EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/35 The jurisdiction of the court in claims against a managing director living outside The Netherlands (NL)

<p>The Dutch Supreme Court decided that proceedings of a company against its managing director should be brought before the court in the country where the managing director is domiciled, in accordance with Article 20(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This only applies if the managing director, in his capacity as director and manager, for a certain period of time, performed services for and under the direction of the company in return for remuneration, since in such a case it is presumed that he has an employment agreement as a worker.</p>

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Facts

Holterman Ferho Exploitatie was a holding company established in the Netherlands. It had three subsidiaries under German law, all established in Germany. Mr Spies von Büllesheim ('Spies'), a German national with an address in Germany who was also a manager and had authority to sign on behalf of the three German subsidiaries, was appointed a director of the company. On 7 May 2001, Holterman Ferho and Spies concluded an agreement, drafted in German, confirming his appointment as director ('Geschäftsführer') and setting out his rights and obligations in that respect. On 20 July 2001, Spies became the manager of Holterman Ferho. Spies also held 15% of the shares in Holterman Ferho. At the end of 2006 all contracts between Spies and Holterman Ferho were terminated. On the basis of allegedly serious misconduct in the performance of his duties, Holterman Ferho and its subsidiaries brought an action for a declaratory judgment and damages against Spies before the Dutch court. The companies claimed, primarily, that Spies performed his duties as a manager improperly and that he was liable to them for that under Article 2:9 of the Dutch Civil Code. They also invoked his deceit or recklessness in the performance of his contract under Article 7:661 of the Dutch Civil Code. In the alternative, the companies claimed that Spies' misconduct in the performance of his duties constituted wrongful conduct under Article 6:162 of the Dutch Civil Code.

Spies contended that the Dutch courts did not have jurisdiction to hear the action. The Dutch court (both at first instance and on appeal) held that it had no jurisdiction under either Article 5(1) or (3) of Regulation No 44/2001. With regard to the claim of Spies' mismanagement, the Dutch court held that Regulation No 44/2001 does not designate any particular forum, so that, in principle, the rule in Article 2(1) of Regulation No 44/2001 applied. This meant that Spies could only be sued in the German courts. With regard to the claim of poor performance, the Dutch court considered that the contract must be classified as an 'individual contract of employment' for the purposes of Article 18(1) of Regulation No 44/2001. Under Article 20(1) of that Regulation, an employer can only bring an action before the courts of the Member State in which the employee resides. Since Spies resided in Germany, the Dutch courts had no jurisdiction to hear the claim. According to the Dutch court, that reasoning also applied to action against Spies based on tort, delict or quasi-delict. An action based on tort, delict or quasi-delict – which was linked to the claim relating to 'individual contracts of employment' for the purposes of Article 18 of Regulation No 44/2001 – could not lead to the Dutch courts having jurisdiction, since Chapter II, Section 5 of that Regulation contains a special rule on jurisdiction which derogates from the rules in Article 5(1) and (3) of the same Regulation.

The companies appealed on a point of law against the judgment of the Dutch court. Their criticisms concerned the interpretation of the rules on jurisdiction laid down in Regulation No 44/2001, that is to say, the provisions of Article 5(1)(a), read in conjunction with Article 5(3),

Article 18(1) and Article 20(1). They criticised the court for holding that the Dutch courts had no jurisdiction, as their claims were based on the failure of Spies to fulfil his duties as director of Holterman Ferho.

The Dutch Supreme Court stated that under Dutch law a distinction must be made between, on the one hand, a person's liability as the manager of a company based on breach of the duty to perform his tasks properly under company law pursuant to Article 2:9 of the Dutch Civil Code or on the basis of 'wrongful conduct' for the purposes of Article 6:162 of the Dutch Civil Code and, on the other, that person's liability as an 'employee' of the company – quite apart from his capacity as a manager – on the basis of deceit or reckless performance of his contract of employment under Article 7:661 of the Dutch Civil Code.

The question of whether the Dutch courts had jurisdiction to hear the case required, in the opinion of the Dutch Supreme Court, an examination of the relationship between the rules on jurisdiction in Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001 and the rules on jurisdiction in Article 5(1)(a) and Article 5(3) of that Regulation.

More particularly, the question arises as to whether Section 5 precludes the application of Article 5(1)(a) and Article 5(3), where the defendant is being sued by a company, not only as a manager on the basis that he performed his duties improperly or acted wrongfully, but also on the basis of deceit or reckless performance of his contract of employment.

Judgment of the ECJ

The Dutch Supreme Court asked for a preliminary ruling of the ECJ on this matter. On 10 September 2015 the ECJ ruled that, where a company sues a person for misconduct, the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation (EC) No 44/2001, must preclude the application of Article 5(1) and (3) of that Regulation, if the person performed services for the company as director and manager in return for pay. Further, Article 5(1) of Regulation No 44/2001 must mean that an action brought by a company against a manager based alleged breach of obligations under company law includes 'matters relating to a contract'. The ECJ further noted that referring court must determine on the facts where the manager spent most of his time. Finally, if a company sues a manager for wrongful conduct, Article 5(3) of Regulation No 44/2001 must mean that this relates to tort or delict if the conduct cannot be considered as a breach of the manager's obligations under company law – and that is a matter for the referring court to verify. It was also for the referring court to work out, on the facts, the closest linking factor between the place of the events that caused the harm to the company and the place where the damage occurred.

Judgment of the Dutch Supreme Court

After the ECJ judgment, the case was brought back to the Dutch Supreme Court. The Supreme Court ruled on the facts, that there was an employment agreement between Spies and Holterman Ferho as meant in Articles 18-21 of Regulation 44/2001. It based that conclusion on the circumstances that: (i) Spies was obliged under his employment contract to spend all his working time with Holterman Ferhor and was not allowed to perform any side-activities; (ii) the employment agreement contained clauses on salary, bonus and holiday; (iii) the employment agreement was concluded for five years and was to be tacitly extended for two years (unless it was terminated by a notice period of 12 months); and (iv) although Spies owned 15% of the shares of Holterman Ferho, the employment agreement explicitly stated that he was obliged to follow the instructions of the shareholders' meeting. Therefore, the lower courts had rightly decided that they had no jurisdiction and that the case should have been brought before a German court.

Commentary

In the Netherlands, a managing director is appointed by the general meeting of shareholders, in accordance with Dutch company law. However, managing directors also often have an employment agreement with the company, unless the company is listed on the stock exchange. If the general meeting of shareholders decides to dismiss the managing director, this means automatically that also his employment agreement terminates (unless there is an exception, such as illness).

The claims of the companies based on Articles 2:9 and 6:162 of the Dutch Civil Code, did not flow from his employment agreement, but from his position as managing director, in accordance with Dutch company law. Only the claim based on Article 7:661 of the Dutch Civil Code was based on his employment agreement, since that claim was about gross misconduct, causing damage to his employer. By invoking the Articles 2:9 and 6:162 of the Dutch Civil Code, the companies tried to stay away from Section 5 of Regulation 44/2001. This was because if section 5 applied, they would have to bring their proceedings before the German court, since Spies lived in Germany.

From this case it seems that claims by a company against its managing director must be brought before the court of the country where he lives if the managing director also has an employment agreement with the company. In the Netherlands, this will often be the case. And the question is whether it matters whether the director has an employment agreement under Dutch law – as that is independently interpreted under EU law. The claim must be about the performance of the management tasks he has to fulfill primarily on the basis of the employment agreement. In order to have an employment agreement it is essential that the managing director works under the supervision of the company. This will be the case if he can

be dismissed against his will by the shareholders. If he has the majority of the shares, this condition cannot be fulfilled. Further, claims from shareholders or creditors of the company against the managing director do not fall under Section 5 of Regulation 44/2001, as they are not party to an employment agreement with the managing director.

Comments from other jurisdictions

Austria (Erika Kovács, Vienna University of Economics and Business): This Dutch case tackles at least two major legal issues: first, the pitfalls of how labour law treats directors' status and second, difficulties regarding the definition of "matters relating to individual contracts of employment" in EU regulations on jurisdiction in individual contracts of employment. The second question was addressed and answered by the Holterman judgment of the ECJ (C 47/14, ECLI:EU:C:2015:574, especially paragraphs 45 to 49). The Court made it clear that where a company brings a claim against someone who has performed the duties of a director and manager for misconduct, Articles 18 to 21 of Regulation No 44/2001 on jurisdiction over individual contracts of employment apply provided the director/manager is regarded as an employee. Articles 20-23 of Regulation (EU) Nr 1215/2012, replacing Regulation (EC) No 44/2001, contain similar provisions.Regarding the status of directors and managers in Austria, the following guidelines apply: in Austrian labour law two definitions exist for employees, depending on whether the issue at hand is a matter of individual or collective labour law. In this, dismissal falls within collective law, as it requires the cooperation of the works council. The individual law definition is used when determining which jurisdiction applies. The crucial factor in deciding whether a director is an employee is the degree of personal dependency. If a director has decision-making powers and the power to manage the business, he or she is not regarded as an employee. According to the Austrian Supreme Court, board members of public limited companies are personally independent and thus not employees.In terms of whether directors of limited liability are employees, this also depends on their personal dependency. If the director has to follow the instructions given in company meetings, he or she is regarded as an employee. If the director is also a shareholder, has significant influence on the company and is not under its supervision, he or she is not an employee. If the director has the majority of shares or blocking minority, meaning that it is possible to overrule instructions of the company board, this is considered to be a significant influence. But a person's actual influence on decision-making is more important than the percentage share capital.The Austrian way to determine directors' status seems to be in line with the ECJ's broad interpretation of the term 'employee' for the purposes of Article 18 of Regulation No 44/2001 in the Holterman judgment.

Subject: Private international law, competency

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