope of applicability encompasses not only environmental effect in a narrow sense, such as the impairment of water, soil, air, ecosystems and species, but also claims for compensation for personal injury or material damages.
>
> According to recital No. 24 to the Rome II Regulation, environmental damage is any adverse change in a natural resource, as air or water (which corresponds to the definition in Article 2 Directive 2004/35/CE, 'Environmental Liability Directive').
>
> The emmissions 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 Article 7 Rome II is given; furthermore (impending) material damages exist due to that damage."[42]

Lliuya then continues to argue that this is a typical "Distanzdelikt" where the place of the act and the place of the damage are different, which allows him to opt for the law of the place where the event giving rise to the damage took place, i.e., German law. The court of the first instance rejected the claim but not this argument. Lliuya appealed whereupon the court of appeal rejected the initial judgement and followed Lliuya's legal reasoning on virtually every point. The case is now in the evidence phase. In both instances German civil law was applied without the courts further elaborating on the topic of applicable law, implying it followed Lliuya's argumentation. That would be in line with the reasoning of the Dutch court in *Milieudefensie v. Shell*. The court in that case explicitly stated that despite a lack of case law from the European Court of Justice for guidance, climate change due to CO_2 emissions qualifies as environmental damage for the purpose of Article 7 Rome II:

> "Although Article 7 Rome II refers to an 'event giving rise to the damage,' i.e., singular, it leaves room for situations in which multiple events giving rise

42 Quote from unofficial translation provided by www.climatecasechArticlecom

> to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region."[43]

7. Applicable law outside the EU, the case of the U.S.

Foreign plaintiffs are often drawn to U.S. courts due to the perception that U.S. tort law works in their favour, as opposed to foreign law. Depending on whether a State follows the First or Second Restatement Conflict of Laws, courts in the U.S. either take a territorial approach, focusing on the place of injury or damage (First Restatement) or take a more modern approach whereby other factors – such as domicile of the corporation – are taken into account as well (Second Restatement). Either one of these approaches can lead both to the application of foreign or U.S. tort law, depending on the specifics of the case. Similarly, it depends on the specifics of the case which law would benefit a plaintiff more.

Whytack foresees that in corporate climate cases "given that emissions that are alleged to be tortious do not occur in any one country, it might be argued that the tort, if it occurs anywhere, must occur in the jurisdiction where the harm occurs. That country may have a more significant relationship than a country where only some of the potential defendants reside and a small fraction of the emissions occurred […]."[44] He notes that Rome II provides more flexible rules for transnational environmental litigation, which is confirmed by Milieudefensie and Lliuya.

In a U.S. court Lliuya's case might have led to Peruvian law rather than German law as the applicable tort-law. This is not necessarily a bad outcome per se. In an attempt to map strategies for successful climate litigation against corporations lawyers affiliated with Environmental Law Alliance Worldwide found that civil law jurisdictions are more likely to have a particular statute under which a case seeking compensation for climate damages could be filed.[45]

All in all, U.S. rules of applicable law might be less flexible in that less different outcomes are available than the EU rules of private international law provide.

43 Court-issued English translation of the judgement, accessible through www.climatecasechArticlecom

44 Byers (2017), p. 295.

45 Environmental Law Alliance Worldwide, Holding Corporations Accountable for Damaging the Climate (2014), https://elaw.org/system/files/elaw.climate.litigation.report.pdf

This specifically matters if one has a specific national substantive law in mind and is thus something to take into account when strategizing a case and its forum. Because let us not forget indeed that clearing the private international law obstacles of jurisdiction and applicable law are just means to an end: finding the most favourable and predictable gateway to what comes next: substantive law.

8. Substantive law post-Milieudefensie v. Shell, a novel climate tort?

The difference between *Lliuya v. RWE* and *Milieudefensie v. Shell* is that Milieudefensie was seeking to force Shell to reduce CO_2 emissions whereas Lliuya is seeking compensation for past environmental damages linked to climate change. And surely, cases differ, legal systems differ, court systems differ, domestic laws differ. But a trend can be detected: the ordinary tool of tortious liability is used and moulded into shape to suit climate actions against corporations. How and to what extend still differs from jurisdiction to jurisdiction.

In Milieudefensie, the court – addressed by several civil society organizations led by Milieudefensie – ruled in favour of claimants and ordered oil-giant Royal Dutch Shell to reduce its CO_2 emissions by net 45% in 2030 compared to 2019-levels. The court based its decision on the general duty and unwritten standard of care as laid down in the Dutch Civil Code.[46] It was exactly that unwritten standard of care that gave the court ample manoeuvring space to establish a "climate standard of care", and a breach thereof. To construe this standard of care the court gathered fourteen different factors, such as the policy-setting position of Royal Dutch Shell in the Shell group, the group's CO_2 emissions, the right to life and the right to respect for private and family life of Dutch residents, the onerousness for Royal Dutch Shell and the Shell group to meet its reduction obligation etc.

However, this is a Dutch case, applying Dutch tort law. As mentioned before, there is no guarantee of a similar outcome in other EU-jurisdictions. Furthermore, Shell lodged an appeal and it is by no means certain that the decision will hold in higher instances. What plaintiffs would really need therefore, is uniform EU climate tort law. The proposal for a Directive on Corporate Sustainability Due Diligence could be a step in that direction.[47]

46 Cf. note 16.

47 Proposal for the Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM/2022/71 final. Accessible through https://eur-lex.europa.eu

Under that Directive EU companies would be responsible for mapping climate risks and provide an emission reduction plan.[48] The expansion of directors' duties in the EU may similarly give EU authorities more scope to make individual directors accountable for their companies' operations. The details of the regime are still to be negotiated, but it is clear that the EU is aiming for senior-level responsibility. Companies would be liable for damages if they fail to comply with obligations to prevent, end, or mitigate any potential adverse impacts — including where any failure leads to an adverse impact that could have been avoided.

However, in the current state of the proposal the possibility of climate change litigation is limited; its Article 22 on civil liability refers only to the due diligence obligations set out in Article 7 and 8 of the proposed Directive, leaving out the specific provision on climate change due diligence and mitigation requirements (Article 15). But this may change. In the review provision (Article 29 CSDDD Proposal) it is expressly requested that the European Commission assesses whether the due diligence requirements of Articles 4 to 14 of the proposed Directive should be extended to adverse climate impacts.[49] The contemplated timeline (seven years) after the entry into force of the proposed Directive for the European Commission to assess its impact is rather disappointing, given the urgency of the matter.

The Directive as well as other sustainability due diligence tools might still be in their infancy and in need of refining, but they do appear promising instruments. They can serve as a useful basis for climate change litigation in the EU, thus mitigating the differences between member States' substantive laws.

9. Greenwashing

And then there is greenwashing.[50] These cases are trying to expose that companies are misleading consumers about the effect of their products or services in causing climate change and/or intentionally misleading investors about climate-driven risks to its business, including by failing to disclose climate change

48 Prévost (2023).

49 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0071

50 Setzer, Higham (2022).

risks. Major players such as FIFA,[51] Volkswagen,[52] Ikea[53] and H&M[54] are being called out for misleading or false climate information about their products.

One of the most prominent cases currently pending in the EU is a case against KLM in the – once again – Dutch courts. Plaintiffs, a group of NGOs, argue that KLMs climate advertisements and marketing breach EU consumer law standards by creating the false impression that its flights do not contribute to global warming. The District Court of Amsterdam has granted permission for Dutch campaigners to bring the claim, following a prior hearing on the organisations' admissibility. The decision establishes for the first time that an environmental non-profit can bring a greenwashing claim under the recently passed Dutch class action law. But, just as in FIFA, Volkswagen, H&M or Ikea, this is a domestic case. So far, to the knowledge of the author, there have not been any transnational greenwashing lawsuits, in or outside the EU. It is therefore hard to predict how these cases would behave from a private international law perspective, leave alone from a substantive law perspective.[55] That being said, we can give it a tentative try.

Under existing European case law, jurisdiction in cases regarding misleading advertisement will be for the court of domicile of the company (Article 4) or the *handlungs* or *erfolgsort* of Article 7. Depending on the circumstances (and framing) of the case this may create an extra competence. If several markets are targeted by the advertisements (which will most likely be the case), there is jurisdiction in each of these markets, but for local harm only. This mosaic-approach was first established in Shevill, a pre-internet case.[56] This rule got more complicated with the introduction of internet, where – simply put – the reach of a message (and thus the range of what can be the *erfolgsort)* became virtually unlimited.[57]

51 *KlimaAllianz v. FIFA* (Switzerland); *New Weather Institute v. FIFA* (UK); *Notre Affaire à Tous v. FIFA* (France); *Carbon Market Watch v. FIFA* (France), all accessible through www.climatecasechArticlecom.

52 *Altroconsumo v. Volkswagen* (Italy); https://climatecasechArticlecom/non-us-case/altroconsumo-v-volkswagen-aktiengesellschaft-and-volkswagen-group-italia-spa/

53 https://www.earthsight.org.uk/news/investigations/ikea-house-of-horrors

54 *Chelsea Commodore v. H&M* (USA); https://www.business-humanrights.org/en/latest-news/usa-hm-faces-greenwashing-class-action-lawsuit-over-alleged-misleading-false-marketing-of-sustainable-clothing-line/

55 A Greenwashing Directive that would harmonize (part of) substantive law in the member States is in the making: Proposal for a Directive of the European Parliament and Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM/2023/166 final.

56 Case C-68/93, *Shevill and Others v. Presse Alliance.*

57 Thünken (2002).

Despite calls for a replacement or refinement of the mosaic-approach in internet cases,[58] the recent Gtflix-decision sticks to the principle.[59] Dealing with the interpretation of Article 7(2) of the Brussels I*bis* Regulation in the context of torts committed through an online publication, the ECJ confirmed that the mosaic-approach to jurisdiction first established in Shevill applies to an action seeking compensation for the harm allegedly caused by the placement of disparaging comments on the internet.[60] The court held that the courts of each Member State in which those comments are or were accessible have jurisdiction to hear the case, provided that the compensation sought is limited to the damage suffered within the Member State of the court addressed.

If we apply this approach to greenwashing cases it seems we would have a combination of the virtually limitless online reach of online advertisements resulting in damages that are not suffered by a limited group of individuals but by mankind. How would domestic courts or the ECJ deal with jurisdiction in such cases? Would that not effectively lead to twenty six alternative courts, in addition to the *forum rei*? We do not know the answer to this question as such cases haven't occurred yet, but surely they would present challenges for the judiciary.

As to applicable law, here it seems very important how to frame a case of greenwashing. If framed as a matter of environmental damage, Article 7 Rome II leads to the option for the law of the place where the event giving rise to the damage took place, thus aligning the *forum rei* and its law. However, if framed as unfair competition in the sense of Article 6 Rome II, the outcome may be different. The concept of 'unfair competition' is indeed generally understood to cover misleading advertising, triggering the application of article 6 of Rome II. The concept of unfair competition is broad enough to include both rules that protect consumers and rules that specifically protect competitors. This means that actions taken by consumer organisations based on misrepresentation are covered by the concept. Equally, competitors may rely on it to fight misleading advertising.

Article 6 (1) states that the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. If the consumers are spread out over several countries, the provision will refer each affected consumer to its own law. This rule does not apply where an act of unfair competition affects exclusively the interests of a specific competitor. In that case, the normal rules of Article 4 apply.

58 Buzzoni (2022).

59 *Gtflix Tv v. DR*, Case C-251/20.

60 *Fiona Shevill and Others v. Presse Alliance SA*, ECJ 7/3/1995 C-68/93.

As advertisements are no longer limited to an ad in the newspaper or on national tv, and as climate change has a universal effect, misleading climate advertisement potentially has universal reach with universal effects. These new dynamics lead at least theoretically to the possibility that the law of the country of the plaintiff *always* applies, thus leaving him deprived of the *lex loci delicti* of Article 7. Bringing a case to the EU might thus lead to finding a competent court which applies the law of the country of the plaintiff, not necessarily something he was looking for. This uncertainty might keep non-EU plaintiffs from bringing a misleading advertisement case in an EU-court. Clarification by (eventually) the ECJ as to how a greenwashing claim should be qualified would be welcomed.

10. It's not just about law

What we have established so far is that plaintiffs should not have too much trouble to find a competent court in the EU and having that court establish a reasonably predictable applicable law. As to the contents of that law, things are much less certain and despite recent climate successes in some EU courts, cases can (and will) still be lost as well. But this is not necessarily bad news only.

Obviously, one does not litigate without a fair chance of success. Litigating is generally a costly strategy, with uncertain outcomes, especially in adversarial systems, where claimants are likely to pay their legal representatives and experts' fees regardless the outcome of the case.[61] But there are benefits in trying climate cases, even if they fail in court, and not just to test the boundaries of the law. It is where litigation meets activism. Public opinion can be mobilized even if a case fails. Or maybe even *because* a case fails, especially against big corporate. High-profile judgments on climate change have attracted considerable media and academic attention, regardless of their outcome. For example, cases against others than the major carbons might raise awareness of how other industries might be equally or even more responsible for greenhouse gas emissions.

Litigation can also be used as a starting point of a broader strategy by social movements or organisations, either using other types of activism to set up, or lay the groundwork for, litigation, or resorting to litigation to ensure the feasibility of ongoing campaigns. Thus, although it is unlikely – and probably unwise – to start a court case for publicity reasons only, the attention it would generate as a side-effect might influence the risk assessment of a negative outcome. This is especially significant in what Bouwer and Setzer describe as "name and shame"

61 According to the *Financial Times*, the Lliuya case so far has cost EUR 750.000. Hodgson (2023).

cases, cases that are meant to emphasise the "flagrant inconsistency between discourse and action."[62]

From a legal perspective too, when cases fail, for example in preliminary hearings, this does not have to be just negative. They still might make a positive contribution to climate action. Thus, counter-intuitively for lawyers maybe, the choice to litigate as a strategy or mixed strategy in environmental activism does not always result in clear success in the litigation, but this does not necessarily have to deter activist litigators, if only because litigation campaigns can be re-used. For example, in Lliuya the court of appeal recognised that in principle, it was possible to establish legal causality for RWEs contribution to climate risk in Peru, thus stretching the national concept of neighbourliness to a global concept. This already set a partial precedent: according to the judges' interpretation of the law, major emitters can be held liable for their contribution to climate change impacts. That in itself is a positive, even if Lliuya fails to prove causality.

11. Conclusion

Is forum shopping in the EU a useful strategy in corporate climate change litigation? The tentative answer is yes. Jurisdiction is relatively easy to establish, that is: if one sticks to the safe option of Article 4 Brussels I*bis*: that of the place of domicile of defendant. As to alternatives offered by Article 7, the courts of the place giving rise to the damages, things are less predictable, or practical. The place of the event giving rise to the damage can under established case law either be the *handlungsort* – which in most cases will not lead to a different court than that of Article 4 – or the *erfolgsort.* The latter gives rise to uncertainty, if only because there is no case law in climate cases yet. Would each court in the EU in principle have the assume jurisdiction (considering that climate change and thus its effects are everywhere), and if so, would it then have to limit itself to the damages that occurred there? Practically, it would not make much sense for plaintiffs to go this route, unless it would be for exactly that reason: see if it works.

Of course, this does not mean that EU-courts are the only options available. The U.S. used to be very popular in transnational litigation cases and one would thus expect them to be so for transnational corporate climate cases. However, no such case has hit the U.S. courts yet. This might be a coincidence, or it might have to do with the recent isolationist approach that the U.S. courts have been taking. Furthermore, even without an isolationist trend, plaintiffs always run the

62 Bouwer, Setzer (xxxx).

risk of a successful *forum non conveniens* defence, the absence of which is one of the major advantages of the EU-system (for plaintiffs, that is).

Applicable law in a tort-based case seems to be rather straightforward as well, as it would either lead to *lex loci commissi* or *lex loci damni,* with the exception of greenwashing cases. Substantive law differs from jurisdiction to jurisdiction though, and what has been decided by the court of one Member State will not necessarily be decided by another. Thus, plaintiffs in transnational climate cases aiming for litigation in the EU need careful framing of the claim and careful research about the chances of success in particular Member States. The lack of a substantive body of domestic climate case law across EU-jurisdictions and the lack of interpretative decisions of the ECJ make this a challenging job. These cases are costly and therefore not likely to cause a tsunami of cases.

That being said, in particular the Netherlands might be an interesting go-to jurisdiction as so far it has delivered some promising landmark cases, such as *Milieudefensie v. Shell* and the pending KLM greenwashing case. As earlier in Urgenda,[63] a case against the State rather than a corporation and therefore not discussed in this paper, Dutch courts seem to be willing to accommodate climate claims. Perhaps this is too premature a conclusion though, as both the Shell and KLM cases will – considering their importance – most likely go all the way to the Court of Cassation.

Another development to keep a close eye on are the upcoming EU-Directives on corporate sustainability due diligence and greenwashing. Once adopted, they will help to close some of the gaps between the substantive laws of Member States, leading to a more uniform climate liability framework. This could certainly be an extra incentive for EU-forum shoppers. All in all, it is still early in the game for corporate climate cases as a whole, domestic or transnational, to draw firm conclusions. But surely in the near future things will continue to develop. That is, if sufficient funding for climate cases is available to help climate lawyers and their clients to explore climate change litigation boundaries.

63 HR 20-12-2019, *State of the Netherlands v. Urgenda*, English court-issued version available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf

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