CLAIMANTS' MEMORANDUM
-
TEAM GREEN SWAN

by

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1. ***Statement of the facts***

- A group of Almasian miners and their families **["Claimants"]** practiced artisanal mining from 1960-2010 in Kotawongo, Almasi.
- 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.
- RMC has no employees nor an office in Almasi, but its directors hold office in Belgium. Board meetings are held annually with RMC's board members attending through video conference from Antwerp. RMC's name appears at the entrance of IJC's Antwerp headquarters.
- In 2010, the Almasian miners entered into contracts of employment with KM, while their contracts were pre-signed in-blank by directors in Antwerp. The contracts include a choice for Almasian law and courts. In the period 2010-2014, the working conditions were dangerous and working hours were constantly increased.
- In 2014, the Almasian government declared martial law and instituted a mandatory draft of 10 years for able-bodied men. The workers were drafted by the military and forced to work with little to no pay in conditions described as 'akin to a prisoner of war labour camp'. Human rights atrocities were reported to have been committed by security personnel.
- Additionally, since 2010, the mine has been causing pollution and health hazard to the miners and their families.
- On 1 January 2019, the Almasian government was overthrown by a military coup d'état, the mandatory draft was revoked, and the state enacted an immunity law for Almasian registered companies regarding the tortious acts causing personal injury or environmental damage in the mining industry committed on or before 31 January 2018.
- The Claimants initiated proceedings in Belgium, as well as acted in Almasi to obtain an injunction to restrain further acts of pollution by RMC and KM. Also, the English court has granted a World-Wide Freezing Order against IJC and RMC in order to prevent them from disposing of their assets below 100m US dollars pending the outcome of the Belgian proceedings.

2. ***Applicability of the Brussels I-Bis Regulation***

The Claimants submit that the Brussels I-bis Regulation **["Brussels I-bis"]** is applicable to the dispute in view of compliance with the requirements set in Arts. 1, 4(1), 63(1)(a) and 66(1) Brussels I-bis. The analysis related to the domicile of the defendants in a Member State is addressed in §3,5.

3. *Jurisdiction*

As the Claimants have put forward claims both based on contract and tort, and matters of jurisdiction (Brussels I-bis) and applicable law (Rome I and Rome II Regulations) heavily rely on the distinction between contractual and tortious claims, it is important first to determine which claims are based on contract and which claims are based on tort.

3.1. Contractual claims for ill-treatment under the employment contract

The Claimants request the Court to apply Section 5 of Brussels I-bis in relation to their ill-treatment arising out of their individual employment contracts in the period before the military draft (2010-2014). As clarified by the Court of Justice of the European Union **["CJEU"]** in *Shenavai*, an individual working relationship relies on 'a lasting bond which brings the workers to some extent within the organizational framework of the business of the undertaking or the employer'.[1] Furthermore, the employee should be subordinated to the employer[2] and receive a remuneration for the services.[3] The miners signed a long-term contract with the directors in Antwerp, were in a subordinated relationship, and received remuneration for their work.

Furthermore, the tort claims based on ill-treatment between 2010-2014 should also fall under the employment contract. If the conduct complained of is considered to be a failure to perform a contractual obligation, it is considered to be a contractual claim.[4] An employer has a contractual obligation to ensure a safe working environment. Therefore, the ill-treatment is an infringement of this obligation.

Despite the lack of a formal contractual relationship between the miners and IJC and RMC, IJC and RMC should be considered the actual 'employers' in the sense of Section 5 of Brussels I-bis as they belong to the same group of companies. First, the absence of a formal contract does not exclude the existence of an employment relationship within the meaning of Brussels I-Bis.[5] Second, the overriding objective of employee protection pursued by Section 5 justifies a wide definition of the term 'employer'. As indicated by the Advocate General in the *Bosworth*-case, companies belonging to the same group should be subject to the same jurisdictional restrictions, and should all be considered an employer.[6] A solution to the contrary would enable employers to circumvent the

[1] Case C-266/85 *Hassan Shenavai v. Klaus Kreischer* [1987] ECR I-00239, para 16.
[2] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v. F.L.F Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, para 40.
[3] Case C-116/06 *Sari Kiiski v. Tampereen Kaupunki* [2007], para 25; Case C-66/85 *Deborah Lawrie-Blum tegen Land Baden-Württemberg* [1986] ECR I-7645, para 10.
[4] Case C-603/17 *Peter Bosworth, Colin Hurley v. Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:65, Opinion of AG Saugmandsgaard Øe, para 93; *Laval Tumba* v *Separator Spares* [2012] EWCA; A*lfa* [2012] EWCA.
[5] Case C-603/17 *Peter Bosworth, Colin Hurley v. Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:310, para 27.
[6] Case C-603/17 *Peter Bosworth, Colin Hurley v. Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:65, Opinion of AG Saugmandsgaard Øe, para 109; *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd*, [2007], EWHC, paras 32-35.

objective of employee protection provided by Section 5. IJC, RMC and KM belong to the same group of companies. RMC is the subsidiary of IJC and KM is a subsidiary of IJC. Furthermore, as RMC does not have any employees and its directors are IJC's employees, the distinction between IJC and RMC as standalone companies is artificial. They belong to the same group of companies.

3.2. Non-contractual claims based on ill-treatment during the draft period

With regard to the ill-treatment that took place during the forced labour period (2014-2019), the Claimants submit that this can never be considered to be part of a labour agreement between an employee and an employer, even though the contract between the miners and their employer never ceased to exist. Forced labour is forbidden by Art. 4 of the UN Declaration of Human Rights and Art. 5 of the EU Charter of Fundamental Rights and can never be justified by an agreement concluded between the parties. Claims that seek to establish the liability of a defendant and do not involve matters relating to a contract fall within the meaning of tort in the sense of Brussels I-bis.[7]

3.3. Non-contractual claims based on damage to health and environment

On the health damages caused by the Defendants to the miners and their families, the Claimants submit this is a tort-based claim in the sense of Art. 7(2) Brussels I-bis. There is no contractual relationship between the miners' families and RMC or IJC.[8] The claims for health damages are thus based on tort for both the miners and their families.

3.4. Invalidity of the choice of court agreement

Claimants ask the Court to disregard the choice of court agreement as it is in conflict with Art. 23 of Brussels I-bis. This article applies as *lex specialis* for employment contracts. Based on that article, it is only allowed to depart from the rules in Arts. 20-22 Brussels I-bis through an agreement concluded after the dispute has arisen or if it allows the employee to bring proceedings in courts other than those indicated in Section 5 Brussels I-bis. A forum choice as made in the employment contract limits the number of competent courts only to the Almasian court. Therefore, the choice of court is not valid according to Brussels I-bis and the Belgian Court should proceed to assess its competence.

[7] Case C-189/87 *Athanasios Kalfelis v. Bankhaus Schröder, Münschmeyer, Hengst and Co and others* [1988] ECR-05565, paras 17-18.
[8] Case C-26/91 *Handte* [1992] ECR I-03967, para 15; Case C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR I-06511, para 15; Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-07357, para 17.

3.5. Jurisdiction with regards to contractual claims

3.5.1. Jurisdiction of the Belgian Court with regards to IJC

As argued in §3.1, IJC is an employer in the sense of Section 5 of Brussels I-bis. IJC has its statutory seat in Belgium and is thus domiciled in Belgium according to Art. 63(1) Brussels I-bis. Belgian Courts have jurisdiction over the claims against IJC based on Art. 21(1)(a) Brussels I-bis.

3.5.2. Jurisdiction of the Belgian Court with regards to RMC

As RMC is an employer in the sense of Section 5, based on Art. 21(1)(a) Brussels I-bis, the Belgian Court has jurisdiction over the claims against RMC because RMC is domiciled in Belgium in accordance with Art. 63(1)(b) Brussels I-bis, as its central administration is in Antwerp. The central administration is to be considered the place where the management and control centre are located. Established case law defines 'central administration' as 'the place where the company takes its entrepreneurial decision'.[9] The entrepreneurial decisions of RMC are all taken in Belgium, its directors are in Belgium, and the board meetings are physically taking place in Belgium via a video conference with Almasi. Furthermore, legal acts such as the signing of contracts are taking place in Belgium. Lastly, there is no physical RMC office in Almasi, and the name plate of RMC is at the Belgium office, making it clear for any party to see where the administration of the company is.

Should the Court consider RMC not be domiciled in Belgium, then the Belgian Court should retain jurisdiction based on Art. 20(2) Brussels I-bis as the office of RMC in Belgium could be considered an establishment. The CJEU stated two criteria for an establishment in the sense of Art. 20(2) Brussels I-bis in the *Mahamdia*-case.[10] First, it should appear to be a permanent extension of the parent body. Therefore, it should have a management and be materially equipped to negotiate business. This is evident in our case at hand as RMC's nameplate board is located in the Belgian office and the signing of the contracts and meetings take place from the office in Belgium. Second, the claims should be related to commitments entered into at the establishment on behalf of the parent body. These commitments must be performed in the contracting state where the place of business is established.[11] This is also the case, as the directors in Belgium signed the labour contracts on behalf of RMC in Belgium. The labour takes place in Almasi, so the performance of the contract happens in Almasi, the state where the place of business is established statutorily.

Should the Court consider RMC also to not have an establishment in Belgium, then the

[9] *The Place Vava & Ors v. Anglo American South Africa Lmt.* [2013] EWHC; *Young v. Anglo American South Africa Limited ORS* [2014] EWCA Civ.
[10] Case C-154/11 *Ahmed Mahamdia v. Democratic People's Republic Algeria* [2011] ECLI:EU:C:2012:491, para 48.
[11] Case C-33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR -02183, para 13.

Belgian Court has jurisdiction based on Belgian law. According to Art. 5 Belgian Code of Private International Law [**"BCPIL"**] the Belgian Court has jurisdiction over RMC because IJC, as one of the defendants, has its domicile in Belgium.[12] This provision should be interpreted in line with the interpretation of Art. 8 Brussels I-bis and CJEU case law.[13] The claims are connected and it is expedient to determine them together to avoid the risk of irreconcilable judgements resulting from the separate proceedings as the dispute is based on the same situation of law and fact.[14] If these claims are not jointly brought, a risk of irreconcilable judgements exist.

Should the Court consider Art. 5(1) BCPIL not applicable, Art. 11 BCPIL grants jurisdiction to the Belgian Court 'if proceedings abroad seem impossible or when it would be unreasonable to demand that the action is brought abroad.' The Almasian immunity law makes it both impossible to hold defendants liable and unreasonable to start an action in Almasi. Therefore, the Belgian Court should retain jurisdiction based on *forum necessitatis*.

Should the Belgian Court consider not to have jurisdiction pursuant to Arts. 21(1), 20(2) Brussels I-bis or the BCPIL, the Court should accept jurisdiction because denying jurisdiction would lead to denying access to substantial justice. Following Art. 6 European Convention on Human Rights and Art. 47 Charter of Fundamental Rights, case law from the United Kingdom Supreme Court accepted the denial of substantial justice as a ground to accept jurisdiction.[15] The Almasian immunity law makes it impossible to hold RMC or IJC responsible for their actions through legal proceedings. Therefore, declining jurisdiction in Belgium would lead to barring access to substantial justice for the Claimants.

3.6. Non-contractual claims

3.6.1. Jurisdiction of the Belgian Court with regards to IJC

The Belgian Court has jurisdiction with regards to the claims against IJC based on Arts. 4(1) and 63(1) Brussels I-bis because IJC is domiciled in Belgium (see §3.5.1).

3.6.2. Jurisdiction of the Belgian Court with regards to RMC

As RMC is domiciled in Belgium (see §3.5.2), the Belgian Court has jurisdiction based on Arts. 4(1)

[12] 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.'*
[13] The parliamentary history of the BCPIL indicates that this article was aligned with Art. 6 Brussels I (current Art. 8 Brussels I-bis Regulation) and so, the criteria for Art. 6 Brussels I-bis Regulation set out in by the CJEU can be applied; C-98/06 *Freeport* [2007] ECR I-8340, para 54.
[14] Case C-189/87 *Athanasios Kalfelis v. Bankhaus Schröder, Münschmeyer, Hengst and Co and others* [1988] ECR -05565, para 13. Case C-539/03, *Roche Nederland BV and others v. Frederick Primus Milton Goldenberg* [2006] ECR I-06535, para 26.
[15] *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC, para 88.

and 63(1) Brussels I-bis.

Should the Court consider RMC not to be domiciled, the Court should assume jurisdiction based on Art. 6(1) Brussels I-bis and Belgian law (see §3.5.2).

Should the Court consider not to have jurisdiction based on Art. 4(1) nor on Art. 6(1) Brussels I-bis or on Belgian law, the Belgian Court should accept jurisdiction because denying jurisdiction would lead to denying access to substantial justice for the Claimants (see §3.5.2).

4. ***No stay of proceedings based on Art. 34 Brussels I-bis***

The Claimants argue that the proceedings in England are concluded and an order has already been issued by the English court, hence there is no issue of *lis pendens* with the proceedings in Belgium.

No claim has been brought before the Almasian court with regard to the ill-treatment of the miners, hence there is no issue of lis pendens in this regard.

Further, the Claimants argue that there is no issue of related claims as stated in Art. 34(1) Brussels I-bis, and therefore, the Court should refuse to stay or dismiss the proceedings. Art. 34(1)(a) Brussels I-bis, states that the Court may stay the proceedings if there is a risk of irreconcilable judgements. As Almasian proceedings concern a provisional measure, the Almasian court will only assess the probability of the main claims having merit and its urgency. It shall not decide on liability issues or the claims for damages. Hence, there is no issue of irreconcilable judgements. Additionally, in accordance with Art. 34(1)(b), an Almasian judgement cannot be recognized and enforced in Belgium. Claimants present to the Court that the Almasian government has granted immunity for any environmental damage caused by Almasian registered companies on or before 31 December 2018. This means that the rights of the Claimants will not be respected in Almasi, and that the judgement of the Almasian court breaches Belgian public policy.[16] Lastly, Art. 34(1)(c) Brussels I-bis states that the proceedings may be stayed if it is necessary for the proper administration of justice. According to Recital 24 Brussels I-bis the proper administration of justice also includes issuing a judgement within a reasonable time. The proceedings in Almasi are already pending since the 1st of August 2019, and there is no indication that the proceedings will be concluded within a reasonable time. Furthermore, as stated above, the Claimants will not receive a fair trial.[17] Thus, in order to ensure the proper administration of justice, the Claimants request the Court to continue the proceedings.

5. ***Recognition and enforcement of the World-Wide Freezing Order***

The Claimants submit that Brussels I-bis applies to the World-Wide Freezing Order **["Freezing**

[16]Article 6 European Convention on Human Rights.
[17] Richard Fentiman, *International commercial litigation* (2nd edn, Oxford University Press 2015) paras 13.82-12.87.

Order"], since it is a civil and commercial matter (Art. 1(1) Brussels I-bis). Arts. 36 and 39 Brussels I-bis state that a judgement given in a Member State can be recognised and enforced in another Member State without any special procedure or any declaration of enforceability being required.

The Freezing Order granted by the English court does not qualify as a judgement according to Art. 2(a) Brussels I-bis because it is granted by a court that does not have jurisdiction as to the substance of the matter by virtue of Brussels I-bis. Hence, the Freezing Order cannot be recognised and enforced under Brussels I-bis. However, the Claimants argue that the Freezing Order under English law applies *in personam*. It restrains the Defendant from disposing their assets until a judgement is granted in the main proceedings.[18] In the *Stolzenberg*-case, involving a similar situation, the French *Cour de Cassation* decided that the injunction granted by the English court should be regarded as a 'provisional, protective measure' which does not infringe a fundamental right of the debtor. Considering the common legal roots and the procedural principles both countries share, the Claimants request the Court to follow a similar line of interpretation.

Subsequently, the Claimants request the Court to recognize and enforce the Freezing Order based on Art. 22 BCPIL as none of the grounds of refusal as stated in Art. 25 BCPIL apply. The absence of jurisdiction by virtue of Brussels I-bis over the substance of the matter is no ground for refusal. Nor does the Freezing Order infringe fundamental rights of the Defendants as the provisional measure was granted after *inter partes* hearing. Also, it is not contrary to Belgian public policy.

6. ***Applicable law***

With regard to applicable law, the Claimants will address two points. First, the Claimants argue that Belgian law is applicable to the contractual claims. Second, the Claimants submit that Belgian law is applicable to the claims based on the non-contractual obligations (Claim 2B) and the ill-treatment during labour under the military draft. The substantive scope of Rome I and II should be consistent with Brussels I-bis (Recital 7 Rome I, Recital 7 Rome II). Hence, the characterization of the contractual and tort claims as done in §3 also applies here. The Claimants submit that Rome I Regulation **["Rome I"]** applies to the contractual claims (Art. 1, 2 and 29 Rome I) and that Rome II Regulation **["Rome II"]** applies to the tortious claims for the personal injury suffered by the ill-treatment and the health damages due to the environmental issues (Art. 1, 2, 3, 31 and 32 Rome II).

[18] This is different from the anti-suit injunction on which the CJEU decided that it restricts the defendant from commencing in proceedings before a foreign court, and is therefore incompatible with Brussels I-bis Regulation, see: Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] ECR I-3578, paras. 24-31.

6.1. Contractual claims

6.1.1. Applicability of Belgian law based on Arts. 8(1) and 8(4) Rome I

Rome I protects party autonomy as a general principle, but certain limitations apply in order to protect the employees as weaker parties in such relationships when a choice of law concerns individual employment contracts.[19] According, to Art. 8(1) Rome I, a choice of law by the parties may not have the results of depriving the employee of the protection afforded to him by Art. 8(2)-(4) Rome I, namely the 'objective applicable law', which cannot be derogated from by agreement under the law applicable in the absence of such a choice.[20] The objective applicable law should be considered as the minimum standard of protection for the employee in international situations.[21] Thus, in principle the law chosen applies in full to the contract, unless mandatory rules of the objective applicable law would provide the employee better minimum protection.[22] For this reason, one should compare the two national laws, in order to determine whether the minimum protection standard of the second law is respected by the former.[23] Therefore, the Claimants will first set out that there is a closer connection to Belgium as meant in Art. 8(4) Rome I. Second, the comparison between the law chosen and the objective applicable law will be made.

According to Art. 8(2)-(3) Rome I, Almasian law would be the objective applicable law. However, according to Art. 8(4) Rome I, when the contract is more closely connected with a country other than indicated in Art. 8(2)-(3), the law of that country shall apply. In the *Schlecker*-case the CJEU ruled that the law of the country where the work is habitually carried out, may be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.[24] The CJEU held that important parameters to determine the closer connection could be related to the determination of the salary and other working conditions.[25] The Defendants are both domiciled and attending board meetings via video conference in Belgium. The terms of the contract, the working conditions, and the salary has all been decided by the Defendants in Belgium and the signature of the contracts took place in Belgium. Moreover, RMC is the one in charge of the operational resources of the mine, which includes providing adequate working conditions for the

[19] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017); Case C-29/10 *Heiko Koelzsch v. État du Grand-Duché du Luxembourg* [2011], para 33.
[20] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 585-586; Aukje van Hoek, 'Private international law: an appropriate means to regulate transnational employment in the European Union?' [2014] ELR 157, 158; Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECLI:EU:C:2011:842, para 25.
[21] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 585; Recital 35 Rome II Regulation.
[22] Aukje van Hoek, 'Private international law: an appropriate means to regulate transnational employment in the European Union?' [2014] ELR 157, 162.
[23] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 586.
[24] Case C-64/12 *Anton Schlecker tegen Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para 41; The Rome Convention.
[25] Case C-64/12 *Anton Schlecker tegen Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, paras 35-36.

employees. Considering these facts, the Claimants argue that these significant factors show that there is a closer connection to Belgium as meant in Art. 8(4) Rome I. Therefore, the objective applicable law is Belgian law.

In accordance with Art. 8(1) Rome I, a comparison should be made between Almasian law and Belgian law. Claimants point out that the government of Almasi has enacted an immunity law conferring immunity on the Almasian government and Almasian registered companies for any acts causing personal injury in the mining industry on or before 31 December 2018. On the contrary, Belgian law is based on European Directives and Regulations, which requires Member States to guarantee minimum rights for the employees, such as a limit to weekly working hours, rest breaks and safety requirements.[26] Almasian law does not offer any protection for the Claimants, nor can they defend themselves in court against such conditions because of the immunity law.[27] Hence, Belgian law offers better protection and should be applied by the Court to the contractual Claims.

6.1.2. Overriding mandatory rules regarding the contractual claims

Art. 9(1) Rome I states that overriding mandatory provisions are superimposed on the law applicable to the contract to protect an interest that is regarded as fundamental.[28] To assess this, the Claimants request the Court to consider the general structure of the provision and all the circumstances in which that law was adopted.[29]

Based on Art. 9(1)(2) Rome I the law of the forum – the Belgian law – applies; thus, EU rules which guarantee the employees' minimum rights.[30] As the CJEU held in the *Ingmar*-case, protective provisions prevail over the law of a non-Member State, especially when these rules promote fundamental goals of European Union law.[31] Mandatory rules designed to protect weaker parties, such as employees, are a category of overriding mandatory rules when they protect in an indirect manner interests of a public nature. This idea is particularly strong in Belgium[32] and has been upheld by the CJEU in the *Arblade-case* and the *Mazzoleni*-case.[33] Thus, rules aimed at the protection of individual interests also qualify as overriding mandatory rules. Moreover, rules on minimum rest

[26] Council Directive 2003/88/EC of 4 November 2003; Council Directive 89/391/EEC of 12 June 1989; Wet betreffende het welzijn van de werknemers bij de uitvoering van hun werk, 4 augustus 1996.
[27] Case C-125/92 *Mulox IBC Ltd. v. Hendrick Geels* [1993] ECR I-04075, paras 18-19.
[28] Laura Maria van Bochove, 'Overriding mandatory rules as a vehicle for weaker protection in European private international law' [2014] ELR14, 147, 147; Case C-396/96 *Jean-Claude Arblade en Arblade & Fils SARL* [1999], para 30.
[29] Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV tegen Navigation Maritime Bulgare* [2013] ECLI:EU::C:2013:663, para 50.
[30] Council Directive 2003/88/EC of 4 November 2003; Council Directive 89/391/EEC of 12 June 1989; Wet betreffende het welzijn van de werknemers bij de uitvoering van hun werk, 4 augustus 1996.
[31] Case C-381/98 *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc*. [2000] ECR I-9325, para 29; Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 623.
[32] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017) 621-622.
[33] Case C-396/96 *Jean-Claude Arblade en Arblade & Fils SARL* [1999] ECR I-01365, para 36; Case C-165/98 *Mazzoleni and ISA* [2001], paras 25-27.

periods, health, safety and hygiene at work, are considered to be mandatory under Art. 8 Rome I.[34] Hence, the Claimants argue that the mandatory overriding provisions protecting the Claimants should apply.

6.2. Applicability of Belgian law to non-contractual claims

First, the Claimants will argue that Belgian law is applicable law for the ill-treatment, and second, the Claimants will argue that Belgian law is applicable for environmental damage.

6.2.1. Applicability of Belgian law to the tortious ill-treatment claims

Art. 4(1) Rome II states that the law of the country in which the damage occurs applies. However, Art. 4(3) Rome II is an escape clause and states that in case of a manifestly closer connection, the law of that country shall apply. A manifestly closer connection with another country might be based on a contractual relationship between the parties that is closely connected with the tortious act. The ill-treatment of the Claimants during the military draft is so closely related to the employment contract, so that it is reasonable to subject both to the same law.[35] As argued in §6.1.1 the governing contract law is Belgian law. In consequence, according to Art. 4(3) Rome II and in order to avoid inconsistencies, and for proper administration of justice, the Claimants request the Court to apply Belgian law to the tortious acts that took place during the Mandatory draft.[36]

6.2.2. Applicability of Belgian law to the tortious environmental damage claims

Art. 7 Rome II relies on the ubiquity principle, and in line with the CJEU's decision, the person seeking compensation may choose to base his claim either on the law of the country where the damage occurred or where the event giving rise to the damage occurred. The Claimants choose the law of the country where the event giving rise to the damage occured, namely Belgium.[37]The damage is caused by a failure to act, the place giving rise to the damage is the place where the responsible person, in this case the Defendant, should have acted.[38] The habitual residence and the central administration of the Defendants is in Antwerp (Art. 23(1) Rome II, see also §3.5.2) and this is the place the directors take decisions. Thus, the failure to act occurred in Belgium. The Defendants knew or should have known about the pollution and environmental damage caused by the operations of the mine. They are

[34] Ulrich Magnus, Peter Mankowski (eds), *Rome I Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2017), 599.
[35] Ulrich Magnus, Peter Mankowski (eds), *Rome II Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2019), 189-190.
[36] ibid 187.
[37] Case C-21/76 *Handelskwekerij G. J. Bier BV tegen Mines de potasse d'Alsace SA* [1976] ECR -01735; Thomas Kadner Graziono, 'The law applicable to cross-border damage to the environment in', *Yearbook of Private International Law* (European Law Publishers & Swiss Institute of Comparative Law 2007), 73-74.
[38] Dalia Palombo, *Business and human rights: the obligations of the European home states* (Hart Publishing 2019), p. 65; Andrew Dickinson, *The Rome II regulation (OUP 2010)* 7.22.

in charge of the technological and operational resources of the mine. Despite their knowledge, the Defendants failed to act accordingly. Additionally, as the Almasian government enacted an immunity law, Belgian law will provide essential protection to the Claimants who seek to obtain compensation for the damage suffered.

6.3. Consideration of the rules of safety and conduct ex. Art. 17 Rome II

The Claimants argue that Art. 17 Rome II should not apply. In case the Defendants complied with the rules of safety in Almasi for the operations of the mine with regard to the bad working conditions and the environmental damage, it would be inappropriate to exonerate the Defendants from liability for actions they knew or should have known were inadequate.[39] Because the Defendants are domiciled in Belgium, the European Standards should apply to their actions, and there is no issue of sovereignty of the Almasi.

6.3.1. Overriding mandatory rules regarding non-contractual claims

Regardless of the law applicable to the non-contractual claims based on environmental damage, overriding mandatory provisions safeguarding environmental protection should be applied as stated in Art. 16 Rome II. This also goes for the non-contractual claims based on ill-treatment, on which overriding mandatory provisions safeguarding human rights should be applied. Art. 191 TFEU (ex 174 EC Treaty) and the Directive for Environmental Damage and Recital 25 Rome II, underline the EU's aspiration to provide a high level of protection of the environment through the application of the polluter pays principle.[40] Following corporate sustainable responsibility interests, these provisions impose statutory duties on corporations to observe environmental and human rights standards even in extraterritorial activities.[41] These principles are key in protecting public interest, thus, the Claimants argue that these are overriding mandatory provisions that the Court should uphold, and apply to the non-contractual claims (see also Recital 7 Rome I and Art. 9(1) Rome I).

7. *Incompatibility of immunity law with the public order of the forum*

7.1. Contractual claims

Should the court consider Almasian law to be applicable to the contractual claims, immunity law

[39] Ulrich Magnus, Peter Mankowski (eds), *Rome II Regulation Commentary* (Vol. 2, Verlag Dr. Otto Schmidt 2019), 296-297.
[40] Title XIX of the EC Treaty, Environment, Art. 174(2).
[41] Veerle Van den Eeckhout, 'Corporate Human Rights Violations and Private International Law' (2012) 4 Contemporary Readings in Law and Social Justice 178, 201; Aukje Van Hoek, "Transnational corporate social responsibility: some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers" in P. Satyanarayana Prasad (eds), *Human rights: corporate violations. - Repr*. (Hyderabad: The Icfai University Press 2010)

should not be applied as it is manifestly incompatible with the public order of the Belgian forum (Art. 21 Rome I). A provision is manifestly incompatible with the public order if the general principles of Belgian law are at stake. As the CJEU stated, fundamental rights such as the right to a fair legal process is a general principle that should be protected.[42] As said before (§3.5.2) immunity law stands in the way of substantial justice and therefore, the immunity law is manifestly incompatible with the public order of the Belgian forum and should be refused application to both the contractual and non-contractual claims. Furthermore, the effective protection of workers has been recognised as being a matter of public order also by courts in other Member States (e.g. Italian Court of Cassation) and should not be disregarded by the Belgian Court.[43]

7.2. Non-contractual claims

Recital 7 Rome I and Recital 7 Rome II state that the interpretation of the provisions of the two Regulations should be consistent with each other. Therefore, the Claimants request the Court to interpret Art. 21 of Rome I and Art. 26 of Rome II on public policy of the forum in the same way. Consequently, should the court consider Almasian law to be applicable to the non-contractual claims, immunity law should not to be applied as it is manifestly incompatible with the public order of the Belgian forum (Art. 26 Rome II).

8. *Petitum*

The Claimants request the Court to: (1) dismiss the claim of the Defendants to stay or dismiss the proceedings and to continue the proceedings, (2) to accept jurisdiction for the Defendants "IJC" and "RMC", (3) to recognise and enforce the World-Wide Freezing Order, (4) apply Belgian law to both the contractual and the non-contractual claims, (5) not apply Almasian immunity law.

[42] 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], para. 28
[43] Corte di cassazione, 11 November 2002, No 15822, RDIPP 2003, 978.