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judgment

AMSTERDAM DISTRICT COURT
Private law division

Case number / docket number: C/13/646912 / HA ZA 18-416

Judgment on the procedural issue of 14 August 2019

in the matter of

STICHTING ELCO FOUNDATION,
a foundation having its registered office in Amsterdam,
claimant in the principal action,
respondent in the procedural issues,
represented by W.P. Wijers LLM in Amsterdam,

versus

1. **COÖPERATIEVE RABOBANK U.A.,**
a cooperative having its registered office in Amsterdam,
defendant in the principal action,
claimant in the procedural issue seeking to stay the proceedings,
represented by B. Winters LLM in Amsterdam,

2. **LLOYDS BANKING GROUP PLC,**
a legal entity incorporated and existing under foreign law
having its registered office in Edinburgh (Scotland, United Kingdom),
3. **LLOYDS BANK PLC,**
a legal entity incorporated and existing under foreign law
having its registered office in London (United Kingdom),
defendants in the principal action,
claimants with respect to the motion contesting jurisdiction,
represented by C.C.A. van Rest LLM in Amsterdam,

4. **UBS AG,**
a legal entity incorporated and existing under foreign law
having its registered office in Zurich (Switzerland),
5. **UBS SECURITIES JAPAN CO. LTD,**
a legal entity incorporated and existing under foreign law
having its registered office in Tokyo (Japan),
defendants in the principal action,
claimants with respect to the motion contesting jurisdiction,
represented by W. Heemskerk LLM in The Hague,

6. **ICAP PLC,**
a legal entity incorporated and existing under foreign law

having its registered office in London (United Kingdom),
7. **ICAP EUROPE LTD,**
a legal entity incorporated and existing under foreign law
having its registered office in London (United Kingdom),
defendants in the principal action,
claimants with respect to the motion contesting jurisdiction,
represented by S.J.H.M. Berendsen LLM in Amsterdam.

The parties will hereinafter be referred to as Stichting, Rabobank, UBS Switzerland and UBS Japan (collectively UBS et al.), LBG and Lloyds Bank (collectively Lloyds et al.), ICAP plc and ICAP Europe (collectively ICAP et al.)

1. The course of the proceedings

1.1. The course of the proceedings appears from:
- the identical writs of summons dates 14 December 2017, including exhibits,
- the motion seeking to stay the proceedings on the part of Rabobank of 18 July 2018, including exhibits,
- the motion for the court to decline jurisdiction and transfer the case on the part of UBS et al. of 18 July 2018,
- the motion for the court to decline jurisdiction and transfer the case on the part of UBS et al. of Lloyds et al. of 18 July 2018,
- the motion for the court to decline jurisdiction and transfer the case on the part of ICAP et al. of 18 July 2018, including exhibits,
- the statement of defence in response to the motion contesting jurisdiction and the motion seeking a stay of the proceedings, also containing a change of claim (in the matter of ICAP et al.),
- the record of the multiple oral pleadings, held on 18 June 2019, and the procedural documents referred to therein,
- Winters' letter of 30 June 2019, containing comments with regard to the record,
- Wijers' (fax) letter of 1 July 2019, containing comments with regard to the record,
- Berendsen's (fax) letter of 1 July 2019, containing comments with regard to the record.

1.2. In conclusion a date was set for judgment to be rendered on the procedural issues.

2. The facts insofar as these are relevant to the procedural issues

2.1. The articles of association of Stichting read as follows, to the extent relevant for the purpose hereof:

"Definitions
Article 1.
In these articles of association the following terms starting with a capital letter shall have the meaning assigned to them below:
Interested parties: all persons (including legal entities) who during the Relevant Period were residing, domiciled and/or had their principal place of business (including secondary establishments or branches) in the European Union and who under the applicable legal regimes qualify as or are to be treated as:

a. investment firms;
b. credit institutions;
c. insurance undertakings;

d. institutions for the collective investment in securities as well as their management companies;
e. pension funds and their management companies;
f. (other) financial institutions licensed or regulated under EU law or the national laws of a Member State;
g. a party that in the conduct of its profession or business performs investment activities for its own account and/or
h. authorised investment managers,

and who either directly or indirectly:

i. have performed one or more transactions in derivative or non-derivative financial instruments on which interest has been paid that was linked to or derived from:
- the 'London Interbank Offered Rate' (`LIBOR') relating to the Japanese Yen (`JPY LIBOR'), the British Pound (`GBP LIBOR'), the American Dollar (`USD LIBOR') and/or the Swiss Franc (`CHF LIBOR');
- the Euro Interbank Offered Rate (`EURIBOR');
- the 'Tokyo Interbank Offered Rate' (`TIBOR') relating to the Japanese Yen in the offshore market (also referred to as the Euroyen market);
- the 'Singapore Interbank Offered Rate' (`SIBOR');
- the 'Singapore Swap Offer Rate' (`SOR');
- the 'Bank Bill Swap' (`BBSW') and/or
- the 'Hong Kong Interbank Offered Rate' (`HIBOR');
ii. have paid interest on a loan that was linked to derived from JPY LIBOR, GBP LIBOR, USD LIBOR, CHF LIBOR, EURIBOR, TIBOR, SIBOR, SOR, BBSW and/or HIBOR, or
iii. have performed one or more transactions other than those mentioned hereinbefore, in relation to which payment was made which related to, or referred to, or was otherwise connected with, JPY LIBOR, GBP LIBOR, USD LIBOR, CHF LIBOR, EURIBOR, TIBOR, SIBOR, SOR, BBSW and/or HIBOR,

which transactions and/or payments occurred in the course of the Relevant Period and outside the United States of America."

2.2. EURIBOR (Euro InterBank Offered Rate) and LIBOR (London InterBank Offered Rate) are collective names for interest rate benchmarks which are published on a daily basis. The EURIBOR interest rate benchmarks (in different maturities) were calculated - in the period relevant in this case - on the basis of the submission on each business day of quotes to Thomson Reuters by a large number of European banks with the European Banking Federation (the panel banks) of the interest rate at which each of them believed that a hypothetical prime bank could provide or raise unsecured loans in euros for various maturities. After Thomson Reuters had received the rates from all the panel banks, the lowest and the highest rate were eliminated, after which the average of the remaining values represented the EURIBOR interest rate benchmark for the maturity in question. The various LIBOR interest rate benchmarks (for various currencies and maturities) are calculated on the basis of the submission on each business day of quotes to Thomson Reuters by a selection of banks with the British Bankers' Association (the panel banks) of the interest rate at which each of them expects to be able to raise a loan on the interbank money market on that day. Each LIBOR (currency) interest rate benchmark has its own selection of panel banks. After Thomson Reuters has received the rates from all the panel banks, the lowest and the highest rate are eliminated, after which the average of the remaining values represents the LIBOR interest rate benchmark for the currency and the maturity in question.

2.3. Rabobank acted (in the period relevant in this case) as the panel bank for EURIBOR and (in any case) USD LIBOR, GBP LIBOR AND JPY LIBOR.

UBS Switzerland acted (in the period relevant in this case) as the panel bank for EURIBOR and (in any case) USD LIBOR, GBP LIBOR, JPY LIBOR en CHIF LIBOR.
UBS Japan acted (in the period relevant in this case) as the panel bank for (in any case) JPY LIBOR and Euroyen TIBOR.
Lloyds Bank acted (in the period relevant in this case) as the panel bank for USD LIBOR, GBP LIBOR and JPY LIBOR.

2.4. ICAP Europe is an interdealer broker providing brokerage services between financial institutions operating as traders in, inter alia, financial instruments. ICAO Europe is itself not a party to any financial transactions.

2.5. Halfway through the year 2010 various investigations started to be carried out by various authorities in the United States of America (hereinafter: the VS), Europe and Asia into manipulations, or attempted manipulations, of various interest rate benchmarks. Further to these investigations a total of 17 collective actions (class actions) were started in the US, the first ones in 2011, against (inter alia) Rabobank. Of these one has now been disposed of (i.e. *Payne, et al. Bank of America Corp., et al., case 13-CV-00598*), as a result of the claims against Rabobank and the other defendants having been dismissed by the US court in the first instance. A further two class actions regarding GBP LIBOR have been consolidated. At this moment 15 US class actions against Rabobank (in the first instance or on appeal) are still pending, namely:

(i) Mayor and City Council of Baltimore, et al. v. Bank of America Corp., et al. (USD LIBOR),
(ii) Metzler Inv. GmbH v. Credit Suisse AG, et al. (USD LIBOR),
(iii) Gelboim v. Credit Suisse Group AG, et al. (USD LIBOR),
(iv) Laydon v. Mizuho Bank Ltd., et al. (TIBOR and/or JPY LIBOR),
(v) The Berkshire Bank v. Bank of America Corp., et al. (USD LIBOR),
(vi) 33-35 Green Pond Road Assoc., LLC v. Bank of America Corp., et al (USD LIBOR),
(vii) Lieberman v. Credit Suisse Group AG, et al (USD LIBOR),
(viii) Courtyard at Amwell II, LLC et al. v. Bank of America Corp. (USD LIBOR),
(ix) Los Angeles Cty. Employee Retirement Assoc. v. Bank of America Corp., et al. (USD LIBOR),
(x) Guaranty Bank & Trust Co. v. Credit Suisse Group AG, et al. (USD LIBOR),
(xi) County of Riverside v. Bank of America Corp., et al. (USD LIBOR),
(xii) Sullivan v. Barclays PLC, et al. (EURIBOR),
(xiii) Nat'l Asbestos Workers Pension Fund, et al. v. Bank of America Corp., et al. (USD LIBOR),
(xiv) Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, et al. (GBP LIBOR),
(xv) Sonterra Capital Master Fund Ltd., et al. v UBS AG et al. (JPY LIBOR and Euroyen TIBOR).

The actions (i)-(xv) will hereinafter be referred to as the US Class Actions.

2.6. In the abovementioned US Class Action with number (iv) ICAP et al. were also involved. In that action the US Court in the first instance declared that it had no jurisdiction over ICAP et al. in that action. ICAP et al. are furthermore involved in the above-mentioned US Class Action with number (xv).

3. The claims in the principal action

3.1. Following a change of claim, Stichting in the principal action requests the district court, by provisionally enforceable judgment to the extent possible,
Principally: to rule that:

I. Rabobank has (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties (as defined in the articles of association) in the period 1 January 2005 - 30 November 2010, due to its having structured its internal (administrative) organisation

and/or internal control mechanism in such a manner (including failing to structure these otherwise) as to facilitate, or enable in any case, the manipulation of benchmarks,

II. UBS et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2001 - 30 June 2010, due to their having structured their internal (administrative) organisation and/or internal control mechanism in such a manner (including failing to structure these otherwise) as to facilitate, or enable in any case, the manipulation of benchmarks,

III. Lloyds et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2006 – 31 July 2009, due to their having structured their internal (administrative) organisation and/or internal control mechanism in such a manner (including failing to structure these otherwise) as to facilitate, or enable in any case, the manipulation of benchmarks,

IV. ICAP et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 July 2006 – 31 December 2010, due to their having structured their internal (administrative) organisation and/or internal control mechanism in such a manner (including failing to structure these otherwise) as to facilitate, or enable in any case, the manipulation of benchmarks,

V. Rabobank has (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2005 - 30 November 2010, due to Rabobank, or its employees in any case, for whose actions it is accountable, having manipulated interest rate benchmarks,

VI. UBS et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2001 - 30 June 2010, due to UBS et al., or their employees in any case, for whose actions they are accountable, having manipulated interest rate benchmarks,

VII. Lloyds et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2006 – 31 July 2009, due to Lloyds et al., or their employees in any case, for whose actions they are accountable, having manipulated interest rate benchmarks,

VIII. ICAP et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 July 2006 – 31 December 2010, due to ICAP et al., or their employees in any case, for whose actions they are accountable, having manipulated interest rate benchmarks, or having facilitated the manipulation of interest benchmarks in any case and have provided advice to others in that respect,

IX. Rabobank has (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2005 - 30 November 2010, due to Rabobank, or its employees in any case, for whose actions it is accountable, having colluded with one or more other defendants, which collusion represents an ‘agreement’ or ‘concerted practices’ in any case within the meaning of article 101 of the TFEU, with a view to manipulating interest rate benchmarks,

X. UBS et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2001 - 30 June 2010, due to UBS et al., or their employees in any case, for whose actions they are accountable, having colluded with one or more other defendants, which collusion represents an ‘agreement’ or ‘concerted practices’ in any case within the meaning of article 101 of the TFEU, with a view to manipulating interest rate benchmarks,

XI. Lloyds et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 January 2006 – 31 July 2009, due to Lloyds et al., or their employees in any case, for whose actions they are accountable, having colluded with one or more other defendants, which collusion represents an ‘agreement’ or ‘concerted

practices' in any case within the meaning of article 101 of the TFEU, with a view to manipulating interest rate benchmarks,

XII. ICAP et al. have (on a structural and/or continuous basis) acted unlawfully towards the Interested Parties in the period 1 July 2006 – 31 December 2010, due to ICAP et al., or their employees in any case, for whose actions they are accountable, having colluded with one or more other defendants, which collusion represents an 'agreement' or 'concerted practices' in any case within the meaning of article 101 of the TFEU, with a view to manipulating interest rate benchmarks,

XIII. Rabobank, given the unlawful manipulation of interest rate benchmarks by itself and/or by one or more co-defendants, and given the chance of damage being caused to the Interested Parties by Rabobank and/or one or more of its co-defendants as a result thereof, should have refrained from this collective conduct with respect to the interest rate benchmarks with one or more of its co-defendants as referred to in article 166 (1) of Book 6 DCC,

XIV. UBS et al., given the unlawful manipulation of interest rate benchmarks by themselves and/or by one or more co-defendants, and given the chance of damage being caused to the Interested Parties by UBS et al. and/or one or more of their co-defendants as a result thereof, should have refrained from this collective conduct with respect to the interest rate benchmarks with one or more of their co-defendants as referred to in article 166 (1) of Book 6 DCC,

XV. Lloyds et al., given the unlawful manipulation of interest rate benchmarks by themselves and/or by one or more co-defendants, and given the chance of damage being caused to the Interested Parties by Lloyds et al. and/or one or more of their co-defendants as a result thereof, should have refrained from this collective conduct with respect to the interest rate benchmarks with one or more of their co-defendants as referred to in article 166 (1) of Book 6 DCC,

XVI. ICAP et al., given the unlawful manipulation of interest rate benchmarks by themselves and/or by one or more co-defendants, and given the chance of damage being caused to the Interested Parties by ICAP et al. and/or one or more of their co-defendants as a result thereof, should have refrained from this collective conduct with respect to the interest rate benchmarks with one or more of their co-defendants as referred to in article 166 (1) of Book 6 DCC,

XVII. Rabobank has (on a structural and/or continuous basis) unjustly enriched itself in the period 1 January 2005 - 30 November 2010, at the expense of the Interested Parties,

XVIII. UBS et al. have (on a structural and/or continuous basis) unjustly enriched themselves in the period 1 January 2001 - 30 June 2010, at the expense of the Interested Parties,

XIX. Lloyds et al. have (on a structural and/or continuous basis) unjustly enriched themselves in the period 1 January 2006 – 31 July 2009, at the expense of the Interested Parties,

XX. ICAP et al. have (on a structural and/or continuous basis) unjustly enriched themselves in the period 1 July 2006 – 31 December 2010, at the expense of the Interested Parties,

Alternatively, insofar as the principal claims in V – VIII should not be allowed, to rule that:

XXI. Rabobank has on the days listed in paragraphs 10.1.20, 10.1.22 and 10.1.34 of the summons acted unlawfully towards the Interested Parties, due to it, or its employees in any case, having manipulated interest rate benchmarks, for which conduct it is accountable,

XXII. UBS et al. have on the days listed in paragraph 11.1.13 of the summons acted unlawfully towards the Interested Parties, due to them, or their employees in any case, having manipulated interest rate benchmarks, for which conduct they are accountable,

XXIII. Lloyds et al. have on the days listed in paragraph 12.1.8 of the summons acted unlawfully towards the Interested Parties, due to them, or their employees in any case, having manipulated interest rate benchmarks, for which conduct they are accountable,

XXIV. ICAP et al. have on the days listed in paragraph 13.1.17 of the summons acted unlawfully towards the Interested Parties, due to them, or their employees in any case, having manipulated interest rate benchmarks, for which conduct they are accountable,

Holding the defendants jointly and severally liable to pay the costs of the proceedings, including the subsequent costs, plus the statutory interest.

3.2. The claims set forth in I - IV will hereinafter also be referred to as the Internal Organisation claims, the claims set forth in V - VIII as the Manipulation claims, the claims set forth in IX - XII as the Collusion claims, the claims set forth in XIII - XVI as the Group Liability claims, the claims set forth in XVII - XX as the Unjustified Enrichment claims and the alternative claims set forth in XXI - XXIV as the Specific Data claims.

4. The claim with respect to the motion seeking a stay of the proceedings

4.1. Rabobank requests the district court to stay the further hearing of the principal action until final judgment has been rendered in the US Class Actions and to order Stichting to pay the costs of the proceedings, including the subsequent costs plus the statutory interest. In the event that this interim application is dismissed, either in whole or in part, Rabobank requests to be granted leave by the court to file an interim appeal against that decision.

4.2. Briefly put, Rabobank has based its claims on the argument that these proceedings (in the principal action) and the US Class Actions concern claims between the same parties and involving the same cause of action, as referred to in article 33 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the EU 2012, L 351, as most recently amended on 26 November 2014, Official Journal of the EU 2015, L 54 (hereinafter: Brussels I (recast)). According to Rabobank the other conditions of this article have also been met. Alternatively Rabobank takes the view that the claims are related claims as referred to in article 34 Brussels I (recast).

4.3. Stichting puts forward a defence.

4.4. To the extent relevant the parties' submissions will be discussed in greater detail below.

5. The examination of the motion seeking a stay of the proceedings

5.1. In its examination of the case the district court first and foremost states that, in accordance with the article 4 of Brussels I (recast) (the regulation applicable to this case, given the international character of the legal relationship concerned), the Dutch court has jurisdiction to hear and determine the claims against Rabobank in the principal action, for Rabobank has its official seat in Amsterdam and is therefore domiciled in Amsterdam. All of this is for that matter not in dispute between the parties.

5.2. Rabobank requests the court to stay the proceedings in principal action, to which end it relies on articles 33 and 34 Brussels I (recast). According to article 33 (1) Brussels I (recast) the court may stay the proceedings in the principal action, or rendering judgment in those proceedings, where jurisdiction is based on article 4 Brussels I (recast) and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State (such as the US).

5.3. The term the same parties should be interpreted in in line with the regulation. It is an established fact that Stichting, a party acting in these Dutch proceedings pursuant to article 305a of Book 3 DCC under its own name and for its own account, is as such no party to the US Class Actions. Rabobank, however, argues that, although formally speaking the parties to the proceedings are different, the factual situation is such that both Stichting and the claimants in the US Class Actions represent the same persons. As the district court understands Rabobank's arguments, both these proceedings and the US Collective Actions involve the same material parties to the proceedings.

5.4. When examining the question if in such a case there may be a question of the same parties, the district court has regard to case law of the Court of Justice of the European Union, formerly the European Communities (hereinafter: CJEU) regarding article 29 Brussels I (recast) (and its predecessors article 27 (1) Brussels I and article 21 Brussels Convention). Where there are different formal parties to the proceedings, they may within the context of lis pendens be regarded as one and the same party, if it has been established that, with regard to the subject-matter of the two actions, their interests are identical and indissociable (CJEU 19 May 1998, ECLI:EU:C:1998:242, ground 25, Drouot/CMI). In the district court's opinion it has not been established that the interests of Stichting are identical to and indissociable from those of the claimants in the various US Class Actions. First and foremost it is stated that, if nothing else, the interests of the various claimants in the US Class Actions are not identical, since the various actions have been brought for the benefit of parties that have entered into transactions in various financial instruments, where the interest was linked to various interest rate benchmarks. Rabobank's arguments in essence state that the interests of all those different claimants in the US Class Actions are identical to the interests of the natural persons or legal entities whose interests are represented by Stichting under its articles of association. However, it follows from Stichting's articles of association (see 2.1) that it also operates for the purpose of representing the interests of (semi) professional parties who have performed transactions in financial instruments and/or made payments linked to (allegedly) manipulated interest rate benchmarks outside the US, while six of the 15 US Class Actions only concern parties who have performed one, or at least one, transaction in or from the US. The above implies that it is not beyond all doubt that the various parties may be regarded as the same material parties. In other respects too Rabobank has insufficiently explained that all persons or legal entities whose interests are represented by Stichting, fall within the scope of the various 'classes' in the US Class Actions. The mere fact that some of the interests represented by Stichting for the benefit of its members as defined in the articles of association are (also) represented in foreign suits, cannot have the effect of precluding Stichting from asserting its interests before the court as against Rabobank (see CJEU 19 May 1998, ECLI:EU:C:1998:242, ground 20, *Drouot/CMI*). For that reason too the criterion of *the same parties* has not been met.

5.5. With reference to the judgment of the CJEU of 6 December 1994, ECLI:EU:C:1994:400 (*Tatry*), Rabobank has argued that, if partial lis pendens only occurs within the meaning of article 33 Brussels I (recast), due to the parties in this action and in the US Class Actions being partly the same only, these proceedings should in part be stayed. The district court sees no cause for this. Such a stay of the proceedings would cause the action to become fragmented and would therefore not be in the interest of the proper administration of justice as referred to in (1) opening line and (b) of article 33 Brussels I (recast).

5.6. Since the requirements have not been met, no jurisdiction is conferred on the district court pursuant to article 33 Brussels I (recast). The interim application will to that extent be dismissed.

5.7. There is no ground either to stay the proceedings pursuant to article 34 Brussels I (recast). To the extent that the claims are at all related within the meaning of this article, there is no question of a situation where it is expedient to hear and determine the actions together to avoid the risk of

irreconcilable judgments resulting from separate proceedings. The district court does not consider it necessary to stay these proceedings for the proper administration of justice. In so ruling, the district court has assessed all the circumstances of the case (24 of the preamble to Brussels I (recast)). Particular attention should in that respect be given to the fact that the US Class Actions listed in 2.2 (vii), (viii), (ix), (x), (xi), (xiii) are currently being stayed in the US – as has been argued by Stichting without being contradicted – so that no judgments on the merits are to be expected in those cases at reasonably short notice. Stichting has furthermore argued without being contradicted that the claims against Rabobank in the actions with numbers (i), (ii) and (iii) have largely been dismissed and on appeal concern claims under competition law only, and that in the US Class Action with number (xii) all the claims against Rabobank have been dismissed, a decision challenged on appeal. The district court furthermore considers that the facts of this case and the parties (Stichting and Rabobank) and the US are not so closely related as to require the proceedings to be stayed on the ground of the proper administration of justice. Under those circumstances, in considered in their interrelationship, the district court will not use its discretionary power to stay the proceedings.

5.8. Rabobank has argued that the district court should stay the proceedings in accordance with article 21 DCCP, because it is alleged that, by failing to mention in the summons that the US Class Actions are pending, Stichting has not fully and truthfully presented the facts relevant to the decision. This request will be dismissed. Although it might have been expected from Stichting to mention in its summons the fact that the US Class Actions are pending, given the class action brought by itself, failure to do so does not automatically constitute a breach of the duty to tell the truth, even apart from the question if in this case such would have justified a stay of the proceedings.

5.9. Finally, in the event that the district court decides not to stay the proceedings, Rabobank has requested leave to file an interim appeal. The district court sees no cause for derogating from the main rule of article 337 (2) DCCP, because granting leave to file an interim appeal would in fact cause the proceedings to be stayed after all, which is precisely the conclusion the court sees no ground for, while it furthermore on its own motion has to guard against the proceedings being unreasonably delayed. It is furthermore noted that its decision concerns the non-use of its discretionary power, which decision by its very nature will not easily cause an interim appeal to be allowed.

5.10. As the party found against Rabobank will be ordered to pay the costs of the procedural issue, to be assessed by the court in the manner set forth in the decision.

6. The claims with respect to the motion contesting jurisdiction

6.1. Lloyds et al., UBS et al. and ICAP et al. in separate procedural issues request the court to declare that it has no jurisdiction over the matter and to order Stichting to pay the costs of the proceedings, plus the statutory interest. In the event that these interim applications are dismissed, Lloyds et al., UBS et al. and ICAP et al. request leave to file an interim appeal. ICAP et al. furthermore request by way of an alternative that the court stay the further hearing of the principal action pursuant to article 33 Brussels I (recast) until final judgment has been rendered in the US Class Actions in which ICAP et al. are involved.

6.2. Stichting puts forward a defence.

6.3. To the extent relevant the parties' submissions will be discussed in greater detail below.

7. The examination of the claims with respect to the motion contesting jurisdiction

7.1. The question as to whether the Dutch court has jurisdiction should, as far as Lloyds et al. and ICAP et al. are concerned, be answered on the basis of Brussels I (recast), since both materially, formally and temporally the dispute falls under the scope of that regulation. According to settled case law of the CJEU the provisions of Brussels I (recast) should be interpreted autonomously in the light of the origins, the objectives and the scheme of that regulation. The interpretation given by the CJEU with regard to the former Brussels I Regulation likewise applies to Brussels I (recast) when the provisions concerned may be regarded as equivalent.

7.2. Where UBS Switzerland is concerned, the question as to whether the Dutch court has jurisdiction should be answered on the basis of the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal 2009, L 147 (hereinafter: the EVEX Convention), for the registered office, the head office and the principal place of business of UBS Switzerland are outside the EU, so that Brussels I (recast) does not apply (article 64 (2) (a) EVEX Convention). For the application and interpretation of the EVEX Convention the district court has to take account of the principles contained in all the relevant decisions of the CJEU regarding the former Brussels I Regulation and Brussels I (recast).

7.3. In the absence of any applicable regulations or conventions, the international jurisdiction with respect to UBS Japan will have to be determined on the basis of the Dutch Code of Civil Procedure. The provisions relevant for the purpose hereof in article 6 opening line and (e) and article 7 (1) DCCP derive from (the predecessors of) the current corresponding provisions in article 7, opening line, and (2), Brussels I (recast) and article 8, opening line, and (1) Brussels I (recast). Since it was the lawmaker's intention to have regard to these last-mentioned provisions, the district court will allow itself to be guided by CJEU case law when interpreting and applying the aforementioned articles from the DCCP.

7.4. The court which on the basis of Brussels I (recast), or its predecessors, determines its jurisdiction, must not confine itself in that process to the claimant's submissions, but must also assess all the evidence available to it with regard to the actual legal relationship in existence between the parties, including, where appropriate, the arguments put forward by the defendant, with the proviso that, if the defendant challenges the claimant's submissions, the court, when determining jurisdiction, is not required to provide to an opportunity to furnish evidence. This means that assessing jurisdiction on the basis of the EU instruments must not be performed only on the basis of the ground for the claim selected by the claimant (see CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 41, *Freeport/Arnoldsson*, CJEU 28 January 2015, ECLI:EU:C:2015:37, grounds 58-65, *Kolassa/Barclays Bank*, CJEU 16 June 2016, ECLI:EU:C:2016:449, grounds 42-46, *Universal Music/Schilling*). This criterion also applies if the Dutch court within the context of the application of the general rules governing international jurisdiction examines whether it has jurisdiction (see most recently Supreme Court 12 April 2019, ECLI:NL:HR:2019:566, ground 3.4.4).

7.5. Article 4 (1) Brussels 1 (recast) provides the main rule: persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. It is not in dispute that in this case no jurisdiction is conferred on the Dutch court by this provision over UBS et al., Lloyds et al. and ICAP et al.

7.6. However, Brussels I (recast) also provides a number of special rules on jurisdiction. These are based on the close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection is to ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen, all this according to 16 of the preamble to Brussels I (recast). The special rules on jurisdiction must be interpreted restrictively (CJEU 27 September 1988, ECLI:EU:C:1988:459,

Kalfelis/Schröder). They cannot be given an interpretation going beyond the cases expressly envisaged by the regulation in question (CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 35, *Freeport/Arnoldsson*).

7.7. The special rule on jurisdiction of article 8, opening line and (1), Brussels I (recast) reads as follows, to the extent relevant for the purpose hereof:
A person domiciled in a Member State may also be sued:
1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

7.8. Stichting argues that jurisdiction is conferred on the Dutch court by this article and in so doing refers to Rabobank as the 'anchor defendant'.

7.9. It follows from CJEU case law that it is up to the national court, taking account of all the necessary elements of the case (see 7.4), to assess if there is a connection between the actions brought before it, and hence if irreconcilable judgments might result from separate proceedings. The likelihood of irreconcilable decisions is to be understood as the likelihood of contradictory decisions. Relevant in that respect may be if the defendants acted independently from each other. Also relevant is the legal basis of the actions, in which respect it should be noted that an identical legal basis is not a *conditio sine qua non* for applying article 8 opening line and (1), Brussels I (recast). It should furthermore be borne in mind that in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact (c.f. CJEU 13 July 2006, ECLI:EU:C:2006:458, ground 26, *Roche/Primus*, CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 40, *Freeport/Arnoldsson*, CJEU 1 December 2011, ECLI:EU:C:2011:798, ground 79, *Painer/Standard Verlags* and CJEU 12 July 2012, ECLI:EU:C:2012:445, ground 24, *Solvay/Honeywell*).

7.10. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of article 8 Brussels I (recast), provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (CJEU 1 December 2011, ECLI:EU:C:2011:798, ground 81, *Painer/Standard Verlags*).

7.11. The district court takes the view that, as far as the Internal Organisation claims against Rabobank on the one hand and against Lloyds et al., UBS et al. and ICAP et al. respectively on the other hand are concerned, there is no question of a same situation of law and fact. Contrary to what has been argued by Stichting, bringing the same (i.e.: identical) actions against multiple defendants does not automatically mean that a close connection exists between those actions. Stichting has failed to clarify the existence of a factual connection between the way in which Rabobank on the one hand and the other defendants on the other hand had structured their internal (administrative) organisations and/or their internal control mechanisms. The file for that matter does not contain any elements either to show that Rabobank had coordinated its internal business organisation or control mechanisms with (one or more of) the co-defendants. Moreover Stichting has not contradicted that Rabobank on the one hand and Lloyds et al., UBS et al. and ICAP et al. respectively on the other hand are individual undertakings with their own management, their own staff, their own legal/compliance departments, domiciled in different geographical locations, that they operated fully independently from each other when they set up their business and that – as far as their internal organisations and control mechanisms were concerned – they were subjected to different (national) regulatory frameworks.

7.12. With respect to the Manipulation claims there is no question of a same situation of law and fact either, for Stichting accuses Rabobank of its own, independent practices (carried out by its employees from its offices), which are unrelated to the alleged practices of the other defendants. It is true that it accuses Rabobank on the one hand and each of the other defendants on the other hand of similar practices, but doing so is not enough (c.f. CJEU 13 July 2006, ECLI:EU:C:2006:458, grounds 27 and 31, Roche Primus). It is furthermore noted that the laws applicable to the Manipulation claims against Rabobank on the one hand and against each of the other defendants on the other hand (to be determined by the district court on its own motion) are different, meaning that there is no same situation of law either. The Manipulation claim against Rabobank is after all governed by Dutch law, whereas the Manipulation claims against the other defendants are not governed by Dutch law, neither under the Unlawful Act (Conflict of Laws) Act (Wet Conflictenrecht Onrechtmatige Daad (WCOD)), nor under Regulation (EC) no. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), nor under article 159 of Book 10 DCC. It is true that Stichting has also pleaded the anti-choice rule, but it has failed to substantiate that the conditions for applying this rule have been satisfied.

7.13. The considerations in 7.12 above likewise apply to the alternative Specific Data claims.

7.14. The same situation of law and fact does not arise either with respect to the Unjustified Enrichment claims against Rabobank on the one hand and against Lloyds et al., UBS et al. and ICAP et al. respectively on the other hand. If from nothing else, it follows from Stichting's own submissions that the defendants have each of them individually enriched themselves at the expense of the Interested Parties. According to Stichting the enrichment was the object (and the consequence) of each of the individual defendants' practices, which form the basis of the Manipulation claims. However, no coherent body of facts has been argued by Stichting, neither with respect to those Manipulation claims, nor with respect to the Unjust Enrichment claims.

7.15. As to the Collusion claims and the Group Liability claims the following applies. The district court first and foremost states that in this case, unlike in the CJEU judgment of 21 May 2015 (ECLI:EU:C:2015:335, CDC) quoted by Stichting, there is no question of a decision given by the European Commission in which with respect to all the defendants the same infringement of article 101 TFEU is established.
However, Stichting has alleged various specific facts regarding contacts between Rabobank on the one hand and each of the other defendants on the other hand, the purpose of which was to manipulate interest rate benchmarks, meaning that to that extent the same situation of fact may be said to have occurred. Since the accusations concern deliberate collusion with a view to manipulating interest rate benchmarks for the defendants' own benefit, it has been adequately clarified, even if different legal regimes apply, or may apply, that a same situation exists in law as well, since such conduct is unlawful/not permitted in each of the applicable legal systems. To that extent it could also have been foreseen by each of the defendants that, in the event of the alleged collusion being detected, they might also be sued before the court of the place of domicile of a colluding partner. However, for the purpose of determining jurisdiction the specifically alleged collusion between Rabobank on the one hand and each of the other individual defendants on the other hand will have to be examined.

7.16. LBG has argued without being contradicted that it is merely a holding company without activities of its own, that it did not make any submissions whatsoever for any interest rate benchmark whatsoever, and that it (or its employees in any case) never had any contacts with Rabobank about interest rate benchmarks, or the manipulation of these. Similarly, ICAP plc has argued without being contradicted that it operates as a holding company, without conducting a business of its own and without any employees, and that it is not a broker. In light of this Stichting

has provided insufficient concrete facts in substantiation of its claim that there nevertheless exists a close connection within the meaning of article 8, opening line and (1) Brussels 1 (recast) between the Collusion claims and Group Liability claims against, on the one hand, Rabobank and on the other hand LBG and ICAP plc respectively. It is true that for the factual substantiation of its claims Stichting has referred to settlement documents between the various defendants and foreign regulators/foreign judicial authorities, but the very thing not mentioned in these are actual practices of interest rate benchmark manipulations by the aforementioned holding companies.

7.17. The close connection between the Collusion claims/Group Liability claims against Rabobank and those against Lloyds Bank may be assumed only, insofar as Stichting has alleged a sufficiently coherent body of facts with respect to both defendants. General statements are not enough in that respect, given the required restrictive interpretation of the special provisions on jurisdiction, the purpose of which is to avoid that the defendant is summoned to appear before a court, or foreign court, which could not reasonably have been foreseen by him.
As has been rightly argued by Lloyds et al., Stichting has adopted concrete, factual positions only with respect to collusion practices/group practices between Rabobank and Lloyds Bank for the manipulation of JPY LIBOR, not with respect to other interest rate benchmarks. Lloyds Bank has furthermore argued without being contradicted that it did not act as a panel bank for EURIBOR.

7.18. The same applies with respect to the close connection between the Collusion claims/Group Liability claims against Rabobank and UBS et al. As has been rightly argued by UBS et al., Stichting has alleged concrete collusion practices/group practices only between Rabobank and UBS Japan for the manipulation of JPY LIBOR. In addition UBS et al. have argued that the correctness of those arguments does not appear from the material submitted by Stichting, but proof of any (disputed) views is not (yet) an item of discussion within the context of this procedural issue.

7.19. The above also applies with respect to the close connection between the Collusion claims/Group Liability claims against Rabobank and ICAP Europe. As has been rightly argued by ICAP et al., Stichting has alleged concrete collusion practices/group practices only between Rabobank and ICAP Europe for the manipulation of JPY LIBOR. Contrary to what has been argued by ICAP et al., the fact that ICAP Europe itself was not a submitter does not mean that the required connection is absent, since Stichting has specifically argued that ICAP Europe as a broker attempted to cause Rabobank to comply with the wishes of, for example, UBS Japan regarding JPY LIBOR.

7.20. In view of the above the district court comes to the conclusion that pursuant to article 8 opening line and (1) Brussels I (recast) no jurisdiction is conferred on it with respect to:
- the Internal Organisation claims against Lloyds et al., UBS et al. and ICAP et al.;
- the Manipulation claims against Lloyds et al., UBS et al. and ICAP et al.;
- the Unjust Enrichment claims against Lloyds et al., UBS et al. and ICAP et al.;
- the alternative Specific Data claims against Lloyds et al., UBS et al. and ICAP et al.;
- the Collusion claims and Group Liability claims against LBG and ICAP plc;
- the Collusion claims and Group Liability claims against Lloyds Bank, UBS Switzerland, UBS Japan and ICAP Europe, to the extent that interest rate benchmarks other than JPY LIBOR are concerned.

7.21. What remains is the question if the Dutch court does have jurisdiction with regard to the claims referred to in 7.20 pursuant to article 7, opening line and (2), Brussels I (recast), alternatively article 5 (3) EVEX Convention (with regard to UBS Switzerland), alternatively article 6 opening line and (e) DCCP (with regard to UBS Japan). The claims filed by Stichting (including the Unjustified Enrichment claims) after all relate to matters relating to tort, delict or quasi-delict within the meaning of article 7, opening line and (2), Brussels I (recast).

7.22. This question is answered in the negative. It is an established fact that the Handlungsort (the place of the event that caused the damage) is not in the Netherlands, because the acts or omissions of Lloyds et al., UBS et al. and ICAP et al. did not take place in the Netherlands. What cannot be established either is that for Stichting's members under the articles of association the Erfolgsort (the place where the damage took effect) is in the Netherlands. This action concerns purely financial damage (pecuniary loss) sustained by – briefly put – professional investment institutions throughout the European Union. The alleged financial damage sustained by them arises from transactions and/or payments that (except in the US) have taken place, or may have taken place anywhere in the world. Unlike in the case that led to the Supreme Court judgment of 14 June 2019, ECLI:NL:HR:2019:925 (ground 4.5), this case cannot be based on the assumption that the alleged damage sustained by Stichting's members under the articles of association directly occurred in the Netherlands. The mere fact that a part of Stichting's members under the articles of association may have sustained direct damage in the Netherlands, cannot therefore lead to the conclusion that the Erfolgsort is in the Netherlands. The district court also does not agree with Stichting when it argues that this interpretation would prejudice the object of article 305a of Book 3 DCC (the efficient and effective legal protection of groups of injured persons), since this article does not seek to create jurisdiction with respect to defendants who on the basis of the interpretation in line with the regulation of the aforementioned provisions on jurisdiction, cannot be sued before the Dutch court.

7.23. The conclusion in the procedural issues on jurisdiction is that the interim applications must be allowed, with the exception of the Collusion claims and the Group Liability claims against Lloyds Bank, UBS Switzerland, UBS Japan and ICAP Europe with regard to JPY LIBOR.

7.24. ICAP et al. have requested the district court, in the event of the district court assuming partial jurisdiction, to stay the principal action against ICAP et al. until the US Class Actions listed in 2.5 (iv) and (xv) have ended. This request is dismissed on the grounds set forth in 5.2 - 5.7, which also apply to ICAP et al.

7.25. Lloyds et al., UBS et al. and ICAP et al. have furthermore, in the event of the district court assuming partial jurisdiction and staying the proceedings against Rabobank, requested to stay the proceedings against them on the ground of due process of law. Since the proceedings against Rabobank will not be stayed, the district court will not assess these requests.

7.26. Since the interim applications will in part be dismissed, the district court will now discuss the request made by the defendants in respect of whom this judgment is to be regarded as an interim judgment to be granted leave to file an interim appeal against said judgment.
The district court will pursuant to article 337 (2) DCCP grant the requested leave to file an interim appeal for the following reasons. The parties have conducted a fundamental debate in this procedural issue about the interpretation and the application of the relevant provisions on jurisdiction, a debate held in the context of a collective action within the meaning of article 305a of Book 3 DCC, a concept that is still subject to legal developments. It is not inconceivable that on appeal the decision on jurisdiction might (at certain points) turn out to be a different one. If leave to file an interim appeal were denied, the defendants concerned will be forced, given the subject matter of the principal action, to make considerable efforts and incur considerable costs, both factual and legal, in order to continue the proceedings in the principal action in the first instance, after which they will in all probability raise the issue of the district court's decision on jurisdiction once again in appeal proceedings, at the expense of procedural economy. In addition it is not to be ruled out that Stichting too will file an appeal against this judgment (insofar as it concerns a final judgment), in which case it will be advisable to await the outcome of both appeals. Further to this the principal action will be docketed in order for the parties to submit their statements on the continuation of the

proceedings (see 8.18). If they should so require, the parties may also request that the case be split up.

7.27. Since the interim applications with regard to ICAP plc and LBG will be allowed in their entirety, Stichting as the party found against will be ordered to pay the costs incurred by these parties in the procedural issue. However, since these parties have together with ICAP Europe and Lloyds Bank respectively been represented by the same counsel in these proceedings and only a number of submissions relate to them specifically, the cost will be set at nil as far as these parties are concerned. Since the interim applications with respect to Lloyds Bank, ICAP Europe and UBS et al. will in part be allowed and in part be dismissed, both Stichting and these parties will be regarded as the parties found against and the costs of the proceedings will be set off between them, whereby each party will pay its own costs.

8. The decision

The district court

with respect to the motion seeking a stay of the proceedings

8.1. dismisses the application,

8.2. orders Rabobank to pay the costs of the procedural issue, thus far estimated on the part of Stichting at EUR 1,086 (2 points x rate II),

8.3. orders Rabobank to pay the costs incurred after this judgment, estimated at EUR 157,00 in attorneys' fees, plus, if Rabobank fails to comply with the judgment within 14 days from having been given notice thereof and service of the judgment was subsequently effected, an amount of EUR 82 in attorneys' fees and the costs of serving the judgment,

8.4. declares the order for costs enforceable with immediate effect,

with respect to the motion contesting jurisdiction

8.5. allows the interim applications to the extent that the district court hereinafter declares that it lacks jurisdiction to hear and determine the principal action,

8.6. dismisses all other interim applications,

8.7. grants leave pursuant to article 337 (2) DCCP to file an interim appeal against the decision mentioned in 8.6,

8.8. orders Stichting to pay the costs of the procedural issue, thus far estimated on the part of LBG and ICAP plc at nil,

8.9. in all other respects sets off the costs of the procedural between the parties, whereby each party will pay its own costs,

in the principal action

8.10. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1 nos. II, III, IV, VI, VII, VIII and nos. XVIII - XX and nos. XXII - XXIV,

8.11. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1 nos. XI and XV against LBG,

8.12. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1 nos. XII and XVI against ICAP plc,

8.13. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1. nos. X and XIV against UBS et al., to the extent that these concern interest rate benchmarks other than JPY LIBOR,

8.14. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1. nos. XI and XV against Lloyds Bank, to the extent that these concern interest rate benchmarks other thanJPY LIBOR,

8.15. declares that it lacks jurisdiction to hear and determine the claims listed in 3.1. nos. XII and XVI against ICAP Europe, to the extent that these concern interest rate benchmarks other than JPY LIBOR,

8.16. declares that it has jurisdiction to hear and determine the remaining claims,

8.17. orders the case to be set down for hearing on **25 September 2019** in order for a statement of defence to be submitted by Rabobank,

8.18. orders the case to be set down for hearing on **25 September 2019** in order for a motion commenting on the continuation of the proceedings to be submitted by Stichting, Lloyds Bank, UBS Zwitserland, UBS Japan and ICAP Europe,

8.19. defers any further decisions.

This judgment was rendered by M.E.M. James-Pater, C. Bakker and M.C.H. Broesterhuizen and pronounced in open court on 14 August 2019.

(signatures)

ISSUED AS A TRUE COPY
The clerk of the
Amsterdam District Court