Neutral Citation Number: [2022] EWHC 245 (Comm)

Case No: CL-2020-000345

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building

Fetter Lane,

London, EC4A 1NL

Date: 09 February 2022

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

KWOK HO WAN

ACE DECADE HOLDINGS LIMITED

DAWN STATE LIMITED

Claimants/Respondents

- and –

UBS AG (LONDON BRANCH)

Defendants/Applicants

- -

- -

Sa'ad Hossain QC and Matthew Hoyle (instructed by **Harcus Parker Limited**) for the **Claimant/ Respondent**

David Quest QC and Scott Ralston (instructed by **Herbert Smith Freehills LLP**) for the **Defendant/Applicant**

Hearing dates: 20 January 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 9 February 2022 at 10:00am.

Mrs Justice Cockerill :

Introduction

1.
By this application dated 10 November 2020 the Defendant, the London branch of a well-known investment bank, challenges the jurisdiction of the Court in relation to the claims made by the First and Second Claimants.

2.
The issue is whether this Court has special jurisdiction under Article 5(3) and/or Article 5(5) of the 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").

3.
The Defendant's position is that, under Article 2 of the Lugano Convention, it must be sued in the courts of Switzerland, its place of domicile.

4.
The First and Second Claimants in this action (respectively, "Mr Kwok" and "Ace Decade") have brought claims against the Defendant ("UBS London", "UBS") based upon the consequences of what are said to be negligent misstatements and advice provided by UBS ("the Claims"). It is their case that the misstatements and advice given led them to make an investment that was almost completely lost when (contrary to such statements and advice) UBS London exercised security over shares held by it in London as mortgagee.

5.
No jurisdictional issue arises in relation to claims made by the Third Claimant ("Dawn State" and the "Dawn State Claims"). That is because UBS London accepts that these fall within the jurisdiction clauses contained within certain contracts entered into between them.

6.
As will appear below, the issue which arises is an interesting one because it engages a question where the authorities are less than entirely clear; and does so on the basis of facts which are rather more complicated than has been the case in previous reported challenges.

7.
I should note that this is a jurisdictional application at an early stage. Matters proceed only in relation to the issues relevant to that jurisdictional dispute. UBS has put down a clear marker that should the matter proceed here (or elsewhere) the claims are denied in their entirety. It also reserves all its rights in relation to the claims made, including as to the governing law and the adequacy of the Claimants' pleaded case.

The Factual Background

The Investment

8.
The Claims concern an indirect investment by Ace Decade/Mr Kwok in certain shares (so called "H-Shares") issued by a major Chinese financial institution, Haitong ("the Investment").

9.
In Autumn 2013, after discussions with its CEO, Mr Kwok resolved to invest around US$3bn in Haitong. He was subsequently approached by a trusted friend and advisor, Mr Stephen Wong (then a Managing Director of Wealth Management at UBS), who had learned of Mr Kwok's intentions.

10.
Mr Wong informed Mr Kwok that UBS were aware that Haitong would be issuing new H-Shares on the HK stock exchange ("HKEX") and that UBS wished to participate as a placement agent. He stated that if Mr Kwok could commend UBS to Haitong, he and UBS would assist and advise Mr Kwok in acquiring H-Shares in an advantageous manner.

11.
Mr Kwok decided to invest around US$1bn in partnership with UBS (and the remainder through other institutions) and to that end also recommended UBS to Haitong, leading to their appointment as placement agents.

12.
Mr Wong proposed structuring his investment so as to (lawfully) avoid triggering the need for approval by the Chinese securities regulator which would be required by a direct investment of US$3bn in Haitong. The form ultimately proposed by Mr Wong in or around June 2014 was that the H-Shares would be acquired by a corporate vehicle owned and controlled by a third party. This purchase would be funded in part by Mr Kwok (through Ace Decade) and in part through a leveraged finance "Facility" provided by UBS (secured against the H-Shares). Following the acquisition of the shares, Mr Kwok or a nominated entity would have the option to acquire the vehicle. The result was that Mr Kwok's investment prior to the exercise of that option would not be in the shares directly but would be what is known as a synthetic investment.

13.
As a result of further advice from Mr Wong, a Chinese financial services firm called Haixia was chosen to act as the third party, and Dawn State (at that time owned by Haixia) was selected as the relevant corporate vehicle.

14.
Further negotiations took place between UBS (through Mr Wong), Haixia and Ace Decade (through Mr Kwok and others) through November and December 2014. On 21 November 2014 UBS Limited/ UBS's London Branch produced an indicative term sheet proposing UBS AG or one of its affiliates as the Lender. From 12 December 2014 at the latest, UBS London was identified as the branch through which the arrangements with UBS would be made. Thus, on 12 December 2014, UBS London and Dawn State entered into a Custody Agreement which created a "Custody Account" (later referred to as a "Secured Account") which was governed by English law, jurisdiction and financial services regulation.

15.

A “Co-Investment Agreement” was signed between Haixia, Ace Decade and Dawn State in December 2014 followed by a “Letter Agreement” on 18 December. This gave Ace Decade (defined as “the Investor”) the option to acquire Dawn State in return for a fee and assuming primary responsibility for the financing and costs of the Investment.

16.
Under the Co-Investment Agreement:

i)
Haixia Management would arrange for the subscription in the amount of US$1,250 million to the H-Shares (the Project), for which Dawn State was the expected subscription vehicle;

ii)
Ace Decade undertook to indemnify Haixia both against fees and costs in relation to any sums or losses which Haixia had to pay “in connection with” the Financing;

iii)
In return for a further US$500m contribution to the Project (“the Monetary Contribution”), Ace Decade acquired a contractual right to participate, in accordance with the terms of the Co-Investment Agreement, in certain distributions made from the H-Shares to be acquired by Dawn State;

iv)
It was contemplated that Dawn State would arrange for loan financing from a commercial bank in the sum of US$750 million for the Project;

By the Letter Agreement it was agreed that two months after completion of the Project, Ace Decade would be entitled to call for the transfer of the share capital in Dawn State to itself or its nominee. The Letter Agreement records on its face that all parties executed it in Shenzhen, China.

17.
As contemplated by the Co-Investment Agreement, Dawn State subscribed for the H-Shares. There was a series of transaction documents and contracts which embodied this transaction.

18.
UBS provided the loan financing to Dawn State pursuant to a Financing Letter dated 19 December 2014. For present purposes the critical part of the contractual documentation was the term within the “Full Mandatory Pre-payment Events” which provided:

“The Lender, at its option, may terminate this Transaction if any of the following events occur after Utilisation Date: …

(ii) the Closing Price of the Reference Shares on any Scheduled Trading Day is less than (a) 85% of the Closing Price on the previous Scheduled Trading Day; or (b) 75% of the Closing Price on any of the 5 immediately preceding Scheduled Trading Days;..”

19.
In all contracts with Dawn State to which a UBS entity is a party, it is expressly identified as “UBS London” or “UBS London Branch”.

20.

Between December 2014 and April 2015, Mr Kwok, through Ace Decade, transferred to Dawn State approximately US$500m. Pursuant to the Facility Agreement between Dawn State and UBS London this was paid to UBS London (as “Custodian”) in two parts.

21.
On 15 May 2015, in accordance with the Settlement Authorisation given by Dawn State, the US$500m (along with the Facility provided by UBS London) was used to discharge Dawn State’s liability under its Subscription Agreement with Haitong.

22.
Pursuant to clause 6.2(a) of the Security Agreement between Dawn State and UBS London, the H-Shares subsequently allotted to Dawn State (the “Acquired Shares”) were assigned to UBS London by way of security and deposited in the Secured Account held with and registered to UBS London as Custodian. These charges were registered on Dawn State’s company charges register in favour of “UBS AG, London Branch”.

The failure of the Investment

23.
Between 1 and 6 July 2015, there was a substantial drop in the Chinese stock markets, including the HKEX. The price of the H-Shares declined very rapidly, which triggered a series of events critical to both the Claims and Dawn State’s claim:

i)
The decline in H-Share price entitled UBS London (as Lender), under clause 7.7 of the Facility Agreement, to demand a Mandatory Prepayment of the entire Facility over the subsequent three days.

ii)
This demand was made by notice in the name of “UBS London Branch” on the evening of 6 July 2015. Pursuant to the Letter Agreement, Ace Decade was called upon by Haixia to meet this liability.

iii)
On the morning of 7 July 2015 Ace Decade informed UBS London that it could not make payments according to the stringent deadlines. Despite pleas from Mr Kwok, Mr Wong informed him by telephone that no additional time would be given, and that UBS London had resolved to sell the shares.

iv)
On the evening of 7 July 2015, a “Notice of Acceleration Event” was sent to Dawn State by UBS London, indicating its intention to enforce its security.

v)
UBS London then exercised its rights as mortgagee under clause 8.2 of the Security Agreement and the Acquired Shares were purportedly sold on or around 8 July. (The word “purportedly” reflects a part of Dawn State’s claim which takes issue with the bona fides of that sale - there is a claim that the shares were sold at an undervalue. It is however no part of the Claimants’ case that the sale was a breach of duty vis a vis Mr Kwok.)

vi)
UBS London subsequently remitted to Dawn State US$4.7m, being the amount remaining after all fees and charges had been applied.

24.
Ace Decade exercised its option pursuant to the Letter Agreement and control of Dawn State was transferred to Ace Decade on 18 September 2015. As matters stand now, therefore Ace Decade owns Dawn State.

The Claims and the parties' perspective on the facts

25.
The Claims are in negligent misstatement. Put shortly, Mr Kwok and Ace Decade plead that UBS owed a duty of care in tort to them, that in breach of that duty, UBS made false and misleading representations to them about the nature of the financing supplied to Dawn State and how UBS would act in relation to it, and that Ace Decade entered into Co-Investment Agreement in reliance on those representations.

26.
The Claimants say that Mr Kwok expressed repeated concerns about the inclusion of inter alia the mandatory prepayment provisions in the Facility Agreement proposed to Dawn State. In response, Mr Wong:

i)
Represented that UBS London had a policy which it intended to apply to Mr Kwok and Ace Decade that (a) it would not demand additional collateral or mandatory prepayment and (b) even if it did make such a demand, it would give them additional time to make such payments.

ii)
Represented that UBS London had given such favourable treatment as identified in the previous sub-paragraph to a shareholder of the Ping An insurance company and would treat Mr Kwok and Ace Decade in the same way.

iii)
Advised that Mr Kwok and Ace Decade should not be concerned about the margin call and/or prepayment provisions.

27.
The Claimants maintain that these representations were false, and the advice negligent, in particular in that the decision makers at UBS London had no such intentions and/or policies and there was no reasonable basis to advise that they would so act. The subject matter of Mr Wong's alleged negligent communications is therefore primarily the terms and conditions of the margin lending by UBS London to Dawn State and the approach that UBS would adopt. In particular, it is alleged that Mr Wong was negligently wrong to say that (i) UBS had a policy not to strictly rely on its rights pertaining to margin calls and mandatory prepayments if prices moved "in the short term"; and (ii) UBS intended to act and was acting in Mr Kwok and Ace Decade's best interests and was providing finance on the best possible terms.

28.
The true position alleged by Mr Kwok and Ace Decade was that the terms of the financing from UBS to Dawn State were not in accordance with Mr Kwok and Ace Decade's express wishes, expectations and understanding, and they should have been told that.

29.

Ace Decade says that it relied on the negligent communications when it entered the Co-Investment Agreement, and did not withdraw from it.

30.
The Claimants therefore plead that as a result of the actions taken by UBS London between 6 and 8 July 2015 (as well as UBS's negligent misstatements and advice), Mr Kwok and Ace Decade suffered an irreversible and very substantial economic loss, for which they seek damages. The losses pleaded are:

i)
The loss caused by Ace Decade's entry into the transaction, calculated as the Monetary Contribution paid by Ace Decade under the Co-Investment Agreement less the amount recovered under the Co-Investment Agreement. The principal claim is for some US$495 million;

ii)
The loss caused by Ace Decade's failure to withdraw from the transaction under the Co-Investment Agreement, calculated as above but with an additional deduction for a fee that would have been payable to Haixia Management despite Ace Decade's withdrawal; and

iii)
Damages equating to the loss of returns that would have been achieved by Ace Decade had it invested in the H-Shares using a different method instead of the Co-Investment Agreement. Specifically it is said that Ace Decade could and would have entered into an alternative transaction for the acquisition of the H-Shares, and Ace Decade claims damages for the returns it would have made on that alternative transaction.

31.
The Claimants issued the claim form on the 29 May 2020. The claim form was deemed served at UBS London's place of business on 29 September 2020. UBS London does not dispute the validity of service, only the Court's jurisdiction.

The parties' approaches to the facts

32.
The parties look at these facts through rather different prisms, which inform their approach to the jurisdictional dispute.

33.
For the Claimants it is emphasised that Dawn State was effectively part of a bespoke structure created expressly for this series of transactions. The Claimants say that Dawn State was not an independent entity transacting at arm's length from Mr Kwok and Ace Decade, but an entity in respect of whom they continued to play a close role in determining the legal arrangements it would enter into with UBS London. They point out that, although Dawn State would be the contracting entity with UBS London, Ace Decade expressly assumed responsibility for any payments and liabilities under the Facility Agreement and was ultimately the contemplated (and actual) owner of Dawn State. Furthermore the Claimants emphasise the fact that UBS London was posited as the financing partner from the earliest days of the transaction taking shape, and that there was never another possibility.

34.
UBS emphasises however the wider international links involved in this case. In particular UBS points out that:

i)
The Claimants identify UBS as conducting business globally through its Swiss headquarters and also through branches located inter alia in Hong Kong (“UBS HK”) and London (UBS London).

ii)
The central relationship for the tort claims is between Mr Kwok and Mr Wong. Mr Wong was a Managing Director in the Wealth Management Division of UBS, based at the offices of UBS HK.

iii)
The torts are alleged to have been committed by Mr Wong in Hong Kong, with specific locations given as Mr Kwok's offices or at Mr Kwok's residence; likewise reliance is said to have been in HK.

iv)
The subject matter of the advice and misstatements by Mr Wong was an investment in shares in a Chinese company, which were to be listed on the HKEX via a placement by UBS HK and using a Chinese intermediary.

35.
UBS also highlights certain negatives about the London link which is at the heart of this case based on the Claimants’ own pleaded case:

i)
UBS London did not form, and is not alleged to have formed, any contractual relationship with Mr Kwok or Ace Decade.

ii)
UBS London did not participate, and is not alleged to have participated, in any pre-contractual negotiations with Mr Kwok or Ace Decade.

iii)
UBS London did not owe, and is not alleged to have owed, any duty of care to Mr Kwok or Ace Decade.

iv)
UBS London did not give, and is not alleged to have given, any advice to Mr Kwok or Ace Decade.

v)
UBS London did not make, and is not alleged to have made, any negligent misstatement to Mr Kwok or Ace Decade.

The Law

Lugano II – general principles of interpretation

36.
It is common ground that Lugano II applies for the purposes of determining such jurisdiction over the Claims. The Lugano Convention is a treaty concluded by the EU that took direct effect in the United Kingdom. After the expiry of the transition period under the UK-EU Withdrawal Agreement, the Lugano Convention continues to apply to proceedings already commenced.

37.
In this case: (i) UBS is a Swiss company domiciled in Switzerland; (ii) at all material times, Switzerland has been a Convention State; and (iii) the Claims relate to a civil or commercial matter

within the meaning of Article 1 of the Lugano Convention. Accordingly, this Court has jurisdiction to entertain an in person claim against UBS solely in accordance with the provisions of the Lugano Convention.

38.
The parties are largely agreed on the general principles and the backdrop to the argument.

39.
The Lugano Convention refers to the “parallelism” between the Brussels and Lugano regimes. The Lugano Convention falls to be interpreted in the same manner as (i) the Brussels Convention 1968 (Brussels Convention); (ii) the original Lugano Convention 1988; (iii) the Brussels Regulation (Council Regulation (EC) No 44/2001) (Brussels Regulation I); and (iv) the recast Regulation (Parliament and Council Regulation (EU) No 1215/2012) (Brussels Recast Regulation). These instruments are referred to as “the Brussels-Lugano scheme”.

40.
All of them are interpreted similarly because of a consistency of structure and principles: Anton Durbeck GmbH v Den Norsek Bank ASA [2003] QB 1160.

41.
The Brussels-Lugano instruments receive an autonomous interpretation, as Dicey explains at [11-068]:

“The object of interpreting the terms autonomously is to ensure that the instruments are fully effective, and to ensure their uniform application, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to the same legal relationship and to reinforce legal protection by allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.”

42.
The principal basis of jurisdiction under the Brussels-Lugano scheme is domicile. The general rule is that a defendant should be sued in her/his/its state of domicile, with special jurisdictions operating only as derogations from the general rule which has “overriding importance”.

43.
It is common ground that:

i)
The exceptions to the general rule must be interpreted strictly. JSC BTA Bank v Ablyazov (No.14) [2020] AC 727 at [31] per Lord Sumption and Lord Lloyd-Jones JJSC, with whom Lord Mance DPSC, Lord Hodge and Lord Briggs JJSC agreed. See also Dicey at [11-068].

ii)
“it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2.” Etablissements Somafer SA v Saar-Ferngas AG (Case 33/78) [1978] ECR 2183; [1979] 1 CMLR 490 (Somafer) at [7].

iii)
The purpose of the exceptions in Article 5 of the Lugano Convention is to confer special jurisdiction on courts having a “particularly close connecting factor” between the dispute and the courts other than those of the defendant's domicile, thereby promoting the efficient administration of justice and proper organisation of the action.

44.
The only parts of Article 5 which are contended to be relevant in this case are:

i)
Article 5(3) “the courts for the place where the harmful event occurred or may occur.”

ii)
Article 5(5) “arising out of the operations of a branch …”

45.
It is common ground that the Claimant bears the burden of showing a good arguable case that this court has jurisdiction. In Alta Trading v Bosworth [2021] EWCA Civ 687 [2021] ICR 1358 at [30] the Court of Appeal explained how this was to be applied in the context of Lugano II:

“the claimant must establish a good arguable case; that for this purpose the Court must decide, it if can, who has the better of the case; but that where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case (due to the evidential limitations involved at the jurisdiction stage), then it is sufficient if the claimant has a plausible evidential basis.”

46.
Thus, this Court must attempt to decide who has the better of the case. If the Court feels able to make this determination, then whichever party has the better of the case succeeds. However, lacking the benefit of disclosure, witness evidence or even a defence I am not required to make factual findings and am entitled to find jurisdiction on the grounds that the Claims have a plausible evidential basis.

47.
I shall deal with the arguments under the two heads separately.

Article 5(3)

48.
Article 5(3) of the Lugano Convention provides:

“A person domiciled in a state bound by this Convention may, in another state bound by this Convention, be sued: . . . (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”

49.
It is substantially identical to those in those in Article 5(3) of the Brussels Convention, Article 5(3) of the Brussels Regulation I and Article 7(2) of the Brussels Recast Regulation.

50.
Professor Briggs identifies the rationale for the tort exception in Civil Jurisdiction and Judgments (7th ed. 2021) at [14.25]:

“The special jurisdiction established by Article 5(3) is based on the proposition that the court at the place where the harmful event occurred will tend to be one which has a close connection with the facts giving rise to the dispute. Giving it special jurisdiction will give effect to the principle of proximity and will therefore make it more likely that a defendant will know in advance where he is liable to be sued. It will facilitate the administration of justice, the efficacious conduct of proceedings, and the taking of evidence.”

51.

Here, so far as Article 5(3) is concerned, we are talking only about the place where the damage occurs: the Claimants only rely on the damage limb.

52.
The key dispute is whether a relevant head of jurisdiction is engaged on the facts of this case. The issue here turns on the difficulty of applying this principle in cases of economic loss.

53.
UBS says that:

i)
Within the Brussel-Lugano scheme, the distinction between direct and indirect damage is sometimes elusive.

ii)
In circumstances where the location of economic loss can be unpredictable and does not always reflect a particularly close connection to the case, the damages limb is not construed so extensively as to encompass any place where the adverse consequences of an event which has already caused damage arising elsewhere, can be felt.

iii)
The mere fact that a company may suffer a loss on its balance sheet or where its assets are concentrated at its seat or in a bank account in its home jurisdiction is not sufficient to constitute the place of loss.

iv)
In cases of negligent misstatement, the place where the misstatement is received and relied upon is likely to be the place where the damage occurs.

54.
So far as Mr Kwok is concerned, UBS submits that the fact that Mr Kwok has not pleaded how he suffered any loss, only that the measure of his loss is the same as Ace Decade's measure of loss, is a serious deficiency. Mr Kwok does not say what his financial interest is. Since damage is the gist of the action, Mr Kwok's claim is liable to be struck out for that reason alone.

55.
As for Ace Decade's position, UBS submits that none of the pleaded losses were suffered in London. All losses were suffered under, or as a result of, entry into the Co-Investment Agreement. Entry into the Co-Investment Agreement occurred in Shenzhen, China – and on no analysis in London.

56.
UBS submits that Mr Kwok and Ace Decade's case relying on UBS London's actions is wrong for two main reasons.

57.
First, Mr Kwok and Ace Decade's characterisation of its own pleaded case on loss is not accurate. The pleaded case on loss is that Ace Decade would have entered a different transaction in that the Claimants' pleaded counterfactual is that following withdrawal from the Co-Investment Agreement an alternative transaction would have involved “funding it from either [Mr Kwok] and/or [Ace Decade's] own resources or alternative loan financing”. Accordingly, on its own case, Ace Decade suffered a

direct and immediate loss by reason of its entry into the Co-Investment Agreement instead of a different and less-risky alternative method of acquiring the H-Shares.

58.
Second, even if (which is wrong) the identification of Ace Decade's loss starts with enforcement of security under the lending between UBS and Dawn State, that is not a “direct” or “immediate” loss to Ace Decade. Ace Decade only ever suffered (and could only ever have suffered) a loss under and through its own contractual rights and obligations. When UBS enforced its security against Dawn State, that may have occasioned loss to Dawn State, but any loss suffered by Dawn State from that harmful event could only have given rise to a consequential loss to Ace Decade.

59.
UBS submits that Mr Kwok and Ace Decade's analysis is therefore wrong because it asks this Court to depart from the leading cases of Dumez France and Marinari, which stipulate that to satisfy Article 5(3), the relevant loss is the loss suffered immediately and directly, not indirectly and by virtue of losses occasioned to a third party.

60.
UBS also points to a line of English authority as supporting the proposition that in cases of negligent misstatement, the place where the misstatement is received and relied upon is likely to be the place where the damage occurs. Those cases are: Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] 1 Lloyd's Rep 475 Crucial Music Corpn v Klondyke Management AG [2008] Bus LR 327; Aspen Underwriting v Credit Europe Bank [2018] 2 CLC 891 at [130], London Helicopters v Heliportugal [2006] EWHC 108 (QB) [2006] 1 CLC 297The Claimants say that there are a number of legal errors in the Defendant’s approach – in particular that:

i)
The Defendants fails to grapple with the CJEU law both on the application of general principles and specifically on damage in the context of pure economic loss.

ii)
Their approach misunderstands the approach to direct damage in Article 5.3.

iii)
The damage in question “actually manifested” when the Acquired Shares were liquidated and manifested directly in the Secured Account – and potential loss became fixed and certain in London.

iv)
Further a claim in London was reasonably foreseeable and predictable at all material times and tends towards the sound administration of justice and efficacious conduct of proceedings.

v)
This is a direct loss not a loss suffered by someone else, and not an indirect loss. The Claimants say that this is a pure economic loss case – the essence of the case is that they were worse off because of their reliance on negligent statements by UBS.

Discussion

Pleading points

61.

I should deal first with the pleading points. The first is that taken against Mr Kwok, namely that he pleads no loss at all. This is a point which might have force if Mr Kwok were the only or principal claimant. However here Mr Kwok advances only an alternative claim – i.e. his claim only arises if there is a title to sue point as against Ace Decade; in which case the loss pleaded will be asserted by him, mutatis mutandis.

62.
The second pleading point, that against Ace Decade, is that the Claimants' characterisation of their own pleaded loss is wrong. It is said that the Particulars does not plead that the enforcement gave rise to the losses, but rather that Ace Decade would have entered into a different transaction. I do not accept this submission essentially for two reasons. First UBS has zeroed in on one of the sub-paragraphs, the others of which point directly to the principal claims. Secondly the pleaded factors relied upon by UBS are best seen as acts of reliance which caused the loss, not as the loss itself. Although the paragraph which they highlight is couched in terms of "in the absence of those representations" that is essentially part of the factual narrative (under the heading "The Facts Giving Rise to the Claims"). It is then picked up later in the pleading (under the heading "Ace Decade and Mr Kwok's claims") under the paragraph (paragraph 83) dealing with reliance.

The main jurisdiction argument

63.
I turn then to consider the essentials of the argument. One thing on which the parties were ultimately agreed is that fixing on the location of damage in pure economic loss cases is not easy. As the Claimants note, this much is apparent from reading the judgments of the CJEU which has said in terms that it is "not an easy exercise". UBS suggested that the links pointed back towards Hong Kong or China, or possibly the BVI (as the likely origin of the funds provided by the Claimants).

64.
The Claimants urged me to analyse the matter with tight focus on the concept of manifestation and that when that was done, London was the right answer, or at least had a sufficiently plausible evidential basis. They submitted that there were effectively three possibilities: the place where the loss become possible (via the decision to commit to the transaction), the place where the loss was actually felt by the Claimants, and between them the place where the loss materialised or crystallised. This they submitted was the right answer.

65.
One notable point was that despite the skill and clarity with which UBS's argument was deployed by Mr Quest QC, their argument was not firmly grounded, but shifted in the tides of argument.

66.
In writing UBS submitted that assessing whether an Article 5 exception applies does not involve giving every aspect of the factual story equal billing, but rather the identification of the legally relevant conduct by reference to the component elements of the cause of action, and asking whether the legally relevant conduct gives rise to the particularly close connections required by the special jurisdictions under the Brussels-Lugano scheme. That was an argument advanced by reference to the dicta of Lord Sumption in BTA Bank v Ablyazov [2020] AC 727 at [32] that domestic law is "vital" in identifying "legally relevant conduct".

67.

However, that argument played little part in the oral submissions, with Ablyazov not even figuring in the transcript. There is a good reason for that, which is that on further consideration it seems that the Claimants were correct in their submission that that comment was explicitly concerned with the place of the event giving rise to the harm (i.e., a conspiracy, at [30]). In that context the reference to "conduct" is entirely explicable, as is his later reference to "in particular, whether an event is harmful is determined by national law".

68.
The approach of UBS orally focussed more on the English authorities and the proposition that there is at least a rule of thumb that in a case of negligent misstatement the damage will occur where the misstatement is received and relied upon and the distinction between direct and indirect loss.

69.
The first of these authorities was London Helicopters v Heliportugal [2006] EWHC 108 (QB) [2006] 1 CLC 297, a case of negligent misstatement in relation to a certificate issued under a common airworthiness system and then relied on in a succession of sales of a helicopter engine. As Simon J noted at [4] it was factually a relatively straightforward case.

70.
UBS placed reliance on a passage at [25]:

".. there are observations in both cases which support the limited proposition that it is quite likely that in a case of negligent misstatement the damage will occur at the place where the misstatement is received and relied upon. Furthermore these observations were made largely without reference to particular national rules relating to the establishment of tortious liability, and by reference to the autonomous approach established by the European Court of Justice, see for example the Alfred Dunhill case at p. 958."

71.
However this seems to me to provide very little by way of authority. Simon J here purports to do no more than find in this a cross check for a result he had reached otherwise; and he is explicit that they are observations supporting a limited proposition which goes no further than likelihood.

72.
Moreover, one can see from [27] that there were in that case three factors pointing to England as the correct forum; it was not necessary for the judge to split out the determinative reason. Finally, this was not a case where loss was only a possibility at the time of the transaction; the motor was defective, but sold as sound. Damage existed at the time that the transaction completed.

73.
I would also note (consistently with that last point) that at [20-1] Simon J noted that:

"The place where the damage occurred (within the meaning of the first part of the jurisdictional rule in the Bier case) is not the place where a claimant simply suffers financial loss. It is necessary to see where the event giving rise to the damage produced its 'initial', 'direct', 'immediate' or 'physical' harmful effect....

Applying this approach, I would have found that the initial and direct damage occurred when the certificates were received and relied on by the Claimants in England. This was the place where significant damage was done to the immediate victim of the harmful act; and therefore the place where the damage occurred within the meaning of the first part of the jurisdictional rule in the Bier

case. The claim was for more than the adverse consequences of an event which has already caused damage actually arising elsewhere; and the damage was neither indirect nor caused elsewhere. It would follow that England was the place where the event giving rise to liability directly produced its harmful effect on the person who was the victim of the event."

74.
The second case relied upon was Crucial Music Corpn v Klondyke Management AG [2008] Bus LR 32. This was a case involving the sale of music rights relating to a portfolio of budget classical music recordings, where the claim in misstatement arose from the fact that the purchaser (who was assured that there were no collateral rights agreements) received less than the rights they were told they would get when it transpired that there were other rights in the catalogue.

75.
UBS relied on [35] of the judgment where Mr Bernard Livesey QC sitting as a Deputy High Court Judge said:

"The alleged misrepresentations did not cause the impairment of, damage to or diminution in the value of the transferred rights. The misrepresentations allegedly induced the claimants to enter into the agreement and, on completion, to take a transfer of the transferred assets. If this allegation is made out, the misrepresentations caused the claimants to suffer loss and damage at the time they entered into the obligation to take the transfer of the property at the agreed price which presumably was greater than the price which would have been agreed had the parties known the true facts".

76.
There are two problems with reliance on this authority in this context. The first is that, like the Helicopters case, it was a case of a sale where the value transferred at the time of the transaction was less than represented – it was essentially a defective or lesser thing which was transferred. That is very different to this case; in this case at the time of the reliance the value of the shares could perfectly well have gone up or down. I do not accept the submission that the fact that the Claimants' claim that they were induced to enter into a contract with very disadvantageous terms puts this case on an equal footing. The terms might perfectly well not have bitten. The loss might never have happened. It cannot be said that in actual concrete terms the Claimants were less well off at the time of the transaction. That is a significant distinction.

77.
The second problem is that the judge was proceeding on the basis of an agreed statement of the law (at [32]) which accepted the limited Helicopters proposition as laying down a rule. As I have indicated, I do not consider that it does so. Reliance on this case is therefore "bootstraps" analysis.

78.
The third domestic case relied on was Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] 1 Lloyd's Rep 475 at [211]-[214] where Andrew Smith J concluded that:

"Maple Leaf suffered its damage when it committed itself to accepting the deal and ending its subscription form. In a case like this, to my mind, once Maple Leaf had put it outside its control to prevent the loss, the harmful effect occurred."

79.
However again this reliance neglects the context. That was a case where the allegation was that US$30 million had been advanced to fraudsters for the purposes of completing the funding of a

private placement when those fraudsters had no intention at any time of making the relevant subscription. In that context it can hardly be surprising that entering into the agreement was seen as the point at which damage occurred. Again the reliance is in relation to a thing which at that point in time is inevitably worth less than it is represented to be worth.

80.
In my judgment there is little assistance to be gained from these cases. They are all essentially cases of a non-contingent loss crystallising on the entering into of an agreement.

81.
For completeness I should mention Aspen Underwriting v Credit Europe Bank [2018] 2 CLC 891 – referred to in passing but not the focus of oral submissions. This was similarly a case where the loss was not contingent, but instead payment had been made under a settlement of claims under an insurance policy which in fact ought never to have been honoured at all.

82.
This lack of utility is the more so when one bears in mind (as Mr Hossain QC pointed out) that all of these cases predate key decisions of the European court (specifically Case C-304/17 Löber [2019] 4 WLR 5 and Vereniging van Effectenbezitters [2021] IL Pr 23) which are the starting point for the modern iteration of the test. Still further Maple Leaf and Klondyke cite no direct CJEU authority.

83.
I am persuaded that any correct approach to this area has to take full account of the EU jurisprudence.

84.
Fundamentally since Löber the Court is concerned with the question of "where the alleged damage actually manifested itself" ([27]). So far as this is concerned, while UBS is right to say that the damages limb is not construed so extensively as to encompass any place where the adverse consequences of an event which has already caused damage arising elsewhere can be felt, the authorities do appear to indicate a relatively broad approach where economic loss in concerned. Further, as already noted, the authorities are not entirely pellucid on what they do say.

85.
One point however does appear to be clear; it is that the tide of authority is against the proposition that loss is suffered wherever a claimant ultimately feels it. That argument was firmly rejected in the first of the major cases: C-168/02 Kronhofer [2004] IL Pr 27. In that case, the claimant sued four (German domiciled) managers of a German registered financial services firm with whom he had invested roughly $80,000 over the telephone. He alleged that the highly risky nature of the investment (speculative call options on the London Stock Exchange) was not properly explained. Part of the sum was lost when this investment was liquidated, with only part being returned to him.

86.
It was accepted without question by the CJEU that: "the **place where the damage occurred** and the place of the event giving rise to it were **both in Germany**" (at [18], emphasis added). This was the same conclusion accepted by the Advocate General (at [AG51]) after noting at [AG13]:

"As regards the place of damage according to [the Austrian appeal court] it is also Germany where the claimant's investment account was opened, into which he transferred the sums which were then invested, and in relation to which the financial losses have arisen".

87.
The claimant alleged the Austrian courts had jurisdiction under Article 5.3 of the Brussels Convention because his assets (i.e., his economic position) were affected “simultaneously” by the loss and they were “concentrated” in Austria.

88.
The CJEU rejected this contention (at [21]), holding (at [18]) that:

i)
“there is nothing in such a situation to justify conferring jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in the damage occurred and the damage was sustained”.

ii)
The idea of interpreting Article 5.3 of the Brussels Convention to cover “simultaneous” loss “would not meet any objective need as regards evidence or the conduct of the proceedings”.

iii)
The Court’s view was that the claimant was impermissibly attempting to expand the scope of Article 5.3 to include downstream losses resulting from the loss of his money invested in Germany.

89.
In connection with the payment aspect of UBS’s argument it is worth noting that in that case it was not suggested that the place of the damage was the place where the claimant placed his funds beyond his control. That is doubtless because there is CJEU authority against such an approach because:

i)
Such a solution would almost invariably confer jurisdiction on a claimant’s domicile, which the Convention is inherently “hostile” to: Case C-220/88 Dumez France at [16].

ii)
It would, further, permit forum shopping by allowing the claimant to unilaterally vary the place from which he placed his funds beyond his control: Kronhofer at [50].

90.
It is therefore clear (and was effectively accepted between the parties) that the CJEU has made clear that the concept of damage cannot be answered simply by reference to the place where a party’s assets are located or it generally “feels” the economic effect of the liquidation of an investment elsewhere.

91.
As Briggs puts it (at p. 272):

“The Court will generally view with scepticism an analysis which would tend to suggest that the courts for the place of the claimant’s domicile have special jurisdiction, and will therefore scrutinise with care the proposition that that was where the damage occurred. This approach is clearly seen in Dumez France and Marinari, that the principle of forum actoris was specifically discouraged by the scheme of the legislation. But as will be seen, when damage has occurred all over the place, it may be necessary to deem it to be concentrated in a single location”.

92.

The next significant case is Case C-375/13 Kolassa [2015] IL Pr 14. In that case the claimant had invested in bonds issued by Barclays Bank (UK domiciled with a German branch). These were purchased and held by his Austrian internet bank ([12]-[14]). The portfolio of assets underpinning those bonds collapsed and the claimant sued Barclays, alleging it breached prospectus rules. He sued in the Austrian courts, alleging that the loss of his investment occurred in Austria and therefore fell within Article. 5.3.

93.
Having considered Kronhofer, the CJEU nevertheless concluded that, because of the facts of the case, the Austrian courts did have jurisdiction over the claim (at [57]). The key point was the publication in Austria of the prospectus. The CJEU emphasised that:

"The place where the loss occurred thus identified meets… the objective of [the BIR] of strengthening the legal protection of persons established in the European Union by enabling the applicant to identify easily the court in which he may sue and the defendant reasonable to foresee in which court he may be sued… given that the issuer of a [bond] who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus… in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss".

94.
As Briggs notes at p. 274, there is an ambiguity in the judgment in that neither the AG or the CJEU made clear which account it was referring to: the account from which purchase money had been paid out originally, or the investment account with the intermediary in which the worthless entitlement was held. However given that it appears (AG[19]) that the bonds in question were effectively worthless as being part of a "vast pyramid fraud system" there would be analogies with the English authorities relating to items whose value was lower at the time of reliance.

95.
The next case to consider (upon which the Claimants placed considerable reliance) was Case C-12/15 Universal Music International v Schilling [2016] QB 967. In that case Universal Music International "UMI" had in 1998 agreed that it would acquire 70% of the shares in B&M, a Czech record company, with an obligation to acquire the remaining 30% in 2003. The price would be set by a contractual formula. The contracts were drafted by a Czech firm of lawyers. However, the lawyers failed to properly draft the contractual formula, which led to a dispute in which B&M claimed it was owed many times the originally anticipated price. This led to arbitration which resulted in a settlement, under which UMI paid B&M's shareholders €2m for the remaining 30%. UMI sued the lawyers in the Dutch courts for negligence. It alleged that the damage had occurred in the Netherlands as its place of establishment and of the bank account from which it paid the settlement. It was agreed that the events giving rise to the damage (e.g., negligent services) occurred in the Czech Republic.

96.
The CJEU noted that the contract between UMI and B&M, which created an "obligation which the parties… did not intend to create", was entered into in the Czech Republic (at [30]). It went on to note (at [31]):

"The damage for [UMI] resulting from the difference between the intended sale price and the price mentioned in that contract became certain in the course of the settlement agreed between the parties before the arbitration board, in the Czech Republic, on 31 January 2005, the date on which the actual sale price was fixed. Therefore, the obligation to pay placed an irreversible burden on [UMI's] assets"

97.
The Court concluded (at [32]-[33]) that:

“accordingly, the loss of some assets happened in the Czech Republic, the damage having occurred there…

[This conclusion] satisfies the requirements of predictability and certainty laid down by [the BIR] since the conferral of jurisdiction on the Czech court is justified for reasons of sound administration of justice and the efficacious conduct of the proceedings”

98.
The CJEU rejected the suggestion that UMI’s choice to implement the settlement by making payment from a Dutch bank account was sufficient, not least as it would enable forum shopping. I accept the submission that UMI appears to demonstrate that the location where damage manifests is identified from some objectively ascertainable step or act which crystallises the loss and connects the two parties together.

99.
Again however there is a complication in that (as Briggs again notes at p. 275) “the Court did not explain whether the contract it had in mind was the original share purchase contract or the arbitration/settlement contract: both had been concluded in the Czech Republic.” I would tend to accept the submission which was made for the Claimants that the wording at [31] suggests the latter. This appears to be the view also taken by Professor Trevor Hartley in “Jurisdiction in tort claims for non-physical harm under Brussels 2012, article 7(2)” I.C.L.Q. 2018, 67(4), 987-1003. He says: “This assumes that the essence of the harm suffered by Universal Music was the incurring of an obligation to pay the additional sum, rather than the actual payment of the sum.”

100.
Then there is Case C-304/17 Löber [2019] 4 WLR 5, which arose out of essentially the same facts as Kolassa. The CJEU recounted its finding in Kolassa and its treatment of that decision in UMI (at [28]-[29]). It concluded (at [30]) that the place where the harmful event occurred:

“may not be construed as being, failing any other connecting factors, the place in a Member State where the damage occurred when that damage consists exclusively of financial loss which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another member state”

101.
It nevertheless concluded (again) that there were “specific circumstances” justifying attributing jurisdiction to the Austrian courts (at [31]) including that the bond prospectus was notified to the Austrian regulator (at [33]). Those circumstances were “consistent with the objectives… of [the Convention/Regulation]” (at [34]).

102.
Finally there is the very recent case of Vereniging van Effectenbezitters [2021] IL Pr 23 (“VEB”). Like Kolassa this was a case concerned with the issuance of a prospectus. The claimant was a shareholder’s association which brought a collective action against BP plc on behalf of all persons who bought BP shares between 2007 and 2010 through a Dutch investment firm or through a securities account in the Netherlands. It was claimed that BP had provided sellers with inaccurate, incomplete or misleading information (i) about its maintenance procedures before the Deepwater

Horizon oil spill on 20 April 2010; (ii) the extent of that spill; and/or (iii) BP's role and responsibility in respect of that spill. Unlike many of the other cases what was being considered was not a thing of lesser value at the time of the transaction, but a thing which became of lesser value by reason of the occurrence of a contingency (the Deepwater Horizon oil spill).

103.
The claimant relied on Kolassa and Löber, arguing that the loss materialised directly in investment accounts in the Netherlands upon the decline in value of BP's shares when the true information about BP's procedures and responsibility became known (at [15]).

104.
AG Sánchez-Bordona gave a lengthy opinion which rejected the attribution of jurisdiction merely to the place of an investment account (at [AG24]) on the basis that there was no guarantee that this place would be connected to the facts of the dispute (at [AG28]) and furthermore that it was entirely unforeseeable to a company issuing shares where investors happened to hold their investment accounts and so where it might be sued (at [AG29], [AG43]). Instead, he considered that "the place which accorded more closely with the objectives pursued by [the BRR]" would be the place where the shares were listed (at [AG37]-[AG38]).

105.
The AG further considered the "specific circumstances" which might justify attributing jurisdiction to the place of the investment account. Although he considered that this could not be done on an abstract basis (at [AG48]), he noted that (at [AG48]-[AG49]):

"the "specific circumstances" relevant to attributing jurisdiction are those which demonstrate the proximity between the action and the jurisdiction, and the foreseeability of that jurisdiction for the parties… Those circumstances must include:

– factors that facilitate the sound administration of justice and the smooth operation of proceedings; and

– factors that may have helped the parties to determine where they should institute proceedings or where they might be sued as a result of their actions."

106.
The AG concluded that no such circumstances were present on the case file, with the possible exception of the case management advantages (including service of notice and taking of evidence) that could follow from the collective nature of the proceedings (at [AG49] fn. 40).

107.
The CJEU agreed with the AG that the location of an investment account did not identify the place where damage occurred in this case (at [37]). It noted (at [33]) that the place of damage identified in Kolassa and Löber:

"is in line with the objective of [the Convention/Regulation], which is to strengthen the legal protection of persons established in the European Union by simultaneously enabling the applicant to identify easily the court in which he or she may sue and the defendant reasonably to foresee in which court he or she may be sued"

108.
On the other hand, foreseeability was not ensured by allocating jurisdiction to (at [34]):

“the Member State in which the investment account used for the purchase of securities listed on the stock exchange of another State is situated, the issuer of those securities is not subject to statutory reporting obligations. As the Advocate General noted in [AG29], the criteria relating to the domicile and the place where the shareholders hold their accounts do not enable the issuing company to foresee the courts with international jurisdiction before which it could be sued”

109.
Instead, the CJEU considered that (at least in a case where the damage is the result of a decline in value of listed shares) the damage can be said to occur only in a jurisdiction in which the company has complied with reporting requirements to obtain a listing (at [35]). It is only in such a state that a company can “reasonably foresee the existence of an investment market and incur liability”.

110.
It is fair to say that this decision has caused a reasonable amount of debate. It is also fair to say that in the light of this review that the authorities do not speak with complete clarity and that situations where one is considering misstatement cases where receipt, acting and loss are not contemporaneous may defy the desire to provide a very clear rule. VEB does, for example, suggest that Briggs’ conclusion at p. 275 that “the usual answer [in bad investment cases] will be that the loss occurs in, and at the place of, the bank account which was depleted, certainly so if there are other material points of contact with that place” may require some glossing.

111.
However, I conclude that certain points are established and provide critical guidance:

i)
The leading CJEU cases demonstrate that in the context of the damage head it is the manifestation of damage that is relevant, not the transaction that ultimately led to such loss.

ii)
Manifestation is more likely to be associated with crystallisation of the damage than the origins of the transaction in cases where there is a difference. As I will consider further below, while the references in UMI to “became certain” and “irreversible burden” are not posited as the key test, they indicate what the CJEU is looking for when manifestation is not self-evident.

iii)
Caution may be required to be exercised when looking at damage that may or may not occur depending on what happens in the future. In this context careful thought may be needed to distinguish between the last thing that happened to bring the loss home to the claimant and the point where the loss itself becomes clear. In Kronhofer, Mr Kronhofer was exposed to risk from the moment he invested his money with the defendant (that was the very essence of his claim), but it is nowhere suggested that the damage occurred at this time. Similarly, in UMI, UMI was bound to pay more than anticipated as soon as it signed the original contract, but its losses did not actually manifest and become certain until it settled the dispute about exactly how much.

iv)
While it is obviously right that foreseeability and a consideration of factors relating to the sound administration of justice cannot provide an independent basis for a conclusion that jurisdiction resides in a particular location, the CJEU has clearly used such factors in some cases. At times the relation of these factors to the reasoning is unclear. However their existence and the rationale for the rule seems to justify their use by way of cross-check where the analysis simply by reference to manifestation

remains troublesome. This is because the existence of the special jurisdiction is justified by the principle of proximity and is effectively designed to ensure that the jurisdiction is both foreseeable and likely to facilitate the administration of justice, the efficacious conduct of proceedings, and the taking of evidence. Or as Briggs puts it (p. 274): "… the conclusion to which the law comes must be derived from what appears to be the underlying reason for the rule."

112.
Taking all of these matters into account I conclude that the only logical way to view the manifestation test in this rather unusual context is one which focuses on the moment and place where the loss occurs. It cannot sensibly be said that the damage in question "actually manifested" when Mr Kwok and Ace Decade relied on the representations, or when the funds were sent (from whatever destination). Nor can it be right that damage is suffered at the last point - when Mr Kwok and Ace Decade feel the loss.

113.
Once the focus is on actual manifestation the most natural analysis is to view the damage as occurring where and when the Acquired Shares were liquidated; it would follow that the loss manifested directly in the Secured Account. Mr Quest submitted in reply that timing is not determinative – the key question being where damage occurred. Of course, that is right. However, it may be the case that the timing of manifestation is key to answering the question of where, for the purposes of this test, damage occurred.

114.
This seems broadly (and allowing for the subsequent emergence of VEB) to harmonise with Briggs' rather tart conclusion:

"Unless the Court changes its mind again, investment and similar financial loss will occur in the bank account from which the money …. [1] is lost to the account holder."

115.
Here the money is "lost" to the Claimants in London, where the shares they had invested in were held and where the funds they had invested were depleted. It is artificial to say, as UBS does, that because Ace Decade's rights were exclusively under the Co-Investment Agreement the loss could only ever be outside England and that even if one looks at the point at which the shares are sold, the loss is that of an opportunity to make a recovery on the investment or a loss of an opportunity to recover the Monetary Contribution. The loss crystallises, manifests, becomes certain and irreversible with that sale of shares and that loss of the Monetary Contribution which had merged into the shares.

116.
I do not consider that UMI or VEB justify a separate test by reference to the words "fixed" "certain" "irreversible burden" or "registered" or "recorded". It appears to me that those phrases are apparently there as amplifications or indicia of the core test, not alternatives. However, there is sense to looking to those concepts by way of some form of cross check. When that is done the result is consistent. Any potential loss to Mr Kwok and Ace Decade became "fixed" and "certain", an "irreversible burden" on their assets when the Acquired Shares were sold and removed from the Secured Account. Once UBS London purported to exercise its rights and to sell the Acquired Shares, Dawn State's only substantial assets (and hence the value of the Investment) was irretrievably lost. With that Ace Decade's contractual right to acquire Dawn State likewise became effectively valueless. It is at this point that any potential damage created by UBS's negligence "actually manifested" itself, becoming "fixed" and "certain" (i.e., a loss of approximately US$495m).

117.
That account, where the damage was first “registered” or “recorded” was in London with the defendant itself (as in Kronhofer). It is irrelevant that the secondary financial consequence of that manifested damage then simultaneously affected the whole of Mr Kwok and Ace Decade’s economic position; and indeed that approach leads back to a claimant centred analysis which is inimical to the EU law analysis.

118.
Finally, looking to the “special circumstances” also by way of cross check – an approach which appears to be justified by the authorities: those circumstances also point in the direction of London. The Secured Account in London was the place at which it had been agreed by all parties that the Acquired Shares would be held, and all of the contractual documents UBS entered into (albeit for a transaction at one remove from the Claimants) were to be in English and governed by English law. It was therefore entirely predictable and foreseeable from November 2014 that the parties might sue or be sued in London in relation to the Investment and dealings with the Acquired Shares.

119.
Accordingly, both the test and the cross-checks indicate that the requirements of Article 5(3) are established in this case. In the circumstances the argument on Article 5(5) does not arise, but I deal with it below for completeness.

Article 5(5)

120.
Article 5(5) of the Lugano Convention relevantly provides:

“A person domiciled in a state bound by this Convention may, in another state bound by this Convention, be sued: . . . (5) 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.”

121.
This provision is substantially identical to those in those in Article 5(5) of the Brussels Convention, Article 5(5) of the Brussels Regulation I and Article 7(5) of the Brussels Recast Regulation.

122.
It is common ground that UBS London is a “branch, agency or other establishment” within the meaning of Article 5(5). The issue is whether on the facts of this case Article 5(5) is engaged by the Claims.

123.
Like Article 5(3), Article 5(5) is based on a particularly close linking factor between the dispute and the Court, which justifies attribution of jurisdiction for reasons of sound administration of justice.

124.
In Somafer the point was put (in effect) this way at [11]: is the claimant able to show without difficulty the special link between the branch and the claim against the parent body justifying the derogation from Article 2?

125.

The key case so far as this head of jurisdiction is concerned is accepted to be Case C-27/17 flyLAL Lithuania [2019] 1 WLR 669. In that case a Lithuanian airline brought claim against a Latvian airport and a Latvian airline (with a branch in Lithuania) for anticompetitive practices in relation to flights from Lithuania to Latvia. The complaint was that there was predatory pricing via lower fees being charged in Latvia. It sued and obtained judgment in the Lithuanian courts under Article 101 and 102 TFEU. The trial court held it had jurisdiction under Articles. 5.3 and 5.5 of the Brussels Regulation I. On appeal, the appellate court referred a question of the scope of Article 5.5 Brussels Regulation I in a situation where there was no evidence that the Vilnius branch of Air Baltic had actually set the predatory prices despite having the power to set prices.

126.
The CJEU in flyLAL at [59] identified two criteria that must be satisfied for Article 5.5 to confer jurisdiction:

i)
First, there must be a branch, which "implies a centre of operation which has the appearance of permanency… it must have a management and be materially equipped to negotiate business with third parties".

ii)
Second, the dispute must arise out of the "operations" of the branch, i.e., there is a "sufficient nexus" between the dispute and the activities of the branch.

127.
The issue here is really what that latter criterion requires.

128.
The CJEU stated the general principle at [63], that:

"in the case of actions based on tortious liability, in order for the dispute to be regarded as arising out of the operations of a branch, that branch must have actually participated in some of the actions constituting the tort"

129.
In that connection, both the AG (at [AG143]) and the Court (at [64]) emphasised that the question of a sufficient nexus is for the national court to establish as a matter of fact:

"In the present case, it is for the referring court to identify the potential role of the Air Baltic branch in the commission of the anticompetitive conduct alleged. In view of the information contained in the order for reference, it should examine, in particular, whether the activities carried out by that branch included actual acts of offering and applying the predatory pricing alleged and whether such participation in the alleged abuse of a dominant position was sufficiently significant to be regarded as a close link with the dispute in the main proceedings."

130.
The Court then went on to conclude at [66]:

"…article 5(5) of Regulation No 44/2001 must be interpreted as meaning that the notion of a 'dispute arising out of the operations of a branch' covers an action seeking compensation for damage allegedly caused by abuse of a dominant position consisting of the application of predatory pricing, where a

branch of the undertaking which holds the dominant position actually and significantly participated in that abusive practice."

Submissions

131.
UBS London submits that this test is not met. It submits that the simplest way to approach the branch exception is to ask– did UBS London participate in the actions constituting the tort? Did it participate significantly? Did it engage in legally relevant conduct? The answer it says is no, nor indeed is it alleged to have participated. All of the elements of the tort (duty, breach, loss) arise out of things said or done in Hong Kong or mainland China.

132.
UBS's submission is that in circumstances where the pleaded case on the torts is all about UBS HK and Mr Wong's representations, including regarding UBS-wide policies, it is artificial to describe the claim as arising out of the operations of UBS London.

133.
UBS also says that this case cannot be reconciled with the rationale for the branch exception. UBS London did not "stand in" for the parent entity. To reach that conclusion requires the Court to ignore the existence of UBS HK, and the associated alleged long-term cultivation of the relationship between Mr Wong and Mr Kwok in Hong Kong.

134.
The Claimants deprecate what they say is an attempt to gloss flyLAL by reference to "conduct", citing Ablyazov. They submit that the CJEU in flyLAL does not refer to "conduct" and certainly not to intentions. There is no requirement to participate in the fault – just in some of the actions constituting the tort.

Discussion

135.
One point can be cleared out of the way at the outset. To the extent that UBS's case was put on the basis that what had to be established was "standing in" (and this line of argument was not really pursued orally), I reject this. The suggestion of a need for standing in is either an erroneous gloss or somewhat overtaken by the way the Court analysed matters in flyLAL.

136.
Likewise, one can put to one side the faint suggestion in the written submissions that this inquiry is mutually exclusive. Just because the HK branch was involved does not mean that jurisdiction cannot be engaged in England based on the involvement of the London branch. That can be seen on the facts of flyLAL where the Vilnius branch did not "stand in" for the head office of Air Baltic, and the CJEU plainly did not consider that the involvement of one branch necessarily excluded the others.

137.
I also reject as a test the concept of "specially close" which was referred to in argument. This appears to be another gloss. On the authorities what is necessary is to ask the relevant questions bearing in mind all the facts. However at the same time the rationale issue remains in the background (as it does for Article 5(3)); what the test is aiming to encapsulate is a proximity which is special enough that it is appropriate to displace the default rule.

138.
What matters is sufficient nexus. There is a real question about the weight to be given to the words “significantly participated” in [66] of flyLAL. On one analysis they restate the test; this is the view which UBS would advocate. However it seems to me that the CJEU was not purporting to restate or narrow the test. Rather [66] is directed to the facts of that case and the circumstances in which the question was posed.

139.
In flyLAL the involvement of Vilnius was in some ways very minor – the predatory prices were set by Air Baltic in Riga and the anti-competitive agreement was concluded there. All the Vilnius branch did was act as a conduit through which the predatory pricing occurred (and hence loss was caused to flyLAL). The CJEU considered that Article 5.5 would be engaged if the participation was “sufficiently significant” – for example if Vilnius had deployed the predatory pricing. Against that background [66] is probably best seen as answering the specific question. The safer route regarding application of the Article 5(5) test is to stick with the enunciation of the test as stated in earlier authority and as cited by the AG, and regard the test as a fact sensitive one.

140.
For the avoidance of doubt I do not regard the authorities as justifying the submission that sufficiently significant connection requires involvement in the tortious acts. This is nowhere stated in the authorities, and would appear to equated to the “standing in” approach. Indeed the opposite is demonstrated by the facts of flyLAL in that it appears clear that the CJEU’s view was that the branch rule was engaged so long as it had unwittingly offered the predatory prices set elsewhere and without any involvement on its part.

141.
Against that background, if one asks: does the claim arise out of the operations of the branch? To this the natural answer is yes – though it arises out of the operations of another branch also. The claim could not occur nor the story be told without including UBS London in the narrative. Similarly, if one asks the question by reference to the criterion of sufficient nexus I conclude that there is sufficient nexus.

142.
UBS was a critical part of the deal structure; it was there effectively from the outset. It was UBS London’s policies which Mr Kwok deprecated and on which he sought reassurance. The misstatements relied upon were made about UBS London’s policies. The claim resides in a disconnect between what he was told about what the policies and intentions of the London branch were and what those policies actually were. It was in my judgment at least as involved and at least as close to the tort as would be the branch in flyLAL

143.
As for UBS London’s contractual involvement UBS argues that this is an ingenious attempt to confuse alleged conversations about the terms of lending to Dawn State with contractual negotiations when it is not part of Mr Kwok and Ace Decade's case that Mr Kwok negotiated the lending agreements to which Dawn State and ultimately UBS London were the contracting parties.

144.
However, one need not descend into the particulars of the conversations. The fundamental point remains. The contractual counterparty is not an irrelevant factor. UBS London was identified as the relevant contractual counterparty on the UBS side from 12 December 2014 at the latest. Insofar as Mr

Wong made representations he was necessarily referring to the intentions and policies of UBS London Branch.

145.
There is also a crossover with the damage argument (though this would not exist, at least to the same extent if one reached a different conclusion on the Article 5(3) point). UBS contends that the enforcement by UBS London of its rights against Dawn State is not legally relevant conduct for the purpose of the tort claims advanced by Mr Kwok and Ace Decade. I do not accept this submission. Loss is a necessary part of the tort claims. It was UBS London's conduct which created the actionable loss for which Mr Kwok and Ace Decade now claim – and without which they would have no claim. The truth is that the loss which the Court will be investigating was certainly immediately caused in London by the actions of UBS London between 6-8 July 2015. On at least one analysis the damage occurred there. This in and of itself creates a point of connection.

146.
In my judgment these points demonstrate the requisite nexus and UBS's submission that in the circumstances it is artificial to describe the claim as arising out of the operations of UBS London effectively attempts to dodge a proper application of the test as expressed in the authorities.

147.
I reach a conclusion on this point without reference to the question of whether or not Mr Wong should be analysed as acting as agent for UBS London. However in my judgment it is certainly arguable that he was; and that would add further to the nexus.

148.
One may also test it this way: how relevant will UBS London's thoughts and actions be to the trial? The answer to this (which was not seriously disputed) is that there will be a need to investigate UBS London's conduct and intentions both (i) at the time of the representations and advice given by UBS and (ii) the events of 6-8 July 2015 and the loss resulting therefrom.

Conclusion

149.
I therefore conclude that the English court has jurisdiction to try these claims, in particular:

i)
Under Article 5(3) Lugano II, on the basis that London was the place where the harmful event occurred.

ii)
Under Article 5(5) Lugano II, on the basis that UBS London sufficiently and significantly participated in several elements of the causes of action forming the Claims.

150.
Accordingly UBS London's Application is dismissed and I declare that this Court has jurisdiction over the Claimants' claims.

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[1] I have omitted the words "goes out and" because of the VEB factor.