FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

# FOIL UPDATE 3rd March 2023

# Interpreting *Lugano II*

**IN BRIEF**

The Court of Appeal has provided guidance on how Ss5(3) and 5(5) of Lugano should apply when considering special jurisdiction based on where the damage complained of had been sustained.

*Wan and others v UBS AG (2023) EWCA Civ 222*

This appeal raised two questions concerning the proper meaning of articles 5(3) and 5(5) of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (Lugano II). The normal rule under article 2 of Lugano II is that persons domiciled in a state bound by it should be sued in that state. Here, the defendant was the London branch of UBS, which is a Swiss company domiciled in Switzerland. UBS contended that it could only be sued in Switzerland and not England and Wales by two of the three claimants. Those claimants relied on articles 5(3) and 5(5) of Lugano II to establish special jurisdiction for their claims here in England and Wales. A High Court Judge (the judge) accepted their submissions and dismissed UBS's jurisdiction challenge. The question for this court was whether she was right.

It was common ground that Lugano II applied to this case because of the effect of regulations 82, 92 and 93 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, notwithstanding the United Kingdom's withdrawal from the European Union on 31 January 2020. The proceedings were issued on 28 May 2020, which was before the implementation period ended on 1 January 2021 (IP Completion Day).

Article 5(3) provides that a party such as UBS may 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". Article 5(5) provides that a party such as UBS may be sued "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated".

The two central issues in the appeal were whether, in the circumstances of this case, the judge was right to say that: (a) London was "the place where the harmful event[s] occurred" to the two claimants in question (the article 5(3) issue), and (b) the dispute with them arose "out of the operations" of UBS London (the article 5(5) issue).

Dismissing the appeal, the Court of Appeal held that as regards article 5(3), put simply, the harmful event for which compensation was claimed did not occur in this case until UBS London sold certain shares, even if these claimants may have felt the effects of that damage elsewhere. The special circumstances, by way of cross-check, also pointed to London. The parties had agreed that the shares would be held in the secured account in London; UBS London's contractual documentation was in English and governed by English law, and it was foreseeable that the parties might sue or be sued in relation to the investment in London.

The judge was right to hold, as she did, that the place where the damage occurred for the purposes of article 5(3) had indeed been held by the CJEU to be "where the alleged damage actually manifests itself". It was dangerous to seek to define the test for where damage occurs in a wide range of financial loss cases, because they were likely to be so fact dependent.

However, that jurisdiction founded on damage under article 5(3) will not always be where the loss actually crystallises and is made certain. It was of the first importance to give the words of article 5(3) and the damage limb established by *Bier (1978)* an autonomous construction. An autonomous approach to article 5(3) required an answer to the pragmatic questions of where the damage claimed by these claimants actually manifested itself, and whether there were, in substance, factors connecting the dispute to England and Wales such as to allow the specific jurisdiction in article 5(3) to be invoked and to outweigh the general rule that, under Lugano II, parties are to be sued in the place of their domicile.

The judge was right to answer these questions in favour of the jurisdiction of England and Wales. First, the substantive damage claimed did indeed only manifest itself when the shares were sold in London.

Secondly, the fact that these claimants only had an indirect interest in the third claimant was of no consequence, because its loss really did manifest itself in London, howsoever the transaction was structured.

Thirdly, from the start of the transaction it was entirely foreseeable to all the parties and to UBS London in particular that proceedings were likely to be brought in London if things went wrong.

Fourthly, the domicile of UBS had no connection whatever with the transaction, so this was the kind of case where it could always have been seen that article 5(3) might apply so as to displace the general rule under Lugano II.

For these reasons, which were slightly different from those relied upon by the judge, the judge was right to find that London was the place where the harmful events occurred.

As regards article 5(5), again put simply, the claims undoubtedly arose out of UBS London's operations. UBS London significantly participated in the events which had given rise both to the claim and to the loss claimed as the judge found.

The full judgment may be found at: Kwok & Ors v UBS AG (London Branch) [2023] EWCA Civ 222 (01 March 2023) (bailii.org)