

Judgment
COURT OF AMSTERDAM
Department of private law

case number / docket number: C/13/581973 1 HA ZA 15-195

Judgment in the procedural issues of 30 November 2016

in the case of

the foundation

**STICHTING UNION DES VICTIMES DE DÉCHETS TOXIQUES D'ABIDJAN
ET BANLIEUES**

having its registered office in Amsterdam,
claimant in the main,
defendant in the procedural matter,
counsel *mr.* Y.B. Boendermaker, Almere,

versus

the private company with limited liability

TRAFIGURA BEHEER B.V.,

having its registered office in Amsterdam,
defendant in the main action,
claimant in the procedural matter,
counsel *mr.* A. Knigge, Amsterdam.

The parties are hereinafter referred to as the Foundation and Trafigura.

1. The proceedings

1.1 The course of the proceedings appears from the official record of the Case Management Conference held on 4 November 2015 and the hearing of the parties on 6 September 2016 and the documents and procedural acts mentioned therein. On 6 October 2016, a letter was received from Trafigura with a response to the official record of the hearing held on 6 September 2016.

1.2 Finally, a judgment was passed with regard to the procedural issues.

2. The facts so far as relevant in the procedural issues

2.1 Trafigura is the holding company of an international group based in Amsterdam that specializes in global commodity trading and logistics. The Trafigura group is responsible for the procurement, storage, blending, transport and delivery of energy products and raw materials. In 2006, Trafigura chartered the ship, Probo Koala. This ship was built for the transport of solids and liquids and for transporting oil products.

2.2 On 2 July 2006, the Probo Koala docked in Amsterdam and started discharging the waste created on board, the so-called slops. On 5 July 2006, the slops were pumped back into the tanks on board of the Probo Koala, which then left the port of Amsterdam on the same day. On 19 August 2006, the Probo Koala - eventually - docked at the port of Abidjan (Ivory Coast). In the port, the slops were transferred to a local waste disposal company (Compagnie Tommy), whereby this company had illegally dumped the slops in various locations in and around Abidjan.

2.3 The Foundation is a legal entity under Dutch law incorporated in accordance with its Articles of Association to represent the interests of persons who have been victims of the dumping of the slops.

2.4 An association was established called UVDTAB (hereinafter: the Association) in Ivory Coast on 26 September 2006 by Aboubakara Ouattara Mavin (hereinafter Ouattara) as Chairman-Founder. The Articles of Association, which Trafigura has submitted as evidence in the proceedings after Ouattara had sent them to Trafigura by letter dated 3 October 2012, differ in some respects from the Articles of Association that were sent to Trafigura by the competent authorities in Abidjan after Trafigura had made a subsequent request on 4 February 2016. The Articles of Association which Ouattara sent to Trafigura, and which Ouattara has apparently classified as being applicable, include the following provisions, in translation:

“Article 20: Method of voting (...)

20-1; the board consisting of founder-members shall select during the general meeting the Chair by means of a secret ballot and an absolute majority.

(...)

20-3; The mandate of the Chair is permanent.

(...)

Article 25: Quorum

(...)

Voting shall be decided by a simple majority, whereby the Chair's vote is decisive.

(...)

Article 30: Depositing of funds

The funds of the "Unie" shall be deposited with an approved bank into an account opened for this purpose by the Chair-Founder or chair of the Executive Committee.

(-)"

2.5 Trafigura concluded a settlement agreement with the State of Côte d'Ivoire called Protocole d'Accord (hereinafter: the Protocole) in 2007. The Protocole reads in translation, where relevant, as follows:

“(...) 1. The Ivorian State (...) acting (...) on behalf of (...) all victims of the toxic waste,
(...)”

7. SETTLEMENT OF DISPUTES

Parties shall endeavour to resolve any disputes regarding the validity, interpretation and/or implementation of this agreement amicably.

If no amicable solution is reached, disputes are settled in accordance with Ivorian law by the competent Côte d'Ivoire courts. (...) "

2.6 On 19 August 2008, a certificate of incorporation of the Association was issued in Ivory Coast. When reference is made to the official incorporation date of the Association, the date of 19 August 2008 is meant.

2.7 Represented by the British law firm Leigh Day & Co, over 30,000 persons who claimed to have suffered personal injury as a result of the dumping of the slops filed a civil action against (inter alia) Trafigura in the United Kingdom in November 2006. This resulted in a settlement in 2009, the so-called Leigh Day Settlement.

2.8 At the time of the incorporation of the Foundation on 27 June 2011, Kalilou Fadiga (hereinafter Fadiga) was the sole director. In an extract retrieved from the Chamber of Commerce on 18 February 2015, the activity of the Foundation is listed as "Advocacy". The person registered as the "Sole/independently authorised" director and chairman at as 1 August 2011 was Ouattara. In addition to him, the person who has been registered since 14 July 2014 as "Jointly authorised director (with other director(s), see Articles of Association), is Traore Hamed (hereinafter Hamed). On 4 and 5 November 2015 - i.e. the day on and the day after the Case Management Conference in these proceedings - Adame Travore and Petit Bari were registered as directors of the Foundation. The Foundation's Articles of Association read according to the memorandum of incorporation, insofar as relevant, as follows:

"Objects

Article 2.

1. The objects of the foundation are: to represent the interests of persons who have suffered or will suffer health injuries or whose interests have been adversely affected or are likely to be affected due to the dumping of substances in and around Abidjan (Ivory Coast) around August two thousand and six, which substances were located in the ship "Probo Koala" that had been ordered by Trafigura Beheer B.V. to transport the materials (the "Victims"); and to undertake everything connected to the above or that may be conducive thereto, all in the broadest sense of the word.
2. The foundation seeks to achieve its objects, inter alia by
 - (i) conducting legal proceedings for the protection of the Victims' interests;
 - (ii) obtaining compensation for the Victims for the losses that are or have been suffered (...) The foundation is not the ultimate beneficiary of the compensation to be obtained;(...)
3. The costs incurred and to be incurred by the Foundation will be borne by the persons who are the ultimate beneficiaries to the compensation to be obtained.
4. The foundation acts without self-interest and not for profit.

Board

Article 3.

1. The board of the foundation consists of members, the number of which is to be determined by the board, but being at least one member.
(...)"

2.9 The Foundation has submitted a printout of a list with the names of more than 100 people it claims to represent. At the same time, the Foundation has submitted a DVD with a list of the names of all the people it claims to represent (according to the Foundation's count the number is 110,937). In addition, the Foundation has produced a DVD containing - according to the Foundation's explanation - the medical and legal reports of 100 people. The Foundation has submitted a printout of 30 dossiers (also referred to as the sample dossiers). These 30 sample dossiers form part of the aforementioned 100 medical and legal reports. Almost all the printed sample dossiers contain a form entitled "Fiche d'identification d'adhesion et de procuration" (hereinafter the Fiche) and a form entitled "Attestation".

2:10 The majority of Fiches is dated in 2006 and 2007, and a single Fiche is dated in 2009. The Fiches are printed on the Association's letterhead on which the official founding date of the Association is stated in the pre-printed text at the bottom.

The text of the Fiche reads in translation, where relevant:

"I declare by means of the present form that I grant to the founding chair of the UVDTAB, Mr. Ouattara (...), my power-of-attorney to represent me in any judicial or administrative action, both nationally and internationally with the aim of obtaining compensation as victim of the toxic waste from TRAFIGURA and others. In order to help UVDTAB succeed with its mission, I undertake to pay the registration fee and the cost of preparing the dossiers and, after compensation has actually been paid, I agree that 30% of that amount is deducted for commissions and fees.

(...)

In support of which I sign this form (...)

[date]

[Signature or fingerprint]".

2.11 The Attestations included in the sample dossiers are all dated between 3 and 10 July 2013. An Attestation dated 7 July 2013 reads in translation, insofar as relevant, as follows:

FOUNDATION UVDTAB

The undersigned, Mr. Ouattara (...) Chairman of the Union des Victimes des Déchets Toxiques d'Abidjan et banlieues (UVDTAB) under Ivorian law and of the foundation UVDTAB under the law of the Netherlands states that (...) ms (...)

Date of birth (...) duly registered and included in the list of victims of toxic waste who are members of the UVDTAB. (...)

By signing this document I agree (...) the victim (...), the father, mother, guardian, sibling or beneficiary (...) in the continuation of the proceedings against the Amsterdam municipality brought by the foundation UVDTAB, to defend my rights and to obtain compensation from Trafigura and others for the personal injury suffered by me. (...) I

have already registered for the benefit of other [proceeding] prepared by third parties in Amsterdam. I ratify this document in order that it may legally serve and apply (...)”.

2:12 In 2008, on behalf of a large group of claimants, proceedings were brought in the Ivory Coast against inter alia Trafigura. On 23 July 2014, the Ivorian Supreme Court in a joint session in highest court ruled that - also in view of the Protocole - Trafigura is not liable against the claimants.

3 The claim in the main case

3.1. The Foundation seeks, after amendment of the claim, summarised, that in a provisionally enforceable judgment, primarily under the provisions of Book 3, Section 305a of the Civil Code (hereinafter referred to as: Civil Code) the court give a declaratory decision that (1) Trafigura acts and has acted unlawfully towards victims of the toxic disaster with the Probo Koala, (2) Trafigura is liable for the material and immaterial damages suffered, and (3) that subject to a penalty, it is obliged to make a start with the clean-up operations within three months, and alternatively on grounds of powers of attorney and/or mandates issued to the Foundation, or at any rate on grounds of management of another’s affairs, the Court rules that (1) Trafigura is liable towards (present and future) participants in the Foundation for damages which they have suffered and will still suffer and sentence Trafigura to compensate this damage to be assessed during separate follow-up proceedings, as well as that (2) it is, subject to a penalty, obliged to make a start within three months with the clean-up operations, as well as a conviction in the costs of these proceedings.

4 The claim in the procedural issues

4.1. Trafigura seeks that the court, in a provisionally enforceable judgment,
- establishes that the Foundation under the provisions of Article 224 of the Code of Civil Procedure (hereinafter referred to as: Code of Civil Procedure) provides security for Trafigura’s court costs,
- declares that it lacks jurisdiction to hear the claims made by the Foundation and/or at least
- declares that the Foundation is inadmissible in its claims and
- orders the Foundation to pay the costs of these proceedings.

4.2. The Foundation puts up a defence. Insofar as it is of importance, the positions of the parties are addressed below.

5 Judgment in the procedural issues

The Jurisdiction

5.1. With recourse to the provisions of Article 8 paragraph 2 of the Code of Civil

Procedure, Trafigura states that the Dutch court has no jurisdiction since the claims in these proceedings are covered in the Protocol by an exclusive choice for the Ivorian courts. The question whether there is a valid choice of forum must according to her be answered in accordance with Ivorian law, because that is a question of material nature. The Foundation denies that there is a (tacit) choice of forum. It stresses that the primary claims are established on the basis of Book 3 Section 305a of the Civil Code and that any choice of forum does not apply to them, as well as that for the claims in the alternative that the persons for whom they act are not party to the Protocol whereby such persons do not qualify as a party within the meaning of Article 8 of the Code of Civil Procedure.

5.2. The Court insists that in the clause in the Protocol on which Trafigura relies, there is a question of "disputes regarding the validity, interpretation and/or implementation of the present agreement". The foundation bases its claims on Book 8 Section 620 et seq. of the Civil Code and on the argument that Trafigura has acted unlawfully and has in no way used the Protocol on which to base its claims. Without further explanation, which was not given by Trafigura, it is not clear how the claims in the main case, which do not concern the validity, interpretation and/or implementation of the Protocol, but are based on Book 8, Section 620 et seq. of the Civil Code respectively unlawful act, may fall under the operation of the choice of forum clause contained therein. That means that it cannot be established that the choice of forum clause obstructs the jurisdiction of the Dutch courts, resulting from Article 4 paragraph 1 of the Brussels I *bis* Regulation and Article 2 of the Code of Civil Procedure. The Dutch court is therefore competent to acknowledge these claims.

Admissibility

5.3. Trafigura has argued on several grounds that the Foundation should be declared inadmissible. Not in dispute is that the question of the admissibility of a procedural nature shall be governed by Dutch law.

Admissibility in the primary claims

Change of claim and status change

5.4. By writ the Foundation claimed, briefly summarised, compensation for the claiming victims, whereas after the change of claim in November 2015 they primarily litigated on the basis of Book 3, Section 305a of the Civil Code. Trafigura has argued that this is a prohibited change of capacity on the part of the Foundation. In the hearing, the court ruled that this is not the case because the summons left the possibility open that it was litigated on the basis of Book 3 Section 305a of the Civil Code. From the letter from Mr Knigge of 24 March 2015 (being from prior to the change of claim) it appears that he too had already taken that possibility into account so that Trafigura's interests are not be damaged.

The requirement of sufficient safeguards

5.5. Trafigura takes the position that the Foundation should be declared inadmissible because the interests of those for whom the Foundation states to act, are insufficiently safeguarded. To this end Trafigura has called upon the requirement pursuant to the last sentence of Book 3, Section 305a paragraph 2 of the Civil Code for admissibility of a foundation or association which starts a collective action: with legal proceedings the interests of the persons on behalf of whom the claim is instituted should be sufficiently safeguarded.

5.6 The Court takes into account the fact that the legislator, according to legislative history (Lower House, 2011-2012, 33 126, no. 3, pp. 4-6 and 12 et seq.) has added this requirement per 1 July 2013 of Book 3, Section 305a paragraph 2 of the Civil Code, to prevent organisations using the right of collective action for their own commercial objectives. The legislator wants to offer the court a tool to critically assess the admissibility in a collective action, if an organisation: sets itself up as a defender of the interests of the victims but its own commercial interests seem to dominate. According to legislative history, for the purpose of assessing whether this safeguarding requirement is satisfied, the focus lies on the following two questions:

(i) To what extent those involved have ultimately benefited from the collective action if the claim is granted?

(ii) To what extent it can be trusted that the applicant organisation has sufficient knowledge and skills to carry out the procedure?

In order to answer the question of whether the interests of the parties concerned are sufficiently safeguarded, so too according to legislative history, also the following factors should be taken into account:

(-) What other activities has the organisation carried out in respect of the interests of those involved and has the organisation also actually been able to achieve objectives in the past and, if there is a question of an ad hoc organisation, is this founded by an existing organisation who has successfully pursued the interests of the parties concerned in the past (this point of view will be referred to as the track record),

(-) How many victims are members of the organisation and to what extent they support the collective action (hereinafter referred to as: the representativeness) and,

(-) Whether the organisation complies with the principles of the Claim Code.

5.7 The above elements will hereinafter be separately reviewed by the court.

Track record

5.8 It has neither been argued nor does it appear that the Foundation, except for submitting to the court an application in partial dispute proceedings against Trafigura in 2014, has carried out any other activities to represent the interests of the victims that the Foundation claims it represents. In the partial dispute proceedings, the court ruled that the application submitted was "totally unnecessary or unjustified".

5.9 In the absence of any other connecting factor, the Foundation should therefore be classified as an ad hoc organization in the meaning referred to in 5.6 above. At the time of

the incorporation of the Foundation in 2011, Fadiga was the sole director. One month later, Ouattara was registered as the sole director. Afterwards, other directors were registered. The Foundation, however, argues that Ouattara and the other board members have relevant experience or knowledge, but that argument has not been substantiated and neither has it come to light from the submissions. In these proceedings, it has been established that the Foundation has close ties with the Association, while Ouattara serves as the President-Founder thereof. However, there is no explanation on the part of the Foundation which may lead to the conclusion that due to these ties, the Foundation is better able to represent the interests of its alleged supporters. It has neither been argued nor does it appear that the Foundation was incorporated by an existing interest group that in the past had successfully represented the interests of the relevant parties. Therefore, it cannot be said that the Foundation has a relevant track record.

Representativeness

5.10 The Foundation stated in the writ of summons that it acts on behalf of 110,937 Ivorian victims. In the Motion for Change of Claim, the Foundation has explained its representative character as follows: of all the victim associations in Abidjan, the Foundation represents the majority of victims. The Foundation works with 80 victim coordinators and all supporting documents have been collected in an office in Abidjan. The Foundation argues that for each victim it represents, there is a dossier containing a signed power-of-attorney. In support of these arguments, the Foundation has made reference to the submitted documents (see 2.9-2.10). At the hearing of the parties, the Foundation stated that the Foundation is able to digitally produce a further 7,500 powers-of-attorney. According to the Foundation, the Attestations (see below under 2.11) provide sufficient evidence of the authorisations granted to the Foundation.

5.11 Trafigura has denied that the Foundation represents more than 110,000 people and has stated that the Foundation cannot produce evidence thereof by simply producing copies of only a limited number of files and documents which the Foundations describes as 'authorisations'. Furthermore, Trafigura has noted a large number of irregularities in the dossiers produced as evidence by the Foundation which - in Trafigura's opinion - cast doubt on the authenticity of the dossiers and by extension, cast doubt on the reliability of the Foundation.

5.12 In this regard, in the first place Trafigura has argued that forms and reports contained in the sample files appear to have been backdated. Documents from the sample files that were printed on the Association's stationery, show in many cases the date of signature as being earlier (i.e. in 2006 or 2007) than the year shown as the official date of the Association's incorporation that appears in the pre-printed part at the bottom of the letterhead (see below 2.6). At the hearing, the Foundation made the following explanatory statement: the investigation carried out by the Association and mentioned in the documents took place in 2006 when the Association started its activities. In 2008, when the Association was registered, many documents were reprinted on the new stationery. That was also related to the fact that there was new information about the victims that the Association wanted to register. In rebuttal to this, Trafigura has highlighted the fact that some of the forms it refers to, the signatures or fingerprints go over the bottom of the

letterhead, indicating that the bottom of the letterhead was already present on the document when the document was signed and dated; therefore, the previous dates and the further explanation given by the Foundation at the hearing of the parties cannot be true. On this point, the Foundation has not made any specific rejoinder. The Foundation has offered evidence in the form of testimony by K. Bamba, an Ivorian lawyer assisting the Association (hereinafter Bamba), but this offer is insufficiently specific as the Foundation has not explained how Bamba could state anything other than what has already been stated at the hearing of the parties (where she was present), for which reason this offer is not taken up.

5.13 Trafigura has further highlighted the fact that, for example, the dates of birth in two of the 30 printed sample files are questionable. Thus, in dossier 9, forming part of Exhibit 19 Motion for Change of Claim, in a file dated 5 October 2006 relating to a child aged six months (namely Banse Mariam born on 9 May 2006), a photo at the top right of the page can be seen of a child of kindergarten or elementary school age. In a sample file submitted with the same Motion for Change of Claim as dossier 6, there is a child who was born in 2009, i.e. well after the toxic waste dump, so it is unclear how this child could have suffered any injury from the toxic waste dump. In addition, Trafigura has noted that the medical reports in a number of dossiers predate the issuance of the corresponding (unique) identity of the relevant person and the birth dates of a number of people whose medical records have been produced as evidence by the Foundation come after the date of the "Declaration of truth" included in the dossier; this would mean that these documents were drawn up at a time when said persons had not yet been born. With regard to all these absurdities, the Foundation has given no satisfactory explanation.

5.14 Furthermore, Trafigura has commented on the lists showing the names that the Foundation has produced as evidence in support of its representativeness. Referring to a report drawn up by an expert, Trafigura maintains that there are internal duplications and that names on the list are also replicated on lists submitted by other parties that are conducting proceedings with the same goal and for which a settlement has been reached (for example, the Leigh Day list see above under 2.7). The relevant persons therefore have no legitimate interest in the claims in the present proceedings, according to Trafigura. In this regard, the Foundation has provided an explanation about the uncertainty regarding some of the names; for the other names, the Foundation has only challenged in a general sense that there is duplication or overlap with lists from other proceedings. Essentially, the argument put forward by the Foundation is correct that whether or not the names of people are listed who were also involved in other compensation proceedings and the number of said names, is not relevant with regard to the admissibility of the Foundation's claim based on Section 3:305a Civil Code. However, in the opinion of the court, the arguments put forward by Trafigura in this respect - and that to a large extent have not been refuted with sufficient reasons - seriously undermine the credibility of the evidence which the Foundation has produced as evidence to show its representativeness as well as all the arguments put forward by the Foundation in this context.

5.15 Finally, the Foundation, despite repeated requests made by Trafigura in the course of the proceedings, has not submitted copies of all the authorisations that the

Foundation claims to have, and - contrary to Section 85 (2) of the Netherlands Code of Civil Procedure - has not allowed an inspection of the documents themselves. It argues that in the interests of procedural economy, it is not possible to produce as evidence the authorisation for each individual victim and that this is not a reasonable requirement to place on the Foundation. Without a more specific explanation, it is not possible to follow this argument put forward by the Foundation. With the current state of technology, it should be possible for a well-organised organization to produce large volumes of documents, in any event, digitized. The fact that this takes time and money, as well as the Foundation's argument that the Ivory Coast is a developing country where the standards are different than in the western world, do not mean the Foundation cannot be requested to do this. The Foundation has argued that the number of its supporters is irrelevant. The Foundation claims that even if it were to represent just one victim, the Foundation's claim should still be declared admissible. It is true that the number of victims who have joined the Foundation and who support the joint action is not, per se, a decisive factor for admissibility. However, this is a factor mentioned by the legislature (see above under 5.6) that should be taken into account in determining whether or not the interests of the injured parties are being adequately safeguarded. On the basis of the arguments put forward by the Foundation, the court is now unable to establish the persons represented by the Foundation, let alone that 110,937 people have joined the Foundation.

5.16 In summary, it has not been established that the Foundation represents people (and how many) who, according to the objects stated in the Foundation's Articles of Association, have suffered harm as a result of the toxic waste dump and have therefore joined the Foundation and support the joint action. For that reason, the court must find that the requirement for representativeness has not been fulfilled.

Claim Code

5.17 The Foundation has disputed that it does not comply with the principles of the Claim Code and at the same time, has also argued that it does not have to comply with these principles. The court takes into account that the Claims Code is a document prepared by the Claim Code Committee in 2011, which formulates principles which must be complied with by organisations, such as the Foundation, pursuant to Section 3:305a Civil Code. The Claim Code provides a form of self-regulation by the market parties involved, with the aim of preventing the proliferation of entities acting pursuant to Section 3:305a Civil Code and ensuring that the victims' interests are safeguarded and not the (commercial) interests of the founders of these entities. The Claim Code therefore contains rules on the composition, duties and remuneration of the Board and the tasks and composition of the Supervisory Board as well as the not-for-profit representation of collective interests, and the independence and avoidance of conflict of interest. Although compliance with the principles of the Claim Code is not a legal requirement for admissibility, nevertheless since 1 July 2013, there has been an indirect basis in the law, through Section 3:305a (2), last sentence of the Civil Code. The question as to whether and to what extent it may be expected that the applicant organisation has sufficient knowledge and skills to serve the interests of the persons it claims it represents, may well be answered by the fact that the organisation complies with the principles laid down in the Claim Code. The court finds, in line with what has been considered under 5.6, that

compliance or non-compliance with these principles is relevant.

5.18 Trafigura has argued that the Foundation - contrary to the Claim Code which stipulates that the board of an entity within the meaning of Section 3:305a Civil Code must consist of at least three directors - initially had only one director, and until recently two directors and that these directors did not meet the qualification requirements set out in the Claims Code. Trafigura has also pointed out that the Foundation does not have a supervisory board as is unambiguously required by the Claim Code.

5.19 The court gives due consideration to the fact that the Claims Code prescribes that the power to represent the company is vested in the board of directors and in two directors acting jointly. The submitted extract from the Chamber of Commerce for the Foundation (see under 2.8) lists Ouattara and Hamed as directors of the Foundation and also states that Ouattara has sole/independent authority to represent the company. This latter is not in accordance with the Claims Code. The Claims Code also states that the board of directors must have access to specific expertise, and that at least one director must have the specific experience and legal expertise that is necessary for the sufficient representation of the interests in line with its statutory objective. Although the Foundation claims that Ouattara or the other directors have relevant experience or knowledge, it has in no way substantiated that claim. In that context, the Foundation has submitted that it has sufficient knowledge of the issues at hand and is capable of commissioning investigations and seeking legal advice, amongst others from Bamba. However, this cannot be considered equivalent to the availability of a sufficiently qualified board of directors, as prescribed by the Claims Code, and is therefore insufficient. Moreover, it has not been stated or shown that the Foundation has a Supervisory Board; the articles of association show no indication of such, in any case. While the Claims Code does offer legal entities in the sense of Section 3:305a of the Civil Code the option to deviate from individual provisions under exceptional circumstances, this is only permitted if an explanation for the deviation is provided. The Foundation, which defines itself as a foundation under Dutch law in the sense of Section 3:305a of the Civil Code and purports to be in compliance with the principles of the Claims Code, has not explained in the proceedings in question or elsewhere, for instance in a document on its website, why it does not have a Supervisory Board. In fact, it has not even been shown that the Foundation has a website to provide information to its supporters (amongst other reasons). In that respect as well, it fails to comply with the principles of the Claims Code.

5.20 Trafigura has also questioned the autonomy of Ouattara and the board of directors, citing that he has appointed family members to the board of directors, that all the power in the Foundation is in his hands, and that there is a conflict of interests with the Association. According to Trafigura, the Foundation can be equated with, or is in any case closely affiliated with the Association. According to Trafigura, this is evidenced by the sample dossiers of the alleged victims submitted in the proceedings, which were nearly all printed on letterhead stationery of the Association. The Foundation, or in any case Ouattara, has also sent a version of the articles of the Association to Trafigura which has all sorts of things wrong with it, making it unclear which rules the Association is required to follow. All this raises doubts regarding the integrity of the Foundation and its chairman, according to Trafigura.

5.21 The court observes that the dossier offers an impression of a foundation under Dutch law that has close ties to the Association established by Ouattara. Although a conflict of interests or abuse/misuse of power has not been established, it is clear that there is no oversight whatsoever regarding governance of the Association. As an Association under Ivorian law, it is not required to comply with Dutch law or with the Claims Code. Moreover, Ouattara's background and his role within the Association and the Foundation are unclear: the Foundation has offered no background information on his person whatsoever. It must also be stated that the power within the Foundation is vested to a significant extent in Ouattara, since he is (in violation of the provisions of the Claims Code, see 5.19) a director who is independently authorised to represent the Foundation. All in all, it can therefore be stated that insufficient safeguards have been provided to prevent Ouattara from allowing his personal interests to take precedence at any time over the stated considerable financial interests of the parties that are allegedly affiliated with the Foundation. The court also takes into consideration that, as Trafigura has already noted, by signing the Fiche, the participants committed to pay registration fees and costs for compiling the dossiers and that they agreed that 30 per cent of any damages paid by Trafigura would be retained by the Association. Without further information, which has not been provided by the Foundation, this cannot easily be reconciled with the guiding principle stated in Article 2.4 of the Foundation's articles of association (and the principle in the Claims Code) that the legal entity is a non-profit organisation. The fact that the deducted amount would be paid to the Association and not to the Foundation, as the Foundation has submitted in its defence in this context, does not change the matter. Since the Foundation, as outlined in the considerations above, has close ties with the Association, the Foundation cannot rely on such a formality. After all, this does not exclude that there is a construction -the actual claim is submitted by the Association under Ivorian law, whereas the Foundation is merely a vehicle for this Association- which is in violation of the safeguards provided in Section 3:305a of the Civil Code. Finally, the Foundation submitted that retaining a part of the damage compensation ultimately received was justified due to all the time and money that the Foundation has invested in order to submit the claims and recoup the damages. However, the court deems that this argument is insufficient, since the signatories to the Fiche have committed both to pay costs and to hand over a significant percentage of any damages received.

Conclusion

5.22 Trafigura has provided meticulous and extensive facts to support its allegation that the Foundation fails to comply with the requirements it must meet pursuant to Section 3:305a, paragraph 2, last sentence. The response that the Foundation has offered is very minimal and, as shown above, insufficient in the opinion of the court to refute the abundance of persuasive arguments presented by Trafigura. Moreover, the Foundation has been unable to refute the impression created by Trafigura that it does not have its administration in order and that it lacks sufficient knowledge and skills to achieve its statutory objective, or in any case to instruct its counsel appropriately and provide the necessary documentation. On the basis of all the above, it must be concluded that the legal actions of the Foundation do not sufficiently safeguard the interests of the persons on whose behalf the legal actions were instituted. For that reason, the Foundation's

principal claims will be dismissed.

Admissibility of the alternative claims

5.23 The Foundation states that it received power of attorney from 110,937 persons to represent them in the context of these proceedings. Trafigura has argued that the Foundation's alternative claims should also be dismissed if its principal claims are dismissed, since it does not meet the criteria for a foundation under Dutch law in the sense of Section 3:305a of the Civil Code. In this context, it invokes abuse of legal proceedings, since the rules regarding claims foundations would be circumvented by this means, potentially leading to a decision that would not have been preceded by correct legal proceedings and in which the interests of the indirect stakeholders would not have been sufficiently safeguarded.

5.24 The Foundation has not clarified the extent to which its alternative claims pursue a different purpose than its principal claims. Rather, the Foundation's alternative claims correspond in essence with its principal claims. What the Foundation presents to substantiate the alternative claims is in fact (dumping toxic waste) and in legal basis (Section 8:620 and following of the Civil Code and unlawful actions) equivalent to the basis for the principal claims, with the proviso that the Foundation does not base these alternative claims on Section 3:305a of the Civil Code, but rather purports to act on the basis of management of a third party's affairs.

5.25 Since these claims by the Foundation are effectively a disguised form of collective action, considering that its principal claims are based on the same facts and on the same legal basis, the Foundation's alternative claims must also be dismissed. The fact that the Foundation is not formally acting as a legal entity in the sense of Section 3:305a of the Civil Code in the context does not change that situation. On the contrary. If the court were to decide otherwise, it would permit the Foundation -in violation of the requirements for due process- to use its alternative claims to avoid fulfilling the terms and conditions that the law imposes in Section 3:305a of the Civil Code on legal entities protecting equivalent interests of third parties. It should be noted that the right of access to a court by the persons who the Foundation purports to represent is only very minimally restricted as a result of the disallowance of the Foundation. The court solely restricts this foundation under Dutch law from acting on behalf of these persons; in principle, there is nothing preventing these persons from initiating other legal proceedings to achieve the same purpose. The restriction, which states that this Foundation has no access to the court to act as a formal party to the proceedings on behalf of others, moreover serves a legitimate purpose, and is proportionate to the violation and the intended purpose. In this case, it has been established (see above under 5.22) that the legal actions of the Foundation do not sufficiently safeguard the interests of the persons they purport to represent.

5.26 The conclusion is that the Foundation's alternative claims are also dismissed and that the assessment of the further incidents and all other matters on which the parties are not yet in agreement will not be considered. The Foundation, the party against whom the matter is decided, will be ordered to pay the costs of the proceedings, assessed for

Trafigura in the principal proceedings and in the incidents to date at:

- salary of legal counsel	€ 1,356.00 (3 units x rate of € 452.00)
- court registry fees	€ 3,864.00
Total	€ 5,220.00

5.27 Further costs shall be awarded to the extent that they can already be assessed, and will be allocated in the manner stated in the decision.

6. The Decision

The court:

- 6.1. dismisses the claims of the Foundation in the principal proceedings,
- 6.2. orders the Foundation to pay the costs of the proceedings for Trafigura, assessed to date at € 5,220.00,
- 6.3. orders the Foundation to pay the additional costs incurred after this decision, assessed at € 131.00 for legal counsel, to be increased by € 68.00 for legal counsel and the record of service of the ruling on the condition that the Foundation has not paid within 14 days after it has received a demand for payment and subsequently it has been served notice of the decision, to be increased by the statutory interest as of 14 days from today,
- 6.4. declares this judgment to be immediately enforceable in respect of the foregoing order as to costs.

This judgment was handed down by mr. M.M. Korsten - Krijnen, mr. Q.R.M. Falger and mr. R.A. Dudok van Heel, assisted by mr. E.M. Hansen-Löve, and delivered in open court on 30 November 2016.

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