On the territorial jurisdiction of the Québec courts in securities class actions

April 28, 2020

On April 16, 2020, the Superior Court of Québec (the Court) dismissed a securities class action instituted against Volkswagen AG for lack of territorial jurisdiction in *Chandler* c. *Volkswagen Aktiengesellschaft*, 2020 QCCS 1202. The representative plaintiff's proposed class action against Volkswagen AG had been authorized on May 28, 2018 (*Chandler* c. *Volkswagen Aktiengestllchaft*, 2018 QCCS 2270).

This decision is significant as it marks the first time a securities class action is dismissed at the merits stage for lack of territorial jurisdiction in Québec. The Court affirmed several critical principles regarding territorial jurisdiction in the specific context of class actions and about securities:

- The authorization judgment's findings on territorial jurisdiction have no res judicata authority at the merits stage of the class action;
- The Court's lack of territorial jurisdiction may be raised at the authorization stage, at the merits stage, or both. The lack of challenge as to territorial jurisdiction at the authorization stage may not be construed as a waiver of right or attornment to jurisdiction at the merits stage;
- The situs of the trade of a security is a relevant juridical fact in determining the situs of economic injury resulting from the decrease in value of such security.

The class action

Mr. Lawrence Chandler represented a class consisting of all Québec residents who purchased Volkswagen AG's securities between March 12, 2009 and September 18, 2015, and held all or some of these securities until after September 18, 2015. His class action rested on article 1457 of the *Civil Code of Québec* (CCQ). He alleged that class members sustained economic injury as a result of intentional misrepresentations or omissions regarding the compliance of certain diesel-powered vehicles with applicable emissions standards. Following Volkswagen AG's corrective disclosure in September 2015, class members' securities would have decreased in value.

Mr. Chandler's class action targeted three financial instruments, namely Volkswagen AG's Shares (Shares), American Depositary Receipts (ADRs) and Notes.

The Shares were publicly issued by Volkswagen AG, and they are listed and trade on European stock exchanges. The ADRs are not listed on any stock exchanges and they are traded in the United States OTC Markets, not in Canada. Neither have ever been listed for public trading in Québec or in Canada and none of the trading for these securities would take place in Canada.

The Notes were issued by Volkswagen Credit Canada, Inc. (VCCI), a subsidiary of Volkswagen AG and not a defendant to the class action. These Notes were not publicly issued in Québec and have never been listed for exchange. VCCI was authorized to issue Notes outside Québec under a prospectus and in Québec under an exemption thereto, but only to qualified or accredited investors.

Several proceedings were instituted in other jurisdictions involving the same alleged misrepresentations and omissions, including an international ADR settlement in the United States, noteholder and shareholder litigation in Germany, as well as a similar class action, which was dismissed for lack of territorial jurisdiction by the Ontario Superior Court.

Territorial jurisdiction of the Québec courts

Mr. Chandler claimed that the Québec courts had territorial jurisdiction on the basis that Volkswagen AG had attorned to jurisdiction (3148(5) *CCQ*); that Volkswagen AG had an establishment in Québec and that the dispute related to it activities in Québec (3148(2) CCQ); that Volkswagen AG committed a fault in Québec (3148(3) *CCQ*); and that class members sustained injury in Québec (3148(3) *CCQ*).

However, the Court found that none of these connecting factors were met in the case at bar, and her holdings on territorial jurisdiction were as follows:

1. **Territorial jurisdiction is to be assessed globally.** Since there is only one cause of action alleged against Volkswagen AG for all securities, and since there is only one class, there is only one jurisdictional analysis for all three types of securities. And, even if several causes of action were indeed alleged, the Court of Appeal has held that jurisdiction over one cause of action grants jurisdiction over the whole proceeding.
2. **The authorization judgment has no *res judicata* authority regarding territorial jurisdiction.** Conclusions of the authorization judgment about territorial jurisdiction have no *res judicata* authority at the merits stage of the class action. In this case, the jurisdictional argument was not presented in the form of a declinatory exception at the authorization stage but rather under the authorization criteria of article 575 *CCQ*; the court's task was thus to determine whether, taking the facts alleged to be true, it *appeared* to have territorial jurisdiction. The burden at the authorization stage differs from that of the merits stage, as did the record in this case.
3. **The Court's lack of territorial jurisdiction may be raised at the authorization stage, at the merits stage, or both.** The fact that Volkswagen AG did not challenge territorial jurisdiction through a declinatory exception at the authorization stage does not constitute attornment to the Court's jurisdiction, does not preclude it from challenging territorial jurisdiction at the merits stage, nor does it not constitute a waiver of right. Volkswagen AG consistently and repeatedly indicated that it contested the Court's territorial jurisdiction throughout

the proceedings. As the Supreme Court mentioned in *Infineon*, the defendant may challenge the court's territorial jurisdiction at the authorization stage, at the merits stage, or both.

4. **Volkswagen AG has no establishment in Québec and the dispute does not relate to its activities in Québec.** The fact that VCCI, a subsidiary of Volkswagen AG, has an establishment in Québec is not a sufficient connecting factor to Québec in regards to Volkswagen AG, nor does the fact that VCCI guarantees the Notes establish an *alter ego* relationship vis-à-vis Volkswagen AG. The Court further rejected the argument that Volkswagen AG carried on business in Québec through agents which are dealers distributing securities on its behalf as unsupported by the evidence.
5. **No fault was committed in Québec.** The alleged fault, namely that Volkswagen AG omitted to disclose adverse material facts and made misstatements relating to its compliance with U.S. emission standards in various impugned documents, would have occurred in Germany, where the impugned documents were prepared, and where Volkswagen AG conducts its activities, holds its board meetings and makes decisions. The mere fact that impugned documents would have been available in Québec, or sent to investors in Québec, is insufficient to establish that Volkswagen AG committed a fault in Québec, absent any allegation that these documents emanated from or were prepared in Québec, or that any decision to publish this information was made or carried out from Québec.
6. **The *situs* of the trade of a security is a relevant juridical fact in determining the *situs* of economic injury resulting from the decrease in value of such security.** Mr. Chandler alleged an economic injury, namely that the Shares, ADRs and Notes decreased in value following Volkswagen AG's corrective disclosure in September 2015. In Infineon, the Supreme Court held that in order to confer territorial jurisdiction, economic injury must be suffered, not merely "recorded" in Québec, and that the situs of the contract from which the economic injury flows is a relevant juridical fact in fixating the situs of economic injury, even in an extra-contractual liability claim.

   On the basis of the uncontested expert evidence on the record, the Judge found that Shares and ADRs are purchased and sold outside Québec, and that neither are traded in Québec. Therefore, no injury occurred in Québec in regards to these securities.

   As for the Notes, it was deemed that, in light of all the evidence, any connection to Québec was insufficient, too remote and too tenuous to engage the jurisdiction of the Court.

Consequently, the Court found it did not have territorial jurisdiction pursuant to article 3148 *CCQ*. The Court further dismissed Mr. Chandler's reliance on section 236.1 of the *Securities Act* to assert the Court's territorial jurisdiction since his class action was not "*related to the distribution of a security*", as the this provision requires, by Volkswagen AG in Québec.

Forum non conveniens

Although the Court found that it lacked territorial jurisdiction, it addressed the parties' submissions on *forum non conveniens*, opining that, should the Court nevertheless

have territorial jurisdiction, it should not decline to exercise this jurisdiction in favour of another forum.

Since Mr. Chandler alleged a single cause of action, the Court noted that it would be inappropriate to decline to exercise jurisdiction in favour of several *forum* for the three types of securities at issue. In the Court's view, the *forum non conveniens* analysis did not, in this case, point to a single forum that would be clearly more appropriate to hear Mr. Chandler's claims.

Conclusion

This decision is significant for several reasons. First, the Court confirmed that the authorization and the merits stage of a class action, though they are part of the same *proceeding* ("*l'instance*"), nevertheless differ in terms of purpose and procedure. Therefore, the authorization judgment's conclusions on territorial jurisdiction, which are then rendered on a *prima facie* and taking the facts alleged to be true, are not binding at the merits stage, where a different burden of proof applies and the evidence is more extensive.

Second, and most importantly, the Superior Court rejected the representative's expansive approach to territorial jurisdiction in the context of securities litigation, deeming it insufficient that a Québec resident see a decrease in value of a security it holds for the Québec Courts to have jurisdiction over his or her claim. In application of *Infineon*, the Court found that, in the context of securities litigation, the place where the securities are traded is a relevant if not a significant juridical fact in determining where the injury was sustained – an approach which could be setting the pace for future securities class actions in Québec.

By

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