DEFENDANTS' MEMORANDUM

-

TEAM GREEN SWAN

by

Emma Sophie Clemens

Arend Willem Duijnstee

Hagir Naâs

(Erasmus University Rotterdam)

PAX MOOT 2020

1. Statement of the facts

- International Jewellery Co. **["IJC", or "Defendants"]** is a precious gemstone trading company domiciled in Antwerp, Belgium. Its subsidiary, Regional Mining Co. **["RMC", or "Defendants"]** is registered in Almasi and part of a joint-venture, Kotawongo Mine **["KM"]**, with a state-owned company.
- In 2010, Almasian miners entered into contracts of employment with KM. These contracts included an exclusive choice of court agreement in favour of the Almasian courts and a choice of law agreement in favour of Almasian law. The employment contracts between the miners and KM are in effect and ongoing.
- Due to a border conflict with another state, the Almasi government declared in 2014 martial law and instituted a mandatory draft of 10 years for all Almasian able-bodied men. Several workers of KM were drafted for 10 years by the military to work in a time of conflict.
- On 1 January 2019, the Almasian government was overthrown by a military coup d'état. The mandatory draft was revoked. Almasi enacted a law conferring immunity to the Almasian government and Almasian registered companies for any tortious acts causing personal injury or environmental damage in the mining industry on or before 31 December 2018.
- A group of Almasian miners and their families **["Claimants"]** living and working in Almasi, have brought proceedings against IJC and RMC before three different courts: the court of first instance in Almasi, the court of first instance in Antwerp and the High Court of Justice of England and Wales.
- On 1 August 2019 the Almasian courts seized proceedings, on the first of October 2019 the Antwerp court seized proceedings against RMC and IJC, and the High Court of Justice issued a Freezing Order on 7 February 2020

2. Dismissal of the proceedings on the grounds of non-intervention and abuse rights

The Defendants request the Court to dismiss proceedings due to a lack of jurisdiction on the basis of non-intervention. The international public law doctrine of non-intervention prevents States from interfering in matters falling under another State's jurisdiction.[1] This international law principle also applies in private international law.[2] The CJEU held in the *Wood Pulp*-case that only when a practice was implemented on the territory of the EU, the European jurisdiction is applicable and the non-intervention doctrine is unharmed.[3] Furthermore, all the events giving rise to the claims took place

[1] J. Wouters & C. Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' [2009] *The George Washington International Law Review* 939, 952.
[2] ibid, 975.
[3] Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Wood Pulp* [1988] ECR -05193, paras 15-18.

in Almasi in a relationship between an Almasian company KM and the Claimants, Almasian citizens. This is a strictly national case, with no links to any Member State. Moreover, the State of Almasi imposed a mandatory draft due to a military conflict and enacted a law conferring immunity to the Almasian government and on Almasian registered companies. These measures are at the State's own sovereign discretion and no national court should intervene in a public matter in another state. If the Belgian court assumes jurisdiction based on Brussels I-bis, it would infringe the principles of non-intervention and state sovereignty that underlie the Brussels I-bis.

The claims should be dismissed based on the abuse of rights principle. The CJEU recognized the existence of abuse of rights as a general principle of EU law in the *Emsland-Stärke*-case. Abuse of rights occurs if an objective element is fulfilled, being evidence that the conditions were created artificially, and a subjective element is fulfilled, being the fact that the operation was carried out essentially to obtain advantage incompatible with the objective of Community rules.[4] The claims against IJC and RMC are artificially created because there are no real links to the Belgian Court. The Claimants base their contractual claims against IJC and RMC on a contractual relationship that is inexistent.[5] The miners have a contract with KM, not with IJC and RMC. Furthermore, the non-contractual claims against IJC are based on acts conducted on Almasian territory by Almasian legal entities. IJC is not domiciled in Almasi and has no connection with events taking place in Almasi. The EU international private law rules are established to enhance 'judicial cooperation in civil matters which are necessary for the sound operation of the internal market.'[6] The Claimants are not domiciled in the EU and therefore not part of the internal market. Suing IJC and RMC in Belgium gives the Claimants the advantage that the liability of IJC and RMC might be assessed without immunity law being applied. This is not in line with the goal of the Regulation. Therefore, Defendants ask the Court to dismiss proceedings based on an abuse of rights.

3. Applicability of the Brussels I-bis Regulation

Should the Court retain the Brussels I-bis Regulation [**"Brussels I-bis"**] applicable based on Arts. 1, 4(1), 63(1)(a) and 66(1) Brussels I-bis as argued by the Claimants, the Defendants will proceed to

[4] Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR-I 11569, para 43*;* see also: Case C-255/02 Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise. [2006] ECR-I 01609, para 69.

[5] Case law indicates that a claim based on a matter of contract '*cannot be understood as covering a situation in which there is no obligation freely assumed by one party towards another*.' Case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-03967, para 15; Case C-51/97 *Réunion Européene SA and others v Spliethoff's bevrachtingskantoor BV* [1998] ECR I-06511, para 17; Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-07357, para 23.

[6] Recital 1 Brussels I 44/2000.

address the relevance of its provision for the contractual and non-contractual claims brought before this court after discussing the qualification of the claims.

4. Jurisdiction

4.1. Qualifications of the claims

As IJC and RMC are no parties to the employment contract, the claims cannot be qualified as contractual. The CJEU adopts in its case law an autonomous definition of an employment relationship and uses objective criteria in order to define an individual contract of employment.[7] This employment relationship is defined by the essential feature that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration.[8] The limited amount of remuneration does not invalidate the existence of an employment contract.[9] A hierarchical relationship is an essential element for the existence of a contractual relationship between a company and an individual employee. This does hold true for KM, an Almasian registered separate legal entity that is not present in the proceedings. KM is the company that is directing, overseeing and paying the workers. Such hierarchical relationship does not exist between the miners and the Defendants – IJC or RMC – and never did. Qualifying entities as an employer should be approached formally and reservedly in order to serve the predictability of judgements and the fundamental principle of legal certainty in accordance with Recital 15 Brussels I-bis. Qualifying employers in a more holistic approach would prevent defendants to reasonably foresee in which court they may be sued. The CJEU has signified that this foreseeability is relevant in the matters of employment.[10]

Should the Court be inclined to follow a more holistic approach to assess whether IJC and RMC are an employer according to Section 5 of the Brussels I-bis, then the Defendants point to the consideration of the CJEU in the *Voogsgeerd*-case: 'The court seised must, in particular, take into consideration all the objective factors making it possible to establish that there exists a real situation different from that which appears from the terms of the contract*'.*[11] The objective factors of this case clearly indicate that the real situation corresponds exactly to the situation which appears from the terms of the contract. The employees have signed the employment contract with KM and are paid,

[7] Case C-154/11 *Ahmed Mahamdia v. Democratic People's Republic Algeria* [2011] ECLI:EU:C:2012:491, para. 42; Referred to in: Case C-47/14 *Holterman Ferho Exploitatie BV and Others v. F.L.F Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, para 37; Case C-603/17, *Peter Bosworth, Colin Hurley v. Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:310, para. 24.
[8] Case C-66/85 *Lawrie-blum* [1986] ECR -02121, para 10; Case C-47/14 *Holterman Ferho Exploitatie BV and Others v. F.L.F Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, para. 41.
[9] Case C-53/81, *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR -01035, para. 16; Case C-188/00, *Bülent Kurz and Land Baden-Württemberg* [1980] ECR I-10691, para. 32.
[10] Case C-437/00, *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3593, para. 22;
[11] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECLI:EU:C:2011:842, para 62; See, by analogy, Case C-341/04 *Eurofood IFSC* [2006] ECR I-03813, para 37.

directed and overseen by KM. RMC is an investor in KM and provided financial, technical, and operational resources. Investing in a company does not make RMC an employer in that company. As an analogy one may consider the situation of an investment bank in a company, in this situation it would be plainly wrong to consider the bank as an employer. Employment is a matter of a hierarchical relationship, one that does not exist between RMC or IJC and the miners. Thus, the Court should only qualify KM as being the employer in the contractual relationship with the Claimants.

Since KM, the employer in the individual employment relationship, is not a party present to these proceedings, it follows that the claims against the Defendants are not of a contractual nature and can therefore only be considered as tortious claims.

The remaining claims brought in the proceedings for the health damage suffered due to the supposed environmental harm are qualified as claims in tort. Therefore, all claims – 2A and 2B – can only be considered as non-contractual claims.

4.2. Domicile of RMC

Based on Art. 63(1)(b) Brussels I-bis, IJC is domiciled in Belgium because it has its statutory seat in Belgium.

Contrary to the Claimants, the Defendants argue that the domicile of RMC is located in Almasi. The domicile of a legal entity is, in accordance with Art. 63(1) (a-c), determined by its statutory seat, its central administration or its principal place of business. The statutory seat of RMC is in Almasi, since RMC is registered in Almasi. Also, the central administration is located in Almasi. For example, in a similar situation the UK Court of Appeal defined the 'central administration' as: 'the place where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations'.[12] The essential decisions regarding the operations of RMC are made during the annual board meetings of RMC that are held in Almasi according to its statutes of incorporation. As RMC's operations are limited, no essential decisions are made by the directors outside the annual board meeting in Almasi. The central administration is therefore located in Almasi. The manner in which the board meetings are attended, e.g. by video call, are not relevant for the qualification of the physical location of the board meetings. The principal place of business of RMC should also be considered to be in Almasi. Its activity is conducted entirely in Almasi where it invests in KM together with a State-owned company. The limited business RMC conducts is therefore only in Almasi and no other State.

[12] *Young v. Anglo American South Africa Limited ORS* [2014] EWCA Civ, para. 45.

4.3. Jurisdiction with regards to the non-contractual claims

As RMC's domicile is in Almasi, the Defendants argue that the Court does not hold jurisdiction over the claims against RMC based on Art. 4(1) or Art. 7(2) Brussels I-bis.

In accordance with Art. 6(1) Brussels I-bis, national law should be applied to determine jurisdiction. Art. 5(1) of the Belgian Code of Private International Law **["BCPIL"]** does not give ground for jurisdiction based on connectivity as the action has solely been introduced to remove RMC from the jurisdiction of his domicile.[13] This provision should be interpreted in line with the interpretation of Art. 8 Brussels I-bis and CJEU case law.[14] CJEU case law states that even if there is connectivity between claims against multiple defendants, the Court can still find that the applicant artificially fulfilled the provisions' applicability.[15] The latter is the case, as there are no connections with Belgium in this case apart from the domicile of the anchor defendant, IJC. Claims are based on acts conducted in Almasi by KM, an Almasian entity. The miners have a contract with KM, not with RMC nor with IJC. IJC does not have anything to do with the events in Almasi. Therefore, submitting a claim against IJC as anchor defendant showcases the artificial construction of the provision's applicability. Defendants thus conclude that jurisdiction over the claims against IJC cannot be based on Art. 5(1) BCPIL and Art. 6(1) Brussels I-bis.

Furthermore, jurisdiction based on *forum necessitatis* which is laid down in Art. 11 BCPIL does not give grounds for jurisdiction. It requires the claims to be closely connected to Belgium and requires it to be unreasonable to file the action in another state. Both of these elements are not fulfilled. The case is closely connected to Almasi, not Belgium, and proceedings have been filed by the Claimants in Almasi indicating that it is not unreasonable to file an action in Almasi.

4.4. Jurisdiction with regards to contractual claims if IJC and RMC are qualified as employers

Should the court consider IJC and RMC the employers, the Defendants argue that the claims of ill-treatment during the mandatory draft are also contractual claims. First, the contract between KM and the miners was never terminated. Second, the nature of the labour did not change, nor did the place where the labour was carried out change. Also, the miners were still subordinate to its employee, KM. Third, according to CJEU case law the amount of remuneration does not matter to determine whether

[13] This article states: '*In the event of multiple defendants, the Belgian courts will have jurisdiction if one of them has his domicile or habitual residence in Belgium, unless the action has been introduced solely to remove a defendant from the jurisdiction of his domicile or habitual residence abroad.'*
[14] The parliamentary history of the BCPIL indicates that this article was aligned with Art. 6 Brussels I (current Art. 8 Brussels I-bis) and so, the criteria for Art. 6 Brussels I Regulation set out by the CJEU can be applied; C-98/06 *Freeport* [2007], para 54.
[15] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA vs Akzo Nobel NV, Solvay SA/NV, Kemira Oyj, FMC Foret SA* [2015] ECR I-335, para 33.

an employment contract exists.[16] Therefore, the Defendants argue that there is no reason for the Court to assume that the claims based on ill-treatment could be considered to be tortious.

4.5. Validity of the choice of court agreement

The forum choice in the contract between the miners and the employer should be respected. Brussels I-bis does not apply to a choice of court for a non-Member State, yet Art. 25 Brussels I-bis only mentions choices for 'a court or the courts of a Member State.'

According to Belgian law, proceedings should be stayed. As Brussels I-bis is not applicable, the lex fori – Belgian law – should be applied. In Art. 7 BCPIL is stated that the Court must stay its proceedings, when parties have validly agreed upon a jurisdiction clause for a foreign court, unless the foreign judgment cannot be recognised and enforced in Belgium, or the Belgian Courts have jurisdiction based on Art. 11 BCIPL. This is the case. An Almasi judgment is amenable to recognition and enforcement in Belgium through Arts. 22-25 BCPIL. Art. 11 is not applicable as it only applies in exceptional cases 'when the matters present close connections with Belgium.' There are no connections, as argued in Section 2 and 5 of this Memorandum. Based on all arguments presented in Section 2 to 4 the Defendants request the Court to dismiss the claims due to the lack of jurisdiction.

5. Stay of proceedings based on Art. 34(1) Brussels I-bis

Should the Court retain jurisdiction over the claims against RMC and IJC, the Defendants request the Court to stay the proceedings based on Art. 34(1) Brussels I-bis. The Almasian court seized jurisdiction two months before the proceedings were brought before the Court. The proceedings in Almasi are related to the case brought before this Court in the sense of Art. 34 Brussels I-bis, both proceedings are tied to the same question: whether or not environmental harm is incurred because of the activities of RMC. In accordance with Art. 34(1)(a) Brussels I-bis, it is expedient for the Court to stay its proceedings until the Almasian court has decided on this environmental issue to avoid irreconcilable judgements. A judgement of the Almasian court finding that the environment was not harmed by RMC would be irreconcilable with a Belgian judgement ruling that RMC did harm the environment or vice versa, therefore it is expedient to await the judgement in Almasi.

Furthermore, in accordance with Art. 34(1)(b) the judgement of the Almasian court is expected to be capable of recognition in Belgium. Recognition and enforcement of judgements of a third State are, in accordance with Recital 23 Brussels I-bis, a matter of national law. None of the refusal grounds of Art. 25 BCIPL for a foreign judgement apply to a potential judgement by the

[16] Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR -01035, para 16; Case C-188/00 *Bülent Kurz and Land Baden-Württemberg* [2002] ECR I-10691, para 32.

Almasian court. First, the judgement will not manifestly contradict the Belgian public policy, as the Almasian judgement has no connection to the Belgian legal order. Second, there are also no reasonable grounds to doubt that the Almasian courts will uphold the rights of the defense.

A stay would contribute to the proper administration of justice. The Court should assess all the circumstances of the case brought before it. This includes the connections between the facts of the case, the parties, and the third State concerned.[17] The Almasian court has a real and strong connection to the factual circumstances of this case being at the place where the supposed damage and the events giving rise to the damage occurred. Based on the above, the Defendants request the Court to stay these proceedings.

6. Recognition and enforcement of the World-Wide Freezing Order

The Defendants ask the Court not to recognize or enforce the Freezing Order granted by the High Court of Justice of England and Wales. The Freezing order cannot be qualified as a judgement in accordance with Art. 2(a) Brussels I-bis and therefore Art. 36 and Art. 39 Brussels I-bis do not apply. Provisional measures only qualify as a judgement if the court that issued the order has substance of the matter by virtue of Brussels I-bis. The Freezing Order is a provisional measure, taken in accordance to Art. 35 Brussels I-bis, that preserves the factual and legal situation in England.[18] The English court does not however have substance of the matter. Conducting 'some business' in England is not a sufficient ground to provide jurisdiction in the substance of the matter in accordance with Brussels I-bis.[19] In fact the English court only decided on the jurisdiction it had to grant for a provisional measure, the Freezing Order, the court did not decide it had any jurisdiction as to the substance. According to Recital 33 Brussels I-bis the effects of provisional measures, if courts do not have jurisdiction of the substance, are confined to the territory in which they are ordered, in this case English territory. Additionally, in a similar issue in the *Banco Nacional*-case the English Court of Appeal considered that the English court could not issue a World-Wide Freezing Order if the assets are located outside the jurisdiction and there is no real connecting link between the assets and the territory of the forum.[20] Thus, solely the assets located within the territory of the UK should be affected. The Freezing Order is not a judgement under Art. 2(a) Brussels I-bis and thus, the

[17] Recital 24 Brussels I-bis Regulation.
[18] Case C-261/90 *Reichert v. Dresdner Bank AG* [1992] ECR I-02149, para 34.
[19] According to Arts. 4-9 Brussels I-bis Regulation.
[20] *Banco Nacional de Comercio Exterior SNC v. Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662, paras 30-31; Also referring to: Case C-391/95, *Van Uden/Deco line* [1998] ECR I-07091, para 40; *Credit Suisse Fides Trust SA v. Cuoghi* [1998] EWCA Civ 1831.Credit Suisse Fiders Trust SA-case.

recognition and enforcement as meant in Arts. 36 and 39 Brussels I-bis are not applicable. Therefore, the Freezing Order cannot be recognised nor enforced by this Court.

7. Applicable law

Should the Court retain its jurisdiction on Claim 2A and Claim 2B, and dismiss the applications for dismissal or a stay of proceedings, the Defendants submit that Almasian law is applicable to both contractual and non-contractual claims. In §4 of this Memorandum the claims are qualified as tortious claims. According to Recital 7 Rome I and Recital 7 Rome II Regulations, the substantive scope of these Regulations should be consistent with the Brussels I-bis.[21] Therefore, the same qualification should be used for applicable law purposes.

7.1. Applicability of Almasian law to the non-contractual claims

Given the fact that the Court seized is in a Member State, it is bound by the European legislation. The applicability requirements of the Rome II (Arts. 1, 2, 3, 31 and 32) are met, and therefore the Rome II Regulation **["Rome II"]** applies to the tortious claims.

7.1.1. Applicability of Almasian law with regard to the the ill-treatment

As to the tortious acts with regard to the alleged ill-treatment during the mandatory draft, based on Art. 4(1) Rome II, the law of the country in which the damage occured applies. It is clear that in the case at hand, the alleged damage occured in Almasi, and therefore, Almasian law applies. Furthermore, the Defendants argue that Art. 4(3) Rome II is an escape clause and therefore exceptionally applicable when it is clear that the case is more closely connected to another country.[22] In the case at hand, all the events as well as the damage occurred in Almasi, so there is no connection to Belgium. Moreover, Art. 4(3) Rome II requires a contract between the parties, however in the section pertaining jurisdiction the Defendants have illustrated that there is no contract between the Claimants and the Defendants. The Defendants argue that the Claimants signed a choice of law agreement in favour of Almasian law in accordance with Art. 8(1) Rome I. Furthermore, according to Art. 8(2-4) Rome I the objective applicable law is Almasian law. Thus, even under Art. 4(3) Rome II, Almasian law applies to the claims for damages due to ill-treatment during the mandatory draft.

[21] Case C-29/10 *Heiko Koelzsch v. État du Grand-Duché du Luxembourg* [2011] ECR I-01595, para 33.
[22] Recital 18 Rome II Regulation.

7.1.2. Applicability of Almasian law with regard to the Environmental damage

Art. 7 Rome II states that the law applicable to non-contractual obligations arising out of the alleged environmental damage, shall be determined pursuant to Art. 4(1) Rome II. This article states that the law of the country in which the damage occurs, shall apply. According to Recital 17 Rome II 'the country in which the damage occurs' should be the country where the injury was sustained or the property was damaged. This is Almasi, as this is where the mines are located, the labour was performed and the Claimants live. Hence, based on Arts. 7 and 4(1) Rome II Almasian law applies. According to Art. 7 Rome II, the person seeking compensation may choose instead of the law of the country where the damage occured, the law of the country where the event giving rise to the alleged damage occurred. The Defendants claim that the events giving rise to the alleged damage took place in Almasi. in particular, the mining operations took place in Almasi. In addition, all relevant corporate decision-making took place in Almasi as the state-owned company participating in KM decided where and how the mine was to be exploited. After all, the Defendants argue that the objective of Rome II is to improve the predictability of the outcome of litigation and the certainty of the law applicable.[23] If one were to use a broad interpretation of the event giving rise to the damage, this would run counter to the regulation's objective and be detrimental to the predictability of the applicable law. Thus, both the damage and the event giving rise to the damage occured in Almasi and therefore, based on Art. 7 Rome II the applicable law to the claims for the damages due to environmental damage is Almasian law.

Lastly, the Defendants argue that according to Art. 17 Rome II the rules of safety and conduct which were in force at the place and the time of the event giving rise to the liability should be considered. Almasian law was applicable, and the necessary licencing was granted by the Almasian government; thus, the companies complied with the necessary rules of safety and conduct. The CJEU held that it would be a violation of the principle of non-discrimination on ground of nationality to treat a permit from another Member State differently than one from the forum State.[24] The Defendants argue that this should not be any different for permits from a third state. In any case, KM was responsible for the necessary licencing, while the Defendants were simply abiding the rules of Almasi. Furthermore, due to respect to the sovereignty of other countries, it is inappropriate for the Court to conclude that Almasian permits are not sufficient. Especially considering this is a third state, which has no duty to comply with or follow EU rules.[25]

[23] Recital 6 Rome II Regulation.
[24] Case C-115/08 *Land Oberösterreich v. Cez a.s.* [2009] ECR I-10265, para 139.
[25] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2019) 296-297.

7.1.3. Overriding mandatory rules regarding tortious claims

Art. 16 Rome II states that overriding mandatory rules of the forum may apply. The fact that the European Union had the intention to state that a high level of protection of the environment must be safeguarded does not necessarily have the consequences that these rules should directly apply under Belgian law. In any case, the Directive for Environmental Damage only applies to land-, water- and damage to species and natural habitats.[26] Hence, the health damage of the Claimants is not covered by a rule with direct effect which is crucial for safeguarding public interests in Belgian law. Furthermore, Art. 191 TFEU only refers to policies of the EU, and not of third states. [27]

7.2. Applicability of Almasian law with regard to the contractual claims

Should the Court find the Rome I Regulation **["Rome I"],** to be applicable and the claims against the Defendants contractual claims, the Defendants argue that the contract is governed by the law chosen by the parties (Arts. 8(1), 3(1) and Recital 11 Rome I). The parties expressly agreed on the application of Almasian law in their contract. The choice of law agreement ensures party autonomy, legal certainty for both parties, and it protects the Claimants by making sure they will not face problems with international mobility for possible litigation.[28] In fact, proper protection is best assured where the employee discharges his obligations towards his employer and where it is least expensive for the employee to commence or defend himself from court proceedings.[29] In this case, that is Almasi.

Furthermore, the Claimants argue that based on Art. 8(1) Rome I, the objective applicable law should be considered, and compared with the law chosen by the parties. The Defendants argue that the objective applicable law is Almasian law. Article 8(2) Rome I states that the law applicable to the contract shall be the law of the country in which the employee 'habitually carries out his work in performance of the contract'. The CJEU held that this is the place where the employee actually performs the work covered by the employment contract,[30] or the place where he has established the effective center of his working activities.[31] Only the activities which are directly linked to the employment contract must be considered for the analysis.[32]

Contrary to the Claimants, the Defendants argue that the employment contract is not closely connected to another country, as meant in Art. 8(4) Rome I, since the place of the employment is in

[26] Directive 2004/35/EC of 21 April 2004.
[27] Marcus Klamert, Manuel Kellerbauer, Jonathan Tomkin, *Commentary on the EU: Treaties and the Charter of Fundamental Rights (Oxford University Press 2019)* 1517.
[28] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 583.
[29] Case C-125/92 *Mulox IBC Ltd. v. Hendrick Geels* [1993] ECR I-04075, paras 18-19.
[30] ibid, para 20.
[31] Case C-383/95 *Petrus Wilhelmus Rutten v. Cross Medical Ltd.* [1997] ECR I-00057, paras 22-23.
[32] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 587.

Almasi. Hence, the objective applicable law under Art. 8(2)-(4) Rome I, is Almasian law. In addition, the CJEU rejected the assumption that Art. 8(4) Rome I may be used to offer better protection to the employee.[33] It is further argued that due to the protective character of 'the habitual place of work' it should be used as the primary connecting factor, and the escape clause should be used only restrictively.[34] The Defendants argue that Almasian law is the objective applicable law, and thus a comparison between the chosen law and the objective law is not necessary and should not be undertaken by the Court.

7.2.1. Overriding mandatory rules regarding the non-contractual claims

According to Art. 9(3) Rome I, the application of overriding mandatory rules of the place of the performance of the contractual obligation can take effect. The place of the performance is Almasi, as the Claimants performed their obligations under the contract in Almasi.[35] In case the Court decides that Belgian law applies, the Defendants argue that the immunity law is an overriding mandatory rule. The immunity law is enacted by the Almasian government as a mandatory provision, its purpose is to safeguard the political, social and economic public interests of Almasi, after ten years of martial law and a military coup d'etat. Furthermore, the immunity law applies irrespective of the law applicable to the contract.[36] Also, the immunity law is not incompatible to Belgian public policy as meant in Art. 21 BCPIL. Hence, the Defendants argue that the immunity law is an overriding mandatory rule as meant in Rome I, and thus request the Court to apply this to the Claims 2A.

8. Compatibility with Almasian immunity law and public order of the forum

8.1. Non-contractual claims

The Belgian public order states that fundamental human rights should be protected, such as the right to a fair legal process.[37] The Defendants argue that Almasian immunity law is not incompatible with the Belgian public policy. The Belgian Court cannot refuse its application based on Art. 26 Rome II. Firstly, Recital 37 stipulates that Art. 26 Rome II should only be applied in exceptional cases. Secondly, case law indicates that it would be at variance to an unacceptable degree if it infringes a

[33] Case C-64/12 *Anton Schlecker tegen Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para 34.
[34] Aukje van Hoek, 'Private international law: an appropriate means to regulate transnational employment in the European Union?' [2014] ELR 157, 161.
[35] The CJEU uses a broad interpretation, as one can read in Case C-135/15 *Republik Griechenland v Grigorios Nikiforidis* [2016] ECLI:EU:C:2016:774.
[36] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 642.
[37] Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935, paras. 26–27 and 38–39; Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-02563, para. 28

fundamental principle, such as human rights.[38] However, as Almasi and Belgium are both part of the United Nations, both countries seek to protect the Universal Declaration of Human Rights and as such the right to a fair trial.[39] Therefore, the underlying principles of both legal systems are similar and cannot lead to incompatibility.

Furthermore, as the goal of Art. 26 Rome II is to safeguard the fundamental principles of the legal order and domestic law principles should be taken into account when determining a breach in public order.[40] Art. 21 of the BCPIL states that 'in determining this incompatibility, special consideration is given to the degree in which the situation is connected with the Belgian legal order.' As the link with Belgian law becomes closer, the more likely it is that application of provisions can lead to incompatibility with the public order. As argued in §1, this case has no connections to the Belgian legal order. Therefore, there is no reason to apply Belgian law of Belgian public policy rules.

8.2. Contractual claims

The Belgian public order states that the right to a fair legal process is a general principle that should be protected.[41] Applying Almasian immunity law is not manifestly incompatible with Belgian public order. Art. 21 Rome I does not give ground for refusal of application. In accordance with Recital 7, Rome I and Rome II should be interpreted consistently, the same reasons apply as set out in §8.2.

9. Petitum

Defendants request the Court to: (1) dismiss proceedings due to lack of international jurisdiction, (2) stay the proceedings based on Art. 34 Brussels I-bis, (3) not recognise and enforce the World-Wide Freezing Order, (4) apply the Almasian law to both the contractual and the non-contractual claims, and (5) apply the Almasian immunity law.

[38] Case C-7/98 *Dieter Krombach v André Bamberski.*[2000] ECR I-01935, para. 37; Case C-38/98 *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] ECR I-02973, para 20; Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-02563, para 27.
[39] Art. 10 United Nations Human Rights Charter.
[40] Ulrich Magnus, Peter Mankowski (eds), *Rome II Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2019) 647.
[41]Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935, paras. 26–27 and 38–39; Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-02563, para. 28