Case to Watch: Dutch Supreme Court Expected to Rule on Applicable Law in Air-Cargo Competition Damage Claims

On 2 August 2017, the Amsterdam District Court handed down a ruling in which it announced its intention to refer to the Dutch Supreme Court the issue of which laws apply in mass damage claims brought against airlines carriers accused of having operated a cartel in the air-cargo sector.

In 2010*, the European Commission adopted a decision in which eleven air carriers (including British Airways, Air France/KLM, Air Canada and Lufthansa) were fined a total of almost EUR 800 million for fixing prices for fuel and security surcharges on airfreight services.

In the aftermath of this decision, many allegedly injured customers brought follow-on damage claims in multiple jurisdictions against the air-carriers, seeking compensation for their losses. The case at hand is one of those follow-on damage claims and was initiated before the Dutch courts by *Stichting Cartel Competition*, a litigation vehicle consolidating the claims and representing the interests of 266

freight customers.

Among the many complex issues which arise in the context of this dispute, the question of which law actually applies to such follow-on damage claims is particularly interesting.

Before the Amsterdam District Court, *Stichting Cartel Competition* argued that Dutch law should apply to the case since Article 6(3) of EU Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) (***Rome II Regulation***) provides that:

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

The air-carriers have a different position. The airlines argue that the case falls outside the temporal scope of the Rome II Regulation, since this Regulation only entered into force on 11 January 2009, while the cartel ended in 2006. Instead, they

argue that the Dutch courts should apply the Dutch Unlawful Acts Act (the ***UAA***) which contains the Dutch conflict of law rules applicable at the time of the cartel. More specifically, Article 4(1) of the UAA provides that claims arising out of anti-competitive acts shall be governed by the laws of the country in whose territory the competitive conditions were affected (which, according to the air carriers, would be the place from where the flights departed since, in the air cargo industry, the offer (by the carriers) and demand (by the freight forwarders) for airfreight services meet at the airport of departure). In any case, the air carriers consider that, because most claims consolidated by *Stichting Cartel Competition* involve foreign claimants who allegedly have suffered losses on flights that are not related to the Netherlands, those claims are insufficiently connected with the Netherlands for Dutch law to apply.

According to the air carriers, therefore, the law applicable in the case at hand should be specific to each underlying claim and should consist of the law of the country where the underlying flight for this claim departed from.

Uncertain as to which position to follow, the Amsterdam District Court decided to stay the proceedings and will soon refer the question to the Dutch Supreme Court. The International Litigation Blog will of course keep you updated of the outcome in this case.

* *For the sake of completeness, it must be noted that European Commission adopted a new decision in March 2017 after the General Court of the European Union annulled the 2010 decision*.

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