

Dispute Resolution  
Case Law Update  
Rosling King LLP



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### Background

The claim issued in December 2017 concerns an allegation of misappropriation of bank funds, totalling approximately US\$1.9 billion (the “**Funds**”). The claimant bank, a nationalised Ukrainian bank (the “**Bank**”), previously in private ownership, alleged that the first and the second defendants, Mr Igor Kolomoisky and Mr Gennadiy Bogolyubov (the “**First and Second Defendants**”), who were the Bank’s former majority shareholders with a significant degree of control over the Bank, misappropriated the Funds by authorising the Bank to enter into fraudulent loan agreements with borrowers. These borrowers, upon receipt of the loaned Funds, transferred the Funds to their suppliers (the “**Suppliers**”) under sham agreements. Crucially, the Suppliers, who were also defendants, were companies, incorporated either in England (“**English Domiciled Defendants**”) or the British Virgin Islands (“**BVI Defendants**”) over which the First and Second Defendants exercised significant control. At the time of the commencement of the claim, the First and Second Defendants were domiciled in Switzerland.

The latest development in this case concerns an appeal by the Bank against an earlier High Court judgment in which the Judge, Mr Justice Fancourt, ruled that in his interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007, otherwise known as the Lugano Convention (the “**Convention**”), the English Courts had no jurisdiction over the First and Second Defendants.

His justification for reaching this decision was that it appeared that the Bank’s sole objective for pursuing the claim was to artificially bring the First, the Second Defendant and the BVI Defendants within the jurisdiction of the English Courts.

The Judge further ruled that even if the Court had the requisite jurisdiction, proceedings against the First and Second Defendants should be stayed due to a concurrent defamation trial in Ukraine, which involved the same or very similar allegations as in the present case. Given the proximity of the parties, witnesses and evidence to the Ukrainian court system, the Judge stayed the English proceedings.

Having concluded that the English Court did not have jurisdiction over the First and the Second Defendants and that proceedings against English Domiciled Defendants should be stayed, the Court also stayed proceedings against the BVI Defendants as it concluded that, inevitably, a different forum would be better suited to hear the claims against them.

### The First Instance Decision

The Judge concluded that the Bank had deliberately and artificially issued proceedings against the English Domiciled Defendants for the sole purpose of relying on the Convention to then bring the First and Second Defendants within the jurisdiction of the English Courts. The benefit for the Bank, in the Judge’s eyes, was quite clear in that English courts offered “*substantial procedural advantages for the Bank, including the ability to obtain worldwide freezing orders ..., an extensive disclosure regime and cross-examination of witnesses at trial.*”

The Judge thought that the purported sole objective of the Bank was evidenced further when considering the impecuniosity of the English Domiciled Defendants. As a result he reached the



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conclusion that the Bank's chances of successful recovery of the Funds were slim. As such, the Judge decided that he could not allow the Bank to rely on the rights conferred by the Convention, thereby preventing the Bank from suing the First and Second Defendants on the sole basis that the claims were so closely connected that *"it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings."*

### The Court of Appeal Decision

The Court of Appeal allowed the Bank's appeal. In their ruling, Lord Justice Davis Richards, Lord Justice Flaux and Lord Justice Newey, extensively analysed the case law, including the European Court of Justice's jurisprudence. Following which they decided that the literal interpretation of the Convention was such that it was not intended for the Convention's provisions to stipulate that claimants could not issue proceedings against foreign-domiciled defendants if their sole object is to bring them within the jurisdiction of the English Courts. What is more important is the fact that there is a close connection between the domestic defendant and the foreign co-defendant, which in the present case was established.

Moreover, the Court stated that this approach would provide greater legal certainty and foreseeability, especially considering the fact that the First and Second Defendants were able to, according to the Court, quite reasonably foresee that proceedings would be instigated in the English courts given their close connection to the English Domiciled Defendants. Crucially the Court found that the Bank had additional reasons for bringing their claim, in particular subjecting the English Domiciled Defendants to the rigors of disclosure under English law.

The Court then considered whether it was appropriate to stay proceedings pending the Ukrainian defamation lawsuit. The Court of Appeal agreed with the earlier judgment that the Convention could be applied *"by analogy"* to proceedings involving a state that was not a party to the Convention such as the Ukraine. However the Court found that the Judge was nonetheless wrong in staying the proceedings as consolidation of the two claims was not available due to procedural obstacles and given the gravity and magnitude of the frauds committed, which were not at present denied by the Defendants. This in turn meant that it was *"entirely inappropriate to stay an English fraud claim in favour of Ukrainian defamation claims, in circumstances where the fraud claim involves ... fraud and money laundering on an epic scale."* It therefore followed that the previous ruling staying the English claim was erroneous and as such, the Judge was also wrong in holding that the claim against the BVI Defendants would be better suited for a different forum.

### Commentary

In their decision, the Court clarified the interpretation of the Convention, in particular, the sole object test. As a result, prospective claimants can be more confident that they will indeed be permitted to invoke the Convention rights to issue claims against otherwise unreachable defendants. This is particularly so in circumstances where the domestic defendants do not have the requisite financial means to meet any potential judgment and so joining other related foreign-domiciled defendants provides an attractive solution.

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Another important consideration is the desirability of instigating proceedings in English Courts with their robust and reliable procedure rules. It is interesting to note that the Court were willing to apply the Convention rights “*by analogy*” to parties whose countries of domicile are not signatories to the Convention itself. This effect of the Convention, intended to circumvent inconsistent judgments, will likely open up possibilities for litigants who may consider relying on the Convention against defendants from states not bound by the Convention.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.