CITATION: Leon v. Volkswagen AG, 2018 ONSC 4265
COURT FILE NO.: CV-16-566618-CP
DATE: 20180815

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: George Leon, in his capacity as Trustee of The George Leon Family Trust, Plaintiff

AND:

Volkswagen Aktiengesellschaft, Defendant

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Andrew Morganti, Margaret Waddell, Albert Pelletier,* and *Jennie Brodski* for the Plaintiff / Responding Party

Cheryl Woodin, Jonathan Bell and *Jason Berall* for the Defendant / Moving Party

HEARD: July 10, 2018

Proceeding under the *Class Proceedings Act, 1992*

JURISDICTION AND FORUM

[1] Class action judges understand that the principle of international comity is particularly important in litigation involving securities purchased on a foreign stock exchange. The decisions in *Van Breda,*[1] *Kaynes v. BP,*[2] and most recently *Yip v. HSBC*[3] reaffirm the following proposition. There is nothing unfair in expecting Ontario residents who purchase a foreign company's shares on a foreign exchange (because the shares do not trade in Canada) to litigate their claims against this foreign defendant in the jurisdiction of the foreign exchange. Generally speaking, order and fairness are best achieved by having securities claims adjudicated in the forum where the securities are traded.

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[1] *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 ("*Van Breda*").

[2] *Kaynes v. BP* plc, 2014 ONCA 580 ("*Kaynes*").

[3] *Yip v. HSBC Holdings plc,* 2018 ONCA 626 ("*HSBC*-CA")

[2] The defendant's motion to dismiss this proposed class action on jurisdictional grounds or, alternatively, to stay the action because Ontario is *forum non conveniens*, is granted.

Background

[3] Volkswagen AG, based in Wolfsburg Germany, is the world's largest automobile manufacturer by sales, selling more than 10 million vehicles annually via some 1000 subsidiaries. Three years ago, VWAG was caught in a massive fraud involving a "defeat device" that was intentionally installed in its diesel automobiles to circumvent emission-control tests and falsely convey "clean diesel" performance. Not surprisingly, the VW "diesel-gate" scandal resulted in high-profile criminal prosecutions, jail sentences, severe fines and penalties, and multi-billion-dollar class actions.

[4] The first wave of class actions in the U.S. and Canada focused on the vehicles themselves and the misrepresentations relating to the affected automobiles. The class actions were settled, with VW providing a relatively generous vehicle buy-back program and compensation payments.[4]

[5] The more recent wave of class actions are the securities actions that seek damages for the "fraudulent misrepresentations" made by VWAG in the sale of its shares and American Deposit Receipts[5] ("ADRs") during the affected time period. The core allegation is that VW falsely represented that its diesel automobiles complied with government-imposed emission requirements during normal use and failed to disclose that it had secretly installed the "defeat device" that would register false readings when the car was tested.

[6] VWAG shares trade on the Frankfurt Stock Exchange, and several other German and European exchanges. Its ADRs can be purchased on the over-the-counter market in the U.S. VWAG shares have never been listed or traded in Canada.

[7] The plaintiff George Leon, in his capacity as trustee for his family's trust ("Leon"), purchased ADRs on the U.S. over-the-counter market through a Toronto broker. When VWAG disclosed the defeat-device fraud in September 2015, share prices plummeted and VW shareholders world-wide sustained financial losses. Leon, who resides in Ontario, commenced a proposed federal class action in New Jersey under U.S. securities law on behalf of the ADR-holders. The Leon action was consolidated with four other proposed class actions into one multi-district ADR action that was then transferred for case

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[4] *Quenneville v Volkswagen*, 2017 ONSC 2448 [relating to the 2-litre diesel vehicles] and *Quenneville v. Volkswagen Group Canada Inc.*, 2018 ONSC 2516 [relating to the 3-litre diesel vehicles].

[5] ADR certificates are purchased on the over-the-counter market in the U.S. Five ADRs correspond to one VWAG common share.

management to Judge Breyer of the Northern District of California, the same judge who supervised and approved the VW vehicle settlements.

[8] Having conceded in his New Jersey filing that the U.S. federal court "has jurisdiction over the subject matter of this action" and that "venue is proper in this Judicial District", Leon then withdrew from the American proceeding when he wasn't selected as the lead plaintiff and commenced this action in Ontario. In the Ontario action, Leon asks this court to certify a class proceeding against VWAG on behalf of all Ontario residents who purchased VWAG ADRs or common shares over the course of the 2009 to 2015 class period and were holding some or all of these securities on the date of the defendant's first corrective disclosure in September 2015.

[9] Unlike the class definition in the U.S. proceeding, which is limited to ADR purchasers wherever resident (including Ontario), the proposed class action in Ontario is restricted to Ontario residents but includes both ADR and common share purchasers, the latter being Ontario residents that acquired VWAG common shares on the Frankfurt or another European exchange.

[10] The litigation in both the U.S. and Germany is proceeding apace. The proposed ADR class action in the U.S. is at the discovery stage. Certification briefs are to be filed later this year. In Germany, just over 1800 affected VWAG shareholders have filed individual actions in German courts. More than 85 per cent of the plaintiff-shareholders are not resident in Germany and include some 47 Canadian institutional investors, 24 of which have Ontario addresses. Although there is no formal class action procedure in Germany, there is provision for the judicial adjudication of common questions of law and fact, a process that is currently underway.

[11] The proposed Ontario action is based solely on the common law tort of fraudulent misrepresentation. The plaintiff decided not to bring a statutory action under Part XXIII.1 of the *Ontario Securities Act*[6] because VWAG was not a "reporting issuer" on any Canadian exchange, and although the defendant was possibly a "responsible issuer" that had "a real and substantial connection to Ontario",[7] the applicable limitations period for the tort claim (two years from the date of discovery[8]) was more favorable and would allow larger class coverage than the statutory claim (three years from the date of the first misrepresentation[9]).

[12] Here the misrepresentations about "clean diesel" began to appear in VW corporate documents in March 2009 and were first corrected (and thus discovered) in September 2015.

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[6] *Ontario Securities Act,* R.S.O. 1990, c. S-5.

[7] *Ibid.*, s. 138.1.

[8] *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

[9] *Supra,* note 6, s. 138.14(1)(a)(i).

Because the statement of claim in the Ontario action was issued in January 2017, the tort claim can potentially include class members that purchased VWAG securities over the full six-and-a-half-year period, from 2009 to 2015. The statutory claim would be limited to class members who purchased the securities over a three-year period, from January 2014 to January 2017. Hence, the plaintiff's decision to advance only the common law action.

[13] I pause here to note that the proposed ADR class action that is proceeding in the U.S. has a class period that begins in November 2010 and ends in January 2016, covering just over five years. The plaintiff points out that the American proceeding does not include the Ontario residents that purchased ADRs over the 20 month period from March 2009 to November 2010. I will return to this point in the *forum non conveniens* analysis.

[14] VWAG says the proposed Ontario class action should be dismissed or stayed because the Ontario court does not have jurisdiction, and if it does, jurisdiction should be declined because the more appropriate forum is the U.S. (for the ADRs) and Germany (for the common shares).

[15] I agree with the defendant's submission.

The importance of international comity

[16] The principle of international comity, best understood as an attitude of respect for and deference to the legitimate actions of other states and their courts, provides an important underpinning for the modern system of private international law.[10] International comity is key to achieving the predictability, stability and overall fairness that is essential in the resolution of multi-jurisdictional disputes.[11]

[17] International comity informs both the jurisdiction and forum analysis. The real and substantial connection test for jurisdiction *simpliciter* "reflects the underlying reality of the territorial limits of law under the international legal order and respect for the legitimate actions of other states inherent in the principle of international comity."[12] Comity also plays an important role in the analysis of the appropriate forum. As the Court of Appeal noted in *Prince v. ACE Aviation Holdings*,[13] "the principle of comity...underlies the *forum non conveniens* analysis".[14] The Court added in *Kaynes* that it is a "flexible concept" which

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[10] *Van Breda, supra,* note 1, at para. 74.

[11] *Ibid.*

[12] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45 at para. 60. Cited in *HSBC*-CA, *supra,* note 3, at para. 27.

[13] *Prince v. ACE Aviation Holdings Inc.*, 2014 ONCA 285.

[14] *Ibid.*, at para. 63.

"cannot be understood as a set of well-defined rules, but rather as an attitude of respect and deference to other states."[15]

[18] Comity is particularly important in the resolution of cross-border securities disputes. The purchase of securities on foreign exchanges is now commonplace and "the maintenance of an orderly and predictable regime for the resolution of claims is imperative."[16] The prevailing norm or practice is that securities litigation should take place in the forum where the securities trading took place.[17]

[19] This is evident in the laws of most countries, including those of the U.S. and Germany. As the Court of Appeal noted in *Kaynes*:

> In the U.S., there is a well-established regime governing class actions for secondary market misrepresentation ... U.S. law relating to jurisdiction over such claims is based on the principle that securities litigation should take place in the forum where the securities transaction took place. By statute, actions for secondary market misrepresentation under US securities law may only be brought by those who purchased their shares on a U.S. exchange. In addition, the *Securities and Exchange Act of 1934,* 15 U.S.C. s. 78a et seq., s. 27, provides that the US district courts have "exclusive jurisdiction of violations of this title or the rules and regulations thereunder" including claims for secondary market misrepresentation. US law precludes U.S. courts from entertaining private actions involving securities transactions outside the U.S.
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> The U.S. approach to jurisdiction over securities litigation is based on the principle of comity. The SEC's *Study of the Cross-Border Scope of the Private Right of Action under Section 10(b) of the Securities Exchange Act of 1934* (April 2012) recognizes that in cross-border securities transactions, each state "may have an interest in applying its legal regime" but cautions that "[I]nternational comity requires each jurisdiction to recognize the laws and interests of other jurisdictions with respect to persons and activities outside its territory" to ameliorate "potential conflicts among the jurisdictions".[18]

[20] The American foreign law expert retained by VWAG made the same points and then added some further detail. Professor Joseph Grundfest explained that a U.S. federal court would hear securities fraud claims asserted under U.S. federal law by an Ontario resident in connection with ADRs that the Ontario resident purchased in the U.S.; would not hear a

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[15] *Kaynes, supra,* note 2, at para. 35, referring to *Van Breda, supra*, note 1, at para. 74.

[16] *Kaynes, supra,* note 2, at para. 48.

[17] *Ibid.* at para. 52; *Yip v. HSBC Holdings plc*, 2017 ONSC 5332, at para. 271 ("*HSBC*-SCJ"), aff'd on appeal, *supra,* note 3, at para. 54.

[18] *Kaynes, supra,* note 2, at paras. 40-42.

securities fraud claim brought by a U.S. resident based on a security purchased on a Canadian exchange because doing so would be an impermissible extraterritorial application of the statute; and would likely dismiss a common law claim brought by a U.S. investor arising from a purchase of foreign-issued securities on a non-U.S. exchange on *forum non conveniens* grounds because the transaction occurred in a foreign country and that country would have a substantial interest in the action and would provide an adequate alternative forum.

[21] The expert evidence of the German law expert, Dr. Andreas Nelle, is that a German court would hear securities misrepresentation claims brought against a German company regardless of the plaintiff's nationality and place of residence; and further, that the *German Code of Civil Procedure* confers exclusive jurisdiction to the German court that is located in the district where the German company is headquartered.[19] The evidence of the American and German law experts presented by VWAG was not controverted.

[22] If the principle of international comity alone was determinative, there would be no question that, on the facts herein, the plaintiff's complaint about the ADRs purchased in the U.S. should be heard in the U.S. and the complaint about the common shares purchased on German or other European exchanges should be heard in Germany.

[23] The principle of international comity, however, is not by itself determinative. The court is obliged to consider other factors as well. Although nothing turns on this, I find it helpful to visualize the following inter-relationship. The prevailing international norm that securities litigation should take place in the forum where the securities trading took place will only be dislodged if there is a sufficient connection between the subject matter of the litigation and the domestic jurisdiction selected by the plaintiff and there is no foreign forum that is "clearly more appropriate".[20]

[24] Having explained the importance of international comity in both the jurisdiction and forum analysis, I can now turn to the question of jurisdiction.

Jurisdiction *simpliciter*

[25] This court can take jurisdiction over the proposed class action if the plaintiff can establish a real and substantial connection between the proposed securities class action and Ontario. Here, applying the analytical approach set out in *Van Breda*, there are two possible presumptive connecting factors: (i) VWAG carries on business in Ontario and (ii) the tort of fraudulent misrepresentation was committed in Ontario.

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[19] I note that Austrian courts have dismissed securities claims against VWAG that were filed in that jurisdiction because "the plaintiff acquired his shares on a German stock exchange" and "the issuing company [is] located in Germany." See, for example, the Decision of the Supreme Court of Austria, July 7, 2017.

[20] *Van Breda, supra,* note 1, at para. 108.

[26] In my view, neither submission succeeds.

VWAG does not do business in Ontario.

[27] In *Van Breda,* the Supreme Court explained why "carrying on business" as a connecting factor requires some form of physical presence in the jurisdiction such as maintaining an office or conducting regular visits. Active advertising or the fact that an internet site can be accessed from the jurisdiction is not enough to establish that the defendant is carrying on business there.[21]

[28] VWAG has no physical presence in Canada. The defendant manufactures automobiles primarily in Germany and sells them world-wide via some 1000 subsidiaries, one of which is Volkswagen Canada. Every year Volkswagen Canada, which does have a presence in Canada, purchases thousands of vehicles from VWAG and then re-sells them in Ontario and other provinces. The fact that VWAG does business *with* VW Canada does not mean it carries on business *in* Ontario.[22] To be carrying on business in a particular jurisdiction, the defendant must be performing some substantial aspect of *its own* business undertaking beyond simply providing its goods and services within that jurisdiction.[23]

[29] The fact that VW Canada is a wholly-owned subsidiary that sells thousands of cars in Ontario does not mean that its parent VWAG carries on business in Ontario. This was made clear in *HSBC*-SCJ: a foreign parent company does not carry on business in Ontario through a domestic subsidiary due only to its share ownership.[24]

[30] This is not a case where the wholly-owned subsidiary is simply an agent for an off-shore principal – there is no evidence of any such agency. Nor is there any evidence of any improper purpose that would justify piercing the corporate veil.

[31] The fact the VWAG may have advertised in Ontario or provided sales brochures or "clean diesel" auto stickers that were intended to be viewed in Ontario is not enough.[25] And the fact that an interested investor could access the internet from his home in Ontario and review VWAG's disclosure information does not mean that VWAG was conducting business in Ontario. As the Court of Appeal concluded in *HSBC*-CA:

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[21] *Van Breda*, supra, note 1 at 87.

[22] *United States v. Yemec*, 2012 ONSC 4207, at paras. 9 and 17-18.

[23] *HSBC*-SCJ, *supra,* note 17, at para. 186, aff'd on appeal, *supra,* note 3.

[24] *Ibid.*, at para 198.

[25] Recall *Van Breda, supra,* note 1 at para. 87: "Active advertising in the jurisdiction ... would not suffice to establish to establish that the defendant is carrying on business there."

> We do not agree that an issuer that knows or ought to know that its investor information is being made available to Canadian investors, by that level of engagement alone, has a securities regulatory nexus sufficient to establish a real and substantial connection to Ontario ... This would give rise to the universal jurisdiction that LeBel J. explicitly rejected in *Van Breda*."[26]

[32] Nor is this a case where VWAG has attorned to the jurisdiction of this court. It is true that VWAG attorned to this jurisdiction when it defended and settled the Canadian diesel-vehicle class action – the impugned vehicles were sold by VW Canada and were purchased in Ontario (and elsewhere in Canada). However, this does not preclude VWAG from contesting jurisdiction in this case when the impugned products are securities that were purchased on foreign exchanges in the U.S. and Germany.

[33] In short, the "carrying on business" connecting factor has not been established.

The tort was not committed in Ontario.

[34] The tort of fraudulent misrepresentation occurs in the jurisdiction in which the misrepresentation was received and relied upon.[27] Mr. Leon swore an affidavit stating that he reviewed VWAG's disclosure documents in Ontario and relied on the defendant's sale brochures and car stickers. However, on cross-examination he admitted that he had no recollection of what he reviewed prior to purchasing his ADRs and suggested that *perhaps* he reviewed financial statements, analyst reports or a newspaper article – the latter two being third-party documents that were not authored by VWAG.[28]

[35] Given the plaintiff's candid admissions on cross-examination, the evidence that he received and relied upon the alleged misrepresentations in Ontario is weak to non-existent. The plaintiff has not shown that the tort of fraudulent misrepresentation was committed in Ontario. The only connection to Ontario is that Mr. Leon lives here. This is not enough. If the plaintiff's residency alone was sufficient to establish jurisdiction *simpliciter*, this would lead to "universal jurisdiction"[29] with hundreds of legal proceedings world-wide dealing with the same dispute - a result that would totally undermine the norm of international comity.

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[26] *HSBC*-CA, *supra,* note 3, at paras. 33 and 41.

[27] *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517 at para. 52, aff'd 2011 ONCA 185.

[28] In *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8 at paras. 26-27, the Supreme Court noted that where a misrepresentation was conveyed through third parties who were not acting on instructions from the defendant and were not otherwise authorized to make representations on behalf of the defendant, the defendant was not liable for those misrepresentations.

[29] *Van Breda, supra,* note 1, at para. 87.

[36] In my view, for the reasons just stated, there is no real and substantial connection between the subject matter of this proposed class action and Ontario. Jurisdiction *simpliciter* has not been established. The proposed class action is therefore dismissed.

[37] If I am wrong on this point and jurisdiction exists, I would nonetheless, in my discretion, decline to exercise this jurisdiction. I would stay the proposed class action because Ontario is *forum non conveniens*. The defendant has shown that the U.S. and Germany are clearly more appropriate.

[38] My reasoning is set out below.

Forum

[39] Even though comity underlies the *forum non conveniens* analysis and remains a "key consideration",[30] the case law is clear that other factors need to be considered as well.[31] Judges typically consider (a) the location of the majority of the parties; (b) the location of the key witnesses and evidence; (c) contractual provisions that specify applicable law or accord jurisdiction; (d) the avoidance of a multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; (f) geographical factors suggesting the natural forum; (g) juridical advantage, that is, whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court; and (h) the existence of a default judgment in the competing forum.[32]

[40] Except for the juridical advantage factor, a conventional application of the other factors just listed would support the U.S. and Germany as the more appropriate forums.[33] The ADRs were purchased in the U.S; the VWAG common shares were purchased on German or other European exchanges; the members of the VWAG board of directors live in Germany; the applicable law is German for the common shares and New York for the ADRs;[34] and a multiplicity of legal proceedings would be avoided if the securities litigation against VWAG was limited to Germany and the U.S.

[41] I hasten to note, however, that the physical location of parties, witnesses or evidence probably made more sense in the pre-digital era when in-person attendance (for lawsuit-

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[30] *HSBC*-CA, *supra,* note 3, at para. 75.

[31] *Ibid.*

[32] *HSBC*-SCJ, *supra,* note 17, at para. 232. Also see *Muscutt v. Courcelles* (2002) 60 O.R. (3d) 20 (C.A.) at paras. 41-42.

[33] According to leading dictionaries the plural of forum can be either "fora" or "forums". I prefer the latter.

[34] German law applies to the common share actions in Germany, as per the provisions in the VWAG Articles of Association and the *German Code of Civil Procedure*. New York law applies in the ADR class action, as per the provisions in the ADR Deposit Agreements between VWAG and J.P. Morgan.

related examinations) was the expected practice and hard-copy documentary evidence was the norm. Today, given the convenience of cross-examination by video-link and the efficiencies of electronic document delivery, the "physical location" factors are much less significant.[35]

[42] In any event, the only factor that is seriously pressed by the plaintiff is juridical advantage. The plaintiff submits that the putative class members in the proposed Ontario action would be deprived of a legitimate juridical advantage if they were required to advance their claims in the U.S. or Germany.

[43] The plaintiff says there are two important advantages to proceeding in Ontario: (i) the use of a class action procedure that is not available in Germany; and (ii) more favorable limitation periods.

[44] I can dispense with the class action point immediately. The fact that the class action procedure is not available in Germany is of no import. Ontario courts have consistently deferred to jurisdictions with no class proceedings, a deference that reflects the importance accorded to comity in the forum analysis.[36]

[45] In my view, the same deference must be accorded to the foreign jurisdictions even where there are significant differences in comparative limitation periods.

[46] In any event, as the Supreme Court has made clear in *Breeden*,[37] *Van Breda*[38] and most recently in *Haaretz.com v. Goldhar*,[39] the juridical advantage factor is "problematic" in the *forum non conveniens* analysis and "should not weigh heavily in the analysis."[40] The reasons why juridical advantage is a problematic factor were best summarized by Justice Perell in *HSBC*-SCJ:[41]

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[35] The plaintiff submits "there would be substantial inconvenience and expense for either the plaintiff or class members to litigate their claim in Germany or the United States." However, he provides no supporting evidence. Further, this assertion is contradicted by the plaintiff's own conduct in first commencing a proceeding in the U.S. and by the conduct of the 24 Ontario residents who have commenced proceedings in Germany rather than in Ontario.

[36] *Kaynes, supra* note 2, at paras. 43 and 53-54. Also see Justice Perell's decision in *HSBC*-SCJ, *supra,* note 17, at paras. 69 and 273. Perell J.'s analysis of *forum non conveniens* was explicitly approved on appeal: see *HSBC*-CA, *supra,* note 3, at para. 53.

[37] *Breeden v. Black,* 2012 SCC 19, at para. 27.

[38] *Van Breda, supra,* note 1, at para. 112.

[39] *Haaretz.com v. Goldhar,* 2018 SCC 28, at para. 96.

[40] *Ibid.* at para. 76. Also see *HSBC*-CA, *supra,* note 3, at para. 67-69.

[41] *HSBC*-SCJ, *supra,* note 17, at paras. 234-37.

(i) Assessing the merits of rival jurisdictions is inconsistent with the principle of comity; it encourages debate about which jurisdiction's approach to the law is advantageous or disadvantageous; the domestic court may view disadvantage as a sign of inferiority in the rival jurisdiction and favour its own jurisdiction as superior;

(ii) Juridical advantage is a difficult factor to measure; any loss of advantage to the plaintiff in the forum of his or her choice must be weighed against the loss of advantage, if any, to the defendant in the rival jurisdiction; and

(iii) If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, this is properly condemned as forum shopping.

[47] It therefore comes as no surprise that our appellate courts have concluded that juridical advantage in the *forum non conveniens* analysis should be given relatively little weight, and further, that comity and an attitude of respect for the courts and legal systems of other countries will often prevail over any perceived loss of juridical advantage.[42] As it should.

[48] The fact that the five-year limitation period in the ADR proceeding in the U.S. will exclude Ontario claimants that purchased ADRs over the March 2009 to November 2010 time period or the fact that under the one-year or three-year limitation period that applies in Germany[43] many Ontario claimants may be time-barred from proceeding in Germany is the inevitable consequence of different countries having different legal procedures. Provided the legal procedures in the foreign jurisdiction are not riddled with bad faith or corruption, comity requires respect and deference.

[49] Parsing another country's procedural law to assess comparative advantage or disadvantage eviscerates the "attitude of respect for and deference to the legitimate actions of other states and their courts" that lies at the core of international comity.[44] If international comity means anything, it means that in cases where the other country's legal system is otherwise legitimate, that this court should respect and accept the other country's legal system in its entirety, including any differences in litigation procedure and limitation periods.

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[42] *Van Breda, supra,* note 1, at para. 112; *Kaynes, supra,* note 2, at para. 53.

[43] Amendments to the German limitations law in July, 2015 have resulted in the application of a one-year or three-year limitations period depending on certain facts.

[44] See paragraph 16 above.

[50] Indeed, Canadian courts have done exactly that. Even where the proposed Ontario action was time-barred in the foreign jurisdiction, our courts have deferred to comity and to the more appropriate (foreign) forum.[45]

[51] There is a further point that can be made on the facts herein. If the "juridical advantages" are compared, there could well be a juridical *disadvantage* in pursuing this proposed class action in Ontario because the common law misrepresentation claim requires proof of actual reliance, a requirement that could scupper the certification motion.[46] In the U.S. statutory proceeding, reliance can be inferred by showing that the ADRs were trading in an "efficient market."[47] In other words, ADR purchasers that are resident in Ontario would be better off remaining in the U.S. proceeding.

[52] The plaintiff offered to narrow his proposed class definition to exclude Ontario residents who are currently included in the American ADR proceeding or are advancing litigation in Germany. In other words, Leon would maintain the proposed Ontario action but only for the benefit of the Ontario ADR purchasers that fall within the 20-month time period not covered by the U.S. action, and any Ontario common share purchasers that have not yet sued in Germany.

[53] This "carve-out" changes nothing in the above analysis. First, Leon would not be a suitable representative plaintiff because he himself is not a member of either of the two groups that he would purport to represent. Leon purchased ADRs in the U.S. within the class period covered by the U.S. proceeding and not within the 20 months in question and he never purchased any VWAG common shares. Second, this carve-out attempt is akin to forum shopping, a practice that is judicially condemned. Third, if the motivation for the carve-out is to take advantage of more favorable limitation periods (which is conceded), it undermines the principle of international comity. The fact that American class counsel, taking full advantage of American securities and class action law, elected to pursue the statutory claim in the ADR class action and not the cumbersome common law tort claim should also be accorded respect and deference.

[54] The Supreme Court has reminded judges that the overarching concern in the determination of appropriate forum is "fairness to the parties and the efficient resolution of the dispute."[48] The efficiency question is easily answered. It is obviously more efficient to

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[45] See, for example, *Hurst v Societe Nationale de L'Amiante,* 2008 ONCA 573 at para. 50, and *HSBC*-SCJ, *supra,* note 17, at para. 257. Also see *Haaretz.com, supra,* note 39, at para. 96-97. The Supreme Court concluded that Israel was the more convenient forum even though the plaintiff would lose a legitimate juridical advantage.

[46] Discussed in *Coffin v. Atlantic Power Corp.,* 2015 ONSC 3686, at paras. 132-39.

[47] *Ibid.*

[48] *Van Breda, supra,* note 1 at para. 104; *Kaynes, supra,* note 2 at para. 35.

have one proceeding in the U.S. determine the ADR claims and another in Germany determine the shareholder claims. The plaintiff has led no evidence to suggest otherwise.

[55] What about fairness to the parties? The ADR purchasers resident in Ontario (other than those that fall within the 20-month time period discussed above) are already included in the U.S. proceeding. As for the 20-month group, and making the point even more broadly, the plaintiff has not identified a single ADR holder who claims to be prejudiced by his or her inability to proceed in the U.S.

[56] Recall again that Mr. Leon initially commenced an ADR class action in New Jersey, agreeing that the U.S. federal court "has jurisdiction over the subject matter of this action" and that "venue is proper in this Judicial District" and then withdrew from the U.S. proceeding when he wasn't named lead plaintiff. On these facts, there is nothing unfair in telling Mr. Leon that he was right the first time – the more appropriate forum for the ADR purchasers is indeed the U.S.

[57] In Germany, some 47 Canadian investors, 24 of whom have listed Ontario addresses, have commenced litigation against VWAG in German courts. Not one VWAG shareholder has commenced a securities misrepresentation claim in Ontario or anywhere in Canada. The defendant submits that because every Canadian shareholder who has pursued a securities claim against VWAG has elected to do so in Germany (and not Ontario), it is clear that this portion of the purported class "has voted with its feet." I am inclined to agree.

[58] In short, on the evidence before me, I am satisfied that there is nothing unfair in finding that the U.S. and Germany (where the ADRs and common shares were purchased) are clearly the more appropriate forums. As the Court of Appeal noted in *Currie*:

> Take, for example, the case of an Ontario resident who … buys securities on a foreign stock exchange. The Ontario resident has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction. Nor is it unreasonable, whether from the perspective of the foreign defendant or from that of the Ontario plaintiff, to expect that class action litigation in the foreign jurisdiction should dispose finally of the Ontario plaintiff's claim.[49]

[59] And in *Kaynes*:

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[49] *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, (C.A.), at para. 18.

> It would surely come as no surprise to purchasers who used foreign exchanges that they should look to the foreign court to litigate their claims"[50]

[60] And again in *HSBC*-CA, affirming the court below:

> In the case at bar, the *forum non conveniens* factors and the comity factors overwhelmingly favour Mr. Yip bringing his misrepresentation claim in England or Hong Kong, which is the jurisdiction in which he purchased his shares ... [T]here is nothing unfair to expect Mr. Yip and all of the putative Class Members who used foreign exchanges to look to the foreign courts to litigate their claims where the defendant is a foreign corporation whose securities do not trade on a Canadian stock exchange.[51]

[61] In each of these decisions, the Court of Appeal reaffirmed the proposition that order and fairness are best achieved by adhering to the prevailing international standard tying jurisdiction to the place where the securities were traded and thus avoiding a multiplicity of proceedings involving the same claims or class of claims.[52]

[62] I am therefore satisfied on the evidence before me that the more appropriate forum for the ADR purchasers is the U.S. and for the share purchasers is Germany. Ontario is *forum non conveniens.*

Disposition

[63] The proposed securities class action against VWAG is dismissed on the basis of jurisdiction *simpliciter*.

[64] If I am wrong in this regard and jurisdiction exists, I would in my discretion decline to exercise this jurisdiction and I would stay this action in favour of the U.S. and Germany because Ontario is *forum non conveniens*.

[65] Order to go accordingly.

[66] The costs of this jurisdiction motion and the related certification motion that was scheduled to be heard at the same time and is now moot will no doubt be significant. There may be room for an argument that the costs incurred on the companion certification motion

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[50] *Kaynes, supra,* note 2, at para. 50. The Court of Appeal's decision two years later in *Kaynes v. BP plc*, 2016 ONCA 601 does not assist the plaintiff because, unlike here, the defendant BP's shares were listed and traded on a Canadian stock exchange. Also, unlike here, the plaintiff's claim was not "a claim that is or could be advanced in the US class action" (see 2016 ONCA 601, at para. 19). The decision in *Kaynes* (2016) was considered by the Court of Appeal in *HSBC*-CA, *supra,* note 3, at paras. 70-71: "Comity was central in *Kaynes* (2014). The importance of comity did not change in *Kaynes* (2016) ... [which simply] ... applied the *Kaynes* (2014) framework to a new set of facts."

[51] *HSBC*-SCJ, *supra,* note 17, at para. 273. As already noted, Perell J.'s analysis of *forum non conveniens* was explicitly approved on appeal: see *HSBC*-CA, *supra,* note 3, at para. 53.

[52] *Kaynes, supra,* note 2, at para. 53.

would have been much less if VWAG had advanced this jurisdiction motion in a more timely fashion. Or perhaps not. In any event, I encourage the parties to agree on costs. If the parties cannot agree on costs, the defendant should forward a brief costs submission within 14 days and the plaintiff within 14 days thereafter.

[67] I am obliged to counsel for their assistance.

Justice Edward P. Belobaba

Date: August 15, 2018