

# Corporate Climate Liability in Private International Law

Marc-Philippe WELLER\*/Madeleine Petersen WEINER\*\*

\*Director of the Institute for comparative law, conflict of laws,  
and international business law, Heidelberg University, Germany

\*\*Research fellow and doctoral candidate, the abovementioned  
Institute, Germany

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## Introduction

Climate litigation, *i.e.*, litigation with the aim of holding actors accountable for the anthropogenic climate crisis,<sup>(1)</sup> has long outgrown the label it was once given as “the new kid on the block”<sup>(2)</sup>. With the global situation deteriorating and concomitant problems ever-increasing, individuals<sup>(3)</sup>, collectives of plaintiffs<sup>(4)</sup>, and public interest groups such as NGOs<sup>(5)</sup> are taking to the courtrooms with the aim of holding states and corporations accountable for their contributions to global warming.<sup>(6)</sup> The *Anthropocene* – an entirely new world era demonstrating the radical change in the bio- and atmosphere through man-made actions – has been met with civic interest and engagement which extends to litigation efforts.<sup>(7)</sup> This so-called *strategic climate change litigation* is best exhibited in the prominent *Total* case<sup>(8)</sup> in France.<sup>(9)</sup> Several environmental NGOs sued the French oil company *Total* before Parisian courts where *Total* is headquartered. In doing so, these

plaintiffs pursue several different goals: 1) to stop an oil drilling project in Tanzania, 2) for *Total* to reduce its worldwide CO<sub>2</sub> emissions, and 3) to promote political change.<sup>(10)</sup> Not least in light of the global dimension of climate change in itself, as well as the cross-border elements exemplified by this case, several questions arise that can only be answered by the area of law designed to resolve such a *conflict of laws*.

This article investigates and discusses the private international law aspects of corporate climate litigation, taking as a starting point the current developments regarding the worldwide rise of climate litigation (I.), and an overview of the legal climate framework currently in place (II.), before distinguishing between different types of climate litigation (III.). This article will then provide an overview of the applicable law in climate litigation under the EU conflict of laws framework (IV.), and focus on the “event giving rise to the damage” with particular regard to CO<sub>2</sub> reduction claims (V.), while considering the influence of public law operating permits in cross-border settings on the appropriate choice of law analysis (VI.).

## I . The Worldwide Rise of Climate Litigation

According to an empirical study, in recent times, there has been a clear upward trend in climate litigation.<sup>(11)</sup> Until 2017, the total number of climate litigation cases was 900 across 20 different countries. By 2020, this number has nearly doubled to 1,700 cases across 40 countries.<sup>(12)</sup> This shows that the phenomenon of climate litigation is on a steady rise, and its reach is spreading across the globe. Perhaps this climate change litigation “hype” is best explained by the fact that the effects of climate change are becoming more visible<sup>(13)</sup> and yet, little (–or at least arguably not enough–)<sup>(14)</sup> is being done at the political level to stem this development.<sup>(15)</sup> As a result, natural and legal persons feel the need to shift the playing field from the political to the legal arena. This entails several advantages for the plaintiffs by way of a change of narrative: The parties are no longer the people on the one side and the government on the other, but rather natural, legal persons or collectives of plaintiffs as victims (typically of a tort claim) against the tortfeasor. The latter find themselves in the position of having to use the language of the law and the

courts to answer to complaints voiced by the former, which essentially, in their origin, stem from a political issue, not a private law one.<sup>(16)</sup>

Thus far, these cases have been categorized as follows: 1) litigation against new permits for energy plants or industrial facilities, 2) keeping fossil fuels in the ground, 3) corporate liability for CO<sub>2</sub> emissions, 4) measures of adaptation to global warming, and 5) climate reporting, disclosures, and greenwashing.<sup>(17)</sup>

Prominent examples of climate change litigation have been pending before Japanese courts, as well.<sup>(18)</sup> In the *Yokosuka* climate case<sup>(19)</sup> before the Tokyo District Court, citizens submitted an administrative law complaint requesting the revocation of a construction permit issued by the Minister of Economy. The permit concerned a coal-fired power plant. The plaintiffs argued that Japan's policy to continue building and operating coal-fired power plants was against the international movements towards net zero by referring to IPCC reports and the Paris Agreement.<sup>(20)</sup> However, in January 2023, the Tokyo District Court dismissed the claim. The Court held that the permission to build the new power plant was granted on a valid legal basis.<sup>(21)</sup> Furthermore, the court discussed the question of legal standing.<sup>(22)</sup> According to the Tokyo District court, only those living within a twenty-kilometer radius from the power plant were likely to suffer *directly* from significant damage from air pollution and hence, had a legal interest and standing. By contrast, the court did not recognize their legal standing for claims related to CO<sub>2</sub> emissions *in general*, and based on climate change as such.<sup>(23)</sup>

## II. International and European Climate Regulation

The international legal response to global warming culminated in the Paris Agreement on Climate of 2015.<sup>(24)</sup> Art. 2 provides that the contracting states must take measures in order to limit the increase of global temperature below 1.5° Celsius.<sup>(25)</sup> The treaty was signed by 195 parties, an unprecedented success for reaching an agreement at the international level. The agreement adopts a so-called “bottom-up approach”.<sup>(26)</sup> As a public international law instrument, the Paris Agreement has to be ratified and transposed into the national law of the respective signatory states. States are free to decide for themselves *how*

they will contribute to solving the climate crisis. However, they are obliged to publish their Nationally Determined Contributions (NDCs) under the agreements.<sup>(27)</sup> While these NDCs *prima facie* provide transparency, there is plenty of room for loopholes on how companies located in signatory states contribute to global CO<sub>2</sub> reduction. The plaintiffs in climate actions seek to fill this gap by trying to make companies change their business models. Furthermore, the European Union has enacted the European Climate Change Act in 2021.<sup>(28)</sup> In its Art. 2, it states the goal to achieve climate neutrality (“net zero”) in Europe by 2050.

### III. Types of Climate Litigation

#### 1. Public International Law

Climate change litigation can operate at different levels. First, there are climate cases under public international law. Here, there has been a significant paradigm shift of the roles of island states from welfare recipients to creditors with legally binding claims for protection and compensation. Upon the efforts of Palau, there is finally a request for an advisory opinion pending before the International Court of Justice.<sup>(29)</sup> Furthermore, in 2022 the International Tribunal of the Law of the Sea (ITLOS) in Hamburg accepted the request to issue an advisory opinion on the climate liability of the Global North. In this recent and unanimous advisory opinion, the Tribunal establishes a legal obligation on states under the UN Convention on the Law of the Sea (UNCLOS) to protect and preserve the marine environment from climate change.<sup>(30)</sup> Likewise, Chile and Colombia were able to request an advisory opinion of the Inter-American Court of Human Rights (IACtHR), which is currently awaited by the plaintiffs and the international community alike.<sup>(31)</sup> Lastly, in a groundbreaking ruling by the European Court of Human Rights (ECtHR) which was initiated by the Swiss association of so-called “*Klimaseniorinnen*” (“climate seniors”), the ECtHR held that Switzerland was in breach of its obligation to protect the life and well-being of Swiss citizens from the adverse effects of global warming.<sup>(32)</sup>

## 2. Administrative Law (“vertical claims”)

A large number of pending climate cases are brought under domestic administrative and public law. These can be classified as *vertical claims* since they concern the relationship between citizens and their respective States (in a subordinate relationship).<sup>(33)</sup> These claims are typically based on constitutional rights or human rights and refer to the States’ duty to protect their citizens from the risks of climate change. In doing so, the plaintiffs usually request their States to provide stricter climate regulation.<sup>(34)</sup>

The first landmark vertical climate action was brought in the Netherlands. The NGO *Urgenda* sued the Dutch government in order to take measures against climate change.<sup>(35)</sup> The Dutch Supreme Court held that the Dutch government indeed had a duty to prevent dangerous climate change and, hence, was under a positive obligation significantly to cut greenhouse gas emissions in the Netherlands.<sup>(36)</sup>

Apart from the aforementioned *Yokosuka* case, another prominent vertical claim in Japan is the case of *Citizens’ Committee on the Kobe Coal-Fired Power Plant v. Japan*<sup>(37)</sup>. In 2018, twelve residents of the Japanese city of Kobe filed an administrative action against the government seeking more ambitious action on climate change. The plaintiffs made a request before the Osaka district court to compel the government to cancel the notice of finalization of an environmental assessment of two new coal-fired units.<sup>(38)</sup> The plaintiffs also sought an order by the court finding that the government had unlawfully failed to establish regulatory standards consistent with the Paris Agreement.<sup>(39)</sup> However, in 2021, the Osaka district court rejected the plaintiffs’ request.<sup>(40)</sup> On April 2022, the Osaka High Court upheld the judgment by the Osaka district court.<sup>(41)</sup> While the High Court recognized the standing of the appellants in relation to air pollution, the court ruled that CO<sub>2</sub> emissions were not recognized as a legally protected interest in the current Japanese society.<sup>(42)</sup> The court further stated that this interest should be pursued in the policy-making process as a general public interest<sup>(43)</sup> – not before a court of law. However, the court did not rule out the possibility that it could change its view on this interpretation in the future. If there were a change in the social understanding of climate change within Japanese society, the interest not to incur damage through climate change and through CO<sub>2</sub> emis-

sions may be recognized as a legally protected individual interest. On March 9, 2023, the Supreme Court rejected the request for a final appeal, hence, the judgment by the Osaka High Court was upheld.<sup>(44)</sup>

### 3. Private Law (“horizontal claims”)

Climate claims under private law (*horizontal claims*) are typically based on corporate law or tort law. In the prominent *ClientEarth* claim, the British NGO sought to take legal action against *Shell’s* board of directors for mismanaging climate risk.<sup>(45)</sup> *ClientEarth* argued that the board had failed to adopt and implement a climate strategy that “truly aligns with the Paris Agreement’s goal to keep global temperature rises to below 1.5°Celsius by 2050”<sup>(46)</sup>. According to the NGO, *Shell’s* board of directors had breached their duties under sections 172 and 174 of the UK Companies Act, which legally requires the board to act in a way that promotes the company’s success, and to exercise reasonable care, skill and diligence.<sup>(47)</sup> The High Court dismissed the claim.<sup>(48)</sup>

Regarding climate litigation based on tort law, the main questions counter on the causal link between the damage and the emissions, the fact that damages will further increase in the future, but may not be sufficiently pronounced to date, the fact that climate change is the result of multiple actors emitting CO<sub>2</sub>, all of whom would be liable, and the duties of care.<sup>(49)</sup> As it stands, it is unclear whether CO<sub>2</sub> emissions can be characterized as a source of danger and whether companies engaging in climate-damaging activities have to take precautionary measures to minimize that danger. In climate action based on tort law, there is a need to differentiate between the goals of the tort action: compensation claims (1), adaptation claims (2), and mitigation claims (3).

#### (1) Compensation claims

Compensation claims are aimed at the compensation for damages caused by climate change (under German law: § 823 para. 1 German Civil Code).<sup>(50)</sup> They seek retroactive legal relief. This is best exemplified by the claim by *Greenpeace, ReCommon* and 12 citizens who sued *ENI* due to its emissions.<sup>(51)</sup> This is the first Italian civil action against a multinational company. The plaintiffs argued: “We demand that the company’s responsibility for its

climate damage and violation of the Paris Agreement be established”<sup>(52)</sup>.

### (2) Adaptation claims

Adaptation claims have the goal of establishing a positive obligation under law on the defendant to take measures of adaptation to climate change or reimbursement of expenses for measures taken by the plaintiff themselves. A prominent example is the case of the Peruvian farmer *Saúl Luciano Lliuya* against the German company *RWE*.<sup>(53)</sup> *Lliuya* seeks adaptation measures on the part of the defendant because, according to *Lliuya*, *RWE* is partially responsible for global climate change and as a result, for the melting of a glacier, which will potentially flood his property in the future, *i.e.*, his farm in Peru, if no measures are taken to prevent the company from contributing to global warming.<sup>(54)</sup>

### (3) Mitigation claims

Mitigation claims have the goal of the omission or reduction of CO<sub>2</sub> emissions (under German law: § 1004 German Civil Code).<sup>(55)</sup> This is the objective of the *Shell* judgment in the Netherlands.<sup>(56)</sup> In a 2021 ruling by the Hague district court, the Dutch oil company *Shell* was ordered significantly to reduce its CO<sub>2</sub> emissions.<sup>(57)</sup> The case was initiated by an environmental NGO, *Milieudefensie*, and has the potential of setting a significant precedent. The ruling obliges *Shell* to reduce its global greenhouse gas emissions by 45% by 2030 compared to 2019.<sup>(58)</sup> The *Shell* judgment is perceived as a spectacular turning point because, for the first time, climate action was successful 1) under private law (Dutch Civil Code), 2) brought by private parties (an NGO), 3) against private parties (*Shell*). Furthermore, the lawsuit does not concern a specific project (for example, neighbors filing a complaint against an individual industrial plant), but it is directed against *Shell's* climate-damaging business model *as such*. This can be classified as the first type of private enforcement of the Paris Agreement worldwide.

## 4. The Shell-Case before the Hague District Court (2021)

In the *Shell* case before the Hague district court, *Shell's* reduction obligation was drawn from the unwritten standard of care laid down in Book 6 of Section 162 Dutch Civil Code, which provides that acting in conflict with what is generally accepted according to

unwritten law is unlawful.<sup>(59)</sup> The person responsible for the risk has to provide counter-measures to minimize the risk in question.<sup>(60)</sup> The order by the court is far-reaching in three respects: First, the entire *Shell* group (including its subsidiaries) is obliged to reduce its greenhouse gas emissions. Second, *Shell* has to limit the emissions of its business model by 45% by 2030 (which is a significant percentage for a fuel and fossil energy company). Third, this obligation to reduce its emissions extends not only to Scope 1 emissions, but also Scope 2 and Scope 3 emissions.<sup>(61)</sup>

The definition of Scope 1, 2, and 3 emissions is crucial to understanding the enormous impact of the *Shell* judgment. The Greenhouse Gas Protocol (GGP)<sup>(62)</sup> has coined categorizations of a company's emissions into three scopes: Scope 1 emissions are emissions which directly arise from the parent company and its subsidiaries.<sup>(63)</sup> Scope 2 emissions arise at the level of energy suppliers, *e.g.*, from electricity production in coal power plants.<sup>(64)</sup> Scope 2 emissions are attributed to the reporting/parent company insofar as it purchases that electricity.<sup>(65)</sup> Scope 3 emissions include all indirect emissions resulting from the company's value chain.<sup>(66)</sup> The last category, the Scope 3 emissions, make up the largest part of attribution to the reporting company, *i.e.*, *Shell*. Scope 3 emissions encompass all indirect emissions occurring in the production and value chain of the reporting company, including both upstream and downstream emissions.<sup>(67)</sup> Against this background, private climate claims typically have an enormous cross-border impact, as the value chain upstream and downstream usually extends across several countries and jurisdictions.<sup>(68)</sup>

#### IV. Law Applicable to Corporate Climate Litigation

Climate litigation under administrative law is governed by the principle of territoriality. Accordingly, courts usually apply only their state's public law. Contrary to private law, foreign public law cannot be applied before German courts. Climate litigation under corporate law as the aforementioned claims against the directors of the board of *Shell* for the alleged mismanaging of climate risks, are governed by the *lex societatis*, *i.e.*, the applicable company law. To determine the applicable company law, courts apply either the law of the

company's actual administrative office (*real seat theory*),<sup>(69)</sup> or the law of the company's place of incorporation (*incorporation theory*)<sup>(70)</sup>. With regard to climate change litigation under tort law, the Rome II Regulation, a legislative act of the European Union which has immediate and binding legal effect upon all Member States, contains the conflict rules designating the applicable tort law.<sup>(71)</sup> Hence, to determine the applicable *lex delicti*, every court in an EU Member State, which is competent either by way of the special rule for torts, Art. 7 Nr. 2 Brussels *Ibis* Regulation, or under the general rule that the defendant is to be sued at his or her seat, Art. 4 read in conjunction with Arts. 62, 63 Brussels *Ibis* Regulation, takes recourse to the Rome II Regulation.

Art. 7 Rome II Regulation contains a special rule for environmental damage. It provides: "The law applicable to a non-contractual obligation arising out of environmental 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." Art. 7 Rome II follows the so-called ubiquity principle and allows the plaintiff to choose the applicable law, either by referring to the law determined by Art. 4 Rome II, *i.e.*, the law of the place where the damage occurred, or by opting for the law of the country in which the event giving rise to the damage occurred.<sup>(72)</sup> This is the law of the place of action of the alleged tortfeasor (*lex loci delicti commissi; Handlungsort*).

The *lex loci damni* contained in the general rule in Art. 4(1) Rome II Regulation provides that "(...) 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 (...)". The law of the state where the damage occurred is also called the place of effect (*lex loci damni; Erfolgsort*). It is located at the place where the legal interest – for example, property – is violated.<sup>(73)</sup> In the case of the Peruvian farmer against the German energy company *RWE*, this connecting factor would lead to the application of Peruvian tort law since the farmer fears flooding of his property which in turn is located in Peru.

The right to choose between these two options favors the injured party. The underlying rationale according to Recital 25 of the Regulation with its reference to Art. 191 TFEU<sup>(74)</sup>

is “the principle that preventive action should be taken, the principle of priority for corrective action at the source and the principle that the polluter pays”, which altogether justify this favorable treatment of the injured party. In doing so, the European legislature sought to hold potential tortfeasors accountable against a stricter standard, thereby promoting more environmentally friendly behavior in general.<sup>(75)</sup>

### **1. Scope of Application: “Environmental Damage”**

Yet, one could challenge whether the substantial scope of Art. 7 Rome II even applies to climate change claims since the conflict rule requires “environmental damage”. Anthropogenic emissions “only” change the composition of the atmosphere.<sup>(76)</sup> It is undisputed that heavy air pollution, for example, due to a chemical accident, constitutes environmental damage.<sup>(77)</sup> But it is not as clear for CO<sub>2</sub> emissions as such which is also exemplified by the legal reasoning of the Japanese courts in the *Kobe* case.<sup>(78)</sup> In the aforementioned *Shell* case, the Hague district court, however, convincingly affirmed that climate change does constitute environmental damage.<sup>(79)</sup> Climate change indeed goes back to global warming which, in turn, is caused by anthropogenic CO<sub>2</sub> emissions, which – as their amount is increasing – adversely change the natural composition of the atmosphere. This can be classified as environmental damage in the sense of Art. 7 Rome II.

### **2. Scope of Application in Terms of Legal Relief Sought**

Nevertheless, the application of the ubiquity principle is frequently the subject of criticism, particularly in the context of climate change litigation.<sup>(80)</sup> As becomes apparent in the abovementioned scenario, the ubiquity principle was incorporated into Art. 7 Rome II Regulation in order to address a more simple scenario, such as, environmental pollution of a river by way of a contamination in State A that ultimately occurs in State B. Environmental damage in the sense of climate change, however, is a more complex issue. In the event that the melting glaciers in the South American Andes were to endanger properties in Peru, Chile, and Bolivia, the applicable law in terms of the *lex loci damni* would depend in each case on the location of the endangered real estate in each case. This would lead to

Peruvian, Chilean, and Bolivian law, respectively, akin to a mosaic perspective.<sup>(81)</sup> Consequently, the tortfeasor could potentially be held liable under a set of rules that are so ubiquitous that they might not be able to be foreseen as applicable. Moreover, in accordance with a general principle of private international law, the tortfeasor should be able to control the applicable law through their actions. In the context of climate-related claims, this degree of control is questionable, particularly if it leads to a multiplicity of potentially applicable laws. However, the place of effect would at least be limited to the partial damage incurred in the respective state.<sup>(82)</sup> Furthermore, the plaintiff would have to further substantiate the legal injury of a subjective right, in any event. This also helps to identify the place of effect more easily.<sup>(83)</sup>

With regard to the question of how Art. 7 Rome II comes into play, it is necessary to differentiate depending on the lawsuit's objective, *i.e.*, between *compensation*, *adaptation*, and *mitigation* claims.<sup>(84)</sup> In all of these cases, under Art. 7 Rome II Regulation, the injured party has the option to choose between the law of the place where the damage occurred and the place of the event giving rise to the damage. However, the connecting factor "place where the damage occurred" in the sense of Art. 7 read in conjunction with Art. 4(1) Rome II is more easily identifiable for compensation and adaptation claims. By contrast, in CO<sub>2</sub> reduction claims, which aim at changing the *entire* business policy, these claims concern a specific behavior on behalf of the defendant. Consequently, while these claims also invoke a damage likely to occur<sup>(85)</sup>, further emphasis is placed on the connecting factor "event giving rise to the damage" for these behavioral requests, *i.e.*, the place of action as stated in Art. 7 Rome II, which is discussed in further detail below.<sup>(86)</sup>

## V. The "Event Giving Rise to the Damage" under Art. 7 Rome II-Regulation in CO<sub>2</sub> Reduction Claims

This begs the question how accurately to determine the location of the event giving rise to the damage when it comes to climate change of climate change. The location of the event giving rise to the damage is currently controversially discussed – *i.e.*, whether the place of action should be located where the emitting power plants or the industrial facili-

ties are located, respectively, or whether to refer to the place where the potentially harmful business policy of the company in question has been adopted.<sup>(87)</sup>

### **1. Place of the Emitting Source (Power Plant, Industrial Facility)**

The prevailing opinion in legal scholarship follows a narrow approach. Pursuant to this opinion, the event giving rise to the damage shall be the place where the direct cause of the violation of the legal interest has been set.<sup>(88)</sup> In principle, the business decision is to be disregarded when determining the event giving rise to the damage because it constitutes a mere preparatory act in a sequence of events.<sup>(89)</sup> Accordingly, as a starting point, (only) the location of the emitting plant, and not the headquarters of the group, is to be considered as the place of action.<sup>(90)</sup>

### **2. The Real Seat of the Parent Company (Place of the Decision for the Group-wide Business Policy)**

However, the district court in The Hague followed a broad approach in the *Shell* case. According to this broad interpretation of Art. 7 Rome II, the relevant place of action can take place in climate cases even before the actual emissions take place. The Hague district court argued that the place where *Shell's* board of directors had established the group's emissions and climate policy was the relevant place of action.<sup>(91)</sup> Hence, the event giving rise to the damage can be located at the place where the business decision is taken, or the policy is adopted. This place is identical to the effective headquarters of the group.<sup>(92)</sup> *Shell* had adopted its policy at the headquarters of the parent company in The Hague. Hence, Dutch law could be applied to the entire worldwide business activity of *Shell*, including the worldwide Scope 3 emissions.<sup>(93)</sup> The district court argued that this broad approach better serves the EU's goal to promote a high standard of environmental protection as proclaimed in Art. 191 TFEU.<sup>(94)</sup>

### 3. Appropriate Differentiation of Localizing the Event Giving Rise to the Damage According to the Legal Claim in Question

The location of the event giving rise to the damage can vary depending on the legal claim in question. In compensation and adaptation claims, the narrower approach seems more suitable in that it reflects which act or acts *directly* result in the climate change impact.<sup>(95)</sup> Furthermore, an adjustment by way of apportioning the climate damages according to the relevant portions of contribution can help prevent “law shopping” in that this determination of the applicable law would not give effect to each and every law potentially coming into play to the full extent.<sup>(96)</sup> In order not to give effect to a myriad of legal systems, as feared by the Hague district court in the *Shell* case,<sup>(97)</sup> the courts deciding in compensation or adaptation claims could also use their discretion to make rough estimations of proportions of liability in order not to impose rigid calculation methods.<sup>(98)</sup> In case of practical difficulties in determining the applicable law, including the relevant proportions of liability, the court should be equipped to revert to the central place of action as a fall-back mechanism in terms of a company’s environmental tort responsibility.<sup>(99)</sup> The place of the business decision, which is typically seen as having been taken at the place of the effective headquarters, can only be invoked as a last resort, assuming the previously mentioned calculation methods and identification of one central place of action fail.<sup>(100)</sup>

However, regarding mitigation claims, which aim to order a company to omit or reduce CO<sub>2</sub> emissions, the place of the business decision should be revisited. In these cases, it need not be discarded as a mere preparatory act. Rather, instead of merely invoking the law of the place of the business decision as an *ultima ratio* connecting factor, it can be elevated to a *direct* connecting factor if the plaintiff seeks a specific mitigatory behavior on behalf of the entire company. In that case, the business decision as it relates to the legal aim in question is not a mere preparatory act, but “the decisive, the originating, the initiating activity”<sup>(101)</sup> itself. Here, it is appropriate to have special recourse to the law of the place of the business decision because any action following from this is a mere indirect subsequent action – and not the other way around.

Furthermore, this facilitates the task of having to determine the applicable law to *one* le-

gal claim seeking a behavior on behalf of the defendant company as such, which cannot easily be split up into several categories.<sup>(102)</sup> In light of the exceptional nature and novel circumstances underlying mitigation claims,<sup>(103)</sup> and for lack of a more specific conflicts provision governing climate actions, the “event giving rise to the damage” under Art. 7 Rome II Regulation in terms of mitigation claims can be understood as pointing to the law of the place where the environmentally damaging business decision was adopted.

## VI. Public Law Operating Permits in Cross-Border Settings

In the *Shell* case, the district court also discussed the role of operating permits and long-term concessions for oil and gas production in cross-border settings.<sup>(104)</sup> Under German and Dutch substantive law, such operating permits – even if they are part of public law – have to be taken into account in private law as they might have an indemnifying effect, depending on the content of the permit.<sup>(105)</sup> In climate claims based on tort law, the defendant company typically raises the objection that the activity leading to CO<sub>2</sub> emissions is in line with public law operating permits and hence, has to be regarded as legal under tort law, as well.<sup>(106)</sup>

### 1. Method of Substitution

Permits under foreign law may indeed be considered on the basis of the applicable substantive law by means of the private international law method of *substitution*. A domestic legal institute can be substituted by a foreign one if the foreign institute is functionally comparable.<sup>(107)</sup> If the permitting requirements are functionally comparable in the state where the emitting plant was built, such foreign permits can have the same effects before a domestic court as domestic permits.<sup>(108)</sup>

### 2. Local and Moral Data Approach (Art. 17 Rome II-Regulation)

Another method to consider foreign legal permits in cross-border climate action is the *local and moral data approach*, as invented by *Albert Ehrenzweig* in the U.S. in the 1960s.<sup>(109)</sup> This approach has been partially codified in Art. 17 Rome II.<sup>(110)</sup> Pursuant to

Art. 17 Rome II, local “rules of safety and conduct” at a place of action that is not the place of effect must be considered within the scope of the applicable tort statute. Following the intent of the EU legislator and according to the prevailing opinion in legal scholarship, these rules include (foreign) permits and authorizations.<sup>(111)</sup> If, for example, the Peruvian farmer opted for Peruvian law to apply in the *RWE* case, the German defendant company might raise the objection that the energy production permits were lawfully granted and permit carbon emissions.<sup>(112)</sup> They could argue that, under the principle of unity of the legal order, the same conduct cannot be lawful for one purpose and unlawful for another.<sup>(113)</sup> The German permits would then have to be taken into account on the level of Peruvian substantive tort law.

The Hague district court followed this view, locating the place of action at the place of the business decision. In determining the applicable tort statute according to Art. 7 Rome II, it held that the place of action was the place where *Shell* had established its emissions and climate policy (pursuant to a board decision adopted at *Shell's* headquarters, which at the time of the decision were in The Hague).<sup>(114)</sup> Assuming that (only) this place of action were decisive in cases involving Art. 17 Rome II, then only permits and concessions issued under Dutch law could be taken into account. But, in fact, in cases involving Art. 17 Rome II, the source of emissions in question (*e.g.*, the power plant) must be considered the place of action because permits fall under public law and consequently, follow the principle of territoriality.<sup>(115)</sup> For a company with several emitting industrial plants worldwide, there are several places of action within the meaning of Art. 17 Rome II. The respective place of action (location of the plant) consequently determines the substance and scope of the operating permit(s). However, in order adequately to protect the interests of the injured party from environmental damage, foreign operating permits can only be taken into account, if i) the emissions comply with public international law, ii) the underlying conditions to obtain the operating permit under the law of the place of action are identical to those at the place of effect, and iii) the foreign injured parties were participants in the granting process of the operating permit.<sup>(116)</sup>

In terms of substantive law, the Hague district court denied that permits and conces-

sions could have any indemnifying effect with regard to a CO<sub>2</sub> reduction obligation. It merely stated that “it is not apparent that CO<sub>2</sub> emissions have played any role whatsoever in these permits and concession”<sup>(117)</sup>. However, this line of argumentation fails to address the root cause of the problem. The Rome II Regulation follows the principle of unity of the applicable law (*Statutseinheit*), Art. 15 Rome II. The tort statute comprehensively governs the grounds and consequences of liability, including the question of whether and to what extent permits affect or exclude a person’s tortious liability.<sup>(118)</sup>

## Conclusion

Climate litigation raises multiple complex legal questions, both relating to the substantive law- as well as the private international law level. These types of lawsuits have sparked a discussion on global warming and encouraged companies to step up their climate protection measures. At the same time, it is necessary for the political sphere to regulate climate measures for businesses on a broader level, so that individual enterprises are not singled out and targeted by climate lawsuits. This would reduce the pressure on the judiciary to decide on questions containing political components, which is due in part to the current hesitation on the part of the legislature.

An approach of the European Union in this respect is the adoption of the Corporate Sustainability Due Diligence Directive<sup>(119)</sup>. It remains to be seen whether climate lawsuits will continue at the same pace post-adoption of this new step forward on the road to climate neutrality. Ideally – not only for the sake of current and future generations affected by climate change, but also with regard to the stability of democracies founded on the principle of separation of powers – courts would no longer have to decide on political questions as a substitute for the legislature, and the latter would embrace the responsibilities it is endowed with by the power of the people.

## Summary and Concluding Theses

1. Climate change litigation has become an ever-increasing phenomenon and an important tool on the path towards climate neutrality. Climate change litigation en-

compasses both public law litigation between citizens and the state (“vertical claims”) and private law claims between private parties (“horizontal claims”).

2. There are three main types of private climate action, depending on the legal relief sought: *compensation claims*, aiming at compensation through damages or reparation for damages that have occurred due to climate change; *adaptation claims*, aiming at establishing a positive obligation on the defendant to take measures of adaptation to climate change or reimbursement of expenses for measures taken by the plaintiffs themselves; and *mitigation claims*, aiming at receiving a court order to oblige the defendant to omit or reduce their total output of CO<sub>2</sub> emissions.
3. Since many climate actions, by their nature, have a cross-border element, a private international law analysis becomes relevant. Within the European Union, Member States’ courts apply the Rome II Regulation, which governs the law applicable to non-contractual obligations.
4. The general rule for torts under Art. 4 Rome II Regulation leads to the application of the law of the place where the damage occurred (*i.e.*, the place of effect), thus, disregarding the law of the place of the event giving rise to the damage. In climate change litigation, this place is typically difficult to pin down because climate change has adverse effects on a multitude of legal interests and objects worldwide.
5. Superseding the general rule as a more special one, Art. 7 Rome II Regulation governing the law applicable to environmental damage equips the injured party with a choice between the law of the event where the damage occurred as stated in Art. 4 Rome II Regulation, or the law of the event giving rise to the damage.
6. Since climate change and its concomitant adverse effects are due to a combination of several manmade actions, it is difficult to establish *the* single relevant “event giving rise to the damage” on behalf of the defendant for the purpose of Art. 7 Rome II Regulation. Bearing in mind the exceptional character of tort cases based on climate change, there is a need to differentiate according to the specific legal relief sought, not only on the substantive law level, but also on the level of the conflict of laws provision.

7. The event giving rise to the damage in *compensation* and *adaptation claims* is to be established according to a framework which takes as its outset the place of the *actual* emissions, which leads to a mosaic approach, but modifies this approach in that it calls on courts to use their discretion to make estimations of proportions of liability. As a fall-back mechanism, courts can identify the central place of action out of several power plants emitting CO<sub>2</sub>. As a last resort, courts can take into account the place where the business decision was taken as the main place of action. This place will typically coincide with the real seat of the company.
8. In *mitigation claims*, aiming at a specific mitigation or CO<sub>2</sub> reduction behavior on behalf of the defendant company for the entire group, the event giving rise to the damage can be located at the place of the business decision of the company. This is due to the fact that, in *mitigation claims*, the business decision is not a mere preparatory act that methodologically would typically be disregarded in the appropriate private international law analysis of the event giving rise to the damage, but the decisive act in question.
9. Public law operating permits under foreign law can potentially have an indemnifying effect in cross-border climate litigation cases. These operating permits can be considered as “local data” within proceedings on the basis of Art. 17 Rome II Regulation, if several conditions are met, *i.e.*, if the emissions comply with public international law, the underlying conditions to obtain the operating permit under the law of the place of action are identical to those at the place of effect, and if the foreign injured parties had *ex ante* the possibility to be heard in the granting process of the operating permit.

\* Prof. Dr. *Marc-Philippe Weller* is the Director of the Institute for comparative law, conflict of laws, and international business law at Heidelberg University. This article is based on his presentation at the Japanese Private International Law Conference in Osaka in June 2023.

\*\* *Madeleine Petersen Weiner* is a research fellow and doctoral candidate at the abovementioned Institute.

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is-Sorbonne, for valuable comments.

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- (2) Graser, *supra* note 1, p. 317.
- (3) See for example the case of the Peruvian farmer *Saúl Luciano Lliuya* against the German energy company *RWE* before German courts with the aim of obliging *RWE* to take protective measures against climate change so that his home in the Peruvian Andes will not be flooded. The case is currently pending before the second instance court at the time of writing, OLG Hamm, decision of 30.11.2017 – I-5 U 15/17 –, juris.
- (4) See for example the case of the Swiss association of so-called “*Klimaseniorinnen*” (“climate seniors”) against Switzerland before the European Court of Human Rights (ECtHR) for the alleged failings in the prevention of global warming, ECtHR, 9.4.2024, Application No. 53600/20 – *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.
- (5) See for example *Milieudefensie et al. v. Shell*, Rechtbank Den Haag, 26.5.2021, ECLI:N-L:RBDHA:2021:5339. This case will be discussed in further detail below.
- (6) Marc-Philippe Weller/Theresa Hößl/Carolina Radke, “Klimaklagen im Gesellschafts- und Deliktsrecht,” in WiR – Studiengesellschaft für Wirtschaft und Recht ed., *Nachhaltigkeit im Wirtschaftsrecht* (2023), p. 145; Frank Fellenberg, “Rechtsschutz als Instrument des Klimaschutzes – ein Zwischenstand,” *Neue Zeitschrift für Verwaltungsrecht* (2022), p. 913; Marc-Philippe Weller/Mai-Lan Tran, “Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?,” *Zeitschrift für Europäisches Privatrecht* (2021), pp. 577 f.; Anno Oexle/Thomas Lammers, “Klimapolitik vor den Verwaltungsgerichten – Herausforderungen der „climate change litigation“,“ *Neue Zeitschrift für Verwaltungsrecht* (2020), p. 1274; Matthias Lehmann/Florian Eichel, “Globaler Klimawandel und Internationales Privatrecht,” *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 83 (2019), p. 81.
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- (8) Cour d’appel de Versailles, 10.12.2020, N° RG 21/01661 - N° RG 20/01693 N° Portalis DBV3-V-B7E-T2BB, *Association Survie et.al. v. S.A.*, available at <https://survie.org/IMG/>.
- (9) For further climate change litigation cases in France, see Aude-Solveig Epstein/Katrin Deckert, “Climate change litigation in France,” in Wolfgang Kahl and Marc-Philippe Weller eds., *Climate Change Litigation, A Handbook* (2021), pp. 346 ff.
- (10) As expressly stated in Cour d’appel de Versailles, 10.12.2020, N° RG 21/01661 - N° RG 20/01693 N° Portalis DBV3-V-B7E-T2BB, *Association Survie et.al. v. S.A Total*, p. 6.; see also the Complaint in the case of *Notre Affaire à tous v. Total* before the Tribunal Judiciaire de Nanterre, available at <https://climatecasechart.com/>; see also Tribunal Judiciaire de Paris, 29.10.2019, N° RG 22/53942 - N° Portalis, *Les Amis de la Terre France v. Total*, p. 8, available at <https://www.amisdelaterre.org/>. The claim is based on the French *loi de vigilance*, see on this Laura Nasse, *Loi de vigilance. Wirtschaft und Menschenrechte im französischen Privatrecht* (2021), pp. 162 ff.; Weller/Hößl/Radke, *supra* note 6, p. 151.
- (11) Joana Setzer/Catherine Higham, Global trends in climate change litigation: 2021 snapshot, Policy report (July 2021), p. 10, figure 1, available at <https://corpgov.law.harvard.edu/>.
- (12) *Ibid.*
- (13) It should be noted that these effects have already been visible in the Global South for some time. Examples of drastic weather phenomena due to global warming in the Global North include the flooding of the *Ahr* region in Germany in 2021, wildfires in Rhodes, Greece and Canada in 2023, or in California in 2023.
- (14) According to scientific data, the global community would have to reduce global greenhouse gas emissions annually by 7% in order to maintain the goal of 1.5 C of global warming and sustain livable conditions for future generations, Ilona M. Otto, Jonathan F. Donges, Roger Cremades, Hans Joachim Schellnhuber, Social tipping dynamics for stabilizing Earth’s climate by 2050, *Proceedings of the National Academy of Sciences*, Vol. 170, n. 5 (2020), p. 2354. This would require radical climate protection measures that, to date, have not been implemented by any government.
- (15) See, e.g., Stephen M. Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (2011), p. 79.
- (16) See further on the question whether climate protection is a political or a legal issue, Otsuka, “Climate Litigation in Japanese law: The Possibility to file Suits in Japan,” in Anja Hentschel,

- Gerrit Hornung and Silke Jandt eds., *Mensch – Technik – Umwelt: Verantwortung für eine sozialverträgliche Zukunft, Festschrift für Alexander Roßnagel zum 70. Geburtstag* (2020), p. 797.
- (17) See *Global Climate Litigation Report, 2020 Status Review, UN Environment Programme* (26 January 2021), pp. 13-27, available at <https://wedocs.unep.org/>; Setzer/ Higham, *supra* note 11; for a different categorization according to the parties involved in the proceedings, see Otsuka, *supra* note 16, p. 790.
- (18) On climate litigation in Japan, see Otsuka, *supra* note 16; Masako Ichihara/Naoki Ikeda/ Misa Norigami/Hitoshi Ushijima, *Global Perspectives on Corporate Climate Legal Tactics: Japan National Report, British Institute of International and Comparative Law* (February 2024).
- (19) Yokosuka climate case, Tokyo District Court, judgment of 27 Jan. 2023; Tokyo High Court, judgment of 22 Feb. 2024.
- (20) See the report of the Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2023), available at <https://www.ipcc.ch/> showing that “limiting human-caused global warming requires net zero CO<sub>2</sub> emissions”; see also *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C* (23 September 2019), available at <https://climateanalytics.org/>.
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- (22) See Yokosuka Climate Case, Climate Case Chart, available at <http://climatecasechart.com/>. See for a detailed analysis on why Japan has not established the possibility of “public interest suits”, Otsuka, *supra* note 16, pp. 782-784.
- (23) *Ibid.*
- (24) See the Paris Agreement of 12 December 2015, 195 states participating in the 21<sup>st</sup> UN Framework Conference on Climate Change in Paris agreed to limit the increase in the global average temperature to well below 2°C, if possible, to 1.5°C, above pre-industrial levels, see the agreement, available at <https://unfccc.int/>.
- (25) *Ibid.*
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- (27) A self-defined national climate pledge under the Paris Agreement, see United Nations Climate Change, *Nationally Determined Contributions (NDCs)*, available at <https://unfccc.int/>.

- (28) Legal objective for the EU to reach climate neutrality by 2050, European Council, *Climate change: what the EU is doing* (27 January 2024), available at <https://www.consilium.europa.eu/>; European Commission, *European Climate Law*, available at <https://climate.ec.europa.eu/>.
- (29) *Request for an Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023*, available at <https://icj-cij.org/>. See for Palau's prior efforts to seek an advisory opinion in 2011, United Nations, *Palau seeks UN World Court opinion on damage caused by greenhouse gases* (22 September 2011), available at <https://news.un.org/>. These efforts were previously unsuccessful, see Maxine Burkett, A justice paradox: On Climate Change, Small Island developing States, and the Quest for Effective Legal Remedy, *University of Hawai'i Law Review*, Vol. 35 (2013), p. 657 f.; Melissa Stewart, *Climate Change Advisory Opinion: Risk and Reward* (24 March 2023), available at <https://www.lawfaremedia.org/>; Douglas A. Kysar, *Climate Change & The International Court of Justice* (2013); cf. Stuart Beck/Elizabeth Burleson, "Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations," *Transnational Environmental Law*, Vol. 3, n. 1 (2014), p. 19; Stefanie Schmahl, "Internationale Klimaklagen aufgrund von Menschenrechtsverträgen: sinnvoll oder vergeblich?," *Juristenzeitung*, Vol. 77 (2022), p. 319.
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- (31) *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile* (9 January 2023), available at <https://www.corteidh.or.cr/>; see the entire case history, *Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency*, Climate Case Chart, available at <http://climatecasechart.com/>.
- (32) ECtHR, 9.4.2024, Application No. 53600/20 – *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.
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- (34) *Ibid*; see for example, BVerfG, judgment of 24.3.2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, *Neue Juristische Wochenschrift* (2021), pp. 1723 ff.; see further on this

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- (35) Hoge Raad, judgment of 20.12.2019 – Case 19/00135, ECLI:NL:HR:2019:2007 (English translation); Kars de Graf/Gerrit van der Veen, “Climate change litigation in the Netherlands – the Urgenda case and beyond,” in Wolfgang Kahl and Marc-Philippe Weller eds., *Climate Change Litigation, A Handbook* (2021), pp. 363 ff., paras. 12 ff.; Jonathan Verschuuren, “Climate Change and the Individual in the Netherlands,” in Francesco Sindico/Makane Moïse Mbengue eds., *Comparative Climate Change Litigation: Beyond the Usual Suspects* (2021), p. 75 f.; Otsuka, *supra* note 16, pp. 790.
- (36) The Dutch court ordered the Dutch government to reduce the Netherlands’ greenhouse gas emissions by 25% by the end of 2020 compared to the base year of 1990, Hoge Raad, judgment of 20.12.2019 – Case 19/00135, ECLI:NL:HR:2019:2007 (English translation).
- (37) Japanese Supreme Court, judgment of 9.3.2023, see decision, *available at* <https://climatecasechart.com/>; see further on this Otsuka, *supra* note 16, pp. 787-789.
- (38) See the summarized translation of the Complaint pp. 4 section 1, *available at* <https://climatecasechart.com/>.
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- (40) See Sabin Center for Climate Change Law, Citizens’ Committee on the Kobe Coal-Fired Power Plant v. Japan, summary, *available at* <https://climatecasechart.com/>.
- (41) *Ibid.*
- (42) *Ibid.*; see also <https://blogs.law.columbia.edu/>.
- (43) *Ibid.*
- (44) *Ibid.*
- (45) Case number BL-2023-000215, see the Court’s dismissal to *ClientEarth’s* climate claim against *Shell’s* directors, the High Court’s judgment is *available at* <https://www.judiciary.uk/judgments/>, see para 40: “The breaches alleged by ClientEarth”.
- (46) See *ClientEarth’s* latest updates “Our groundbreaking case against Shell’s Board of Directors”, specifically ‘How is Shell’s Board failing its duties?’, *available at* <https://www.clientearth.org/>.
- (47) The duties relied on by *ClientEarth* are expressed in the High Court judgment rendered on July 24<sup>th</sup>, 2023 in section 20 under ‘The duties relied on by ClientEarth’ pp. 7; see *ClientEarth’s* latest updates “Our groundbreaking case against Shell’s Board of Directors”, specifically ‘How is Shell’s Board failing its duties?’, *available at* <https://www.clientearth.org/>; see also Weller/Höfl/

Radke, *supra* note 6, pp. 149 f.

- (48) Dismissal by the High Court, *available at* <https://www.clientearth.org/>.
- (49) As the title suggests, this paper places a particular focus on the private international aspects of corporate climate change litigation. For a more detailed analysis of the substantive legal issues, see Sophia Schwemmer/Christine Heidbrink/Theresa Hößl/Noemi Simon/Mai-Lan Tran/Madeleine Petersen Weiner/Marc-Philipp Weller, *Global Perspectives on Corporate Climate Legal Tactics: Germany National Report, British Institute of International and Comparative Law* (February 2024); Weller/Tran, *supra* note 33. The legality of corporate activities is discussed in further detail within the question of the effects of public law operating permits in cross-border settings (see below, VI).
- (50) *Cf.* in further detail on German law relating to climate actions seeking compensation, Schwemmer/Heidbrink/Hößl/Simon/Tran/Weiner/Weller, *supra* note 49, pp. 20 ff.; Daniel Walden/Lukas Frischholz, “Climate Change Litigation: Beitrag zu globaler Gerechtigkeit oder Abkehr von (zivil) rechtlichen Grundprinzipien?,” *Zeitschrift für Wirtschaftsrecht* (2022), p. 2477; Meik Thöne, “Klimaschutz durch Haftungsrecht – vier Problemkreise,” *Zeitschrift für Umweltrecht* (2022), pp. 332 f.
- (51) See the case *Greenpeace Italy et. Al. V. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*, *available at* <https://climatecasechart.com/>.
- (52) See the *Greenpeace* press release briefing: “The Just Cause“ (“*La giusta causa*”) – MEDIA BRIEFING, pp. 2 *available at* <https://www.greenpeace.org/>.
- (53) Higher Regional Court of Hamm, Decision of 30.11.2017 – I-5 U 15/17, ZUR 2018, p. 118 ff.; for the decision of the first instance court, see Lower Regional Court of Essen, Decision of 15.12.2016 – 2 O 285/15, *available at* <http://www.justiz.nrw.de/>; see further on this Schwemmer/Heidbrink/Hößl/Simon/Tran/Weiner/Weller, *supra* note 49, p. 16.
- (54) See an English translation of *Lliuya’s* complaint, *available at* <https://climatecasechart.com/>.
- (55) See further on this, Schwemmer/Heidbrink/Hößl/Simon/Tran/Weiner/Weller, *supra* note 49, pp. 17-20.
- (56) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation); see also Gerjanne te Winkel/Xandra van Heesch, *The Shell judgement- a bombshell in private international law*, *available at* <https://www.nipr-online.eu/>; the spectacular success of this judgment is due to its novelty, as it was one of the first cases to successfully deal with climate action between private parties. *Milieudefensie* took this success as a means to continue their campaign against greenhouse gas emissions and

continue to question the company's actions in order to implement the judgement, see Milieudefensie, *Shell, houd je je eigenlijk wel aan het vonnis?* [Shell, are you actually abiding by the verdict?] (23 May 2023), available at <https://milieudefensie.nl/>. More recently, the campaign against *Shell's* actions is ongoing in Argentina where local activists fight against the company's new actions, see Milieudefensie, *Hoe stop je de nieuwe olie- en gasprojecten van Shell? Evelyn uit Argentinië vertelt* [How do you stop Shell's new oil and gas projects? Evelyn from Argentina reports] (8 June 2023), available at <https://milieudefensie.nl/>.

- (57) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 5.3; on this, see Weller/Tran, *supra* note 33, pp. 4-5; Leopold König/Sebastian Tetzlaff, ““Forum shopping” unter Art. 7 Rom II-VO – neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei “Klimaklagen,” *Recht der Internationalen Wirtschaft* (2022), p. 25 ff.; Gerhard Wagner, “Klimaschutz durch Gerichte,” *Neue Juristische Wochenschrift* (2021), pp. 2257 ff.
- (58) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 5.3.
- (59) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.4.1.
- (60) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), sections 4.4.24.; 4.4.20 and 4.4.53.
- (61) Greenhouse gas emissions are categorized into Scopes 1, 2 and 3, see Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 2.5.4. *Shell's* obligation to reduce emissions extends to all three scopes, see sections 4.4.55 and 5.3; see further on this, Roda Verheyen/Johannes Franke, “Deliktsrechtlich begründete CO<sub>2</sub>-Reduktionspflichten von Privatunternehmen,” *Zeitschrift für Umweltrecht* (2021), p. 628; Marc-Philippe Weller/Mai-Lan Tran, “Milieudefensie et al. versus Shell: Auswirkungen für Klimaklagen gegen deutsche Unternehmen,” *Zeitschrift für Europäisches Umwelt- und Planungsrecht*, Vol. 19 (2021), p. 352.
- (62) See Greenhouse Gas Protocol, *We set the standards to measure and manage emissions*, available at <https://ghgprotocol.org/>; for an in-depth explanation, see Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard, Revised Edition* (2004), available at <https://ghgprotocol.org/>.
- (63) Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard, Revised Edition* (2004), pp. 25-27, available at <https://ghgprotocol.org/>.

- (64) See *ibid*; see also Greenhouse Gas Protocol, *GHG Protocol Scope 2 Guidance* (2023) available at <https://ghgprotocol.org/>.
- (65) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 5.2.
- (66) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), see sections 25, 29 (and 1.2 for the purpose of this standard).
- (67) See Greenhouse Gas Protocol, *GHG Protocol Scope 2 Guidance* (2023) available at <https://ghgprotocol.org/>, figure 1.10, p. 10. This accounts for oil or gas companies, which sell the majority of their fuels downstream. However, the situation is different for energy producers such as *RWE*, who process the extracted fuels into electricity in their own power plants – here, the Scope 1 share makes up the “lion’s share” of emissions, *cf.* Jan-Erik Schirmer, *Nachhaltiges Privatrecht* (2023), pp. 204 f.; Weller/Hößl/Radke, *supra* note 6, p. 159.
- (68) However, it could be argued that the *Shell* case before the Hague district court lacked a cross-border element because both, the plaintiffs and the defendant, were domiciled in the Netherlands.
- (69) Under the real seat theory (*Sitztheorie*) as applied by German courts in cases containing non-EU companies, the theory designates the law of the place where the entity has its actual or real seat applicable, *i.e.*, where the entity carries out its main business, see Federal Court of Justice, judgment of 27.10.2008 – II ZR 158/06, *Neue Juristische Wochenschrift* (2009), p. 289 with commentary by Eva-Maria Kieninger, “Anmerkung zu BGH 27.10.2008, “Trabrennbahn”,” *Neue Juristische Wochenschrift* (2009), p. 292 (so-called *Sitztheorie*).
- (70) This test is applied in cross-border cases within the EU and many common law states, designating the law of the place of the place of incorporation applicable, see CJEU, judgment of 5.11.2002, C-208/00, ECLI:EU:C:2002:632 – *Überseering*; CJEU, judgment of 30.9.2003, C-167/01, ECLI:EU:C:2003:512 – *Inspire Art*.
- (71) 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), text available at <https://eur-lex.europa.eu/>.
- (72) Peter Mankowski, “Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie,” *Praxis des Internationalen Privat- und Verfahrensrechts*, n. 5 (2010), p. 389; Andrew A. Dickinson, *The Rome II Regulation* (2008), p. 439.

- (73) Ulrich Magnus, in Ulrich Magnus/Peter Mankowski eds., *European Commentaries on Private International Law, Rome II Regulation* (2018), Art. 4 Rome II, n. 72 (“solely the immediate and direct consequence of the violation of the right or interest of the victim”); Sophie Zeidler, *Klimahaftungsklagen* (2022), p. 275.
- (74) Treaty on the Functioning of the European Union (hereinforth: TFEU). Recital 25 refers to Art. 191 TFEU’s predecessor contained in Art. 174.
- (75) Wolfgang Wurmnest/Benedikt Wösser, “Localising the Place of Damage in Private International Law,” in Martin Schmidt-Kessel, ed., *German National Reports on the 21st International Congress of Comparative Law* (2022), p. 640; Geert van Calster, “Lex ecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation,” *Praxis des Internationalen Privat- und Verfahrensrechts* (2022), p. 443: “Clearly, by providing an exception to the general rule which, disguised as a conflict of laws provision, allows the injured party the choice of applicable law, the Commission is pursuing objectives which actually have nothing to do with conflict of laws, but which are rather intended to encourage potential environmental polluters to take environmental protection very seriously by threatening them with the application of a more stringent system of substantive law”; Mankowski, *supra* note 75, p. 389; Michael Bogdan/Michael Hellner, in Ulrich Magnus and Peter Mankowski eds., *European Commentaries on Private International Law, Rome II Regulation* (2019), Art. 7, n. 1; see further on the underlying political considerations of Art. 7 Rome II Regulation, Marc-Philippe Weller/Madeleine Petersen Weiner, “Politische Prinzipien des Europäischen Kollisionsrechts am Beispiel der Anknüpfung von Klimaklagen nach Art. 7 Rom II-VO,” in Christian von Bar, Oliver Knöfel, Ulrich Magnus and Heinz-Peter Mansel, eds., *Gedächtnisschrift zu Ehren von Peter Mankowski* (2024).
- (76) Lehmann/Eichel, *supra* note 6, p. 94.
- (77) See also ClientEarth Communications, “What is chemical pollution?” (2022), available at <https://www.clientearth.org/>.
- (78) See *supra* note 40, the court found that CO<sub>2</sub> emissions did not constitute a legally protected interest in the current society.
- (79) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.2.
- (80) See for example Stefan Huber in *Beck’scher Online-Großkommentar zum Zivilrecht, Rom II-Verordnung* (2022), Art. 7, n. 31; König/Tetzlaff, *supra* note 57, pp. 33-34.
- (81) Lehmann/Eichel, *supra* note 6, pp. 96 f.; Madeleine Petersen Weiner/Marc-Philippe Weller,

- “The Event giving rise to the damage“ under Art. 7 Rom II Regulation in CO<sub>2</sub> reduction claims,” *Yearbook of Private International Law*, Vol. XXIII (2021/2022), p. 263.
- (82) Huber, *supra* note 80, n. 31.
- (83) König/Tetzlaff, *supra* note 57, p. 35.
- (84) Marc-Philippe Weller/Carolina Radke, “Klimaklagen vor deutschen Gerichten, ” in Gesellschaft für Rechtspolitik eds., *Jahrbuch Bitburger Gespräche* (2023), pp. 42-43.
- (85) In the *Shell* case, the potential harm (imminent environmental damage) was held to be for Dutch residents and inhabitants of the Wadden region in the future if *Shell* should continue emitting CO<sub>2</sub>, cf Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.6.
- (86) Cf. Weller/Höfl/Radke, *supra* note 6, p. 157; see similarly Andreas Spickhoff in *Beck Online-Kommentar Bürgerliches Gesetzbuch*, VO (EG) 864/2007 (2024), Art. 7 n. 4.
- (87) For further a more detailed overview of positions adopted in jurisprudence and legal scholarship to date on the location of the “event giving rise to the damage” under Art. 7 Rom II Regulation, see Weiner/Weller, *supra* note 81, pp. 269-273.
- (88) Lehmann/Eichel, *supra* note 6, p. 96; Eva-Maria Kieninger, “Conflicts of jurisdiction and the applicable law in domestic courts’ proceedings,” in Wolfgang Kahl and Marc-Philippe Weller eds., *Climate Change Litigation, A Handbook*, (2021), p. 141, n. 48; Gerhard Wagner, “Haftung für Menschenrechtsverletzungen,” *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 80 (2016), p. 744; Thomas Pfeiffer, “Öffentlich-rechtliche Anlagenehmigung und deutsches internationales Privatrecht,” *Jahrbuch des Umwelt- und Technikrechts* (2000), p. 266.
- (89) Thomas v. Plehwe, in Rainer Hüßtege and Heinz-Peter Mansel eds., *Bürgerliches Gesetzbuch*, Part 6, 3<sup>rd</sup> ed. (2019), Art. 7 Rome II, n. 19.
- (90) Kieninger, *supra* note 88, p. 141, n. 48; Weiner/Weller, *supra* note 81, pp. 273 ff.
- (91) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.6.
- (92) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.6.
- (93) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.2.
- (94) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.3.6.

- (95) Weiner/Weller, *supra* note 81, p. 274.
- (96) Weiner/Weller, *supra* note 81, p. 274.
- (97) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), sections 4.3.2.
- (98) Weiner/Weller, *supra* note 81, p. 275.
- (99) Weiner/Weller, *supra* note 81, pp. 277 f.
- (100) Weiner/Weller, *supra* note 81, pp. 278 f.
- (101) Mankowski, *supra* note 1, p. 560 (translated by the authors from the German original version); see also similarly Zeidler, *supra* note 73, pp. 276 f.
- (102) Cf. König/Tetzlaff, *supra* note 57, p. 39.
- (103) See also König/Tetzlaff, *supra* note 57, p. 39.
- (104) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), sections 4.4.44, 4.4.48.
- (105) See in regard to the *Shell* case, Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.4.46.; see in general, Bogdan/Hellner, *supra* note 75, Art. 7, n. 22 ff.; Zeidler, *supra* note 73, pp. 303 ff.; Kieninger, *supra* note 88 p. 145.
- (106) See the English translation of *Shell's* Statement of Defense, p. 174, available at <https://climatecasechart.com/>.
- (107) Jan von Hein in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 12, 8<sup>th</sup> ed., Private International Law (2020), n. 247; Marc-Philippe Weller, “Referral, Recognition and Consideration: New Methodological Approaches in Private International Law – Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit,” *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 81 (2017), p. 776.
- (108) Leonhard Hübner, “Climate change litigation at the interface of private and public law – the foreign permit”, *Praxis des Internationalen Privat- und Verfahrensrechts* (2022), p. 223.
- (109) Albert A. Ehrenzweig, “Local and Moral Data in the Conflict of Laws: Terra Incognita,” *Buffalo Law Review*, Vol. 16 (1966/1967), pp. 55-60; see further, Charlotte Harms, *Neuaufgabe der Datumtheorie im Internationalen Privatrecht* (2019); Marc-Philippe Weller, “Die Datumtheorie,” in Martin Gebauer, Heinz-Peter Mansel, Götz Schulze eds., *Liber Amicorum Erik Jayme – Die Person im IPR* (2019), pp. 53 f.
- (110) Hübner, *supra* note 108, p. 223; Eva-Maria Kieninger, “Das internationale Privat- und Verfahrensrecht der Klimahaftung,” *Praxis des Internationalen Privat- und Verfahrensrechts*

- (2022), p. 8.
- (11) Bogdan/Hellner, *supra* note 75, Art. 7, n. 22.
- (12) See Respondent's statement of defense on the matter of 28.4.2016, p. 10; iv), arguing that emissions do not establish a breach of duty of care, *available in English at* <https://climatecasechart.com/>.
- (13) See the English summary of Respondent's written submission after oral proceedings of 13.11.2017, p. 2, B. Incompatibility with the legal system, *available at* <https://climatecasechart.com/>; Alexandros Chatzinerantzis/Markus Appel, "Haftung für den Klimawandel," *Neue Juristische Wochenschrift* (2019), p. 885; Gerhard Wagner, *Klimahaftung vor Gericht* (2020), pp. 75 f.
- (14) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), sections 4.3.1 and 4.3.6. It should be noted, however, that as of 2022, *Shell* has since moved its headquarters to London.
- (15) Weller/Tran, *supra* note 6, p. 596.
- (16) Thomas Kadner Graziano, "Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung," *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 73 (2009), p. 50; Weller/Tran, *supra* note 6, p. 596; Marc-Philippe Weller/Jan-Markus Nasse/Laura Nasse, "Klimaklagen gegen Unternehmen im Lichte des IPR," in Christoph Benicke and Stefan Huber eds., *National, international, transnational: Harmonischer Dreiklang im Recht, Festschrift für Herbert Kronke* (2020), p. 618.
- (17) Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation), section 4.4.48.
- (18) Guillermo Palao Moreno, in Ulrich Magnus and Peter Mankowski eds., *European Commentaries on Private International Law, Rome II Regulation*, 2019, Art. 15, n. 17.
- (19) 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, Official Journal L, 5 July 2024, Art. 22 (1); see on this Hübner/Lieberknecht, "Mehr Pflichten für weniger Unternehmen? Kerninhalte der Corporate Sustainability Due Diligence Directive (CSDDD) und ihre Umsetzung im deutschen Recht," *Neue Juristische Wochenschrift* (2024), pp. 1841-1846.