CJEU Case Note: CJEU 10 September 2015, C-47/14 (*Holterman Ferho v. Spies*)

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1. INTRODUCTION

In 2014, in a case involving director liability, the Dutch Supreme Court referred three questions on the application of the EU Brussels I Regulation to the European Court of Justice (ECJ). The questions concerned matters of international jurisdiction in a case between a Dutch company and its director who lived in Germany and performed his management activities from there. Since the director was also an employee of the company, the Supreme Court's first question was whether the special jurisdictional provisions in the EU Brussels I Regulation on employment contracts also had to be applied to the corporate law claim. On 10 September 2015, the ECJ answered the questions (case C-47/14, *Holterman Ferho v. Spies*).

The answers were issued in the context of Brussels I, but are just as relevant to the explanation of the recast Brussels I Regulation, as the provisions of Brussels I applied in *Ferho v. Spies* (most notably Articles 5(1), 5(3) and 20) are the same in the recast regulation (Articles 7(1), 7(3) and 22).

2. FACTS

Mr Spies used to be the director of Ferho, a Dutch limited liability company, and was tied to the company by an employment contract. He was domiciled in Germany and performed his management tasks relating to Ferho in Germany. Further, Spies was the director of three German subsidiaries. In the case at hand Spies was held liable for mismanagement of Ferho during the term of his directorship. The liability claim submitted to a Dutch court was based on:

– improper management as a managing director (section 2:9 of the Civil Code);
– default under the employment contract (section 7:661 of the code); and
– tort (section 6:162 of the code).

Spies argued that the Dutch courts had no jurisdiction based on, among other things, Article 20(1) of Brussels I. This article stipulates that an employer may bring proceedings only in the courts of the Member State where the employee is domiciled. According to Spies, the claim should have been submitted to the competent German court.

The district court and the Court of Appeal declared themselves incompetent to rule on the dispute. In cassation, the Supreme Court found that it needed further explanation of Brussels I and referred the following questions to the ECJ:

- Does Section 5 of Brussels I – which contains special jurisdictional provisions with regard to employment contracts – prevent the applicability of Section 2 of Brussels I in case of a claim against a director also being an employee of the company?
- If not, would the relationship between a director and a company qualify under Article 5(1) of Brussels I (contract)? If so, would the place where such agreement was or should have been executed be the place where the company has its corporate residence within the meaning of Article 60 of Brussels I?
- If not, would a claim based on a breach of a director's obligations under Dutch corporate law qualify under Article 5(3) of Brussels I (tort)? If so, would the place where the damage occurred be the place where the company has its corporate residence within the meaning of Article 60 of Brussels I?

3. ECJ DECISION

The ECJ ruled that section 5 of Brussels I prevents the applicability of section 2 of Brussels I in case of a claim against a director, provided that the relationship with the director is considered to be an employment contract within the meaning of Brussels I. An employment contract exists if, for a certain period, the director

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performed services for and under the direction of the company in return for remuneration. The ECJ held that this issue was for the referring court to determine. Regarding the subordination relationship, the court considered that it was for the referring court to examine the extent to which Spies, in his capacity as a shareholder of the company, could influence the administrative body of the company of which he was the manager. If his ability to influence that body was not negligible, it would be appropriate to conclude that there was no subordination relationship.

In regard to the second question, the ECJ ruled that an action brought by a company against a former director on the basis of an alleged breach of the director's company law obligations falls within the concept of 'matters relating to a contract' as referred to in Article 5(1) of Brussels I. The ECJ considered such relationship to be a 'contract for the provision of services' within the meaning of Article 5(1)(b) of Brussels I because the legal relationship between a director and a company is characterized by the performance of a particular activity in return for remuneration. Further, the ECJ ruled that in the absence of any stipulation in the company's articles of association or any other document, it was for the referring court to determine the place where the director had carried out most of his activities, provided that the provision of services in that place was not contrary to the parties' intentions. Article 5(1)(b) states that the courts of such place are competent to rule on the dispute.

In answer to the third question, the ECJ considered that Article 5(3) of Brussels I applied only if the director's conduct could not be considered to be a breach of his obligations under company law. Otherwise, Article 5(1) of Brussels I applied.

4. ANALYSIS

4.1. First Question

Under Dutch law, the relationship between a director and a company is twofold. On the one hand, it is based on a contract (either an employment contract or a management contract), while on the other it is based on corporate law. In the case at hand, Spies and Ferho concluded an employment contract. Under such contract the task to be performed by the director is to manage the company. In view thereof, it is impossible to distinguish between the activities to be performed under the employment contract and the activities to be performed under corporate law. Therefore, the ECJ's approach that section 5 of Brussels I prevents the applicability of section 2 of Brussels I in case of a claim against a director who is an employee is to be applauded.

Section 5 of Brussels I applies only if a director is tied to a company by an employment contract within the meaning of that section. The fact that the contract qualifies as an employment contract under national law is not decisive. According to the ECJ, an employment contract exists if, for a certain period, a person performed services for and under the direction of a company in return for remuneration and was bound by a lasting bond which to some extent brought him or her within the organizational framework of the company. This definition may be unsurprising, but it is nevertheless interesting as it is the first time that the ECJ has clearly defined the term 'employment contract' in the context of Brussels I.

The ECJ's considerations with regard to the required relationship of subordination appear realistic. It is for the referring court to examine the extent to which Spies, in his capacity as a shareholder in Ferho, could influence the administrative body of the company of which he was the manager. No subordination relationship exists if the director's ability to influence the administrative body was not negligible.

4.2. Second Question

The ECJ left it for the referring court to decide whether an employment contract within the meaning of Brussels I existed. If not, the second question becomes relevant. In this context the ECJ ruled that an action brought by a company against its former manager on the basis of an alleged breach of his or her obligations under company law falls within 'matters relating to a contract', as referred to in Article 5(1) of Brussels I. In the case at hand, Spies and Ferho freely assumed mutual obligations as Spies chose to manage and administer the company and the company undertook to remunerate him for those services. This decision is in line with the ECJ's decision in *Peters Bauunternehmung* (34/82, EU:C:1983:87).

The further specification that the relationship between a company and its managing director be regarded as a contract for the provision of services appears to be technically correct in case a director receives remuneration for his services. In the event of a contract for the provision of services, the courts of the place where the services were primarily provided or should have been provided under the contract have jurisdiction. The ECJ reiterated that this place must be deduced, insofar as possible, from the contract itself (as held in *Wood Floor Solutions Andreas Domberger* (C-19/09, EU:C:2010:137)).

If the contract does not specify the place where the director should carry out his or her activities, it is for the referring court to verify from the company's articles of association or any other document that defines the manager's obligations towards the company whether it is possible to ascertain the place where the services were mainly provided. If not, it is for the referring court to determine the place where the director, for the most part, carried out his or her activities in the performance of the contract. For that purpose, it is possible to consider the time spent in those places and the importance of the activities carried out there.

One of the essential characteristics of a contract for the provision of services is that the services are provided in return for

remuneration, as the ECJ in its present decision repeated. In the context of international jurisdiction, this leads to a distinction between directors performing their services for remuneration and directors performing their services without remuneration. For instance, directors of foundations and associations in the charity, cultural and religious sectors often receive no remuneration.

In case of a contract for the provision of services, the place of the main provision of services under the contract constitutes jurisdiction. In case of a 'normal' contract, the place of the 'litigious obligation' (to be defined in accordance with national law) constitutes jurisdiction (*Tessili v. Dunlop* (C-12/76, ECLI:EU:C:1976:133). In other words, while in a contract for services the place is more abstractly defined on the basis of the main provision of services under the contract, in a normal contract the place is more specifically defined on the basis of the litigious claim. It is remarkable that different criteria apply when defining jurisdiction in cases against directors performing their services with or without remuneration.

4.3. Third Question

The answer to the third question is less interesting. It confirms earlier ECJ case law. According to the case law, Article 5(3) of Brussels I (tort) applies only to actions which seek to establish the liability of a defendant and do not concern 'matters relating to a contract' within the meaning of Article 5(1) of Brussels I. Only where the challenged conduct may not be considered a breach of the manager's obligations under company law does Article 5(3) of Brussels I come into play. In such cases it is for the referring court to identify, based on the facts, the closest linking factor between the place of the event giving rise to the damage and the place where the damage occurred.

5. CONCLUSION

The ECJ has issued an interesting decision that is relevant to many international director liability cases. It demonstrates that in such cases the competent court is not automatically the court of the place of establishment of the company. If a director has an employment relationship within the meaning of Brussels I, only the courts of the place where he or she is domiciled are competent. If a director does not have an employment agreement, much depends on the agreed or actual place of performance. Thus, to prevent any jurisdictional issues, it may be sensible to bring suits before the courts where the defendant is domiciled.