judgment

OF THE AMSTERDAM COURT OF APPEAL

civil law and tax law division, team I

case number : 200.226.640/0 I

case number Amsterdam District Court :C/13/500953/HAZA 11-2560

judgment of the civil chamber sitting with three judges dated 4 February 2020

in the matter of

CDC PROJECT 13 SA,
a company incorporated under the law of Belgium,
having its registered office in Brussels, Belgium,
appellant,
also respondent in the cross-appeal,
lawyer: M.H.J. van Maanen in The Hague

v

KEMIRA CHEMICALS OY,
a company incorporated under the law of Finland,
having its registered office in Helsinki, Finland,
respondent,
also appellant in the cross-appeal,
lawyer: A. Knigge in Amsterdam.

1. The appellate proceedings

The parties are hereinafter referred to as CDC and Kemira.

By summons of 10 August 2017 CDC has filed an appeal against a judgment of the Amsterdam District Court dated 10 May 2017, pronounced under the abovementioned case number between CDC as the claimant and Kemira as the defendant.

The parties then submitted the following documents:
- statement of appeal, with exhibits;
- defence on appeal, also statement in the cross-appeal, with exhibits;
- defence in the cross-appeal, with exhibits.

The parties then applied for judgment. Finally, by letters of 31 December 2019 CDC and Kemira have withdrawn all reciprocal grounds for appeal insofar as they specifically relate to (the assignment or, as the case may be, the limitation of) the claims under Czech or Slovakian law.

The parties had their cases argued at the hearing of 10 October 2019: CDC by the aforementioned Van Maanen and T.S. Hoyer, lawyer in The Hague, and Kemira by P. Sluijter and L.F. Dröge, both lawyers in Amsterdam, as well as the aforementioned Knigge, each party basing its arguments on the submitted pleading notes. On behalf of Kemira, Max Gallist (general counsel) has appeared before the court. On behalf of CDC, T. Schreiber and V. Savov (CDC Holding's managing director and executive director, respectively) have appeared before the court. Together with their oral documents, the parties have submitted further exhibits: Kemira has submitted Exhibits up to and including 52 in these appellate proceedings, and CDC has submitted exhibits up to and including 64.

In appeal, CDC has requested the Court of Appeal to set aside the contested judgment and refer the case back to the Amsterdam District Court in order to – taking into account the judgment of the Court of Appeal – take the matter up in the main action and order Kemira to pay the costs of the proceedings in both instances. In the principal appeal, Kemira has requested the Court of Appeal to (otherwise) uphold the contested judgment – insofar as any claims remain after the assessment in the cross-appeal – or dismiss the grounds for appeal brought forward by CDC, and order CDC to pay the costs of the proceedings in both instances, increased by subsequent costs and interest on the (subsequent) costs.

In the cross-appeal Kemira has argued that the Court of Appeal should set aside the contested judgment and declare CDC's claims inadmissible, or deny CDC's claims, and order CDC to pay the costs of the proceedings in both instances, increased by subsequent costs and interest on the (subsequent) costs. In the cross-appeal, CDC has argued that the appeal should be rejected and Kemira should be ordered to pay its costs.

In the appellate proceedings both parties have offered to prove all their assertions.

2. Facts

In 2.1 – 2.8 of the contested judgment, the District Court has established the facts that it has taken as a starting point for its judgment. These facts have not been disputed in appeal and will therefore also serve as the starting point for the Court of Appeal. Insofar as any complaints have been made on the correctness of the facts established by the District Court, the Court of Appeal will take those complaints into account in the summary of the facts set out below. Insofar as any complaints have been made on the completeness of the facts, this has been taken into account below. In summary and where necessary supplemented by other facts that have been established as having been argued by the one party and not or not sufficiently disputed by the other party, the following facts wills serve as a starting point.

2.1 On 2 August 2007 the Commission sent several producers of sodium chlorate, including Kemira (at the time named Finnish Chemicals Oy), a Statement of Objections. Kemira issued a press release that very day, stating, among other things:

"Finnish Chemicals Oy, a subsidiary of Kemira Oy, has received an EU Commission Statement of Objections concerning selling of sodium chlorate, with regard to alleged antitrust activities during 1994-2000."

2.2 The Commission published its decision by means of a press release dated 11 June 2008. The press release reads, insofar as relevant here, as follows:

*"**The European Commission has imposed fines, totalling EUR 79 070 000 on four groups of companies for allocating sales volumes and fixing prices for sodium chlorate, an oxidizing agent used mainly for bleaching in the pulp and paper industry. (...) The companies concerned are: (...) Finnish Chemicals,***
[**Court of Appeal: Kemira**] (..). Between late 1994 and 2000, these companies fixed prices and allocated markets through a series of meetings and other illicit contacts.
(..)
The Commission's investigation was triggered by an application for immunity lodged by EKA Chemicals in March 2003. Finnish Chemicals also made an application under the 2002Leniency Notice.

Action for damages
Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages."

2.3 The Commission published a summary (hereinafter: the summary) of its decision of 11 June 2008 in the Official Journal of the European Union of 17 June 2009. The summary states, insofar as relevant here:

"**1. *INTRODUCTION***
(1) On 11 June 2008, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No. 1/2003 the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.
(2) The Decision is addressed to 8 legal entities: EKA Chemicals AB and its parent company Akzo Nobel NV; Arkema France SA and its parent company during the time of the infringement Elf Aquitaine SA; Finnish Chemicals Oy and its parent company during the time of the infringement Erikem Luxembourg SA; and Aragonesas Industrias y Energia SAU and its parent company during the time of the infringement Uralita SA, for an infringement of the provisions of Article 81 of the Treaty and Article 53 of the EEA Agreement.
(..)

3. SUMMARY OF THE INFRINGEMENT
(9) The product concerned, Sodium Chlorate (hereinafter 'SC'), is a strong oxidizing substance agent used mainly for the manufacturing of chlorine dioxide which in turn is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include drinking water purification, textile bleaching, herbicides and uranium refining. The estimated EEA market value for SC in 1999 was approximately EUR 203 million. The four undertakings involved in the infringement had an estimated market share of about 93 %, i.e. between EUR 185 and 195 million.

(10) The decision concludes that EKA Chemicals AB, Finnish Chemicals Oy, Arkema France SA and Aragonesas Industrias y Energia SA operated between 21 September 1994 and 9 February 2000 a cartel with a view to sharing the market for SC by allocating sales volumes and by fixing and/or maintaining its prices on the EEA market. The parties also exchanged information to facilitate and/or monitor the implementation of the illicit arrangements.

(11) The involved undertakings pursued a strategy of stabilizing the SC market with the ultimate aim to allocate the SC sales volumes among each other, to coordinate the pricing policy towards the customers and thereby to maximize the profit margins. It is further demonstrated that the competitors attempted to implement the illicit arrangements on the market by means of the renegotiating SC prices with the respective customers."

2.4 On 30 October 2009 the Commission published a non-confidential version of the decision. In that version, large parts of the decision's text were left out, in particular on the issue of the nature and extent of the infringement.

2.5 Several parties to which the decision was addressed filed an appeal against the decision; Kemira was not among them. By judgment of 17 May 2011 the Court of First Instance (hereinafter: the Court) declared the appeal by Elf Aquitaine SA (T-299/08) and Arkema France SA (T-343/08) unfounded. Subsequently, on 25 October 2011 the Court dismissed the appeal filed by Uralita SA (T-349/08) and Aragonesas Industrias y Energia SAU (T-348/08) as unfounded. No remedy was sought against that decision. The appeal filed by Elf Aquitaine was dismissed on 12 February 2012. The decision has by now become irreversible for all parties addressed (hereinafter also referred to as: the cartel members).

2.6 Between CDC and twelve groups of pulp and/or paper producers who were (allegedly) buyers of the sodium chlorate supplied by the cartel members (hereinafter also referred to as: the Customers) agreements were made by which the Customers assigned all their (alleged) claims for damages against the cartel members to CDC, at a purchase price to be paid by CDC. In these proceedings, after a reduction of claim, the following parties are left:

a. Altri, S.G.P.S., S.A., a Portuguese company with a subsidiary, both with production sites in Portugal;
b. Billerud AB, a Swedish company with two subsidiaries, all with production sites in Sweden;
c. Celulosas de Asturias S.A. (CEASA), a Spanish company, with a production site in Spain;
d. Mondi SCP, a.s., a Slovakian company with a production site in Slovakia;
e. Mondieteti a.s., a Czech company with a production site in the Czech Republic,
f. Rottneros AB, Swedish company with a subsidiary, both with production sites in Sweden;
g. Sodra Cell AB, a Swedish company with a Norwegian subsidiary and production sites in Sweden and Norway;
h. Stora Enso Oyj, a Finnish company with Swedish and Finnish subsidiaries and production sites in Finland and Sweden;
i. M-Real Oyj, a Finnish company with Swedish and French subsidiaries and production sites in Sweden and France;
j. Oy Metsa-Botnia Ab, a Finnish company with production sites in Finland.

2.7 Insofar as these companies form part of a group of companies (the subsidiaries referred to in 2.6 a, b, f, g, h and j) the subsidiaries have first entered into agreements with their respective parent companies pursuant to which they were required to assign their alleged cartel damage claims. These parent companies then entered into assignment agreements with CDC for all their own claims and those of their subsidiaries (hereinafter: the assignment agreements). The assignment agreements between CDC and the parent companies are all governed by Dutch law. Equally so, the assignment agreements between CDC and the companies referred to in 2.6. a, c, d and e are governed by Dutch law.

2.8 The assignment agreements between the subsidiaries and the parent companies all provide as follows, insofar as relevant:

> *'ASSIGNOR hereby assigns to ASSIGNEE all damage claims which ASSIGNOR has or might have with regard to purchases of Sodium Chlorate between 1 January 1992 and 31 December 2007, resulting from the violation of Article 101 and/or Article 102 Treaty on the Functioning of the European Union (TFEU, formally Article 81 and/or Article 82 EC-Treaty), Article 53 EEA-Agreement and/or the corresponding provisions in the Europe-Agreements (i.e. Agreements establishing an Association between the European Communities, their Member States and future Member States) and/or national competition laws, which constitute the Sodium Chlorate Cartel practiced in the European Union and in the EFTA States (see European Commission, decision of 11 June 2008, COMP/38.695), against any and all members of this Cartel, in particular Eka Chemicals AB (Sweden)/ Akzo Nobel NV (Netherlands), Finnish Chemicals Oy (Finland)/ Erikem S.A. (Luxembourg), Arkema France SA (France)/ Elf Aquitaine SA (France), Aragonesas Industrias y Energia S.A. (Spain)/ Uralita S.A. (Spain), including their legal successors and parent companies. The damage claims subject to this transfer by assignment have to be understood in a broad sense, covering any and all cartel-related damages, such as price overcharges, loss of profit, the costs of claims enforcement, and all the interests in this regard, including accessory rights.'*

2.9 The assignment agreements between CDC and the companies (some of which are parent companies) referred to in 2.6 a-j (designated as 'Company') all contain the following provisions:

> ***1. Definitions***
> *(...)*
> *(c) "Cartel" shall mean the anti-competitive practices constituting an infringement of Article 101 and/or 102 TFEU (previously Article 81 and/or Article 82 EC Treaty), Article 53(1) EEA-Agreement and/or the corresponding provisions of the agreements establishing an association between the European Communities, their Member States and future Member States ("Europe-Agreements") and/or national competition laws by Sodium Chlorate producers, as specified by the European Commission in its decision of 11 June 2008 (Case COMP/38.695), without however being limited to the time period of the infringement as defined in this decision (i.e. l September 1994 until 28 February 2000), which has affected the Product market in Europe.*
> *(d) "Cartel Period" shall mean the period in which the Cartel resulted in quantifiable damages. This period covers, but is not limited to the time period of the infringement defined in the decision of the European Commission COMP/38.695 (...).*
> *(g) "Damage Claims" shall mean any and all manners of damage claims against members of the Cartel regarding Cartel-related damages, including overcharges, interest, loss of profit, costs, expenses and fees.*
> *(l) "Product" shall mean Sodium Chlorate of any type and/or concentration, measured in metric tons.*
> *(. ..)*
> ***2. Claims Purchase***
> *(a) CDC hereby agrees to fully and finally purchase from COMPANY any and all Damage Claims of COMPANY-Group that COMPANY has against any and all*

members of the Cartel resulting from the Cartel and from Product purchases by COMPANY-Group during the Cartel Period.
(b) COMPANY hereby agrees to fully and finally sell, assign and transfer to CDC any and all Damage Claims of COMPANY-Group that COMPANY has against any and all members of the Cartel resulting from the Cartel and from Product purchases by COMPANY-Group during the Cartel Period. CDC agrees to accept the assignment of such Damage Claims by COMPANY.
(c) The Parties will execute the obligation set forth under Provision 2 (a) and (b) in a separate deed of transfer (within the meaning of article 3:94 Dutch Civil Code) under which the ownership of the Damage Claims of COMPANY-Group will pass from COMPANY to CDC.
(. ..)
16. Applicable Law
This Agreement is governed by Dutch law.

2.10 The deeds of assignment for the claims of the companies (some of which being parent companies) referred to in 2.6 a-j provide, inter alia:

2. Assignment and Transfer of any and all Damage Claims
(a) Pursuant to the Purchase and Assignment Agreement, COMPANY hereby fully and finally assigns and transfers to CDC any and all Damage Claims of COMPANY-Group that COMPANY has against any and all members of the Cartel resulting from the Cartel and from Product purchases by COMPANY-Group during the Cartel Period.

3. Assessment

3.1 This case is what is often referred to as a 'follow-on' cartel damages action. Initially, claims were also filed against the other members of the cartel – Akzo/Eka and Arkema France SA(/Elf Aquitaine) – but those claims have been withdrawn. CDC has argued that the claims of the cartel members' buyers listed in 2.6 have been assigned to it, and now requests an immediately enforceable judgment, after a change (reduction) of claim, in summary ordering Kemira to pay damages in the amount of well over EUR 61 million, less the amounts that would otherwise have been for the account of Akzo/Eka and Arkema France SA (/Elf Aquitaine) pursuant to the internal obligation to contribute, and plus the statutory interest under the law applicable to the claims, and ordering Kemira to pay the costs of this action.

With a view to efficient litigation, the District Court has informed the parties that it will first decide on two points of dispute: the limitation of the assigned claims and the legal validity of the assignments on which CDC has based its right of action. The parties have not raised any objections to this approach and the District Court has thus proceeded. The Judgment against which an interlocutory appeal has been permitted within the framework of that litigation process refers to both of these points.

3.2 As for the limitation, the District Court ruled that the claims governed by Finnish law are time-barred, save insofar as they occurred in the period from (1 October) 1998. Kemira's limitation defence did not refer to the claims that occurred after 1 October 1998, and there was no need for the District Court to pronounce a ruling on those claims.

The District Court finds that the claims governed by Spanish law and Swedish law, respectively, as well as the claims governed by Czech and Slovakian law, are time-barred. No decision has

been made on the claims governed by Austrian law as the District Court found that Kemira had no interest in such decision, given the reduction of the claim.

As for the assignments, the District Court ruled, in brief, that they are legally valid.

3.3. CDC has lodged a principal appeal against the ruling and its legal grounds relating to the limitation in its grounds for appeal 1-6, and Kemira has filed a cross-appeal with its second ground for appeal.

Kemira has filed a cross-appeal against the ruling and the legal grounds on which it was based with regard to the assignments, in its first ground for cross-appeal (which contains three sub-grounds).

These grounds will be discussed below. Insofar as the parties' appeals also examine other aspects of the dispute, here and there, just briefly or at length, these will be disregarded, as this interlocutory appeal is not intended for such discussions, given the aforementioned decisions with a view to efficient proceedings. If needed, the debate on those aspects may be continued after the case has been referred back to the District Court.

Limitation

3.4 It is not disputed that the inadmissible disruption of the market in terms of competition law caused by the cartel, and subsequently the illicit behaviour (under EU law) has taken place at the Customers' respective production site(s). It has also been established that the law applicable to the question of whether the Customers' claims are time-barred is the law that is always applicable to those damage claims (the law applicable to claims).

The first ground for appeal refers to the way in which the District Court has applied the rules from the applicable jurisdictions and need not be discussed separately when taking into consideration what is found below on each of those jurisdictions.

3.5 Spanish law

3.5.1. With ground for appeal 2 CDC argues that under Spanish law the claim against Kemira from the legal entities among the Customers who run a production site in Spain is not time-barred. The statutory regulations of Article 1968.2 in conjunction with 1969 of the Codigo Civil (hereinafter referred to as the CC, the Spanish Civil Code) provide for a subjective limitation period of one year, which will start to run if the injured party is not only aware of the unlawful act and the liable person, but also able to determine the extent of its damage. This means that the limitation period cannot start before the 'single and continuous infringement' of competition law has been finally determined, and the injured parties are aware of the facts relating to the way the cartel worked, and the damage that they suffered. In this matter, that moment was after the appeal period had expired, and after the Court had rejected the appeals referred to in para. 2.5, on 25 October 2011. At any rate, this moment did not occur any sooner than after the Court had ruled on the appeal lodged by cartel members other than Kemira, in May 2011. Two weeks after that ruling the summons was issued. Therefore, the claim is not time-barred.

3.5.2 In Kemira's opinion, the statement of 17 June 2009 (see para. 2.3 above) and certainly the publication of the non-confidential version of the decision dated 30 October (para. 2.4) provided the Customers with sufficient information on the infringement, the party responsible for the infringement and the damage. At that time, in accordance with Spanish case law, the limitation period started to run. Kemira points out that assignments agreements were signed

with CDC back in 2009. As it is not disputed that no use has been made of the possibility under Spanish law (Article 1973 CC) to interrupt the limitation period, even though the summons was not issued until 31 May 2011, i.e. more than one year after 31 October 2009, the claim is time-barred.

3.5.3 First of all, the Court of Appeal finds that for the period at issue here, prior to the directive on cartel damage coming into force, the rules on limitation periods were not harmonized, which means that the Member States were free to make their own rules for limitation periods, also within the framework of the right to damages for parties injured by a cartel that is prohibited under EU law. The starting point for an answer to the question at hand is therefore whether, under Spanish law, the claims are time-barred. Spanish law must in that context be interpreted in a manner that is in accordance with EU law. If the claim is time-barred under Spanish law, it must be decided whether that consequence is in violation of the principle of effectiveness under EU law, in the sense that will be extremely difficult if not impossible to exercise the right to damages.

The parties have acknowledged that this question must be answered on the basis of the recent judgment of the CJEU in the *Cogeco* case (C-637/17, 28 March 2019, ECLI:EU:C:2019:263).

3.5.4 The only disagreement between the parties is about the moment when the limitation period started to run. For that question, the ruling in the *Cogeco* case is important as well.
In its judgment, the CJEU found as follows, insofar as relevant:

"43 Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 25).
44 In that regard, and specifically in the context of competition law, those rules must not jeopardise the effective application of Article 102 TFEU (see, to that effect, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 26).
45 In that context, as limitation periods constitute detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of competition law, it is necessary, first, as the Advocate General observed in point 81 of her Opinion, to take all elements of the Portuguese rules on limitation into consideration.
46 Secondly, account must be taken of the specificities of competition law cases and in particular of the fact that the bringing of actions for damages on account of infringements of EU competition law requires, in principle, a complex factual and economic analysis.
47 In those circumstances, it must be stated that national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that right by the persons concerned, so as not to undermine completely the full effectiveness of Article 102 TFEU.
48 It follows that the duration of the limitation period cannot be short to the extent that, combined with the other rules on limitation, it renders the exercise of the right to claim compensation practically impossible or excessively difficult.
49 Short limitation periods that start to run before the person injured by the infringement of EU competition law is able to ascertain the identity of the infringer may render the exercise of the right to claim compensation practically impossible or excessively difficult.

50 It is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law.
51 The same applies to a short limitation period that cannot be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority or by a review court.
52 The appropriateness of a limitation period, having regard to the requirements of the principle of effectiveness, is of particular importance both in respect of actions for damages brought independently of a final decision of a national competition authority and for actions brought following such a decision. With regard to the latter, if the limitation period, which starts to run before the completion of the proceedings following which a final decision is made by the national competition authority or by a review court, is too short in relation to the duration of these proceedings and cannot be suspended or interrupted during the course of such proceedings, it is not inconceivable that that limitation period may expire even before those proceedings are completed. In that case, any person suffering harm would find it impossible to bring actions based on a final decision finding an infringement of EU competition rules.
(. ..)
55 In the light of the foregoing considerations, the answer to the second question and the part of the fourth question relating to the compatibility of national legislation such as Article 498(1) of the Civil Code with EU law is that Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority."

These findings show that the principle of effectiveness, given the special nature of infringements of competition law, especially in the event of follow-on claims, entails that the injured party must be able to await the final decision of the competition authority (including appeal, if any) and must have sufficient time after that to file its claim for damages, without a national limitation regime, as a whole, standing in its way. Even though the CJEU refers to national competition authorities, this rule applies just as well to the Commission as a competent EU authority, given the background explained by the CJEU. In the *Cogeco* case there was no EU authority that ruled on the cartel and, as a result, there was no reason to discuss this in the context of answering the questions.

3.5.5 Furthermore, the parties agree that, in agreement with the opinions of Spanish legal scholars, the judgment of the Spanish Supreme Court No. 528 of 4 September 2013 (ECLI:ES:TS:2013:4739) is relevant for determining the beginning of the limitation period of one year under Spanish law. According to this judgment, before *Cogeco* the Spanish law was interpreted such that the injured party needed to have information on the liable person and on the damage. A difference of opinion did exist on the question whether that information on the damage should include full knowledge of its extent.

3.5.6 Against that background and given the opinion of the CJEU as it appears from the *Cogeco* judgment, the Court of Appeal finds that the starting point should be that an interpretation of Spanish law in accordance with EU law entails that in the present case there should be time to at least wait for the final decision of the competition authorities, including appeal, before the limitation period starts to run. In this context it is of vital importance that in this case, unlike in the *Cogeco* case which dealt with abuse of a monopoly, a cartel is at issue.

This involves several members. To determine the damage caused by the cartel, it is important to know which legal entities have infringed competition law during which period of time This means that this final decision, in this case, is not already provided by the Commission's decision and Kemira's failing to appeal against that decision, but only by the ruling of the EU court as referred to in 2.5, i.e. no sooner than on 17 May 2011.

However, this does not alter the fact – which is, for that matter, rightfully submitted by Kemira – that, by not filing an appeal against the Commission's decision, it has been established that Kemira has infringed competition law and has an obligation to pay the penalty imposed by that decision. After all, that penalty does not affect the injured parties and the mere circumstance that competition law has been infringed is not sufficient, under Spanish law, to start the limitation period. In order for it to start running, there must be some understanding of the damage in the sense that a rough calculation of the damage can be made. The damage largely depends on the duration, nature and extent of that infringement. The decision of the EU court in the appeal by the cartel members other than Kemira was relevant for determining the extent of the infringement and, as a consequence, the damage for which the Customers could claim compensation, as well as for determining which parties were liable for the damage. The fact is that the Customers can, in principle, file claims against all members of the cartel for compensation of the damage that they have suffered as a result of the single and continuous infringement of competition law by those cartel members, albeit that the period during which each member took part in the cartel must be taken into account.

Also, this does not alter the fact, as Kemira has argued and substantiated, that under Spanish all cartel members are not automatically jointly and severally liable for the total damage, or, at any rate, that there are limitations applicable if only one of the cartel members is held responsible. This aspect relates to the substantive assessment of the admissibility of the claim, which has nothing to do with the start of the limitation period.

3.5.7 The fact that some Customers entered into assignment agreements as early as 2009, apparently because these Customers had discussed this with CDC in the context of a different cartel, cannot affect the above findings. After all, as CDC emphasises, Customers who believe that they have suffered losses as a result of a cartel are free to file claims for damages as soon as they believe they have sufficient relevant information. The fact is that they may even initiate proceedings before any competition authority has dealt with the matter. This is, however, not relevant for the present question on the start of the limitation period under Spanish law, or for the degree of certainty about the required facts in that context. It is also noteworthy that the Customers listed in 2.6 c and d, respectively, signed the assignment agreement with CDC on 21 April 2011, even though Kemira submits that it has information showing that Ceasa was already consulting with CDC in October 2010.

3.5.8 As the summons is dated 31 May 2011, limitation under Spanish law does not apply, as the summons was issued before the one year limitation period had started to run, and, therefore, before it had expired.

3.5.9 Even if, in general terms, it must be assumed that the limitation period started as a result of the publication of the press release or the summary of the Commission's decision, the present matter cannot lead to a different conclusion. That would have been possible only if the limitation period had been interrupted within one year after the press release or that publication. An interruption, however, also requires a specific and economic analysis, as the cartel was a secret operation and it may have affected a vast amount of transactions over the many years

before the Commission published the press release and the summary. Given the importance that Spanish law attaches to information on the damage before the limitation period starts to run, such investigation should at any rate also deal with the damage as a result of potentially affected transactions. With a view to the short term of one year, it must be ruled in this case that the limitation regime, including the possibility of interruption, is insufficiently attuned to the specific nature of competition law and the purposes for which this law is implemented.

Therefore, in this specific case the limitation regime, in spite of the possibility of interruption, violates the principle of effectiveness, on the ground that it was extremely difficult to exercise the right to damages. The fact that some Customers, as evidenced by assignment agreements entered into in 2009, may already have been able to determine their position at that time, cannot imply that this finding, in general terms, is not correct.

3.6 Finnish law

3.6.1 In ground for appeal 3 CDC argues that under Finnish law the claim from the legal entities among the customers who run a production site in Finland is not statute-barred insofar as it relates to claims that arose prior to 1 October 1998.

3.6.2 In ground for cross-appeal 2, Kemira submitted that it was not sufficiently evident from the judgment that the cut-off date fell on 1 October 1998 (and not on another date in the same year), so that the judgment cannot be upheld on that point, but that lacks relevance. After all, as the District Court also found, the parties (and their experts) agree that claims that arose from 1 October 1998 onwards were not time-barred (because that is when the law changed in Finland). Given this background, no significance can be reasonably attached to the mere fact that, in a number of places, the District Court mentioned only the year 1998 and not the precise date of 1 October 1998 each time.

3.6.3 At the time of the summons, the subjective three-year limitation period for the claims that arose before 1 October 1998 had not yet expired, given *mutatis mutandis* the same grounds as considered above for Spanish law under 3.5.1-3.5.7, but the dispute is not about that. It is about the objective limitation period.

3.6.4 CDC has established that under Finnish law the claims were time-barred because the objective limitation period of 10 years had already expired at the time of the decision of 17 May 2011. This period begins the moment the event giving rise to the damage occurs. The Finnish Supreme Court thereby interpreted the cartel damage claims as a series of claims arising from damages consisting of each separate transaction where damage arose, as a result of the cartel, usually in the form of an overcharge. That means that for each transaction where there was an overcharge as a result of the cartel, the limitation period started to run at the moment of that transaction, or at least at the moment that overcharge was calculated. The limitation period had therefore already expired for all those transactions (from the beginning of the cartel, according to the decision of 21 September 1994) up to 1 October 1998 by the time the competition law infringement was definitively established in May 2011 at the earliest. The Finnish limitation rules cannot, therefore, be applied, because they make recovery of the damage impossible, which is contrary to EU law, as CDC submits in its third ground for appeal.

3.6.5 Kemira claims that the Finnish limitation period, assessed according to the *Cogeco* rules, is not contrary to the principle of effectiveness. This is a long period, of 10 years, that can be interrupted quite simply – with a letter – as required. As early as 2 August 2007 or June 2008 (paras. 2.1 and 2.2.) there was enough knowledge to send an interruption letter.

3.6.6 It is established that in the period in question, limitation was governed by Section 7(2) of the

Limitation Act (LA) (in the English translation used by both parties) and that the law has since been amended, so that Section 18 of the Competition Act (CRA) (in the English translation used by both parties) has applied since then. Both parties are relying on the Finnish Supreme Court judgment KKO 2016:11 which established, inter alia, that the objective limitation period under Section 7(2) LA is not comparable to the limitation period under Section 18(3) CRA introduced specifically for cartel damages, meaning that the latter is not relevant for claims predating its entry into force. Thus, for the period prior to 1 October 1998, it comes down to the interpretation of Section 7(2) LA as to when the period commenced.

Based on what has been explained in respect of Spanish law above, and the significance of *Cogeco* – which applies equally to Finnish law – one must proceed from the assumption that an injured party can wait until a final decision has been taken by the competition authorities (including the appeal body). If the separate transaction is assumed to be the moment of the event giving rise to the damage, Section 7(2) LA leads to a finding that, for transactions between 1994 and 1 October 1998, the summons should, in principle, have been issued during the period from 2004 to 30 September 2008 at the latest. This means that that period had already expired by the time of the non-confidential decision of the Commission in October 2009 (para. 2.4) and even more so by the time of the decision of the General Court in May 2011.

3.6.7 Kemira argues that, given all the limitation rules that must be assessed in accordance with *Cogeco*, this still does not mean that the limitation period made it practically impossible to enforce the rights, because customers could have interrupted the limitation, certainly any time after the press release from the Commission or Kemira in August 2007 or that of the Commission in June 2008.

In any case, that argument does not apply to the claims relating to events giving rise to damage in the period before August 1997. It has been neither submitted nor shown how, before Kemira's first press release (para. 2.1), the customers could have been aware of any cartel, even to the limited extent that is necessary for an interruption letter. The cartel was kept secret and neither before nor after this release or the press release from the Commission did Kemira openly admit, in that respect, that it was liable for damage caused as a result or otherwise take responsibility. To that extent, the limitation rules must therefore be disregarded as being contrary to the principle of effectiveness, because they made it impossible to file a claim.

3.6.8 For transactions from the period between August 1997 and 11 June 1998, this Court finds that the information was too limited for an interruption letter. After all, the Commission Statement of Objections was not known to the customers and the press release from Kemira only contained the following:
Finnish Chemicals Oy, a subsidiary of Kemira Oy, has received an EU Commission Statement of Objections concerning selling of sodium chlorate, with regard to alleged antitrust activities during 1994-2000.
This reveals an investigation only in the most general terms; it is not at all clear that this is about a cartel. This Court also refers to its findings in 3.5.9.

3.6.9 Since Finnish law differs from Spanish law when it comes to the knowledge of the scope of the damage required for the limitation period to start running, the Commission release of 11 June 2008 contained enough information in itself – under Finnish law – for the customers to be able to draft an interruption letter. However, for the claims from 11 June 1998 (ten years before the date of the Commission press release) to 30 September 1998 (when the CRA came into force), there was only a period of between 1 and 111 days available. Given the specific characteristics of this type of damage claim, as mentioned in *Cogeco*, that period is so short that even the limited investigation

needed for an interruption could not reasonably be carried out. This is because, under Finnish law, even that limited investigation, 14 to 9.75 years after the transactions, should mean that it had been ascertained whether business had been done with the cartel members named in the press release and, if so, with whom, and whether those transactions could be assumed to have been affected by the cartel. This period is so short that, although it did not make the drafting of an on-time interruption letter and subsequent filing of a claim impossible, it certainly made it extremely difficult.

3.6.10 That being the case, what the effects of the Finnish rules are on joint and several liability remains unanswered. The claims are not time-barred under Finnish law.

3.7 *Swedish law*

3.7.1 CDC argues, in ground for appeal 4, that under Swedish law the claim of the legal entities among the customers that operate a production location in Sweden was not time-barred. For claims that arose before 1 August 2005, Swedish law has a special objective limitation period of five years for damage resulting from competition law infringements which may, in principle, be interrupted (Section 33 of the Swedish Competition Act (SCA) in the English translation used by both parties). The general statutory limitation rule for non-contractual claims has an objective period of 10 years, which begins on the day the damage occurs. Swedish law does not provide for a subjective period of limitation.

It is to be assumed that all claims result from events giving rise to damage that predate 1 August 2005, meaning that Section 33 SCA applies. Section 33 SCA has not yet led to legal judgments, meaning that the start of that period is uncertain and the date on which the damage occurred may possibly be interpreted as being the date that the injured parties learned of the damage. If that period begins at that point, it had not yet expired by the time of the summons.

If the transactions giving rise to the damage are taken as a starting point, the claims could no longer be enforced by the time of the decision of the General Court in May 2011, because of that limitation. Even if 17 September 2009 is taken as the starting point, the same would apply, since the transactions in question were between 1994 and 2000. CDC also points out that it is because the cartel members kept the cartel a secret that the customers did not become aware of their damage earlier. In particular, CDC considers it wrong that they (or the customers) could have or should have interrupted the limitation period, quite simply because this was not possible under Swedish law or because it is unclear what should have been interrupted.

3.7.2 Kemira holds the view that the limitation period can be interpreted as only beginning to run at the point when the injured party learns of both the infringement and the damage. In addition to the specific five-year limitation period there is also the generic ten-year period, which applies if the specific period cannot be applied. Furthermore, action could have been expected from of customers even after their claims were time-barred. They had sufficient information in 2007, 2008 and certainly at the end of 2009. It follows from directive case law (NJA 1998 s 438) that a declaratory judgment can be requested before the injured party learns of its damage.

3.7.3 This Court considers that the objective nature of the period and the text of the relevant Section 33 (in the English translation used by both parties, which provides, to the extent relevant: *Any undertaking who, intentionally or negligently, infringes any of the prohibitions contained in section 6 and 19 shall compensate the damage that is caused thereby to another undertaking or party to an agreement. The right to such compensation shall lapse if no action is brought within five years from the date when the damage was caused.)* are incompatible with the beginning of the period of limitation's depending on the injured party's knowledge. Case law on Section 33 SCA is lacking, as

is any insight in the Swedish literature in that regard. Therefore, the starting point is either, for all damage claims, the date when the cartel ended, 9 February 2000, or – for every damage claim that arises from a transaction influenced by the cartel – the date when that transaction took place. In both interpretations it is clear that the five years had long expired by the time of the General Court's decision in May 2011 and also by the time the Commission published the non-confidential version of the decision in 2009. Therefore that rule, having regard to *Cogeco*, is in principle contrary to the principle of effectiveness and so must be disregarded.

3.7.4 Kemira's opinions have not adequately substantiated the argument that, under Swedish law, a period that does not apply because it is contrary to EU law is replaced by a period (the generic ten-year period) that would otherwise not apply *ratione materiae*. The institution of limitation, which is strongly focused on predictability and legal certainty, is not generally consistent with such an extension of the scope of this rule.

3.7.5 That the customers should still have taken action, even though their claims were time-barred, and that the fact that they waited can be invoked against them in the context of the principle of effectiveness, as Kemira alleges, does not hold water in this case. Interrupting a limitation period that has already expired must be regarded as futile. Launching proceedings in which a declaratory judgment is requested might have been possible in theory but, in the circumstances, it could not be required of the customers and of CDC in the context of the principle of effectiveness. CDC summonsed Kemira two weeks after the judgment of the General Court. Since it had to wait for that decision, taking into account *Cogeco* and what has been considered above, that action was sufficiently diligent. They cannot be blamed for that (nor can CDC) and, in light of the principle of effectiveness, they cannot otherwise bear the risk of not having taken action earlier, partly because the cartel was kept secret.

Thus, the claims are not time-barred under Swedish law either.

3.8 *Czech and Slovak law*

In ground for appeal 5 CDC argues that, under Czech and Slovak law, the claim of the legal entities among the customers that operate a production location in the Czech Republic and Slovakia respectively is not time-barred. During the oral arguments it took the position that the scope of the claims involved is expected to be small. The parties have since let it be known, by letter dated 31 December 2019, that they agree that there is no need for a finding on this point. In view of this request, this ground for appeal will not be discussed.

3.9 *Extended effect*

3.9.1 Lastly, in ground for appeal 6 CDC argues that, in para. 4.27 of the judgment, the District Court was wrong to find that CDC failed to provide sufficient explanation for its allegation that there was an extended effect from the cartel up to and including 2002. It points out that it submitted an expert report to the court *(Quantification of Damages sustained by the Assignors to CDC Project 13 SA as a result of the European Sodium Chlorate Cartel,* dated l June 2014, Schinkel and Bun 2014) as well as the fact that the report shows that the prices for sodium chlorate only normalised two years after the end of the cartel. It also submitted a new report to this Court from the same experts, for further guidance.

3.9.2 This Court interprets para. 4.27 as meaning that the District Court thus gave no substantive ruling on the alleged extended effect. Extended effect is taken to mean that anti-competitive agreements or practices continue to have an effect on the market once they have ended, for example in the form of knock-on price increases. Essentially, this relates to the scope of the damage caused by the 'single and continuous' competition law infringement that was established, in this case, with the

Commission decision upheld after judicial review; it does not relate to a separate infringement or other unlawful act. Whether the cartel had an extended effect, and if so in what period and to what extent, requires extensive investigation (both empirical and econometric) and the legal argument on the subject between the parties, in view of the direction of the District Court, is not yet over. After all, no discussion on the matter was possible at the personal appearance hearing, for example.

Against this background, this Court takes this consideration to mean, purely in the context of the discussions on limitation, that CDC has failed to explain that the extended effect – disputed by Kemira – makes a difference to the decisions to be taken on that point.

3.9.3 CDC has now indicated that in the legal systems (Finland and Sweden) where the individual transaction is relevant to the start of the limitation, its submissions on this point mean that, up to May 2002, there were transactions that were possibly influenced by the extended effect of the cartel.

3.9.4 For Finland, the parties are merely in dispute about the transactions that predate 1 October 1998, because the parties agree that the transactions from more recently are not time-barred. This aspect cannot, therefore, be relevant there.

3.9.5 For Sweden, it follows from the considerations under 3.7, above, that even if the five-year period began to run in June 2002, it was in any case long expired by the time of the non-confidential decision on 30 October 2009. This similarly makes no difference.

That means that this ground for appeal needs no further discussion, because it makes no difference to the decision on limitation and is otherwise premature.

The assignments

3.10 In summary, and to the extent now relevant, the District Court justified its ruling that the assignments are legally valid as follows. The validity of the assignments is governed by the law applicable to the assignments, which is Dutch law as chosen in the assignment agreements (para. 4.11). The assignment agreements provide sufficient evidence that they relate to claims from customers for the compensation of all damage as a result of the cartel, against all the members of the cartel mentioned in the decision, including Kemira. The deeds of assignment contain sufficient information in order to establish which claims these are (para. 4.14). There is no breach of the prohibition on ownership of collateral (para. 4.17). The assignments are also not void on account of being contrary to public policy and/or good morals (para. 4.19).

In ground for cross-appeal 1, which is sub-divided into three parts, Kemira is challenging the ruling of the District Court on the assignments.

3.11 Because all relevant assignment agreements were signed after 17 December 2009, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (hereafter: Rome I) applies. It follows from Article 14(2) Rome I that, inter alia, it must be determined which law governs the claims. The fact is that the law that applies to the alleged cartel damage claims determines the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged by being paid (cf. also Article 10:135(3) DCC, which does not, however, have temporal application to these assignments). From the letter dated 9 October 2019, sent on behalf of both parties for the oral arguments, the Court of Appeal infers that parties are agreed (so that the District Court also proceeded from this assumption, as evidenced by para. 4.24) that the law that governs each assigned cartel damage claim is the law of the relevant production location. The parties also evidently assume that, under the three relevant legal systems – Spanish, Finnish and Swedish law – claims such as the ones under consideration can be transferred. As regards CDC, this

is embedded in the assignment agreements to which it is party, while Kemira is challenging the legal validity of the assignments on various grounds, but has not contested the transferability of the claims as such. In the context of its official obligations on this point, this Court has found no reason to assume that the claims are not transferable. The parties have also agreed that the law governing the agreements that oblige assignment is Dutch law.

Specificity requirement

3.12.1 In ground for cross-appeal 1a Kemira complains that at the time of the assignment the requirement of specificity was not satisfied. Although a generic description may lead to a valid transfer under certain circumstances, in that case – based on the description – one must be able to show, using other objective information, which claims have been transferred. This is not the case here. It is unclear from whom, when, to what extent and at what price individual customers purchased sodium chlorate. It was not until two years later that CDC unilaterally established the object of the assignments, based on the economic opinion of Schinkel and Bun. The finding of the District Court therefore testifies to an incorrect interpretation of the law, according to Kemira.

3.12.2 The requirements to be imposed on the validity of the transfer of the claim between the customers and CDC must, according to Article 14(1) Rome 1, be assessed under Dutch law.

The deed of assignment must sufficiently specify the claim to be transferred. For that purpose it is sufficient for the deed to provide such information, supplemented by objective information, as will allow one to establish which claim is involved, potentially after the event. Rightly, that in itself is not in dispute (cf. Dutch Supreme Court 16 May 2003, ECLI:NL:HR:2003:AF4602, NJ 2004/183). The question of how specific that information must be depends on the circumstances of the individual case (Dutch Supreme Court 4 March 2005, ECLI:NL:HR:2005:AR6165, NJ 2005/326). This does not just come down to what is apparent from the deed itself. What is decisive is the meaning that parties, in the circumstances, could reciprocally attribute to each other's statements and conduct, and what they could reasonably expect of each other in that respect (Dutch Supreme Court 16 May 2003, ECLI:NL:HR:2003:AF4602, NJ 2004/183).

3.12.3 The assignment agreements (and deeds) did not need to specify in more detail than they do from whom, where, to what extent and at what price the individual customers purchased sodium chlorate. In this case, the parties (the customers and CDC) could expect the necessary further details to be found in the customers' (the assignors') accounts. After all, it must be assumed that, as with trade receivables, the purchases of requisites for the production process, such as sodium chlorate, would be recorded accurately, stating supplier, amount and delivery date. This applies to the deeds of assignment between the subsidiaries and their parent companies, as referred to in para. 2.8, in the same way as it does to the deeds of assignment between CDC and the (parent) companies (see paras. 2.9/2/10).

3.12.4 When establishing what CDC and the customers could reasonably expect from each other, it also needs to be considered that the debtor who must be notified, meaning Kemira, must reasonably understand, on the basis of the information it is given, which claim or claims the assignor and assignee have in mind (cf. Dutch Supreme Court 21 April 1995, ECLI:NL:HR: 1995:ZC1704, *NJ* 1996/652). Each of the assignment agreements and deeds makes reference to "*all damage claims which ASSIGNOR has or might have with regard to purchases of Sodium Chlorate between 1 January 1992 and 31 December 2007, resulting from the violation of Article 101 and/or Article 102 Treaty on the Functioning of the European Union (TFEU, formally Article 81 and/or Article 82 EC-Treaty), Article 53 EEA-Agreement and/or the corresponding provisions in the Europe-Agreements (i.e. Agreements establishing an Association between the European Communities, their Member States and future*

Member States) and/or national competition laws, which constitute the Sodium Chlorate Cartel practiced in the European Union and in the EFTA States (see European Commission, decision of 11 June 2008, COMP/38.695), against any and all members of this Cartel."

The decision was notified to each of the cartel members in the version that concerned each of them and was thus known to Kemira as far as its role in the cartel was concerned. Also, as a member of the cartel, it was obviously aware of its own role in the cartel; it may also be presumed to be aware of that of the other cartel members. That means that the description must have been clear to it. Since the following was added – "*The damage claims subject to this transfer by assignment have to be understood in a broad sense, covering any and all cartel-related damages, such as price overcharges, loss of profit, the costs of claims enforcement, and all the interests in this regard, including accessory rights"* – it is even less likely it is that there was any confusion on the matter. The temporal scope is also clear.

As regards the assignments between the subsidiaries and the parent companies, no higher requirements need to be set from that point of view. It has been neither submitted nor shown that the organisation within the group of the customer(s) led to a lack of clarity for Kemira as debtor when it comes to the question of which claims were assigned to CDC. What has been considered above regarding the accounts and Kemira's knowledge of the cartel also applies in full when it comes to the reassigned claims of the subsidiaries.

3.12.5 Accordingly, the assignment agreements (deeds) contain sufficient information to establish after the event which claims have been transferred. Given the content of the assignment documentation there was also no need to specify in more detail the procedure for objectively establishing which claims are involved. Also, the fact that this has not been established at this stage of these complex proceedings and the fact that the claims, and the amounts, will still have to be established on the basis of further investigation (empirical and/or econometric) does not mean that the specificity requirement has not been met. As a member of the cartel it must be sufficiently clear to Kemira which claims are involved, based on the contents of the assignment agreements (deeds), so that on that basis Kemira must be deemed to be in a position to submit the grounds for defence that it could have submitted against the individual customers.

Ground for cross-appeal 1a cannot succeed for that reason.

3.13 *Czech Republic and Slovakia*

In the ground for cross-appeal that appears between grounds for cross-appeal 1a and 1b, but which is not designated by a letter and which this Court will call ground for cross-appeal 1c, Kemira argues that the claims involving the product markets in Slovakia and the Czech Republic were not assigned. This is because it can be inferred from the definition given in the assignment agreement that the assignments to CDC only relate to claims for the compensation of damage on the "Product market in Europe" and "as specified by the European Commission". Claims in respect of transfers to Slovak and Czech customers are not covered in any case. At the time of the infringement Slovakia and the Czech Republic were neither Member States of the European Union nor party to the EEA Agreement and the Commission did not establish any infringement on these markets. Article 81 of the EC Treaty and Article 53 of the EEA Agreement were not valid law in Slovakia and the Czech Republic either. There was also no relevant decision of any national competition authority regarding anti-competitive behaviour by cartel members on the Czech or Slovak markets. Kemira submits that it therefore runs the risk that it will again be required to pay these claims.

However that may be, Kemira has no interest in a decision on this ground for cross-appeal, since

according to the aforementioned letter of 31 December 2019 the parties are withdrawing all grounds for cross-appeal that relate to (the assignment or limitation of) claims under Czech and Slovak law. Accordingly, this Court will not discuss this ground for cross-appeal.

3.14 *Prohibition on ownership of collateral*

3.14.1 Ground for cross-appeal 1b argues that the assignments were in breach of the prohibition on ownership of collateral (Article 3:84(3) DCC). It argues that the assignments were purely intended to provide CDC with security. They did not entail any actual transfer, because the economic interest remains largely with the customers. The agreed "purchase price" is a fixed price of *"0,01 Euro per metric ton Supplied Product Quantities"* and a variable price of 80% of the revenue from the recovered claims. This is no different from a 'no cure no pay' construction for the services to be carried out by CDC, where the level of the compensation it receives is uncertain and therefore the sale is a pretence. Furthermore, Article 1(1)(b) provides for a return transfer of the claims (or an obligation to make such transfer) if, for example, there is a change of control at CDC. Essentially, CDC provides a service to customers and, for that, receives almost exclusively a results-based remuneration. Accordingly, Kemira argues, there is no transfer, since the claims continue to belong to the assets of the customers in an economic sense.

This argument fails, on the following grounds.

3.14.2 Kemira criticises the assignment agreement as referred to at para. 2.9. The relevant passages of that text state:

"CDC hereby agrees to fully and finally purchase from any and all Damage Claims of COMPANY-Group that COMPANY has against any and all members of the Cartel (...)
(a) COMPANY hereby agrees to fully and finally sell, assign and transfer to CDC any and all Damage Claims of COMPANY-Group that COMPANY has against any and all members of the Cartel (...) CDC agrees to accept the assignment of such Damage Claims by COMPANY.
(b) The Parties will execute the obligation set forth under Provision 2 (a) and (b) in a separate deed of transfer (within the meaning of article 3.94 Dutch Civil Code) under which the ownership of the Damage Claims of COMPANY-Group will pass from COMPANY to CDC."

3.14.3 This text, also considered under the Haviltex criterion having regard to the fact that the text is also intended to operate vis-à-vis third parties, should be interpreted as meaning that actual transfer is intended. The use of the words 'purchase' and 'sell' combined with the term 'fully and finally' clarifies the words 'assign' and 'transfer', so that there can be no misunderstanding that full and final sale and purchase and thus actual transfer are intended. The actual transfer meant that the claim became part of CDC's assets and can henceforth be recovered by its creditors. No more is required of a transfer within the meaning of Article 3:84 DCC. Evidently the parties agreed that, in this respect, the law applicable to the claim is not relevant and/or would not produce different results.

More specifically, the following applies.
Kemira argues that the pretence sale that it alleges is partly evidenced by the low (symbolic) fixed purchase price combined with a results-based remuneration. It has failed to provide sufficient explanation for this submission against the background of the specific nature of a competition case such as this one. After all, this specific nature means that for countless reasons it can be onerous for separate customers to bring proceedings on an individual basis. That is sufficient justification for the chosen structure, where customers transfer the claims to CDC for a small fixed purchase price and an uncertain variable purchase price. For the customers, this means that they can cash the value of

their claims – which is uncertain, and to be established in the proceedings. On the one hand, CDC runs the risk of losing the proceedings but, on the other, may keep a percentage of the proceeds, which represents a more attractive amount, the more favourable the outcome of the proceedings. These are complicated and lengthy proceedings that necessarily require investment from CDC, even though the outcome is unknown.

Contrary to Kemira's argument, it is impossible to see, without further explanation, such an agreement tailored to the nature of the transferred claims should be considered to be a breach of the prohibition on ownership of collateral. In this situation it would have been logical for Kemira to further demonstrate that the purchase price did not match the fair value of the transferred claims and that the claims represented great value for the customers; value that remained with the customers after assignment. They should also have explained why the question of how the purchase price relates to the value of the claims was relevant to the nature and validity of the transfer. After all, under Dutch law it is, in principle, up to the parties (the customers and CDC) to make agreements on the matter as they see fit, whereby they are free to agree a price that suits them. Consequently, these arguments cut no ice.

3.14.4 This is no different even if one takes into account that the customers have a repurchase option that (inter alia) can be exercised in the event of a change of control. This is a personal obligation that does not affect the property law consequences of the transfer (cf. Dutch Supreme Court 19 May 1995, ECLI:NL:HR:1995:ZC1735, *NJ* 1996/119 *(Sogelease).* Rather, the repurchase right confirms the arrangement that the claims had become part of CDC's assets; after all, without that arrangement the repurchase right would have been meaningless.

3.14.5 There has also been insufficient explanation for Kemira's submission that the assignments were purely intended to provide security. CDC has denied – and explained and substantiated that denial – that it had or has claims against the assignors, and there is no evidence of such claims from the agreements. Without further explanation, which is lacking, it is unclear which claims of CDC against the assignors security was provided for.

Ground for cross-appeal 1b cannot succeed for that reason.

Conclusion

3.15 Parties are agreed that, given the reduction of the claim, no claims remain under Austrian law.

3.16 The offers to produce evidence have no bearing on facts and circumstances that, if proven, may lead to a different decision in this case, and are therefore rejected as serving no purpose.

3.17 CDC's grounds for appeal partly succeed, while Kemira's grounds for cross-appeal fail. The judgment being appealed will be set aside. As the unsuccessful party, Kemira will be ordered to pay the costs of the proceedings (both principal appeal and cross-appeal), with the costs of the latter being estimated at zero, given the interconnectedness of the principal appeal and the cross-appeal.

3.18 The case will be referred back to the District Court in Amsterdam for further proceedings and a decision with due regard to this judgment.

2. Decision

This Court of Appeal,

ruling on the principal appeal and cross-appeal:
sets aside the judgment being appealed, to the extent that it rules that the claims are time-barred under Spanish, Finnish and Swedish law;

upholds the remainder of the judgment being appealed;

orders Kemira to pay the costs of the proceedings in the principal appeal and cross-appeal, estimated to date on the part of CDC at EUR 796.42 in disbursements and €16,503 in lawyers' fees and at €157 in additional fees, plus €82 in additional fees and the costs of the record of service if this judgment is served, plus statutory interest, if this order to pay costs is not settled within fourteen days of this judgment or of the date when the additional fees fall due;

declares these orders immediately enforceable;

dismisses all additional or alternative claims;

refers the case back to the District Court of Amsterdam for further proceedings and a decision with due regard to the findings and decisions of this Court.

This judgment was issued by P.F.G.T. Hofmeijer-Rutten, C.C. Meijer and J.M. de Jongh and pronounced in open court by the cause-list judge on 4 February 2020.

[signed and stamped]