The liability of a company director from the standpoint of the Brussels I Regulation

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On 10 September 2015, the ECJ delivered its judgment in *Holterman Ferho Exploitatie* (C-47/14), a case concerning the interpretation of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

More specifically, the case involved the interpretation of Article 5(1) and Article 5(3) of the Regulation, which provide, respectively, for special heads of jurisdiction over contractual matters and matters relating to a tort or delict, as well as the interpretation of the rules laid down in Section 5 of Chapter II (Articles 18 to 21), on employment matters. The said provisions correspond, today, to Articles 7(1) and (2) and Articles 20 to 23 of Regulation No 1215/2012 of 12 December 2012 (Brussels Ia Regulation).

The request for a preliminary ruling arose from a dispute involving a German national resident in Germany, Mr Spies von Büllesheim, who had entered a Dutch company's service as a managing director, in addition to being a shareholder of that company. He had also been involved in the managing of three German subsidiaries of the company, for which he served as a director and an authorised agent.

The company brought a declaratory action and an action for damages in the Netherlands against Mr Spies von Büllesheim, claiming that he had performed his duties as director improperly, that he had acted unlawfully and that, aside from his capacity as a director, he had acted deceitfully or recklessly in the performance of the contract of employment under which the company had hired him as a managing director.

The Dutch lower courts seised of the matter took the view that they lacked jurisdiction either under Article 18(1) and Article 20(1) of the Brussels I Regulation, since the domicile of the defendant was outside the Netherlands, or

under Article 5(1)(a), to be read in conjunction with Article 5(3).

When the case was brought before the Dutch Supreme Court, the latter referred three questions to the ECJ.

The first question was whether the special rules of jurisdiction for employment matters laid down in Regulation No 44/2001 preclude the application of Article 5(1)(a) and Article 5(3) of the same Regulation in a case where the claimant company alleges that the defendant is liable not only in his capacity as the managing director and employee of the company under a contract of employment, but also in his capacity as a director of that company and/or in tort.

The ECJ observed in this respect that one must ascertain, at the outset, whether the defendant could be considered to be bound to the company by an "individual contract of employment". This would in fact make him a "worker" for the purposes of Article 18 of Regulation No 44/2001 and trigger the application of the rules on employment matters set forth in Section 5 of Chapter II, irrespective of whether the parties could also be tied by a relationship based on company law.

Relying on its case law, the ECJ found that the defendant performed services for and under the direction of the claimant company, in return for which he received remuneration, and that he was bound to that company by a lasting bond which brought him to some extent within the organisational framework of the business of the latter. In these circumstances, the provisions of Section 5 would in principle apply to the case, thereby precluding the application of Article 5(1) and Article 5(3).

The ECJ conceded, however, that if the defendant, in his capacity as a shareholder in the claimant company, was in a position to influence the decisions of the company's administrative body, then no relationship of subordination would exist, and the characterisation of the matter for the purposes of jurisdiction would accordingly be different.

The second question raised by the Hoge Raad was whether Article 5(1) of the Brussels I Regulation applies to a case where a company director, not bound by an employment relationship with the company in question, allegedly failed to perform his duties under company law.

The ECJ noted that, generally speaking, the legal relationship between a director

and his company is contractual in nature for the purposes of Article 5(1), since it involves obligations that the parties have freely undertaken. More precisely, a relationship of this kind should be classified as a "provision of services" within the meaning of the second indent of Article 5(1)(b). Jurisdiction will accordingly lie, pursuant to the latter provision, with the court for the place where the director carried out his activity.

To identify this place, one might need to determine, as indicated in *Wood Floor Solutions*, where the services have been provided for the most part, based on the provisions of the contract. In the absence of any derogating stipulation in any other document (namely, in the articles of association of the company), the relevant place, for these purposes, is the place where the director in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' agreed intentions.

Finally, inasmuch as national law makes it possible to base a claim by the company against its former manager simultaneously on the basis of allegedly wrongful conduct, the ECJ, answering the third question raised by the Hoge Raad, stated that such a claim may come under "tort, delict or quasi-delict" for the purposes of Article 5(3) of the Brussels I Regulation whenever the alleged conduct does not concern the legal relationship of a contractual nature between the company and the manager.

The ECJ recalled in this connection that the Regulation, by referring to "the place where the harmful event occurred or may occur", intends to cover both the place where the damage occurred and the place of the event giving rise to it. Insofar as the place of the event giving rise to the damage is concerned, reference should be made to the place where the director carried out his duties as a manager of the relevant company. For its part, the place where the damage occurred is the place where the damage alleged by the company actually manifests itself, regardless of the place where the adverse consequences may be felt of an event which has already caused a damage elsewhere.