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NL – Cross-border Jurisdiction in FRAND and Anti-Anti-Suit Injunction Proceedings

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In two recent decisions the District Court of The Hague assumed cross-border jurisdiction in FRAND / Standard Essential Patent ('SEP') proceedings. In a first case the Court assumed jurisdiction on claims related to the FRANDness of a SEPs (patent pool) license. In a second case the Court assumed jurisdiction on an anti-anti-suit injunction ('AASI') claim related to SEPs. Both cases confirm the Dutch Court's willingness to consider cross-border relief in international (FRAND) disputes.

The first case concerns proceedings started by Vestel against HEVC Advance patent pool administrator Access Advance (US) and pool members Philips (NL), GE Video Compression (US) and IP Bridge (JP). Vestel requests, *inter alia*, a declaratory judgment that neither Access Advance's pool license offer nor the bilateral offers of its members Philips, GE Video Compression and IP Bridge are FRAND, that Vestel's license offer(s) are FRAND or, in the alternative, that the Dutch court set a global FRAND rate.

Access Advance and the non-Dutch pool members challenged the Court's jurisdiction to hear Vestel's claims. By the recently published interlocutory judgment of 15 December 2021 the Court rejected this challenge. The Court held it has jurisdiction to hear the claims against pool administrator Access Advance and the non-Dutch pool members based on connectivity of claims against Dutch pool member Philips (jurisdiction undisputed).

As the non-Dutch defendants were all located outside of the EU, not the Brussels I (Recast) Regulation, but national Dutch jurisdiction provisions applied, specifically Article 7(1) Dutch Code of Civil Procedure ('DCCP'). The Hague Court reasoned that while this provision was modeled after (the predecessor of) Article 8 (1) Brussels I (Recast) Regulation, the Dutch legislator had intended to formulate a rule with a somewhat different, i.e. broader, scope.

First, this already follows from the *wording* of the two provisions, according to the Court. Instead of "*closely connected*" and the avoidance of "*irreconcilable judgments*" (Article 8 (1) Brussels I (Recast) Regulation), the Dutch legislature opted for claims that are "*connected*" and reasons of "*efficiency*" (Article 7(1) DCCP).

Second, the difference between the NL and EU jurisdiction provisions can be explained by their different *objectives*. The EU-regime strives to avoid irreconcilable judgments in different Member States which may give rise to problems of mutual recognition and enforcement, while this is not a

consideration under the Dutch provision.

Moreover, as followed from the *legislative history*, the Dutch legislator had expressly left open the possibility of a wider regime of jurisdiction under Dutch law on certain points.

The Court further found that there was sufficient connection between Vestel's claims against Philips and the foreign co-defendants to justify joint treatment for reasons of efficiency under Article 7(1) DCCP. The Court reasoned (translation):

4.7 The claims are identical against all defendants, and pertain to the same territory. Likewise, the bases for these claims are largely identical. Vestel et al. impute all defendants of not wishing to grant Vestel et al. a licence under FRAND conditions for the SEPs in the Access Advance Patent Pool. Vestel et al. impute both Philips N.V. and each of its co-defendants, with argumentation, of conspiring and/or still conspiring/cooperating in an effort to force Vestel et al. to accept non-FRAND licensing conditions. Vestel et al. impute Philips N.V. and its co-defendants of jointly, both collectively (through the administrator Advance) and individually (in the bilateral negotiations) making non-FRAND licensing proposals (in coordination with each other). It is these coordinated and concerted factual actions of Philips N.V., its fellow pool members (here GEVC and IP Bridge) and Advance that, according to Vestel et al., are restricting competition through abuse of the defendants' position of power and through acting in violation of the cartel prohibition and otherwise wrongfully, by acting in violation of pre-contractual good faith and violation of the contractual commitment to provide a FRAND licence.

4.8 Contrary to what Philips et al. argue, these imputations are not so unfounded that they cannot pass the (limited) review as described above at paragraph 4.5 for the purposes of this motion on jurisdiction. Firstly, it is established that the SEP-holders Philips N.V., GEVC and IP Bridge all license their SEP portfolios (in respect of the HEVC standard at issue here) to Advance and Advance is making and has made licensing proposals to Vestel et al. on behalf of these co-defendant SEP-holders. If these proposals are not FRAND, this could constitute abuse of a position of power that would theoretically be imputable (in part) to the SEP-holders, all the more so because according to the assertion of Vestel et al., Advance cannot deviate from the standard Patent Pool License (PPL). It should be clear that a further material review of the FRAND-ness of these proposals goes beyond the scope of this motion on jurisdiction. The same can be said for the imputation that the bilateral proposals are not FRAND. It must, moreover, be noted that there is at least some indication confirming the assertion that these bilateral proposals were indeed coordinated; see, for example, GEVC's e-mail of 24 August 2018 (EP33):

"As you noted, GE 's bilateral license offer is structurally similar to the patent pool license offered by HEVC Advance..."

According to Vestel et al., the pool members additionally calculated a markup over the PPL in their bilateral proposals.

The Court thus held that it had international jurisdiction to hear Vestel's claims against Access

Advance and pool members Philips, GEVC and IP Bridge. The Vestel proceedings on the merits of a FRAND license will therefore continue against Access Advance and the relevant pool members before the The Hague Court. The Court's decision can be found [here](#) (in Dutch).

The second case concerns an AASI filed by Ericsson against Apple Inc. (US), two Dutch Apple entities and two Irish Apple entities. Ericsson feared that the Apple defendants would start proceedings somewhere in the world to obtain an anti-suit injunction ('ASI') against Ericsson, which might involve an action to prevent Ericsson from enforcing its (standard essential) patents, as well as an ASI to enforce a 'covenant not to sue' against Ericsson.

One day after the Vestel decision, the PI judge of the District Court of The Hague assumed jurisdiction vis-à-vis Apple Inc. on the basis of Article 7 (1) DCCP (using similar reasoning as in the Vestel case) and vis-à-vis the Irish Apple entities on the basis of Article 8 (1) Brussels I (Recast) Regulation. The jurisdiction as to these foreign defendants was limited to claims with respect to the Netherlands and Belgium. In short, because the Dutch Apple entities are only active in those countries and therefore there might only be a threat of the foreign Apple entities (co)filing ASI claims there.

Ericsson's AASI claims were however rejected in these PI proceedings due to a lack of urgent interest. In short, the Court concluded – on the basis of the facts put forward – that it had not become plausible that there was a (real) threat that the Apple defendants would file for a preventive ASI against Ericsson, so that the urgent interest of the claims insofar as based on this assertion was lacking. This finding was not changed by Apple being unwilling to undertake that it would not request a preventive ASI in the future, as Ericsson was not entitled to such a general undertaking. The Court's decision can be found [here](#) (in Dutch).

The Dutch Court, with above decisions, has lived up to its reputation as a venue to adjudicate international disputes, including the determination of a global FRAND rate.

Disclaimer: the author's firm represents Vestel.

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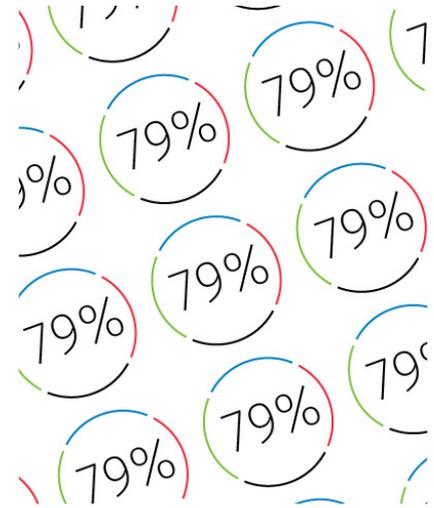
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