

Locating pure financial damage in cross-border securities class actions: clarity on the horizon?

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Introduction

Determining a court's jurisdiction in cross-border class actions involving pure financial damage has proven difficult in practice. This is particularly true when jurisdiction is based on the special competence rules set out in Article 7(2) of the recast EU Brussels Regulation. The European Court of Justice (ECJ) has rendered different decisions regarding the interpretation of Article 7(2) in recent years. Consequently, claimants and defendants often differ in their interpretation of how these rules should be applied.

The Dutch Shareholders Association (VEB) v British Petroleum (BP) is a good example of the confusion surrounding this matter. After two lower court rulings, the Dutch Supreme Court has applied to the ECJ for a preliminary ruling to gain further clarity.

Facts

VEB concerns a class action relating to the 2010 oil spill in the Gulf of Mexico. VEB initiated proceedings against BP before the Amsterdam District Court based on Article 3:305a of the Civil Code, seeking a declaratory judgment regarding BP's liability towards investors who bought, sold or held BP shares around the time of the spill. BP is alleged to have misinformed shareholders about the spill, thus violating its legal information obligations and acting unlawfully towards its shareholders. The alleged damage suffered by the BP shareholders (ie, a sharp decline in share value after the spill) qualifies as pure financial damage.

Special competence rules of recast EU Brussels Regulation

VEB based the Amsterdam District Court's jurisdiction on Article 7(2) of the recast EU Brussels Regulation. This provision stipulates that a defendant can be summoned before the court of the place where a harmful event occurred or may occur. This covers both the place where a harmful event takes place (*handlungsort*) and the place where the damage occurs (*erfolgsort*). Key elements such as foreseeability and sound administration of justice must be taken into account when assessing jurisdiction based on the *erfolgsort* (or any other ground set out in the regulation). An overly broad definition of the *erfolgsort* would not serve the principle of the regulation that defendants can reasonably foresee a court's jurisdiction based on the *erfolgsort*. Conversely, too narrow a definition would hinder the principle of sound administration of justice in the interest of the claimants.

VEB and BP agree that the harmful event did not take place in the Netherlands, but differ in their interpretation of where the damage occurred. Therefore, the Supreme Court's preliminary ruling request to the ECJ mainly focuses on whether pure financial loss can create an *erfolgsort* and, if so, where and how this can be localised.

BP filed a motion to dismiss the case due to a lack of international jurisdiction. The Amsterdam District Court granted the motion. The Court of Appeal later confirmed the district court's judgment (for further details please see "[Fact\(or\) finding: locating pure financial damage in cross-border securities class actions](#)"). VEB contested this decision before the Supreme Court.

VEB in ECJ case law

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VEB is closely connected to the ECJ's findings in three other cases.

In *Kolassa* (C-375/13), the ECJ held that the courts where a claimant is domiciled have jurisdiction based on the *erfolgsort*, particularly when the damage occurs directly in the claimant's account with a bank established within the area of jurisdiction of those courts.

In *Universal Music* (C-12/15), the ECJ concluded that the location of a bank account in which pure financial loss occurs does not provide a sufficient connection for jurisdiction based on the *erfolgsort*, without other additional circumstances that attribute to the jurisdiction of that court.

In *Löber* (C-304/17), the ECJ further consolidated the *Kolassa* and *Universal Music* judgments and applied the framework articulated in both cases, observing that they were consistent with the objectives of:

- legal certainty;
- proximity of the court to a dispute; and
- the sound administration of justice.

Despite the similarities, the Supreme Court considered *VEB* to differ from the abovementioned cases in various ways.

The Supreme Court held that *Kolassa*, *Löber* and *VEB* all concern pure financial damage that occurred directly in a bank or investment account (ie, the financial loss was the result of a decline in the value of shares held in the particular bank or investment account). Investors themselves had no influence on these events. *Universal Music* differed on this point, since the aggrieved party had caused the bank account's value to fall by making a payment from the account.

The Supreme Court continued by stating that *VEB* differs from *Kolassa* and *Löber* as it is not based on misleading information in a prospectus distributed in the Netherlands. Instead, it is based on incomplete and misleading information that was made public through press releases, websites and public statements by directors. As such, BP did not – individually or generally – address Dutch investors.

The Supreme Court also specifically referred to the ECJ's ruling in *eDate Advertising* (C-509/09), which concerned the liability of alleged violations of personality rights by content posted on the Internet. In this decision, the ECJ granted jurisdiction to the courts of EU member states in whose territory content posted on the Internet is or has been accessible. This raises the question of whether there is cause for a comparable rule of jurisdiction for compensation claims from shareholders because of incorrect, incomplete or misleading information that has been made public by international listed companies.

The Supreme Court went on to observe that unlike in *Kolassa* and *Löber*, *VEB* is a class action based on Article 3:305a of the Civil Code. As such, the individual circumstances could pose extra challenges with regard to identifying the *erfolgsort*. This raises the question of whether – and if so, how – specific circumstances should be established collectively.

Lastly, the Supreme Court addressed the internal competence of the Dutch courts. Assuming that the Dutch courts have jurisdiction over the collective action instituted by *VEB*, BP shareholders will be able to file individual damage claims in follow on proceedings. This raises the question of whether all claims can be brought before the courts that have jurisdiction in a collective action. This could be relevant if (for example) a shareholder is domiciled or their bank account is located outside the Amsterdam District Court's jurisdiction.

If the Amsterdam District Court is not authorised to hear all individual damages claims, the question arises as to which factors determine the internal relative jurisdiction. The Supreme Court questioned whether in that case the internal relative jurisdiction should be determined based on:

- the place of residence of the aggrieved parties;
- the place of business of the bank where the investor in question holds their personal account;
- the place of business of the bank where the investment account is held; or
- another relevant factor.

Preliminary questions

In view of the above, the Supreme Court submitted the following questions to the ECJ:

1. (a) *Is Article 7(2) Regulation to be interpreted as the direct occurrence of purely financial damage to a Dutch investment account, which damage is the result of investment decisions taken under the influence of widely distributed, but incorrect, incomplete and misleading information from an international listed company, provides a sufficient starting point for*

international jurisdiction of the Dutch court by virtue of the location of the occurrence of the damage (*Erfolgsort*)?

(b) If not, are there additional circumstances required that justify the jurisdiction of the Dutch court and what are those circumstances? Are the already mentioned additional circumstances sufficient for the jurisdiction of the Dutch court?

2. Does the answer to question 1 differ if it concerns a claim based on article 3:305a [Civil Code], initiated by an association whose purpose is to protect the collective interests of investors who have suffered damage as referred to in question 1, which entails, among other things, that the places of residence of the aforementioned investors have not been determined, nor the special circumstances of the individual purchase transactions?
3. If the Dutch court has jurisdiction over the article 3:305a [Civil Code] declaratory proceedings based on art. 7(2) of the Regulation, is the requested Dutch court also authorized to hear all individual claims for damages from investors who have suffered damage as referred to in question 1?
4. If the answer to question 3 is negative, is the internal competence of the court then determined on the basis of the place of residence of the aggrieved investor, the place of business of the bank where the investor holds his personal bank account or the place of business of the bank where the investment account is held, or another connecting factor?

Comment

The ECJ's response could provide further insight into which factors constitute a sufficient connection to establish an *erfolgsort* under Article 7(2) of the recast EU Brussels Regulation. So far, the factual circumstances of a case are open to diverse interpretation by different courts in EU member states. It is questionable whether the existing situation meets the regulation's aim of strengthening the legal protection of persons established in the European Union by enabling:

- applicants to easily identify the court in which they may sue; and
- defendants to reasonably foresee the court in which they may be sued (*Kronhofer v Maier*, C-168/02).

A similar application of the ECJ's ruling in *eDate Advertising* could be a pragmatic way to address the aforementioned issue. After all, in today's increasingly digital and global world, it is questionable whether companies reaching out to an international group of investors could reasonably argue that only one court is authorised to address all claims in numerous cross-border disputes.

The ECJ's answers relating to the role and status of Article 3:305a of the Civil Code declaratory proceedings could be useful in class actions before the Dutch courts and add to the Netherlands' attractiveness as a venue for collective redress in cross-border disputes.

The ECJ will now consider the Supreme Court's preliminary ruling request, which will likely take until the end of 2020. Claimants and defendants involved in cross-border cases in both the Netherlands and other EU member states will likely keep a close eye on any developments.

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