

PRACTICAL LAW

DISPUTE RESOLUTION BLOG



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Implications of the judgment in PJSC Commercial Bank Privatbank v Kolomoisky

The Court of Appeal has recently delivered a significant judgment in the *Privatbank* case which touches on a number of interesting points of interpretation relating to the *Lugano Convention* and the *Brussels Recast Regulation*. Below, we consider some of the implications of this historic decision.

Rejection of sole object test

In interpreting Article 6(1) of Lugano (which mirrors Article 8 of Brussels Recast), the court ruled that even where a defendant was sued in a *jurisdiction* with the sole object of making it an “anchor defendant” to sue foreign defendants in that jurisdiction, this would not prevent the claimant from gaining the benefit of Article 6(1) (paragraph 102).

While at first blush the unequivocal terms in which the ruling is expressed may seem like a complete rejection of any consideration of the claimant’s motivations of suing the anchor defendant in a particular jurisdiction, it is worth noting that the ruling leaves open the possibility that these motivations will be subject to further examination where proceedings are abusive. Given the *obiter* views of Lord Briggs in *Vedanta Resources plc v Lungowe* which are cited by the court (paragraph 92), it is likely that courts will narrowly interpret what constitutes abuse for these purposes.

In this case, the court, quoting the *Cartel Damages*, *Freeport* and *Reische Montage* cases, cited a few examples of what would constitute abuse at paragraph 108:

- Collusive behaviour between claimant and anchor defendant.



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- Naming a fictitious person as anchor defendant.
- The deliberate commencement of proceedings against an anchor defendant in the knowledge that they were inadmissible.

Reflexive application of Article 28 of Lugano

Article 28 of Lugano permits a court to *stay proceedings* where related proceedings are pending in the courts of another member state. Lugano does not deal with a situation where related proceedings are pending in the courts of a non-member state. From a tactical perspective, this lacuna has allowed defendants to pursue parallel proceedings in non-member states as a way of exerting pressure on claimants. However, as a result of the court's ruling that, in principle, Article 28 could be applied "reflexively" to proceedings in a non-member state, this tactic will no longer be available. This will result in *costs* savings, greater certainty and fewer inconsistent judgments for claimants.

Under Lugano (Protocol No. 2), while courts are not bound by decisions of other member states or of the *European Court of Justice (ECJ)*, they are required to have due regard to the decisions of other member states. In a *no-deal Brexit* scenario, this judgment will provide some comfort that English proceedings (which will by then be regarded as "third country" proceedings) may be recognised by the courts of other Lugano states on a reflexive application of Article 28.

Related actions: "heard and determined together"

Under Article 28 of the Lugano Convention, proceedings are deemed related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

The court, pursuant to Article 34 of Brussels Recast and a reflexive application of Article 28 of Lugano, considered whether it was appropriate to exercise its discretion to stay English fraud proceedings in light of ongoing *defamation* proceedings in Ukraine.

Expert evidence suggested that the Ukrainian court hearing the defamation proceedings did not have the jurisdiction to hear the fraud claim and therefore the two actions could not be consolidated. The court refused to grant a stay and held that the unavailability of consolidation will usually be a compelling reason for refusing a stay.

In the recent case of *Euroeco Fuels (Poland) Ltd v Szczecin And Swinoujscie Seaports Authority SA and others*, the Court of Appeal cited this aspect of *Privatbank* with approval and gave further colour on the point (albeit in the context of Article 30 of Brussels Recast which mirrors Article 28 of Lugano). It noted that even if the two actions could not be consolidated, they will need to be tried by the same judge or panel of judges in the same court and that judgment will be given in both actions at the same time (paragraph 48) in order for them to meet the "heard and determined together" requirement of related actions.

Those asking the court to exercise its discretion to grant a stay in favour of related actions will, going forward, need to satisfy the court that the actions are able to be heard and determined together in a real sense. Given this point has historically been contentious, with varying first instance decisions on it, clarification will be welcomed by both claimants and defendants.

Brexit

This seminal decision on the Lugano Convention and the time at which it has been delivered forces one to step back and look at the English courts' role more broadly in developing the Brussels / Lugano jurisprudence. Post-Brexit, Britain will not be able to provide opinions to the ECJ on matters referred to it by national courts, but the Lugano Convention may offer an interesting back door for English courts to continue to influence this jurisprudence.

The UK government has professed interest in acceding to the Lugano Convention after the [exit date \(UK government position paper, July 2018\)](#). As noted above, Lugano states have a duty to “pay due account” to the principles laid down by the courts of other member states in relation to the Convention (Article 1 of Protocol No. 2 of Lugano). Given the substantial similarity between the provisions of the Lugano Convention and of Brussels Recast, courts frequently have regard to cases decided under either regime when grappling with questions of interpretation relating to either one of them. If the UK does accede to the Lugano Convention post-Brexit, decisions given by English courts on Lugano may continue to influence jurisprudence under the Brussels regime, whether by opening up the reflexive application of other provisions, further codifying the situations which constitute abuse of Article 6(1) of Lugano and Article 8(1) of Brussels Recast, or otherwise.
