Jurisdiction over financial damages – the A-G Opinion in the Volkswagen Case before the CJEU

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The assessment of a court's jurisdiction based on Art. 7 (2) of the Brussels Ibis Regulation in cases involving exclusively financial damages has been a continuous challenge (cf., e.g., ECJ, 12.09.2018, Case C-304/17 (*Löber*); ECJ, 16.06.2016, Case C-12/15 (*Universal*); ECJ, 28.01.2015, Case C-375/13 (*Kolassa*)). Against this background, the Advocate General's opinion in the Volkswagen emissions scandal case (*Campos Sánchez-Bordona*, Opinion of Advocate General delivered on 02.04.2020, Case C-343/19 (*Volkswagen*)) sets forth some important guidelines when determining a court's jurisdiction pursuant to Art. 7 (2) of the Brussels Ibis Regulation.

In the *Volkswagen* case, an Austrian consumer organization is pursuing claims for damages assigned by 574 purchasers of vehicles as well as a declaration establishing the liability of Volkswagen for as yet unquantifiable future damages. The assignors have all purchased their vehicles in Austria not directly from Volkswagen itself, but from either a commercial dealer or a private seller. The question is whether this gives the Austrian court called upon to decide the case jurisdiction under Art. 7(2) of the Brussels Ibis Regulation.

Assignees as direct victims

Before discussing the main question presented by the Austrian court, the Advocate General addresses two important preliminary issues. The first is whether the assignees are direct or merely indirect victims of Volkswagen's tortious behavior. It is well-settled in the ECJ's case-law that the place where the damages arose includes only the place where *initial* damages sustained by a *direct* victim ensued. Thus, the damages being claimed cannot be merely the consequence of damages arising elsewhere (cf. ECJ, 19.09.1995, C-364/93 (*Marinari*), paragraphs 14 and 15; ECJ, 29.07.2019, Case C-451/18 (*Tibor-Trans*),

paragraph 27). Since none of the assignees in the *Volkswagen* case have purchased vehicles directly from Volkswagen, one could argue that the assignees are only *indirect* victims of Volkswagen's tortious behavior (i.e., manipulation of the cars' engines) for their damages are only the consequence of the damages incurred by the commercial dealers and private sellers from whom they purchased theirs cars.

Yet the fact alone that a claimant has not established contractual relations with the tortfeasor does not necessarily makes him an indirect victim of the latter's behavior (ECJ, 29.07.2019, Case C-451/18 (*Tibor-Trans*)). In accordance with this ruling, the Advocate General also concludes that the lack of contractual relations between Volkswagen and the assignees does not necessarily precludes them from claiming damages as direct victims. He argues instead that the loss of value of the vehicles did not become a reality until the manipulation of the engines was made public. Therefore, neither the commercial dealers nor the private sellers who owned the cars before the assignees experienced any loss. As a result, the damages suffered by the assignees cannot be deemed as a mere consequence of the commercial dealers'/private sellers' damages and the ones among them who retained the vehicles as part of their assets at the time the defect has been made public are to be considered as the direct victims of Volkswagen's tortious actions (points 40 *et seq.*, 81).

The place where the damages arise

A second issue the Advocate General had to resolve was whether the place where the damages arose amounts to the place where the vehicles were physically located. He answers this in the negative (points 72 and 73). The location of the vehicles is – from the defendant's perspective – unforeseeable and does not establish a proximity between the court and the dispute. Thus, the place where the damages arose is the place where the act pursuant to which the vehicles became part of the purchasers' assets took place, i.e., the place where the transactions occurred (point 74). It is interesting to note that the Advocate General is referring here to a noticeable action (the transaction entered into by the parties) in order to *physically* allocate damages which *per se* (because purely financial) are actually *non-physical* (point 53). Furthermore, it is no coincidence that the Advocate General briefly mentions bank accounts in his reasoning. For

his line of argument in the *Volkswagen* case resembles to a great extent the ECJ's ruling in the *Universal* case, where the Court held that the place where the damages arose was the place where a settlement had been executed between the parties and not the place where the bank account was located from which the obligations arising out of the settlement had been paid (i.e., the place where – like the place where the purchased cars where located in the *Volkswagen* case – the loss had materialized) (ECJ, 16.06.2016, Case C-12/15 (*Universal*), paragraphs 31 and 32).

In addition to the ECJ's ruling in the *Universal* case, a comparison may be drawn between the Advocate General's reasoning in the *Volkswagen* case and Advocate General *Bobek*'s opinion in the *Löber* case. There, Advocate General *Bobek* submitted that a person incurs damages at the place where he or she enters into a legally binding and enforceable obligation to dispose of his or her assets in a detrimental manner and *not* at the place where the pecuniary loss becomes apparent (*Bobek, Opinion of Advocate General delivered on 08.05.2018, Case C-304/17 (Löber), points 73, 82*). Applied to the *Volkswagen* case, this reasoning means that the place where the damages arose cannot be allocated to the place where the cars were physically located and thus where the pecuniary losses became perceptible, but rather to the place where the assignees entered into a legally binding and enforceable obligation to pay the purchase price. This reasoning is also sound if one (as the Advocate General in the *Volkswagen* case) considers the damages incurred by the purchasers to be the (negative) difference between the price paid and the value of the tangible goods received in return (points 36 and 37). For if the parties, for example, enter into a contract to sell (i.e., a bilateral promise of sale) or a sales contract (i.e., a contract of sale) under a legal system like the German one, where a sales contract by itself does not transfer ownership in the subject-matter of the contract, the financial damages occurring due to the (negative) difference between the price paid and the value of the tangible goods received in return take place already at the moment in which the purchaser enters into the contract to sell or the contract of sale: from this moment on, the obligation to pay the purchase price is part of his assets and it is not compensated by his claim against the seller, creating thereby a (negative) balance in his estate. .

General principles for determining jurisdiction under Art. 7 (2) of the

Brussels Ibis Regulation

With these issues out of the way, the Advocate General deals with the concrete question posed by the Austrian court.

He begins his analysis by throwing some light upon the reasoning of the ECJ in some of its previous rulings regarding the construction of Art. 7 (2) of the Brussels Ibis Regulation in cases involving pure financial damages. He suggests that what the ECJ was doing in reality in the cases *Löber*, *Universal* and *Kolassa* was to develop a two-prong approach for assessing a court's jurisdiction at the place where the damages arose: on the first step, a court called upon to decide a case must determine whether the damage arose at the place it sits. Once this has been done, the court must take into consideration the "other specific circumstances" of the case at hand in order to ascertain whether the rationale underlying Art. 7(2) of the Brussels Ibis Regulation supports its jurisdiction (points 56, 59).

It is, however, not possible to conclude with exactitude after reading the Advocate General's opinion whether he proposes to use this two-prong approach in *every* case involving financial damages or *only* in those cases where the fact pattern resembles the facts in the *Löber*, *Universal* and *Kolassa* cases. Two passages of the Advocate General's opinion suggest the latter. On point 59 he states that the second step of the approach proposed *may* be required for purely financial damages and on points 70 and 71 he seems to try to fit the facts of the *Volkswagen* case into the facts of the *Löber*, *Universal* and *Kolassa* cases in order to justify the application of the two-prong approach to the case at hand.

In addition to carving out the different steps a court must undertake in order to determine its jurisdiction under Art. 7 (2) of the Brussels Ibis Regulation, the Advocate General also clarifies some ambiguities in previous rulings of the ECJ pertaining to the second step of the forum court's analysis (cf., for example, ECJ, 16.06.2016, Case C-12/15 (*Universal*), paragraph 27; ECJ, 28.01.2015, Case C-375/13 (*Kolassa*), paragraph 47; ECJ, 16.01.2014, Case C-45/13 (*Kainz*), paragraph 24). He reasons that this second step *does not* authorizes the court of the forum to ascertain whether it is *best* placed, in terms of proximity and foreseeability, to decide the matter as compared to the court of the place of the event giving rise to the damage (points 60-66, 80). Instead, the *sole* purpose of the examination of the "other specific circumstances" of the case is to *confirm (or*

reject) the jurisdiction of the court of the place where the damage occurred based on the proximity of the court to the dispute (or the lack thereof) (point 80). For the court of the forum cannot disrupt the abstract *ex-ante* balancing of interests carried out by the legislator in Art. 7 (2) of the Brussels Ibis Regulation. The legislator, however, has deemed both the courts of the place where the event giving rise to the damages and the courts of the place where the damages have arisen as being equally suited for hearing a tortious case. Consequently, a national court cannot undermine this legislative intent by engaging in a comparison between the courts of these two places.

Conclusion

To sum up, the Advocate General's opinion touches on different issues of pivotal importance when assessing a court's jurisdiction under Art. 7 (2) of the Brussels Ibis Regulation. Besides laying down the two-prong approach to be followed by national courts in (at least some) of the cases involving purely financial losses when determining their jurisdiction pursuant to Art. 7 (2) of the Brussels Ibis Regulation, the Advocate General also discusses the question of whether a purchaser who acquired some goods without directly transacting with the tortfeasor can still be deemed as a direct victim of the latter's tortious behavior and how to precisely determine where a financial damage has arisen.

The A-G's opinion is here.