The VW NOx Emissions Group Litigation, [2019] EWHC 783(QB), and (some aspects of) CoL

Yesterday, the High Court of London decided two preliminary issues in a large group action, certified as a Group Litigation Order (sub no. 105), brought by about 91,000 owners or lessees of VW, Audi, Skoda and SEAT cars. The claim is brought, against the manufacturers of the affected vehicles (VW, Audi, Skoda, and SEAT), against the relevant VW financial services arm and against a variety of authorised UK based VW dealers. Article 8 no. 1 of the Brussels Ibis Regulation will have been of relevance to the foreign ones amongst the defendants. No express explanations are offered how claimants eligible for the UK group litigation are determined – presumably it depends on where the car was bought.

The precise personal/territorial scope of the respective mass litigations would have been interesting, since the proceedings in the UK are just some of many by disaffected VW owners around the world, and the outcomes for the claimants seem to differ quite substantially. As early as in 2015, a class-action similar to the UK one was commenced against VW in the Federal Court of Australia, on behalf of around 100,000 VW owners, which was settled for up to AusD 87 million. The total amount may go up to AusD 127 million, depending on the ultimate number of claimants. On 1 April 2020, the Federal Court of Australia approved the settlement of the Australian class actions. The settlement was approved on the basis of a Settlement Scheme developed by the solicitors for the applicants and made public here, that sets out the process by which claims can be registered, assessed and paid, and the Deed of Release and Settlement that was agreed between the parties, made publicly available by those solicitors here. In Germany, proceedings under the (quite restrictive) collective redress mechanism of the "*Musterfeststellungsklage*" were settled recently as well, in this case for up to € 830 Million in total in relation to around 400.000 claimants. These claimants still need to accept individually the offered sums until 20 April 2020 after receiving offers from VW based on the remaining value of their cars these days. Individual litigations outside the *Musterfeststellungsklage* about the influence of the amount of kilometres that the respective car has already run (amongst other issues) are reaching the German Federal Court of Justice these days (the hearings will take

place on 5 May 2020). In addition, the Court of Justice of the European Union is dealing with other aspects of the VW case, see on CoL here.

The claim in the UK proceedings alleges a variety of causes of action against the Defendants, including fraudulent misrepresentation in relation to the sale of the affected vehicles. A number of those causes of action proceed upon the basis that the software function of the Engine amounts to a "defeat device" within the particular meaning of Article 3 (10) of EU Parliament and Council Regulation 715/2007 dated 20 June 2007. If so, then one consequence is that its use in the engine and thus, the sale of the affected vehicles, was unlawful, being prohibited by Article 5 (2) of the Regulation.

Thus, the question arose whether Brexit altered anything in this respect. This question is easy to answer at the moment, see para. 12: "Brexit makes no difference here because EU Law (including the jurisdiction of the CJEU) will continue to have effect as if the UK was still a Member State until the end of the transition period which is 31 December 2020".

A further issue relates to the Claimants' reliance on formal letters to VW, issued by the "competent authority" in Germany for these purposes, being its Federal Motor Transport Authority, the German "*Kraftfahrtbundesamt*" ("the KBA") dated 15 October, 20 November, and 11 December 2015 ("the KBA Letters"). The Claimants contended that these letters constitute decisions that the software function is a defeat device, that those decisions bind the courts in Germany as a matter of German law, that they also bind other authorities in other Member States, including English courts, either as a matter of EU law or as a matter of German law and by reason of EU and/or English law, there is a conflicts rule to the effect that the question as to whether they bind the UK court must be decided by reference to their binding effect or otherwise under German Law, being the law of the seat of the KBA.

For a number of reasons, including analogies to competition law, the Court decided that the KBA's finding binds all Member States (including their courts) as a matter of EU law. This is why the Court abstained from taking a decision on the alternative grounds advanced by the Claimants.

At the same time and independently from the binding effects of the KBA's finding, the Court found on its own account that the affected vehicles did contain defeat

devices. Another bad day for VW.

The full text of the judgment is available here.