



Global bank sued in London for negligent misstatements made in China

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Case Summary

- The High Court has held that UBS AG (“**UBS**”) could be sued in England for negligent misstatement in relation to certain investments held in a custodian account by its London branch (“**UBS London**”) and which were subsequently liquidated. This decision was taken notwithstanding that: (i) the relevant misstatements were made in Hong Kong by a UBS employee based there; (ii) the applicable contract between the parties was signed in China; (iii) the relevant investments were listed on the Hong Kong Stock exchange; and (iv) the bank is otherwise domiciled in Switzerland.
- The Court held that in cases of pure economic loss, the relevant test to determine jurisdiction is to focus on the moment and place where the loss occurs, i.e. where the loss actually manifests and becomes irreversible. This is irrespective of: (i) where the act that gave rise to the cause of action was actually carried out; (ii) the location of the parties; or (iii) where the loss is felt. In a case concerning shares held in a custodian account, the Court found that the loss arose when those shares were liquidated, such that the loss occurred in the location of the custodian account (in the present case, England).

What does this mean for you?

- While the Court’s judgment provides helpful clarification of certain jurisdictional issues concerning the Lugano Convention¹ in the context of claims for economic loss, the key practical takeaway is for foreign-domiciled banks and financial institutions, who should remain mindful of the location of their custodian and other accounts. In circumstances where a claim is alleged in relation to a custodian account held in England, then even if the bank is domiciled abroad or the relevant acts giving rise to the claim have been carried out in another jurisdiction, the location of the account may be sufficient to establish the English Courts’ jurisdiction.
- This will be of particular concern where a financial institution has strategic or substantive legal reasons not to litigate in England, for example because another jurisdiction operates a more ‘bank-friendly’ approach to issues of liability, causation, or assessment of damages. Accordingly, in such circumstances, financial institutions should think carefully about the likelihood of litigation in all jurisdictions to which the transaction may have some connection, even if the connection is seemingly minor (like the location of a custodian account).

Case overview

- The underlying dispute concerned an indirect investment by the claimants in certain shares issued by a Chinese financial institution, Haitong (the “**Shares**”). The claimants were advised on the transaction by Mr Stephen Wong, the then Managing Director in the Wealth Management

Division of UBS who was based in its Hong Kong branch ("UBS HK"). The claimants purchased the Shares, which were listed on the Hong Kong stock exchange, partly with the help of a loan facility provided by UBS London, which took security by holding the investment in its custodian account. The underlying documentation (all of which was signed in China) provided UBS London with mandatory prepayment rights in respect of the loan, but Mr Wong represented to the claimants that UBS had a policy not to strictly rely on those rights and to act in the claimants' best interests by providing finance on the best possible terms.

- Following a drop in value of the Shares in July 2015, UBS London exercised its mandatory prepayment rights, sold the Shares and later remitted USD 4.7million to the claimants, being the amount remaining after all fees and charges had been applied. The claimants subsequently issued proceedings in the English High Court for economic loss in the amount of USD 495million against UBS London, which they allege was caused by: (i) UBS London exercising its mandatory prepayment rights; and (ii) the misstatements by Mr Wong that UBS had a policy not to strictly enforce such rights. UBS London disputed the English Court's jurisdiction and therefore the question for Court was whether it had special jurisdiction under Article 5(3) and/or Article 5(5) of the Lugano Convention, which continues to apply to proceedings issued before Brexit.
- Pursuant to Article 5(3) of the Lugano Convention, "*a person domiciled in a state bound by this Convention may, in another state by this Convention, be sued ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*" (emphasis added). The Court therefore had to grapple with the issue of where the damage in a case of economic loss had occurred.
- The Court drew a careful distinction between situations where, at the time of the misstatement, the item which was the subject of the misstatement was already less valuable than indicated at the time the item was transferred to the claimant, and situations, such as the present one, where at the time of the misstatement, the claimants were not less well off as the value of the Shares could have gone up or down. The Court therefore rejected the principle under English law that the damage usually occurs where the misstatement is made, relying instead on European case law to investigate where the damage actually arose.
- The Court noted that the concept of damage could not simply be answered by reference to the place of the party's assets or where it "feels" the economic effect of the loss, rather the focus ought to be on the moment and place where the loss occurs. In the present case, it could not reasonably be said that the loss occurred when UBS employee, Mr Wong, made the misstatements in Hong Kong, nor when the claimants relied on them when signing the underlying transaction documentation in China, nor where the damage was suffered (i.e. felt) by the claimants. Instead, the Court held that the *most natural analysis* was to view the loss as occurring where *the Shares were liquidated* and it therefore followed that the loss manifested directly in the custodian account held by UBS London in London. It was at this point that any potential damage created by UBS's alleged negligent misstatements actually manifested and became certain and the Court therefore rejected UBS's challenge to the jurisdiction.
- As the Court found that it had jurisdiction under Article 5(3) of the Lugano Convention, the arguments under Article 5(5) became moot, but the Court briefly addressed them regardless. Pursuant to Article 5(5) of the Lugano Convention, "*a person domiciled in a state bound by this Convention may, in another state by this Convention, be sued ...as regards a dispute arising out of the operations of a branch...in the courts for the place in which the branch...is situated*". The Court noted that the fact that UBS HK was heavily involved did not preclude there being a sufficient nexus to UBS London which had been identified as a party to the documentation from the beginning. In addition, it was the actions of UBS London (in exercising its mandatory prepayment rights) which ultimately led to the actionable tort.

- Accordingly, the key in this case was the location of the custodian account—in circumstances where a number of countervailing factors pointed in the direction of Hong Kong as an appropriate jurisdiction.

For the full case transcript, see here: [*Kwok and others v UBS AG \(London Branch\)* \[2022\] EWHC 245 \(Comm\)](#)

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¹ Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano II on 30 October 2007 (the "**Lugano Convention**"): available [here](#)

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