Where in the world?

Donny Surtani & Nick Chapman examine the increasing predictability of jurisdiction in EU tort cases & the impact of *Universal Music International Holding BV v Schilling*

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IN BRIEF

- Under the rules that control jurisdictional issues for civil claims within the EU, the general position is that a defendant should be sued in the member state in which they are domiciled. However, where a claim is brought in tort, the claimant is also able to issue proceedings in either the place where the damage occurred or the place of the event that gave rise to the damage.
- The allowances given to tort claimants have the potential to create difficulties where the damage is purely financial loss. More specifically, previous decisions of the Court of Justice of the European Union (CJEU) have raised the possibility of a claimant being able to pursue a claim in a jurisdiction that has very weak links to the subject-matter of the dispute, purely on the basis that that jurisdiction is the location of the claimant's bank account, which felt the alleged loss.
- The CJEU has recently held that pure financial damage of this kind is not enough to establish jurisdiction. In doing so, it has provided certainty and given effect to the purpose of the jurisdictional allowances that are provided for tort claims.

The Court of Justice of the European Union (CJEU) recently considered the rules relating to tort jurisdiction in *Universal Music International Holding BV v Schilling* (C-12/15, 16 June 2016). In doing so, the CJEU held that the rule allowing a claimant to sue in the member state "where the harmful event occurred" will not extend to situations where that damage consists solely of financial damage materialising in the bank account of the claimant. This ruling provides predictability and gives greater effect to the principles underlying the allowances given to a claimant when bringing a tort claim.

Background & issues for the CJEU

In 1998, University Music International Holding BV (Universal), the Dutch subsidiary of an international group of companies, agreed to purchase shares in a Czech company, B&M. Universal initially acquired 70% of the shares with an option to purchase the remaining shares five years later. The price of the remaining shares would be established using a formula set out in the contract drawn up by Universal's Czech legal advisers.

When Universal sought to exercise its purchase option, a dispute arose over the proper reading of the price formula provided by the contract. The dispute was a consequence of Universal's legal advisers failing to incorporate an amendment suggested by Universal. The effect was that while Universal expected to pay approximately €300,000 for the shares, the sellers claimed the amount owed was approximately €31m. The parties eventually settled the dispute, with Universal paying €2.7m for the shares. The settlement sum was paid from Universal's Dutch bank account.

Universal subsequently advanced a negligence claim against its Czech legal advisers for the difference between the intended purchase price and the settlement amount, along with subsequent costs incurred. It brought the claim in the Netherlands on the basis that as the settlement sum had been paid from its Dutch bank account, that was where the harm had occurred for the purposes of Art 5(3) of EU Regulation 44/2001 (Brussels Regulation), which addresses jurisdictional issues for claims involving more than one member state.

As an aside, please note that the Brussels Regulation has since been replaced by EU Regulation 1215/2012 (Recast Regulation). The Recast Regulation applies to all proceedings commenced before the EU courts on or after 10 January 2015. While there are slight differences between the instruments (eg Art 5(3) of the Brussels Regulation is Art 7(2) of the Recast Regulation), the Recast Regulation stresses the importance of continuity, including in regards to interpretations of the instruments by the CJEU (Art 34).

Article 5(3) of the Brussels Regulation & jurisdiction in tort claims

The default position under the Brussels Regulation is that defendants should be sued in the courts of the member state in which they are domiciled (Art 4(1)). The Brussels Regulation then goes on to provide a number of additional grounds for jurisdiction, including Art 5(3), which provides that claims brought in tort, delict or quasi-delict may be brought in the courts of "the place where the harmful event occurred". These words are intended to cover both the place where the damage occurred and the place of the event that gave rise to the damage. The claimant may then elect which of these jurisdictions they wish to bring a claim in.

The exception provided by Art 5(3) is based on the close connecting factors that are likely to exist between the dispute and the courts located where the harmful event occurred. Recognising this connection is intended to give effect to the sound administration of justice and the efficient conduct of proceedings through practical considerations such as the ease of taking evidence.

The decision of the CJEU in *Universal*

In *Universal* it was common ground that the event that gave rise to the damage occurred in the Czech Republic. The disagreement related to the place where the damage occurred. Universal argued that this was the Netherlands as that was the location of the bank account that paid out the settlement sum. The primary question for the CJEU was whether "the place where the harmful event occurred" can be construed as including places where the only damage that occurred consisted of financial damage that was the

direct result of an unlawful act committed in another member state. The CJEU also provided guidance on the separate question of what information should be taken into account when a national court is asked to determine jurisdiction, but this issue is not discussed here.

The CJEU began its considerations by setting out relevant principles provided by the recitals of the Brussels Regulation, namely:

- The rules of jurisdiction must be highly predictable and founded on the default position that a defendant will be sued in the courts of the member state in which they are domiciled (recital 11);
- There should be alternative rules based on a close link between the court of another member state and the action, or in order to facilitate the sound administration of justice (recital 12); and
- It is important to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given by the courts of two member states (recital 15).

From this platform the CJEU noted that as the tort rule provided by Art 5(3) is an exception to the default position, it must be interpreted "independently and strictly" such that it does not extend to situations that were not envisaged by the Brussels Regulation.

The CJEU held that "the place where the harmful event occurred" could not be read so broadly so as to encompass any place where the adverse consequences of an event can be felt. In this regard, the term will not extend to the place the claimant is domiciled and where their assets are concentrated if the only purported damage to be felt there is financial damage arising from an event that occurred in a different member state.

Applying this to the current circumstances, the CJEU held that Universal could not bring a claim in the Netherlands. In reaching this conclusion it considered that the damage to Universal became certain when the settlement was agreed. At that point, there was an irreversible burden on Universal's assets. The fact that Universal made a payment from a Dutch bank account in order to implement the settlement did not change the fact that the damage (ie the loss of some of Universal's assets) occurred in the Czech Republic.

This conclusion required the CJEU to distinguish its earlier decision in *Kolassa v Barclays Bank plc* (E-375/13, 28 January 2015). In *Kolassa* the CJEU allowed an Austrian claimant to bring prospectus liability proceedings against a British bank in Austria. It did so on the basis that the damage was suffered in the claimant's Austrian bank account. The *Kolassa* decision was distinguished by the CJEU in *Universal* by virtue of other factors that created a link between Mr Kolassa's claim and Austria (most notably, the prospectus had been issued in Austria and the investments were re-sold to Mr Kolassa through an Austrian bank). This interpretation means that *Kolassa's* scope has been significantly reduced.

Effect of the judgment on the predictability of jurisdiction

The CJEU's judgment in *Universal* represents a very substantial development in the European law of jurisdiction as it applies to tort claims—indeed, it has been described by commentators as "rather revolutionary" (Matthias Haentjens & Dorine Verheij, "Finding Nemo: Locating Financial Losses after Kolassa and Profit" (2016) 31 JIBLR 346). It should be regarded as being both correct and helpful for a number of interconnected reasons, most notably:

- It gives better effect to the underlying principles of Art 5(3) of the Brussels Regulation. The exception to the default rule that defendants should be sued in the member state in which they are domiciled exists to encourage the proper administration of justice. To do this, there should be genuine connections between the dispute and the jurisdiction. The mere location of a bank account does not give effect to this principle;
- It limits the scope of *Kolassa*. Following that decision there was concern that claimants could pursue claims in jurisdictions that had very weak links to the subject matter of a dispute, on the sole ground that the bank account in which the loss was felt was located in that jurisdiction. Where there was the possibility of multiple claimants (eg in prospectus liability claims), this raised the possibility of a defendant facing parallel claims in a number of jurisdictions (see Donny Surtani "Prospectus Liability: bracing for parallel claims in multiple jurisdictions" [2015] 5 JIBFL 284 (May)); and
- It avoids "forum shopping". As was noted by the CJEU, a company such as Universal is likely to have many bank accounts from which it can decide to pay the settlement amount. In doing so, it would have a significant degree of control over where any future proceedings could be heard.

The effect of these considerations is that the decision in *Universal* provides a sufficient degree of certainty for potential defendants. It allows them to predict the jurisdictions in which they may possibly face claims and avoids the risk of parallel claims resulting in irreconcilable judgments. **NLJ**

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