NEWSLETTER

CASE LAW

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NETHERLANDS

JUDGMENT ON ESSENTIALLY DERIVED VARIETIES (EDVs) (IN THE FIRST INSTANCE)

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Procedural background

In 2002, a court in The Hague, Netherlands, gave a provisional judgement in a case concerning the notion of 'Essentially Derived Variety' (EDV) (see UPOV Gazette No. 94 of December 2002). The court concluded the proceedings by its judgment of July 13, 2005, probably the very first court interpretation of the notion of EDV in the world. Filing an appeal was still possible at the time of preparing this publication.

Relevant facts

Party D is the holder of a plant breeders' right, granted by the Community Plant Variety Office (hereafter called: an EU-PBR), for the variety 'Dangypmini' of the species Gypsophila. Party A is marketing material of two other varieties of that species, known as 'Blancanieves' and 'Summer Snow'.

EDV?

The proceedings in this court case revolve around the question whether 'Blancanieves' and 'Summer Snow' can be considered varieties derived from 'Dangypmini' in the sense of Article 13, paragraphs 5 (a) and 6 of the Council Regulation on Community plant variety rights (EC/2100/94; hereafter called "the EU Regulation"). The court comes to a negative answer to that question.

DNA fingerprinting

Party D supports its claim that 'Blancanieves' is an EDV of 'Dangypmini', for which he is the holder of an EU-PBR, by the results of DNA fingerprinting. Those results show, according to Party D, such a strong genetic similarity between the two varieties that 'Blancanieves' is to be considered an EDV of 'Dangypmini'.

Party A, producing another fingerprinting report, challenges the set-up as well as the conclusions of the DNA fingerprinting, brought forward by the other party.

The court leaves conclusions from either DNA fingerprinting aside because it finds sufficient grounds for its verdict in 'classic' characteristics.

Interpretation of Article 14 of the UPOV Convention

Since the provisions concerning EDV's in the EU Regulation result from the UPOV Convention, the court formulates some considerations with regard to the EDV provisions in the UPOV Convention, notably Article 14 paragraph 5 (a) (i) and (b).

Firstly, the court considers that at first glance the text of (b) (i) seems at odds with (b) (iii). After all, a condition of (b) (i) is that the (in the sense of: all) characteristics of the initial variety must be preserved while (b) (iii) provides that the essential characteristics must only be maintained insofar as they do not result from the act of derivation. The court concludes that (b) (i) mainly aims at laying down that the derived variety must have its genetic origin in the initial variety.

When assessing the question whether the essential characteristics of the initial variety are found sufficiently in the derived variety, according to (b) (iii) abstraction is required of the changes that result from the act of derivation. It is not required that an EDV should have all essential characteristics of the initial variety; changes in (essential) characteristics, that have resulted from the act of derivation should be disregarded.

Secondly, the court holds the opinion that it can be concluded from (the creation history of) the rules in both the UPOV Convention and the EU Regulation that a variety must not deviate considerably from the initial variety in order to consider

it an EDV. First of all, the simple fact that the initial variety has been used at some point during the development of the new variety is not enough ground to consider the latter an EDV. To that end the court points at the wording "essentially derived", apparently to express the discrepancy between the initial variety and the EDV should not be too substantial, at the examples quoted in Article 14 paragraph 5 (c) of the UPOV Convention and at the "Explanatory Notes" to the draft UPOV Convention (dos. No. IOM/IV/2 of June 22, 1989, page 12). Finally in this respect the court finds it important that the extension of the protection of initial varieties to EDV's can be considered an exception provision to the main rule of independence of distinguishable varieties. Being an exception it should be interpreted in a limited manner.

Implementation of interpretation

Important for the case is the fact that 'Dangypmini' and 'Blancanieves' differ in a large number of characteristics as regards shape and form (morphology). In this respect the court takes note that the Community Plant Variety Office determined that differences can be established in 17 out of the 21 tested characteristics, which apparently are relevant for Gypsophila. Those differences are so substantial in number and significance that the conclusion can no longer be justified that this is a matter of one or a few differences as required for an EDV. In addition it was insufficiently demonstrated how the large number of morphological differences could have been obtained with only relatively simple "acts of derivation".

As regards 'Summer Snow' it was insufficiently motivated that and why that variety should be considered an EDV from 'Dangypmini', even more so when one considers that in its decision to grant EU-PBR for 'Summer Snow' the Community Plant Variety Office did not even typify 'Dangypmini' as a "similar variety" and, consequently, has not investigated it either.

Conclusion

The conclusion from the above is that trading (harvested) material of both 'Blancanieves' and 'Summer Snow' does not mean an infringement of the EU-PBR for 'Dangypmini'.