SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000838-173

DATE : April 16, 2020

BY THE HONOURABLE CHANTAL CHATELAIN, J.S.C.

LAWRENCE CHANDLER

Plaintiff

v.

VOLKSWAGEN AKTIENGESELLSCHAFT[1]

Defendant

JUDGMENT
(Declinatory exception and *forum non conveniens*)

I. INTRODUCTION

[1] The Defendant, Volkswagen Aktiengesellschaft (**VW**), is a German corporation with its registered seat in Wolfsburg, Germany. It has no domicile in Québec.

[2] VW submits that the Québec courts do not have jurisdiction over the present class action proceedings instituted against it by Mr. Chandler because, in its view, none of the connecting factors attributive of jurisdiction enumerated in Article 3148 of the *Civil Code of Québec* (***C.C.Q.***) are present. Alternatively, should the Court have jurisdiction, VW argues that the Court should decline to hear the matter based on the doctrine of *forum non conveniens* as the authorities of Germany and the United States would be in a better position to decide the dispute.

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1 The style of cause of the Originating Application Instituting a Class Action contains a typographical error in the designation of the Defendant which was inadvertently spelled *"Volkswagen Aktiengestllchaft"* instead of the correct designation which should have been *"Volkswagen Aktiengesellschaft"*. As this is a mere error in designation of no consequence, the style of cause is hereby corrected.

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[3] On May 28, 2018, this Court authorized the Plaintiff, Mr. Lawrence Chandler, to bring a class action against VW on behalf of the following class (**the Authorization judgment**):[2]

> All residents of Québec who purchased Volkswagen Aktiengesellschaft's (**VW**) securities during the Class Period (i.e. between March 12, 2009, and September 18, 2015) and held all or some of those acquired VW securities until after September 18, 2015.
>
> (**the Class or the Class members**)

[4] On February 18, 2019, the Court dismissed VW's application which sought to specify that the Class was limited to holders of equity securities to the exclusion of holders of debt instruments. The Court confirmed that the term "securities" for the purposes of the Authorization judgment did include debt instruments, such as notes (the **Class definition judgment**).[3]

[5] On May 27, 2019, the Court approved the notices to the Class members and ordered their publication.[4]

[6] On May 29, 2019, Mr. Chandler served his Originating Application Instituting a Class Action (the **Originating application**).

[7] He basically claims that the Class members, who invested in VW's securities, suffered monetary damages when the value of their securities dropped as a result of the disclosure of VW's intentional misrepresentations or omissions in relation to the compliance of certain of its Volkswagen and Audi diesel-powered vehicles with applicable emissions standards. According to Mr. Chandler, VW's defrauded investors and the public by deliberately cheating on emissions tests and making its diesel vehicles appear environmentally cleaner than they actually were.

[8] Mr. Chandler argues that VW was required to disclose facts that could affect the price of its securities as well as the decision of a reasonable investor to acquire VW's securities, or conversely that VW was required not to disclose facts that it knew to be false or to constitute misrepresentations.

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2 *Chandler* c. *Volkswagen Aktiengestllchaft*, 2018 QCCS 2270, application for leave to appeal dismissed *Volkswagen* c. *Chandler*, 2018 QCCA 1347. As indicated, "*Aktiengestllchaft*" should have read "*Aktiengesellschaft*" in all the previous reported cases where the name of VW was spelled incorrectly.

3 *Chandler* c. *Volkswagen Aktiengestllchaft*, 2019 QCCS 467, application for leave to appeal dismissed *Volkswagen Aktiengesellschaft* c. *Chandler*, 2019 QCCA 641.

4 *Chandler* c. *Volkswagen Aktiengesellschaft*, 2019 QCCS 1813.

[9] Invoking Article 1457 *C.C.Q.*, which is the general civil liability regime in Québec, he claims that VW's actions or omissions constituted a fault and that the loss suffered by the Class members resulted from that fault. As a result, he seeks compensatory damages against VW, on his behalf and that of the Class members, for the loss of value of VW securities which resulted from alleged misrepresentations and omissions.

[10] On July 3, 2019, VW served its Notice of Disclosure of a Declinatory Exception. The Application for Declinatory Exception for lack of territorial jurisdiction and, in the alternative, *forum non conveniens* was served on August 16, 2019.

II. CONTEXT

[11] For convenience, the Court reproduces the summary of the allegations in support of the action contained in the Authorization judgment:[5]

> II. ALLEGATIONS IN SUPPORT OF THE PROPOSED CLAIM
>
> [7] Mr. Chandler filed his Motion for Authorization to Institute a Class Action on January 17, 2017. The Motion was amended on December 8, 2017, and re-amended on December 28, 2017 (**Motion for Authorization**).
>
> [8] VW is one of the largest automotive manufacturers in the world, with sales revenue of more than €170,864,000. It is a publicly traded company incorporated under the laws of Germany and its share capital is valued at €1,283,315,873.28.
>
> [9] VW's securities are traded on worldwide stock exchanges, namely the Over The Counter (**OTC**) Markets and the Frankfurt Stock Exchange. The average trading volume rises to hundreds of thousands of securities traded daily.
>
> [10] On July 19, 2012, Mr. Chandler, a Québec resident, purchased VW securities in the form of 300 of VW's sponsored unlisted American Depositary Receipts (**ADR**) listed on the OTC Markets Group for a total of US $9,627.00. On June 14, 2016, Mr. Chandler sold his 300 ADR at US $30.3083 per share for a total of US $9,092.49.
>
> [11] ADR are an American instrument which confers upon its purchaser a form of indirect ownership over foreign securities that are not traded directly on a national exchange in the United States. ADR do not appear to be sold directly in Québec, but rather in the United States.
>
> [12] Five ADR correspond to one underlying ordinary share of VW.

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5 It is not necessary at this point to dwell on any distinctions that could exist between the Motion for Authorization to Institute a Class Action and the Originating application.

[13] On September 18, 2015, the US Environmental Protection Agency (**EPA**) issued a Notice of Violation of the Clean Air Act to VW (as well as other entities in the same corporate group) alleging that VW had installed software on some of its vehicles from model years 2009-2015 that circumvented EPA emissions standards for certain air pollutants.

[14] Concomitantly with the issuance of the Notice of Violation, VW publicly admitted that it had created and installed a software function in the auxiliary emissions control device (**AECD**) of its 2.0L and 3.0L diesel engines (**Corrective Disclosure**). This device (**Cheating Device**) allowed VW to cheat US emissions tests and made its diesel vehicles appear cleaner than they actually were.

[15] The Cheating Device was designed to recognize whether the vehicle was undergoing US emissions testing or whether it was being driven on a road under normal conditions. If the Cheating Device detected that it was being tested, the vehicle would perform in an emissions mode that met US emission standards. If the vehicle was not being tested, it would operate in a different mode which emitted 40 times more atmospheric pollutants than permitted.

[16] According to Mr. Chandler, VW branded its diesel engines as "clean diesel engines", while they were not in light of the applicable emissions standards.

[17] The publication, on March 12, 2009, of VW's 2008 annual report which did not disclose the creation and the implementation of the Cheating Device in its vehicles marks the beginning of the proposed class period. The Corrective Disclosure made by VW on September 18, 2015, marks the end of the proposed class period.

[18] Mr. Chandler argues that throughout the class period, VW engaged in a scheme to defraud its investors by preparing and releasing documents containing misstatements and omissions of material facts regarding its business operations.

[19] Mr. Chandler concludes that as a result of the Corrective Disclosure, the value of VW securities dropped. He notes that by the tenth trading day following the release of the Corrective Disclosure, the value of VW's securities dropped 36.46%.

[12] It must be emphasized that three financial instruments have been discussed by the parties in the context of the Application for Declinatory Exception, i.e. the Shares, the ADRs, and the Notes. At the outset, a brief description of each instrument and the findings of the Court as to where they trade or are being issued is in order.

a) The VW <u>Shares</u> were publicly issued by VW. They are primarily listed on the Frankfurt Stock Exchange and are further traded on regional German stock exchanges, as well as the Luxembourg and Swiss Stock Exchanges.

The VW Shares have never been listed for public trading in Québec or

elsewhere in Canada.

An investor residing in Québec could not have bought the Shares on a Canadian exchange or another Canadian regulated marketplace.

However, a Québec resident can acquire and hold Shares.

To acquire Shares, a Québec resident simply has to deal with an investment dealer that can provide indirect trading access to a European marketplace where the Shares are publicly traded.

To do so, the investment dealer registered in the province of Québec would enter into an execution and clearing arrangement with a non-Canadian broker that is an approved trading member, subscriber or participant to one of the European marketplaces where the Shares are publicly traded.

As a matter of fact, the Court finds that none of the trading allowing a Québec resident to acquire Shares would take place in Canada.

b) ADR is an American instrument which provides its purchaser with a form of indirect ownership over foreign securities that are not traded directly on a national exchange in the United States.

ADRs allow United States brokers to purchase and sell rights to shares in non-U.S. companies.

More specifically, the ADRs at issue herein are negotiable certificates, representing a specified number of VW common or preferred shares, issued by a United States depository bank.

The ADRs at issue herein were publicly issued in the United States, i.e. outside the province of Québec.

Also, the ADRs are not listed on any stock exchanges. They are traded in the United States OTC Markets located outside Canada.

However, a Québec resident can acquire and hold ADRs.

To do so, a broker registered in Québec acting on behalf of the Québec investor would be required to enter into an execution and clearing arrangement with a United States broker-dealer who is an approved trading member, subscriber or participant to the United States OTC markets where VW ADRs are publicly traded.

As a matter of fact, the Court finds that none of the trading allowing a Québec resident to acquire ADRs would take place in Canada.

Furthermore, the ADRs are located outside Canada at the United States Depository Trust & Clearing Corporation, which is the depository of the VW's ADRs.

c) The Notes were issued by VW Credit Canada, Inc. (**VCCI**).

VCCI is not a defendant in this action. VCCI is, however, a subsidiary of VW through VW Credit, Inc. (**VCI**), which is a wholly owned subsidiary of Volkswagen Group of America, Inc. (**VWGoA**), which in turn is a wholly owned subsidiary of VW.

The Notes are irrevocably and unconditionally guaranteed by VW.

Notes can be issued publicly or privately.

VCCI is authorized to issue VCCI Notes outside Québec under a prospectus and in Québec under an exemption thereto, but only to qualified or accredited investors.

During the Class Period, VCCI privately issued VCCI Notes in and outside Québec under the accredited investor prospectus exemption provided by section 2.3 of National Instrument 45-106.

There was no public issue of VCCI Notes in Québec.

Primary market transactions in Québec involved certain accredited investors, and, as regards the secondary market, VCCI Notes traded on OTC markets in Europe.

Based on the evidence[6], VCCI privately distributed Notes to at least 13 unique accredited investors in Québec. The evidence does not indicate if other issuances took place. Also, the Court does not know how many of the Notes distributed to accredited investors were outstanding during the Class Period.

VCCI Notes have never been listed for exchange.

[13] Various proceedings have been instituted in other jurisdictions in relation to the same or similar purported misrepresentations or omissions of VW as those at issue herein. Following is a description of the nature and status of these proceedings.

A. Proceedings in the United States respecting ADRs

[14] The proceedings in the United States concern ADRs.

[15] Between September 25, 2015 and November 25, 2015, five putative securities class action complaints were filed in the U.S., against, among others, VW, on behalf of purchasers of VW ADRs. These claims alleged securities fraud under the U.S. *Securities Exchange Act*.

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6 Exhibit P-38, p. 3.

[16] On December 10, 2015, the five actions were consolidated and transferred to the U.S. District Court for the Northern District of California as part of a multidistrict litigation before Charles R. Breyer J., under the caption *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (the **"U.S. Proceeding"**).

[17] The allegations in the U.S. Proceeding are made on behalf of a worldwide class (including Québec) and substantially relate to the same conduct at issue in this proceeding.

[18] Importantly, the class action in the U.S. covers ADRs holders during the period of November 19, 2010 to January 4, 2016, which is shorter than the Class Period in the present matter, i.e. March 12, 2009 to September 18, 2015.

[19] On November 28, 2018, Breyer J. rendered a preliminary approval order respecting a settlement for global holders of VW's ADRs, including Québec residents (**the U.S. Settlement**).

[20] Pursuant to the preliminary approval order, notice of the settlement was made to class members by:

a) mailing more than 217,000 notice and claim form packages to holders of record of VW's ADRs during the class period;

b) publishing a summary notice in the Investor' Business Daily newspaper and over PR Newswire; and

c) maintaining a settlement website.

[21] The U.S. claims administrator sent out 251 settlement notice packages (in English only) to Québec addresses. In addition settlement notice packages may have been sent by brokers directly to their clients in Québec. Class members were entitled to object to the settlement or exclude themselves from it by submitting objections or exclusion requests by April 18, 2019.

[22] However, the evidence is that Mr. Chandler never received the package and was only informed by class counsel, Mr. Faguy, on or about April 16 or 17, 2019, two to three days before the expiry of the objection or exclusion period.

[23] In total, 16 class members excluded themselves from the U.S. Settlement, including four class members from Canada. Mr. Chandler is the only Québec resident who opted out of the U.S. Settlement.

[24] On May 10, 2019, Breyer J. granted final approval of the settlement of the U.S. Proceeding.

[25] According to the evidence before this Court, 607 claims were received from Québec addresses, out of which only 68 claims were deemed eligible by the U.S. claims administrator under the U.S. Settlement.

[26] On February 5, 2020, U.S. Plaintiff's Counsel agreed, subject to approval by Justice Breyer, to extend the time for Québec residents to submit any claims under the U.S. Settlement until February 26, 2020. The Court does not know if additional claims from Québec residents were made or accepted.

B. Proceedings in Germany respecting the Shares and the Notes

[27] Shareholders and noteholders litigations are also ongoing in Germany against VW for alleged securities misrepresentations. As class actions do not exist in the German legal system, the claims are individual claims, mostly by institutional investors. The individual plaintiffs in these matters are claiming damages, essentially based on the same facts as alleged herein.

[28] According to the evidence of VW, over 84% of the 1,628 institutional plaintiffs who are suing VW in Germany in these proceedings are non-German investors. These non-German institutional investors include at least 48 Canadian institutional investors of which five listed Québec addresses.

[29] It should be noted that 20 institutional Class members opted out of the present proceedings and all of these opt outs are by holders of Shares or Notes who are also pursuing their claims in the German proceedings. Of these 20 opt outs, nine are pursuing noteholders claims in Germany.

C. Other proceedings

[30] In Ontario, Mr. George Leon, in his capacity as trustee for his family's trust, sought certification of a class action against VW based on the tort of fraudulent misrepresentation. The proposed class was comprised 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."

[31] On August 15, 2018, Belobaba, J. of the Ontario Superior Court of Justice dismissed Mr. Leon's proposed class action.[7] He concluded that the court did not have jurisdiction *simpliciter* and that, alternatively, he would use his discretion to decline to exercise his jurisdiction and would stay the action in favour of the United States and Germany because in his view, Ontario is *forum non conveniens*.

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[7] *Leon* v. *Volkswagen AG*, 2018 ONSC 4265.

[32] Belobaba, J. found that order and fairness were best achieved by applying the prevailing international standard tying jurisdiction to the place where the securities are traded:

> [1] [...] 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.

[33] Other proceedings had been commenced against VW in Austria and the Netherlands, but have since been dismissed, withdrawn or postponed, apparently based on jurisdictional grounds.

III. QUESTIONS AT ISSUE

[34] Do the Québec courts have jurisdiction over the proceedings pursuant to Article 3148 *C.C.Q.*?

[35] Alternatively, should the Court decline jurisdiction in favour of the Courts of Germany with respect to the claim relating to the Shares and the Notes and in favour of the Courts of the United States with respect to the claim relating to the ADRs?

IV. ANALYSIS

A. Québec courts' jurisdiction

[36] In *Club Resorts Ltd.* v. *Van Breda*, the Supreme Court of Canada confirmed that in Québec, the rules of private international law are found in the *C.C.Q.*, which contains a complete set of well-developed rules:[8]

> (3) Constitutional Underpinnings of Private International Law
>
> [21] Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Québec, in the *Civil Code of Québec*,

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[8] *Club Resorts Ltd.* v. *Van Breda*, 2012 SCC 17, par. 21.

> S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question [...] and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution [...].
>
> [Our emphasis, References omitted]

[37] The principles of international comity, order and fairness applicable in the *common law* provinces may be used to interpret the rules provided in the *C.C.Q.*, but they are not binding in themselves. This was explained by Sansfaçon J., then at the Superior Court, in *Québec (Procureur général)* c. *Imperial Tobacco Canada Ltd.*:[9]

> [24] Au Québec, les règles complètes qui gouvernent l'ordre du droit international privé se trouvent au Livre dixième du *Code civil du Québec*[16]. Ces règles, ajoutées à celles du *Code de procédure civile*, établissent la compétence des tribunaux[17], les pouvoirs discrétionnaires que possède le Tribunal pour l'élimination des tribunaux inappropriés[18], l'exception de litispendance[19] ainsi que les règles de reconnaissance et d'exécution des décisions étrangères[20].
>
> [25] En raison de leur codification, les tribunaux doivent interpréter ces règles en examinant d'abord le libellé particulier des dispositions du C.c.Q. Les principes qui sous-tendent les règles prévues au C.c.Q. (les principes de courtoisie, d'ordre et d'équité) peuvent servir, au besoin, à interpréter ces dernières, mais elles ne sont pas contraignantes en soi[21].
>
> [Our emphasis]
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> [16] *Club Resorts Ltd.* c. *Van Breda*, 2012 CSC 17 (CanLII), [2012] CSC 17, [2012] 1 R.C.S. 572, par. 21.
> [17] Art. 3136, 3139 et 3148 C.c.Q.
> [18] La doctrine du *forum non conveniens*, codifiée à l'art. 3135 C.c.Q.
> [19] Art. 3137 C.c.Q.
> [20] Art. 3155 C.c.Q.
> [21] *Spar Aerospace* c. *American Mobile Satellite*, 2002 CSC 78 (CanLII), [2002] 4 R.C.S. 205, [2002] CSC 78, par. 22 et 23.

[38] In the present proceedings, the Court must therefore first turn to Article 3148 *C.C.Q.* to determine whether it has jurisdiction to hear the matter. The existence of only one of the connecting factors enumerated in Article 3148 *C.C.Q.* is sufficient to ground the Court's jurisdiction. The parties acknowledge that paragraphs (1) and (4) of Article

9 *Québec (Procureur général)* c. *Imperial Tobacco Canada Ltd.*, 2013 QCCS 2994, par. 24-25.

3148 are not applicable and they are not invoked by Mr. Chandler. The parties disagree, however, as to whether the Québec courts' jurisdiction can be based on the criteria found at paragraphs (2), (3) and (5) of Article 3148:

> 3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
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> (1) the defendant has his domicile or his residence in Québec;
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> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
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> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;
>
> (5) the defendant has submitted to their jurisdiction.
>
> However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.
>
> [Our emphasis]

[39] The legal principles respecting the applicable burden of proof are uncontroverted. They are aptly described in *Marciano* c. *Universal Perfumes and Cosmetics*:[10]

> Le fardeau de la preuve
>
> [19] Il est reconnu que l'article 3148 C.c.Q. établit une large assise juridictionnelle à la compétence des tribunaux québécois.
>
> [20] La juridiction du Tribunal s'apprécie à partir de la requête introductive d'instance, dont les faits allégués sont tenus pour avérés pour cette fin, comme le rappelle la Cour suprême dans *Spar Aerospace* c. *American Mobile Satellite*: [...]

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[10] *Marciano* c. *Universal Perfumes and Cosmetics*, 2016 QCCS 4889, par. 19 to 30. See also, *Transax Technologies inc.* c. *Red Baron Corp. Ltd.*, 2017 QCCA 626, par. 13-16.

> [21] Les pièces auxquelles réfère la demande introductive d'instance peuvent aussi être considérées afin de rechercher la démonstration *prima facie* des facteurs de rattachement.
>
> [22] Les défenderesses doivent aussi produire une preuve visant à contredire les faits qui établissent les éléments de rattachement allégués à la demande introductive du recours mentionnés. C'est ce que la Cour d'appel enseignait dès 1994 dans *Baird* c. *Matol Botanical International* : [...]
>
> [25] Les règles suivantes s'appliquent donc.
>
> [26] D'abord, le Tribunal doit vérifier la demande introductive du recours et être satisfait que, de par ses allégations et ses pièces, elle établit suffisamment, c'est-à-dire *prima facie*, le lien juridictionnel avec le Québec. Dès lors, il appartient au défendeur qui soutient que le tribunal québécois n'est pas compétent de présenter une preuve niant ou autrement contestant les éléments de rattachement allégués à l'action. Cette preuve, qui pourra se faire par déclaration sous serment ou autrement, même par témoins, devra contredire les faits ou les pièces allégués à l'action pour que le juge puisse conclure que la démonstration *prima facie* de la juridiction du tribunal québécois est ébranlée et ne suffit plus.
>
> [27] Si le défendeur présente une telle preuve suffisamment sérieuse pour qu'elle puisse réellement mettre en doute les faits soutenant la preuve *prima facie* que comportent les faits et les pièces allégués au soutien de l'action, alors le demandeur devra prouver les faits ainsi contestés. L'appréciation de la preuve que fera le juge le sera selon le critère de la prépondérance.
>
> [28] À cette étape préliminaire, le juge devra s'abstenir de s'engager dans une analyse pointue normalement associée à l'audition au mérite, puisqu'il n'aura pas alors eu l'opportunité d'entendre l'ensemble de la preuve [...]
>
> [...]
>
> [30] Cela dit, il ne faut pas perdre de vue qu'il sera toujours nécessaire, en droit international privé, d'établir la présence d'un lien réel et substantiel entre le litige et la juridiction qui veut s'en saisir.
>
> [Références omises]

[40] VW filed evidence to support its position as to jurisdiction. As indicated above, when a defendant adduces evidence that is serious enough to really challenge the facts alleged by a plaintiff respecting the jurisdiction of the court, it is up to the plaintiff to prove the facts alleged according to the balance of probabilities.[11]

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[11] *Marciano* c. *Universal Perfumes and Cosmetics*, 2016 QCCS 4889, par. 26-27.

[41] Here, the Court finds that the evidence submitted by VW is serious enough to engage a debate so that the burden of proof now rests on Mr. Chandler's shoulders. In reaching its decision, the Court will consider the evidence adduced, keeping in mind the applicable principle which requires that the Court refrain from engaging in a pointed analysis normally associated with the hearing on the merits, absent the opportunity to hear the whole of the evidence.[12]

[42] Before turning to the jurisdictional analysis, some preliminary issues raised by the parties must be addressed.

1. Should each security at issue be assessed distinctively for the purposes of the jurisdictional analysis

[43] VW submits that the class action involves three categories of Class members, those who purchased Shares, those who purchased ADRs, and those who purchased Notes. Therefore, it further argues that the jurisdictional analysis under Article 3148 *C.C.Q.* should be segmented so that each type of security at issue in the proceedings be assessed separately.

[44] VW outlines that the Shares, the ADRs and the Notes do not all have the same issuer, trade on different markets, operate in a different fashion and would respond to a corrective disclosure in a different manner. VW adds that "on the merits, the Plaintiff must demonstrate, on the balance of probabilities, that the claims of purchasers of Shares, ADRs and VCCI Notes each have a real and substantial connection to Québec."[13]

[45] VW thus concludes that each of these instruments has a different nexus for the purposes of the jurisdictional analysis and that Mr. Chandler's burden is to establish jurisdiction in regard to each of the Shares, ADRs and Notes. According to VW, a distinct jurisdictional analysis for each instrument is consistent with the Court's authority to divide a class into subclasses, notably in cases where the burden of proof varies as among different categories of class members.

[46] VW's argument is ill-founded.

[47] First, at present, there is only one class that has been defined pursuant to the Authorization judgment and VW never suggested or requested that subclasses should be created. Its attempt to segregate the jurisdictional analysis according to the nature of the security held by the Class members constitutes an indirect review of the

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[12] *Id.*, 2016 QCCS 4889, par. 28.
[13] VW's Argument Brief, par. 59.

Authorization judgment and of Class definition judgment. Applications for leave to appeal both these judgments have been dismissed.[14]

[48] Second, although it may be possible at a later stage of these proceedings that the Class as defined pursuant to the Authorization judgment be divided into subclasses and that the claim be dismissed against one of the subclasses and not another, for the purposes of the jurisdictional analysis, that eventuality does not change the fact that only one cause of action is alleged by Mr. Chandler with respect to all VW securities, not three distinct causes of action respecting three distinct types of securities.

[49] In any event, even if more than one cause of action was at issue, in *Poppy Industries Canada Inc.*, the Court of Appeal indicated that jurisdiction must be determined globally, and not segmented for each cause of action. As such, jurisdiction over one of the causes of action suffices to grant jurisdiction over the whole proceeding:[15]

> [32] Article 3148(3) *C.C.Q.* also gives jurisdiction to the Québec authorities when "injury was suffered" in Québec. In *E. Hofmann Plastics Inc.* v. *Tribec Metals Ltd.*, this Court decided that <u>this provision did not require that each potential cause of action bear a connecting factor to Québec and that one cause of action is enough to grant jurisdiction</u>:
>
>> [13] Firstly, the historical evolution of Québec's private international law supports exercising jurisdiction in the instant case. Prior to the entry into force of the C.C.Q. in 1994, the question of international jurisdiction was decided pursuant to article 68 C.C.P., which required that the whole cause of action originate in Québec. Now article 3148(3) C.C.Q. establishes jurisdiction on the basis of one key element of the cause originating in Québec (fault, damage, injurious act, or an obligation arising from a contract). The appellant's assertion that 3148(3) requires both causes of action to originate in Québec ignores this legislative evolution from article 68 C.C.P. to article 3148(3) C.C.Q. Moreover, the minister's comments tell us that part of 3148(3)'s *raison d'être* is to avoid the complications that arose from the application of article 68 C.C.P. in the context of international jurisdiction: *"Le troisième point ne reprend pas l'expression du droit antérieur 'toute la cause d'action', puisque l'application de cette règle était la source de nombreuses difficultés."* Requiring article 3148(3) to apply to both causes of action would reintroduce complications similar to those that resulted from the application of article 68 C.C.P.,

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[14] *Volkswagen* c. *Chandler*, 2018 QCCA 1347 and *Volkswagen Aktiengesellschaft* c. *Chandler*, 2019 QCCA 641.

[15] *Poppy Industries Canada Inc.* c. *Diva Delights Ltd.*, 2018 QCCA 163.

> such as an unnecessary division of the dispute to be spread out over two jurisdictions. The legislator has chosen to avoid such scenarios.
>
> [References omitted]
>
> [33] Consequently, jurisdiction must be determined globally, and not separately for each cause of action. Jurisdiction over one of the causes of action will be sufficient to grant jurisdiction for the whole proceeding.
>
> [Our emphasis]

[50] That said, the Court will comment on the specificity of each type of security where necessary.

2. Does the Authorization judgment have *res judicata* authority respecting jurisdiction

[51] Mr. Chandler submits that the conclusions in the Authorization judgment regarding jurisdiction are *res judicata*.

[52] The Court disagrees.

[53] VW had argued at the authorization stage that the Québec courts did not appear to have jurisdiction on this matter. However, the jurisdictional argument was not then presented as a declinatory exception, but rather in the context of the determination of whether the criteria to grant authorization under Article 575(2) of the *Code of Civil Procedure* had been met. Under Article 572(2), the authorization judge must determine, taking the factual allegations of the motion for authorization to be true, whether "the facts alleged appear to justify the conclusions sought". The Authorization judgment summarized VW's approach at the authorization stage as follows:

> [28] In a novel approach, VW states that, at the authorization stage, it is not raising the jurisdiction issue as a preliminary or declinatory exception based on Articles 166 and 167 CCP. Rather, VW invokes the lack of jurisdiction of the Québec courts only as part of its argument under Article 575(2) CCP respecting whether the facts alleged appear to justify the conclusions sought with respect to the jurisdiction of the Québec courts. Taking VW's approach, the question to be determined by the Court is not whether the Québec courts lack jurisdiction to hear the Motion for Authorization or, ultimately, the proposed action, but rather, at the authorization stage, taking the facts alleged to be true, whether Mr. Chandler has satisfied his burden to demonstrate that the Québec courts appear to have such jurisdiction.
>
> [Emphasis in the original]

[54] In these circumstances, it goes without saying that the Authorization judgment is not binding on the Court on the question of whether or not the Québec courts have jurisdiction in this matter. That was made abundantly clear at paragraph 40 of the Authorization judgment where the Court stated:

> [40] As explained below, the Court finds that, at the authorization stage, taking the facts alleged as true, the Québec courts do appear to have jurisdiction to hear the proposed class action.
>
> [Our emphasis]

[55] In addition, in fact, because of the very different nature of the argument made by VW under section 575(2) *C.C.Q.* at the authorization stage and the present declinatory exception, presented at the merits stage of the dispute, the record now before the Court substantially differs from the record that was submitted at the authorization stage.

[56] The Court will now turn to the analysis of the criteria of Article 3148 *C.C.Q.* raised by the parties to determine whether the Québec courts have jurisdiction over this matter.

3. Did VW submit to the Québec courts' jurisdiction (Article 3148(5) *C.C.Q.*)

[57] It appears logical to begin the jurisdictional analysis with paragraph (5) of Article 3148 *C.C.Q.* since Mr. Chandler argues that VW submitted (or attorned) to the jurisdiction of the Québec courts or waived its right to raise lack of jurisdiction. If he is right, this would render the analysis of the other criteria unnecessary.

[58] At the authorization stage, the Court held that VW had waived its right to raise a declinatory exception based on lack of jurisdiction for the following reasons:

> [34] While it is true that in its answer dated May 8, 2017, as well as in its letter of June 23, 2017, to the Coordinating Judge of the Class Action Division in Montréal, VW initially reserved its rights to eventually raise declinatory exceptions, VW later confirmed that it would not raise any such exception.
>
> [35] In fact, during a case management conference held on September 1, 2017, the Court specifically asked VW whether it intended to file any declinatory motion and VW responded in the negative. Three other case management conferences were held after that date and the issue of jurisdiction was never raised.
>
> [36] In addition to its clearly stated intention not to raise any declinatory exception, VW is also presumed to have waived the jurisdictional argument at the authorization stage because it filed a motion for leave to submit relevant

> evidence under Article 574 CCP (which motion was granted by the Court) and examined Mr. Chandler out of court under no reserve whatsoever and without ever raising the jurisdictional argument.
>
> [37] In light of the foregoing, the Court determines that VW did, in fact, waive its right to raise a declinatory exception based on lack of jurisdiction at the authorization stage. This implies that VW has also waived its right to raise the jurisdictional argument under Article 575(2). Having reached this conclusion, the Court does not have to address the argument under Article 575(2). However, for the sake of completeness, the Court will address that argument.
>
> [Footnotes omitted]

[59] Mr. Chandler pleads that the reasons which lead the Court to find that VW had waived its right to raise a declinatory exception based on lack of jurisdiction at the authorization stage are equally applicable at the merits stage and that VW specifically submitted to the Court's jurisdiction. The Court disagrees.

[60] Indeed, as soon as the Originating application was filed, VW consistently and repeatedly indicated that it contested the Court's jurisdiction. VW merely authorized its counsel to accept service of the Originating application, but again "under reserve of its rights to contest the jurisdiction of this Court."[16] It then served its Application for Declinatory Exception at the very first opportunity. VW took no procedural or other steps and presented no argument whatsoever that could be assimilated or amount to submitting to the Court's jurisdiction[17] and, as a matter of fact, apart from events which occurred at the authorization stage, i.e. prior to the filing of the Originating application, none are alleged by Mr. Chandler.

[61] Even if an application for authorization to institute a class action and a subsequent originating application in a class action can be said to be part of the same class action "proceeding" (*"l'instance"*),[18] the originating application in a class action is a <u>new</u> action subject to a new set of procedural steps, including any applicable preliminary exceptions. Contrary to the submissions of Mr. Chandler, the new *Code of Civil Procedure* enacted on January 1, 2016 did not change that reality.

[62] Furthermore, by nature the authorization stage is a preliminary step in the proceeding which must be conducted swiftly. It would be incongruous and contrary to the nature of the authorization process to compel defendants to raise their jurisdictional arguments at the authorization stage and, failing this, that they be foreclosed from doing

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16 *Chandler* c. *Volkswagen Aktiengestllchaft*, 2019 QCCS 2036.

17 For an indication of some acts which can be considered as amounting to submitting to jurisdiction, see *Barer* v. *Knight Brothers LLC*, 2019 SCC 13, par. 59 to 70.

18 *Groupe Jean Coutu (PJC) inc.* c. *Sopropharm*, 2017 QCCA 1883, par. 16-20.

so at the merits stage. In fact, as illustrated in *Infineon Technologies AG* v. *Option consommateurs*, the court's alleged lack of jurisdiction is sometimes raised at the authorization stage, sometimes at the merits stage and sometimes at both stages:[19]

> [42] According to a well-established jurisprudence of the Québec courts, challenges to Québec's jurisdiction can properly be made and dealt with at the outset of a proceeding for authorization of a class action. The judgment rendered at this stage will determine, on the basis of the allegations, whether the matter appears to be properly before the court (see *Thompson* v. *Masson*, 1992 CanLII 3662 (QC CA), [1993] R.J.Q. 69 (C.A.)). However, this does not mean that a judgment dismissing a jurisdictional challenge at the authorization stage ends the debate over the territorial jurisdiction of the Québec courts. This issue could be raised again later, because the judgment rendered at this stage is only an interlocutory decision (art. 1010 of the *C.C.P.*). The court may subsequently reconsider the issue in light of all the evidence, and decline jurisdiction, at the trial on the merits (*Thompson*, at p. 73).
>
> [Our emphasis]

[63] As indicated in *Rogers Communications, s.e.n.c.* c. *Brière*, although in another context, "the purpose of the authorization judgment cannot be to decide that the respondent has waived a right of any kind."[20]

4. Does VW have an establishment in Québec and does the dispute relate to its activities in Québec (Article 3148(2) *C.C.Q.*)

[64] This criterion is two-pronged:

a) the defendant must have an establishment in Québec, and

b) the dispute must relate to its activities in Québec.

[65] As to whether VW has an establishment in Québec, the clear answer is no. VW does not have an establishment in Québec.

[66] The entity which has an establishment in Québec is VCCI, the issuer of the Notes.[21]

[67] However, as explained above, VCCI is a subsidiary of VW through VCI, which is a wholly owned subsidiary of VWGoA, which in turn is a wholly owned subsidiary of VW.

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19 *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59, par. 42.

20 *Rogers Communications, s.e.n.c.* c. *Brière*, 2016 QCCA 1497, par. 62, unofficial English translation.

21 Although VW is represented in some prospectuses as being an issuer of notes, VW is not an issuer in Québec and there has been no issue of notes by VW in Québec.

Nevertheless, Mr. Chandler alleges that "VW AG, via VCCI, has an establishment in Québec."[22] To support this position, he invokes that VW guarantees the Notes issued by VCCI, that VW is the "âme dirigeante" of all of its wholly owned subsidiaries and that VCCI is the agent of VW in Québec, along with other dealers or distributors of securities in Québec. He also suggests lifting the corporate veil[23] and that VW and VCCI are *alter egos*.

[68] None of Mr. Chandler's arguments are convincing.

[69] The mere fact that VCCI is VW's wholly owned subsidiary does not constitute a sufficient connecting factor to Québec.[24] More is needed.

[70] Also, the fact that VW is a guarantor of Notes issued by VCCI is insufficient to assimilate the two entities as being the same entity and to conclude that VW has an establishment in Québec within the meaning of Article 3148(2) *C.C.Q.* Likewise, the fact that VW guarantees the Notes does not permit to conclude, as argued by Mr. Chandler, that the Notes issued by VCCI are to be considered in reality as having been issued by VW or that VW conducts activities in Québec in relation to the dispute.

[71] Mr. Chandler further argues that VW carries on business in Québec through agents which are dealers distributing securities on its behalf. That argument is untenable. Mr. Chandler picks and chooses various words or phrases in selected financial documents to try to support his argument, but he does not succeed in adducing any convincing evidence proving that agents or representatives distributed securities in Québec on behalf of VW or that VW carried on business in Québec in relation to the facts in dispute through agents or representatives. Notably, Mr. Chandler refers in his argument to an "Agency Agreement" entered into between VW and VCCI and numerous other entities, but he does not produce that agreement nor does he cite any extracts thereof that could enlighten the Court. The few extracts of financial documents cited by Mr. Chandler do not support his assertion that VW has an establishment in Québec for the purpose of distributing securities, nor that the present dispute relates to VW's activities in Québec.

[72] The authorities relied upon by Mr. Chandler are also of little support.

[73] In *Filosofia Éditions inc.* c. *Entreprises Foxmind Canada ltée*, the Court of Appeal confirmed the existence of a connecting factor to Québec because the commercial activities abroad of the foreign entities had an impact on the economic situation of the

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22 Originating application, par. 199.

23 In this case, various layers of veils would need to be lifted.

24 *Interinvest (Bermuda) Ltd.* c. *Herzog*, 2009 QCCA 1428, par. 26, citing *MNC Multinational Consultants Inc./Consultants Multi-National inc.* c. *Dover Corp.*, J.E. 98-1179 (C.S.).

co-defendant, its parent sister company in Québec, due to the corporate structure put in place by the controlling mind.[25]

[74] Here, the theory of the case is that VW committed the faults alleged, i.e. the omissions and misrepresentations, not VCCI. Therefore, even if VW could be said to be the "*âme dirigeante*" of VCCI that would not lead to the conclusion, as Mr. Chandler suggests, that the issuance of the Notes by VCCI can be considered as being the issuance of Notes by VW.

[75] In *Rapid Collect Inc.* c. *Moneygram Payment Systems Inc.*, the website of the defendant, a foreign company, clearly referred its customers to its "local agents around the world" and referenced agent locations in 227 cities in Québec.[26] It is based on that specific factual background that Silcoff J. indicated that "For the purposes of article 3418(2) *C.C.Q.*, when a non-resident corporation carries on business in Québec through agents or representatives, the criteria of article 3148(2) *C.C.Q.* are generally met."

[76] Here, the facts differ and, based on the evidence, VCCI and VW cannot be conflated as a single entity and the Court simply cannot find that VCCI is acting as VW's agent in Québec to carry on its business in this province.

5. Was a fault was committed in Québec or an injury suffered in Québec (Article 3148(3) *C.C.Q.*)

[77] The Court must now determine whether, as required under Article 3148(3) *C.C.Q.*, it has jurisdiction over the matter either because "a fault was committed in Québec" or an "injury was suffered in Québec."

a) Was "a fault was committed in Québec"

[78] To decide whether Québec authorities have jurisdiction under this criterion, the question to be answered is whether the alleged acts or omissions of VW that might constitute a fault were committed in Québec. The answer is no.

[79] Mr. Chandler's claim under Article 1457 *C.C.Q.* is extra-contractual in nature; no contract is alleged to have been entered between him or any Class members and VW. VW's alleged fault is its extra-contractual omission to disclose adverse material facts, and misstatements relating to its compliance with US emission standards. The misstatements and omissions are said to have been made in various financial

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[25] *Filosofia Éditions inc.* c. *Entreprises Foxmind Canada ltée*, 2013 QCCS 2519, par. 35, confirmed in appeal *Foxmind Games, n.v.* c. *Filosofia Éditions inc.*, 2014 QCCA 399, par. 8.

[26] *Rapid Collect Inc.* c. *Moneygram Payment Systems Inc.*, 2009 QCCS 6585, par. 12-13.

documents referred to as the Impugned Documents as defined in the Originating application.[27]

[80] According to the evidence filed, the vast majority of VW's activities, management board meetings and decisions occur in Germany. But more importantly, based on the evidence, the Impugned Documents were prepared in Germany. Other than bald unsubstantiated allegations, there is simply no evidence of a specific fault or omission by VW vis-à-vis the Class members that would have been committed in Québec.

[81] Respecting the availability of some of the Impugned or other documents in Québec, although the Authorization judgment is not *res judicata* or binding on this point, the analysis contained therein is equally applicable at this stage:[28]

> [45] Although VW's financial information may have been available in Québec, there is no allegation that the documents in which the information is contained emanated from or were prepared in Québec or that any decision to publish that information was made or carried out from Québec.
>
> [46] Also, there is no allegation that VW's alleged violation of the International Financial Reporting Standards (IFRS) would have been committed in Québec.
>
> [47] In that context, the mere allegations that VW "sent Core Documents such as proxies and annual reports as well as non-core documents to investors and Class Members in Québec" or that these documents were "sent to and accessible by investors in Québec" are insufficient to conclude that a fault was committed in Québec.

[82] Finally, the fact that prospectuses remitted to the *Autorité des marchés financiers* by VCCI (and not by VW) indicated that VW guaranteed the Notes issued by VCCI (and not by VW) and incorporated VW's consolidated interim and yearly financial statements by reference cannot ground the Court's jurisdiction because that fact cannot reasonably constitute a fault by VW committed in Québec under Article 3148(3) *C.C.Q.*

[83] In sum, Mr. Chandler has not satisfied his burden of proving that VW committed a fault in Québec.

b) Was an "injury was suffered in Québec"

[84] With respect to whether an injury was suffered in Québec, the Court's Authorization judgment concluded that the facts alleged in the Motion for authorization

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27 Originating application, par. 6m).
28 Authorization judgment, par. 45-47.

appeared to justify the conclusions sought in accordance with the low authorization criterion of Article 572(2) of the *Code of civil procedure*:[29]

> [49] Based on the teachings of the Court of Appeal in the matter of *Infineon*, VW argues that no injury was suffered in Québec, as opposed to only being recorded here.
>
> [50] The Court does not agree.
>
> [51] In *Poppy Industries Canada Inc.* v. *Diva Delights Ltd.*, Justice Roy, writing for the Court of Appeal, recalls that where financial damage is merely recorded in Québec, that fact is not sufficient to ground jurisdiction under Article 3148(3).
>
> [52] However, Justice Roy goes on to explain that Article 3148 sets out a broad basis for jurisdiction. As indicated in *Infineon*, purely economic damage is not *per se* excluded from the scope of Article 3148 CCQ and economic damage can serve as a connecting factor, as long as it is suffered in Québec: [...]
>
> [53] Here, the Court finds that on a *prima facie* basis, there is an arguable argument to be made that the loss alleged to have been incurred by Mr. Chandler was not merely a loss recorded in Québec, but rather an injury that was really suffered in Québec. Based on the facts as pleaded, Mr. Chandler:
>
> a) Resides in Québec;
>
> b) Made his purchase and sell orders for VW securities in Québec;
>
> c) Received confirmation of the purchase and sell orders in Québec;
>
> d) Held the securities in Québec; and
>
> e) Suffered monetary loss in Québec.
>
> [54] This is sufficient to establish the Court's jurisdiction at this stage, not only with respect to Mr. Chandler, but also the whole class as defined.

[85] As previously indicated, consistent with the threshold applicable at the authorization stage, this finding resulted from a *prima facie* analysis, taking the allegations of the Motion for authorization as true, and is therefore not binding for the purposes of the present jurisdictional analysis. In addition, the record and evidence in support of the present application regarding jurisdiction are more substantial and detailed than what was available to the Court at the authorization stage.

[86] In the Originating application, Mr. Chandler makes the following allegations in support of his position that an injury was suffered in Québec:

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[29] *Id.*, par. 49-54.

> 20. The Plaintiff resides in Québec;
>
> 21. On July 19, 2012, the Plaintiff purchased three hundred (300) of VW AG's sponsored unlisted American Depositary Receipts ("ADR") listed on the OTC Markets Group at US $32.09 per share for a total of US $9,627.00, the whole as appears from RBC's Confirmation Notice, communicated herewith as Exhibit P-12;
>
> 22. The Plaintiff issued his trade order for VW AG ADRs from Québec and confirmation of his purchase was received in Québec;
>
> [...]
>
> 228. Following the release of the Corrective Disclosures, VW AG's securities dropped an average of 34.2%;
>
> 229. The Plaintiff and Class Member's decision to purchase VW AG securities were made in Québec based on documents received in Québec;
>
> 230. The Plaintiff and Class Members, either directly or through their licensed brokers, placed offers to purchase VW AG securities. These offers contained all of the essential elements of the proposed contracts;
>
> 231. The Defendant accepted the Plaintiff and Class Members' offers to purchase its securities and confirmations of its acceptance were received in Québec;
>
> 232. The Plaintiff and Class Members' contracts were concluded in Québec as a result of which they held securities in Québec;
>
> 233. Due to the Defendant's misrepresentations, fraud, breaches of its duties and negligence, the Plaintiff and Class Members suffered a monetary loss in Québec;
>
> 234. As particularized herein, the damages caused by the Defendant were suffered by the Plaintiff and Class Members in Québec;

[87] VW vigorously contest the allegations of Mr. Chandler respecting where the trading, as well as the gains and losses alleged by Mr. Chandler actually occurred. VW submits that Mr. Chandler's damages were only recorded (as opposed to being suffered) in Québec. VW filed extensive and compelling evidence to support its position as to the *situs* of the injury, which it argues is Germany for the Shares and the United States for the ADRs.

[88] The decision of the Supreme Court of Canada in *Infineon* constitutes the decision of principle on the issue.

[89] In that case, the Supreme Court, *per* LeBel and Wagner J.J., held that "where financial damage is merely recorded in Québec, that fact is not sufficient to ground jurisdiction under art. 3148(3)". However, the Court also emphasized that "in terms of the type of damage covered by art. 3148(3), there is no principled reason to exclude purely economic damage from its scope" and that "it is clear from the Québec jurisprudence that economic damage can serve as a connecting factor under art. 3148(3)".[30]

[90] The Supreme Court went on to explain that in that case, the damage was allegedly suffered as a result of the contract between Dell (which was not a party to the proceedings) and Ms. Cloutier (the representative plaintiff) and that although the contract was not the source of the cause of action and notwithstanding that none of the appellants were parties to it, it is "a juridical fact that establishes where the alleged economic damage occurred":[31]

> [46] *Quebecor Printing*, a case the appellants rely on, should not be read so broadly as to systematically exclude a purely economic loss as a type of damage to which art. 3148(3) applies. Rather, that case indicates that <u>where financial damage is merely *recorded* in Québec, that fact is not sufficient to ground jurisdiction under art. 3148(3)</u>. To satisfy the requirement of art. 3148(3), the damage must be *suffered* in Québec. As Kasirer J.A. explained in the judgment of the Court of Appeal in the case at bar, <u>there is a distinction between damage that is substantially suffered in Québec and damage that is simply recorded in Québec on the basis of the location of the plaintiff's patrimony</u>:
>
> > [*Préjudice*] is to be distinguished from the "*dommage*/damage" that is the subjective consequence of the injury relevant to the measure of reparation needed to make good the loss. As a result, in specifying "damage was suffered in Québec/*un préjudice y a été subi*" as the relevant connecting factor, article 3148(3) seeks to identify the substantive *situs* of the "bodily, moral or material injury which is the immediate and direct consequence of the debtor's default" (article 1607 C.C.Q.) and not the *situs* of the patrimony in which the consequence of that injury is recorded. [para. 65]
>
> [47] This application of the C.C.Q. is not, as the appellants assert, a novel, or undue, extension of Québec's jurisdiction. Rather, it is based on the language of

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30 *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59, par. 45.

31 *Id.*, par. 46-48, referring notably *Quebecor Printing Memphis Inc.* c. *Regenair Inc.*, 2001 CanLII 27960 (QC CA). Justice Roy, J.A., noted in *Poppy Industries Canada Inc.* v. *Diva Delights Ltd.*, 2018 QCCA 163, par. 41, that "The legislator replaced the word "damage" with the word "injury" in May 2014, as part of a series of amendments made to ensure terminological uniformity without changing the substance of the text, as allowed by section 3 of the *Act respecting the Compilation of Québec Laws and Regulations*."

> art. 3148(3) and on the jurisprudence. As this Court stated in *Spar Aerospace*, at para. 58, "[t]here is abundant support for the proposition that art. 3148 sets out a broad basis for jurisdiction."
>
> [48] In the instant case, the economic damage was allegedly suffered by Ms. Cloutier — not merely recorded — in Québec. More specifically, the damage was allegedly suffered as a result of the contract between Dell and Ms. Cloutier. Although the contract is not in fact the source of the cause of action in this case, which is extracontractual in nature, it is a juridical fact that establishes where the alleged economic damage occurred: the conclusion of the contract is the event that fixes the "*situs*" of the material damage suffered in Quebec. As a result, the contract is relevant, regardless of the fact that none of the appellants were parties to it, to the determination of whether the Quebec courts have jurisdiction in this case. As we will explain below, Ms. Cloutier's pecuniary loss flowed directly from her contract with Dell, which is deemed under Quebec's *Consumer Protection Act* to have been made in Quebec. The resulting economic damage did not merely have a remote effect on Ms. Cloutier's patrimony in Quebec; rather, she suffered it in Quebec upon entering into the contract in that province, and this brought her claim within the scope of art. 3148(3).
>
> [Our emphasis]

[91] Confirming the reasoning of Kasirer, J.C.A, as he then was, the Supreme Court held that the damage was connected with a contract that had been concluded in Québec since, under the Québec *Consumer Protection Act*,[32] the remote-party contract at issue was deemed to have been concluded at the consumer's address. Accordingly, "the jurisdiction of the Québec courts did not rest merely on the existence of a Québec patrimony, since the loss was suffered in Québec as the result of a material event that occurred in Québec".[33]

[92] In a recent decision, the Court of Appeal further confirmed that the place where the contract was concluded cannot, in itself, be a sufficient criterion to confer jurisdiction on Québec courts. It is rather a juridical fact, among others, to determine the *situs* of the injury pursuant to Article 3148(3) *C.C.Q.*:[34]

> [79] Dans son jugement, le juge de première instance a d'ailleurs jugé opportun de reproduire un extrait des propos de la Cour suprême. Il a également repris à son compte les motifs du juge Kasirer relativement à l'opportunité de considérer le lieu de conclusion du contrat, à l'origine des dommages réclamés, comme un fait juridique susceptible de déterminer le lieu du préjudice subi.

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32 CQLR, c. P-40.1, sections 20-21 as they existed at the relevant time.
33 *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59, par. 25-26, 54 and 56.
34 *Partner Reinsurance Company Ltd.* c. *Optimum Réassurance inc.*, 2020 QCCA 490, par. 79-82.

> [80] L'appelante plaide que, ce faisant, le juge se serait trompé, puisqu'il aurait fondé sa conclusion concernant le lieu du préjudice subi sur le seul fait que le contrat d'Amendement, dont il découle, a été conclu au Québec.
>
> [81] L'appelante a raison de soutenir que le législateur a exclu le lieu de la conclusion du contrat comme facteur de rattachement, puisqu'il établissait des liens trop ténus avec les autorités québécoises, de sorte qu'il ne peut s'agir d'un critère suffisant pour conférer à lui seul compétence aux tribunaux québécois.
>
> [82] Cela dit, l'appelante ne peut prétendre qu'il s'agit du seul facteur ou « fait juridique » qu'a considéré le juge de première instance pour conclure à l'application de l'article 3148(3) C.c.Q. J'estime qu'il s'agit plutôt d'un fait juridique retenu parmi d'autres.
>
> [Our emphasis]

[93] The Court therefore has to determine the real *situs* of the injury alleged by Mr. Chandler. Based on *Infineon*, the place where the contract for the acquisition of the securities was concluded is a relevant juridical fact for that purpose, and this, notwithstanding if VW was a party or not to the contract.

[94] In that respect, the Court agrees with VW that the alleged economic injury resulting from a decrease in value of the Shares and of the ADRs[35] would normally occur in the jurisdiction where the Class members *purchased and sold* these securities because. Indeed, it is typically an important juridical fact from which the pecuniary loss would flow.

[95] So, where were the securities at issue purchased and sold?

[96] With respect to the Shares and the ADRs, contrary to the allegations of Mr. Chandler, the evidence adduced by VW demonstrates that the Shares are purchased and sold on market exchanges in Europe and that the ADRs are purchased and sold on the OTC markets in the United States.

[97] According to the uncontested expert report of Mr. Jean-François Bernier pertaining to regulatory and operational matters in the securities industry, an investor residing in Québec cannot execute a trade himself in VW's Shares. The Shares publicly trade solely in Europe and can only be bought and sold by a non-Canadian broker who is an approved trading member, subscriber or participant to one of those European marketplaces.[36] The trade is therefore executed outside of Québec.

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[35] As explained below, VW does not have the same position for the Notes.

[36] Expert Report of Jean-François Bernier of September 16, 2019, par. 4-8.

[98] Mr. Bernier explains that the same applies to the purchase and sale of ADRs. VW ADRs are publicly traded solely in the United States OTC markets, and can only be bought and sold by a United States broker-dealer who is an approved trading member, subscriber or participant to the United States OTC markets.[37] Again, the trade is executed outside of Québec.

[99] With respect to the Shares and the ADRs, the Court finds that the place where these securities were acquired is an important juridical fact from which the pecuniary loss flowed. Consequently, the economic injury relating to the decrease in value of the Shares and the ADRs was not suffered in Québec.

[100] With respect to the Notes, VW argues that the Note holders cannot possibly have suffered any damages since VW did not default on or fail to pay interest on any Notes.[38] That is, however, not determinative at this point. Indeed, for the purposes of the jurisdictional analysis, the issue is not whether Mr. Chandler will succeed in proving damages, but rather, whether the alleged injury caused by VW was suffered in Québec. Here, the class action was authorized on the basis of the allegation that VW securities, including the Notes,[39] suffered a decline in value as result of the alleged faulty conduct of VW and that under the general liability regime in Québec, all holders of VW securities, including Notes holders, are entitled to compensation.[40]

[101] That said, it is not contested that the Notes were only privately issued to qualified or accredited investors in Québec under a prospectus exemption and that no public distribution took place in Québec. It is also established that the VCCI Notes have never been listed for exchange. Finally, as indicated above, the only evidence filed by the parties is that VCCI privately distributed Notes to only 13 unique accredited investors in Québec.[41] It may be that other issuances took place, but the parties, and Mr. Chandler in particular, on whom the burden of proof lies, elected not to adduce additional evidence in this regard.

[102] Notwithstanding these facts as well as the fact that VW did not issue the Notes and that it is not a party to any contract relating to the acquisition of the Notes, based on *Infineon*, the private issuance of the Notes by VCCI in Québec to a limited number of

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[37] Expert Report of Jean-François Bernier of September 16, 2019, par. 29 and 32.

[38] Although the Originating application contains no specific allegations respecting the decline in value of the Notes, Mr. Chandler specifies in argument that the claim advanced on behalf of Note holders is for the Notes' decline in value, not for a default to pay. The Court makes no finding whatsoever as to whether Mr. Chandler could succeed in proving that assertion.

[39] As confirmed by the Class definition judgment, *Chandler* c. *Volkswagen Aktiengestllchaft*, 2019 QCCS 467, application for leave to appeal dismissed *Volkswagen Aktiengesellschaft* c. *Chandler*, 2019 QCCA 641.

[40] Article 1457 of the *Civil Code of Québec*.

[41] Exhibit P-38, p. 3.

qualified or accredited investors is a factor to be considered to determine whether the Québec courts have jurisdiction under Article 3148(3) *C.C.Q.* However, as indicated above, that is not the only relevant factor. To paraphrase *Infineon*, the Court must look at whether "the alleged pecuniary loss flowed directly from the contract" and whether the alleged loss was suffered in Québec "as the result of a material event that occurred in Québec" (our emphasis).

[103] Here, the consideration of all the relevant facts lead the Court to conclude that the events relied upon by Mr. Chandler are insufficient to ground the Québec courts' jurisdiction. As strenuously argued by Mr. Chandler, this case is not founded on three causes of action corresponding to each type of security at issue, but on a single cause of action and a single series of acts and omission which allegedly had an impact on VW securities as a whole. Given the way that Mr. Chandler framed his claim, the fact that it indiscriminately targets holders of all types of security and the findings of the Court relating to the manner and circumstances around the acquisition of the securities, including the Shares, the ADRs and the Notes, the Court believes that the theoretical connecting factor relating only to where the Notes were acquired is insufficient, too remote and too tenuous to engage the jurisdiction of the Court under Article 3148(3) *C.C.Q.*[42]

* * *

[104] In conclusion, the Court finds that it does not have jurisdiction in this matter under Article 3148 *C.C.Q.* because none of the connecting factors are satisfied.

B. Québec courts' jurisdiction under Section 236.1 of the *Securities Act*

[105] Mr. Chandler also relies on Section 236.1 of the *Securities Act*[43] to assert the Court's jurisdiction:

236.1. Any action under this Title or any action under the ordinary rules of law in respect of facts related to the distribution	236.1. L'action fondée sur le présent titre ou l'action intentée selon le droit commun pour des faits reliés au

[42] The case *E. Hofmann Plastics Inc.* c. *Tribec Metals Ltd.*, 2013 QCCA 2112 is distinguishable because in that case, more than one cause of action was raised and the appellant (defendant in the first instance) was arguing that Article 3148(3) required that each cause of action bears a connecting factor. The Court of Appeal rejected that argument because jurisdiction in relation to at least one of the causes of action was clearly established. It is in that context that the Court of Appeal held that "This article confers jurisdiction on Québec authorities, but it does not serve to exclude causes of action whose jurisdiction may be founded on another legislative provision. Put otherwise, 3148(3) opens the door to jurisdiction, but it does not close it ahead of other causes of action which might have a separate jurisdictional foundation" (par. 11).

[43] CQLR, c. V-1.1.

of a security or to a take-over bid or issuer bid may be brought before the court of the plaintiff's residence.	placement d'une valeur ou à une offre publique d'achat ou de rachat peut être portée devant le tribunal de la résidence du demandeur.
In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.	En ce qui concerne le placement d'une valeur, la loi du Québec est applicable dès lors que le souscripteur ou l'acquéreur réside au Québec, indépendamment du lieu du contrat.
Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect.	Toute stipulation contraire concernant la compétence des tribunaux ou la loi applicable est sans effet.

[Our emphasis]

[106] The case law on Section 236.1 of the *Securities Act* is scarce and, as readily admitted by Mr. Chandler, there is no case law supporting his position that the Court's jurisdiction can be founded on this provision.[44] Based on the wording of Section 236.1 and the remedial nature of the *Securities Act* which must receive a large and liberal interpretation,[45] he nevertheless posits that so long as the purchaser of a VW security resides in Québec, the Québec courts have jurisdiction, regardless of the place where the purchase was concluded.

[107] The Court disagrees because Section 236.1 of the *Securities Act* contains an important qualification: the action must be "related to the distribution of a security" or, in French, "*pour des faits reliés au placement d'une valeur*".

[108] In the Court's view, this class action is not "related to the distribution of a security" within the meaning of Section 236.1 of the *Securities Act*. The class action relates to misrepresentations or omissions of VW in relation to the compliance of certain of its vehicles with the applicable emissions standards and the consequences of these acts and omissions on the value of VW securities. The action is not based on securities legislation nor does it relate to the distribution of securities. Rather, invoking the general extra-contractual civil liability regime in Québec codified in Article 1457 *C.C.Q.*, the

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44 The parliamentary debates relating to the adoption of this provision also do not provide much guidance: QUEBEC, NATIONAL ASSEMBLY, "*Étude détaillée du projet de loi 6 – Loi modifiant diverses dispositions législatives concernant les valeurs mobilières*", Journal des débats (Hansard) of the Committee on the Budget and Administration, 33rd Parl, 1st Sess, vol. 29 N° 60 (June 15, 1987), at CBA-2672, 2673.

45 *Autorité des marchés financiers* c. *Desmarais*, 2019 QCCA 898, par. 119 and *Doyon* c. *Autorité des marchés financiers*, 2017 QCCA 1157, par. 43, both citing *Infotique Tyra inc.* c. *Québec (Commission des valeurs mobilières)*, 1994 CanLII 5940 (QC CA), p. 10.

action alleges that VW committed a civil extra-contractual fault for which Mr. Chandler seeks compensatory damages for the loss in the value of VW securities resulting from alleged misrepresentations and omissions.

[109] Furthermore, for the reasons outlined above, the distribution of securities in Québec by VCCI cannot be considered as being the distribution of securities by VW and cannot serve as a basis for asserting jurisdiction over VW pursuant to Section 236.1 of the *Securities Act*.

[110] The Court considers that if the intention of the legislator by enacting Section 236.1 of the *Securities Act* had been to modify the application of the rules of private international law in Québec and of Article 3148 *C.C.Q.* as suggested by Mr. Chandler, a clearer language would have been used.

C. *Forum non conveniens*

1. The principles

[111] Given the findings above, it is not necessary to deal with VW's alternative conclusion based on *forum non conveniens*. The Court will nevertheless address the parties' submissions in that respect should its findings on the issue of jurisdiction be wrong.

[112] In the event that the Québec courts have jurisdiction over the present matter, VW invokes the benefit of Article 3135 *C.C.Q.* which incorporates the *forum non conveniens* doctrine aimed at ensuring the sound administration of justice and fairness to the parties. Specifically, *forum non conveniens* is designed to serve as an important counterweight to the broad basis for jurisdiction set out in Article 3148.[46] As such, Article 3135 *C.C.Q.* provides that even if a Québec court has jurisdiction over a matter, on an application by a party, it may exceptionally decline jurisdiction if it decides that the authorities of another jurisdiction are in a better position to decide the dispute. The remedy is exceptional and discretionary.

[113] In undertaking an analysis of the application of the *forum non conveniens* doctrine, the advantages and disadvantages of proceeding in one jurisdiction or another need to be assessed.[47] The following are relevant non-exhaustive factors typically considered by the courts:[48]

a) the parties' residence, that of witnesses and experts;

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46 *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, 2002 SCC 78, par. 57.
47 *Club Resorts Ltd.* c. *Van Breda*, 2012 CSC 17, par. 112.
48 *Oppenheim forfait GMBH* c. *Lexus maritime inc*, 1998 CanLII 13001 (QC CA), pp. 7-8.

b) the location of the material evidence;

c) the place where the contract was negotiated and executed;

d) the existence of proceedings pending between the parties in another jurisdiction;

e) the location of Defendant's assets;

f) the applicable law;

g) advantages conferred upon Plaintiff by its choice of forum, if any;

h) the interest of justice;

i) the interest of the parties; and

j) the need to have the judgment recognized in another jurisdiction.

[114] In addition, in accordance with Article 491 of the *Code of Civil Procedure*,[49] the Court must take into account the guiding principles of procedure in its decision-making. Among these guiding principles, codified at Articles 17 and following of the *Code of Civil Procedure*, is the need to consider proportionality and the sound administration of justice.

[115] None of these factors is determinative in itself; rather they are assessed globally, keeping in mind that the result of the analysis must clearly designate a single forum.

[116] It must be stressed that the existence of another equivalent or equally competent forum is not sufficient for the Québec courts to decline jurisdiction. Indeed, the overall analysis of the situation (in the light of all the aforementioned factors or other factors deemed relevant) must leave a clear impression ("*impression nette*") tending towards the foreign forum. If a clear impression tending towards a single foreign forum does not emerge from the analysis, the court should refuse to decline jurisdiction, particularly when the connecting factors to the other jurisdiction are questionable.

[117] Although emanating from the *common law*, the following observations of the Supreme Court of Canada are equally applicable herein:[50]

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[49] Article 491 provides: "491. An application urging a Québec court to decline international jurisdiction, stay its ruling or dismiss an application for lack of international jurisdiction is made in the same way as any preliminary exception. When ruling on its international jurisdiction, the court considers the guiding principles of procedure in addition to the provisions of the Civil Code."

[50] *Lapointe Rosenstein Marchand Melançon LLP* v. *Cassels Brock & Blackwell LLP*, 2016 SCC 30, par. 51-52.

> [52] The burden is on the defendant to demonstrate that a court of another jurisdiction has a real and substantial connection to the claim and that this alternative forum is "*clearly* more appropriate" than the one where jurisdiction may be assumed: *Breeden*, at para. 37 (emphasis in original); and *Van Breda*, at para. 109 (emphasis added). This threshold will be met where, based on its "characteristics", the alternative forum "would be fairer and more efficient" for disposing of the litigation: *Van Breda*, at para. 109. It is not sufficient that the alternative forum merely be "comparable" to the forum where jurisdiction has been found to exist: *ibid.* Forum non conveniens is not concerned only with fairness to the party contesting jurisdiction; it is also concerned with efficiency and convenience for the proceedings themselves: para. 104.
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> [Our emphasis]

[118] With respect to the burden of proof, the burden is on the defendant to satisfy the court that it should decline jurisdiction because it would be fairer and more efficient to defer to another authority under article 3135 *C.C.Q.* given the exceptional circumstances of the case:[51]

> [32] Tout d'abord, il incombe à la partie qui veut écarter l'application de la règle générale de démontrer qu'il serait plus juste et efficace de renvoyer l'affaire à une autre autorité en vertu de l'article 3135 C.c.Q. étant donné les circonstances exceptionnelles de l'affaire[8].
>
> [33] L'article 3135 C.c.Q. convie le juge à soupeser la protection accordée à une personne de procéder au Québec et les circonstances qui permettraient de qualifier l'affaire d'exceptionnelle[9].
>
> [...]
>
> [37] Comme l'explique très bien le juge Vézina dans l'affaire *Stormbreaker*, ce fardeau ne consiste pas seulement à affirmer que l'autorité d'un autre État est mieux placée pour trancher le litige. La démonstration doit tenir compte d'une seconde condition, soit celle de démontrer les circonstances exceptionnelles de l'affaire.
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> [8] *Club Resorts Ltd.* c. *Van Breda*, [2012] 1 R.C.S. 572 (CSC), 2012 CSC 17, paragr. 108 et 109.
> [9] *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, paragr. 991.

2. Application of the principles

[119] VW argues that Germany is the *forum conveniens* for the Shares and the Notes and that the United States is the *forum conveniens* for the ADRs.

[51] *Droit de la famille — 152222*, 2015 QCCA 1412, par. 32-37.

[120] Some preliminary remarks are in order.

[121] First, Mr. Chandler submits that it is not legally possible to decline jurisdiction in favour of two distinct forums as VW suggests because the result of a *forum non conveniens* analysis must necessarily lean toward a single forum for the entire proceeding. It is not necessary to decide this issue in the abstract because, in any event, in this instance, the Court is of the view that it would not be appropriate or fair to segment the proceeding and decline jurisdiction in favour of two different forums. Indeed, as indicated above, the class action raises a single cause of action which allegedly impacted the value of VW securities, including Shares, ADRs and Notes. Considering the nature of the claim as framed, the Court believes that would not be appropriate to subdivide the claim for the *forum non conveniens* analysis. That said, even if the claim was segmented to consider each type of security separately, the findings of the Court as to *forum non conveniens* would be the same.

[122] Second, the Court is aware that the common law provinces recognize that the principle of international comity, which underlies the *forum non conveniens* analysis, often favours pursuing secondary market claims against the issuer of the securities before the forum where the securities trade.[52] However, the Court is not convinced that the principle should apply to the same extent in the context of international comity (as opposed to interprovincial comity) or in Québec which codifies in the *C.C.Q.* the rules of private international law. Anyhow, even in the common law provinces, favouring the forum where the securities traded is not an absolute dictum.

[123] Turning to the relevant factors to decide the *forum non conveniens* application, the Court finds that although some of the relevant factors may militate in favour of declining jurisdiction, other factors more overwhelmingly favour assuming jurisdiction.

[124] Two factors in particular seem to favour other jurisdictions, i.e. the place where the securities are traded and the applicable law.

[125] Regarding where the securities are traded, the ADRs are traded in the United States and the Shares are traded in Europe[53]. These facts do seem to favour either the United States or Germany, as the case may.

[126] Regarding the applicable law, Mr. Chandler maintains that pursuant to Section 236.1 of the *Securities Act*, Québec law would be applicable to the dispute. The Court

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52 *Yip* v. *HSBC Holdings plc*, 2018 ONCA 626, par. 54 and 75, application for leave to appeal dismissed, 2019 CanLII 23866 (SCC); *Leon* v. *Volkswagen AG*, 2018 ONSC 4265, par. 18 and 39.

53 As for the Notes, they were privately issued in Québec by VCCI (and not by VW) to accredited investors under a prospectus exemption. VCCI Notes also traded on OTC markets in Europe.

has already held that this provision is inapplicable herein. Therefore, the relevant provision is Article 3126 *C.C.Q.* which establishes that:

> 3126. The obligation to make reparation for injury caused to another is governed by the law of the State where the act or omission which occasioned the injury occurred. However, if the injury appeared in another State, the law of the latter State is applicable if the author should have foreseen that the injury would manifest itself there. [...]

[127] As previously decided, no fault was committed in Québec and no injury was suffered in Québec. Therefore, there appears to be no foundation for the application of Québec law. Although the applicable law factor is not determinative, in this case, it seems to favour either the United States or Germany as the proper forum, as the case may. Regardless, the Québec courts are often called upon to apply foreign law and can rely on expert evidence if required.

[128] However, apart from these two factors, should the Court have underlying jurisdiction, the other relevant factors weigh more heavily in favour of retaining jurisdiction.

[129] With respect to the parties' residence, the Class is situated in Québec whereas VW has its head office in Germany. None of the parties reside in the United States. This factor therefore does not lean towards either Germany or the United States as being the *forum conveniens*.

[130] Similarly, VW has not convinced the Court that the location of VW's assets or the need to have the judgment recognized in another jurisdiction would cause a difficulty in this instance so as to favour a jurisdiction other than Québec.

[131] As for the residence of the witnesses and experts as well as the location of the material evidence, VW, on whom the burden of proof rests, has not described in great detail what evidence could be adduced at trial and where the residence of the witnesses would be. Still, at this stage, it is reasonable to expect witnesses from various jurisdictions, including Canada, the United States and Germany. One might also expect that much of the documentary evidence will not be disputed and may be produced by consent. The use of technology can also alleviate some of the inconvenience and cost related to the administration of the evidence and make in-person attendance unnecessary.

[132] Regarding the juridical advantage factor, it is acknowledged that class actions do not exist in the German legal system. The Court agrees with VW that the mere fact that class actions do not exist in Germany is not a determinative factor. However, although there are some shareholder and noteholder litigations currently proceeding in Germany, VW cannot plead or purport to rely on the existence of proceedings "between the same

parties" in that jurisdiction as regards the Class. In addition, VW rightly points out that at least 48 Canadian institutional investors have pursued shareholder claims in Germany and that out of these, 20 investors opted out of the present action to apparently pursue their claims in Germany. Of these 20 investors, 9 are pursuing noteholder claims in Germany. However, in the Court's view, that means that there is very little overlap, if any, with the remaining Class members covered by these proceedings.

[133] Furthermore, considering the absence of pending proceedings in Germany covering the Class members, any new individual claim brought against VW in Germany by any Class members who have not already sued under German law would presumably be prescribed. Although the legal expert evidence regarding the law in Germany is not categorical on this point, it appears that overcoming any prescription argument would constitute a big hurdle for any new claimant.

[134] With respect to the United States, which VW submits is the *forum conveniens* for the ADRs, the Northern District of California has already approved a settlement for any ADRs claims filed against VW in the United States.

[135] However, the period covered by the U.S. Settlement is shorter than the period covered for ADR holders in the present class action. Indeed, the U.S. Settlement covers ADR holders during the period of November 19, 2010 to January 4, 2016, while the present matter covers the period of March 12, 2009 to September 18, 2015. This means that ADR holders in Québec would be left with no recourse at all if this Court declines jurisdiction. In addition, although the U.S. Settlement covers some Québec residents who are presumably also Class members, any Class member who has not submitted a claim is now barred from doing so in the United States because the delay to submit a claim expired at the latest in February 2020.

[136] Lastly, VW has not provided any response to satisfy the Court as to the adequacy of the United States claims process for Québec residents. As indicated by Mr. Chandler, the 251 Settlement notice packages sent to Québec residents were in English only and Mr. Chandler himself did not even receive a package. Moreover, there is no explanation as to the extraordinarily high number of Québec residents whose claims were denied by the United States claims administrator (only 68 claims were deemed eligible out of 607).

[137] In these circumstances, assessing the relevant factors globally, the Court does not believe that Germany or the United States constitute *forums conveniens*. Declining jurisdiction in favour of either of these jurisdictions or both would not be fairer and more efficient, nor would it be in the interest of justice or in the interest of the Class.

[138] In summary, with great respect for the contrary opinion, if the Court did have jurisdiction over the matter, the other forums proposed by VW would not appear "clearly

more appropriate" and VW has not convinced this Court that this is a case where it would have been appropriate for the Court to exercise its discretion to exceptionally decline jurisdiction.

FOR THESE REASONS, THE COURT:

[139] **GRANTS** in part Volkswagen Aktiengesellschaft's Application for declinatory exception for lack of territorial jurisdiction and, in the alternative, *forum non conveniens*;

[140] **DISMISSES** the Originating application instituting a class action for lack of jurisdiction;

[141] **THE WHOLE** with legal costs.

CHANTAL CHATELAIN, J.S.C.

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Date of hearing: February 28, 2020

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