MAYER | BROWN

Cross-border disputes

Forum/jurisdiction and parallel proceedings:

English Court of Appeal confirms Lugano rules can be applied "reflexively" to justify a stay in view of prior related proceedings pending in Ukraine

A. Summary

1. In *JSC Commercial Bank Privatbank v Kolomoisky and Ors* [2019] EWCA Civ 1708 ("***Privatbank***"), a Ukrainian bank had commenced English proceedings alleging fraudulent misappropriation of over US$1.9 billion against two Swiss individuals, three English companies and three BVI companies.

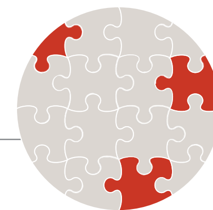
2. The English Court of Appeal decided that, in view of prior parallel proceedings pending in a non- "EU/ Lugano" country (in this case Ukraine), English Courts not only had the ability (depending on the circumstances) to stay English proceedings against:

   - EU-domiciled (in this case UK) Defendants - pursuant to the express entitlement to do so that had been introduced in the Brussels I Regulation when it was re-cast; and
   - non- "EU/Lugano" (in this case BVI) Defendants - as part of its *forum conveniens* discretion,

   but also those against (non-EU) Lugano-domiciled (in this case, Swiss) Defendants. That was so notwithstanding the absence of express wording in the 2007 Lugano Convention entitling them to do so (the wording included in Recast Brussels I not yet having been added).

3. It reached that decision on the basis of its determination that provisions in the Lugano Convention – which, on their face, only served to allocate jurisdiction as between the Courts of Lugano States – could be applied "reflexively", despite the *Owusu v Jackson* principle, so as to permit such a stay in favour of the Courts of a non-Lugano country.

4. The Court of Appeal further found that a discretion to stay the proceedings against the UK and Swiss Defendants in fact existed in this case since they were "related" to the Ukrainian (defamation) proceedings for the purposes of Brussels/Lugano - in that it would be "expedient" (which in its view meant "desirable" rather than "practicable" or "possible") for them to be heard and determined together to avoid the risk of irreconcilable judgments.



5. As it happened, the Court of Appeal decided that (contrary to the views of the first instance Judge) the discretion should not be exercised in the circumstances. That was primarily because the claims could not be consolidated with the Ukrainian proceedings and since it would be "entirely inappropriate" to stay such a serious fraud claim because of a defamation claim.
6. The most notable of these decisions, however, was that the discretion in respect of the proceedings against the (non-EU) Lugano-domiciled (Swiss) Defendants existed at all.
7. Strictly, that ruling concerned the "reflexive effect" of provisions:
   - under the 2007 Lugano Convention, rather than under Recast Brussels I; and
   - which related to parallel proceedings rather than exclusive jurisdiction clauses (albeit that the Court of Appeal said *obiter* that its views on Lugano applied, even more strongly, to the latter too).

   However, it nevertheless creates a tension with, and undermines, various aspects of the recent decision in *Gulf International Bank BSC v Aldwood* [2019], in which a first instance Judge had said that the provisions of Recast Brussels I could not be applied "reflexively" so as to justify a stay of proceedings against an EU-domiciled Defendant in view of an exclusive jurisdiction clause in favour of a non- "EU/ Lugano" country.

B. The basis of jurisdiction of the English Courts and the potential effect of the parallel proceedings in Ukraine

8. The English Courts in principle had jurisdiction in respect of the claims against:
   - three English companies under Article 4 of the Recast Brussels I Regulation ("**Recast Brussels I**")[1] since they were domiciled in the UK (an EU State);
   - the two Swiss individuals under Article 6(1) of the Lugano Convention of 2007 (the "**2007 Lugano Convention**")[2], since they were domiciled in Switzerland - a (non-EU) Lugano State[3] - and the claims against them were closely connected with the claims against the (EU/)Lugano Defendants which were being sued in the Courts of their domicile (the UK)[4]; and
   - three BVI companies, since permission had been obtained[5] to serve them out of the jurisdiction on the basis that they were "necessary or proper parties" to the claims against the other Defendants[6], there was a serious issue to be tried and England was the most appropriate forum or *forum conveniens* for the determination of the dispute[7].

1 Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
2 The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007.
3 Lugano States (i.e. those subject to the 2007 Lugano Convention) comprise the EU Member States (currently including the UK), plus Iceland, Norway and Switzerland. Thus the "non-EU" Lugano States comprise Iceland, Norway and Switzerland alone.
4 Since the Swiss Defendants were domiciled in a "non-EU" Lugano State, the English Court was obliged, in relation to the claims against them, to apply the 2007 Lugano Convention rather than Recast Brussels I in relation to the question of jurisdiction and the impact of the prior parallel Ukrainian proceedings.
5 Pursuant to CPR rules 6.36-6.37.
6 Under 6BPD para 3.1(3).
7 Since the BVI companies were not domiciled in either an EU or a (non-EU) Lugano State, neither Recast Brussels I nor the 2007 Lugano Convention applied in the circumstances at hand, in respect of the claims against them, in relation to the question of jurisdiction and the impact of the prior parallel Ukrainian proceedings, so the English Court therefore applied the common law rules to those issues.

9. A number of issues concerning "anchor-" and "co-" Defendants arose including:

   - whether the "sole purpose" of suing the UK Defendants was to enable the Swiss Defendants to be sued in the English Courts too;
   - if so, whether Article 6(1) of the 2007 Lugano Convention could be engaged in those circumstances so as to give jurisdiction against the Swiss Defendants;
   - whether permission to serve out in respect of the BVI Defendants should stand if the claims against the other Defendants did not proceed.

   Those issues are the subject of a separate Case Law Update in our Cross-border Disputes Series, and so they are not addressed here.

10. In addition however, there was an issue as to whether the English proceedings against each of the Defendants could/should be stayed in view of prior parallel proceedings pending in Ukraine (a non-"EU/Lugano" country).

11. Depending upon the circumstances, the English Courts in theory had the ability to order such a stay:

   - in respect of the EU-domiciled (UK) Defendants, pursuant to the express entitlement to do so that had been introduced in the Brussels I Regulation when it was re-cast[8]; and
   - in respect of the non- "EU/Lugano" (BVI) Defendants, as part of their *forum conveniens* discretion[9].

12. However, there was a question as to whether the English Courts were able to order a stay in respect of the claim against the (non-EU) Lugano-domiciled (Swiss) Defendants in circumstances in which the 2007 Lugano Convention (unlike Recast Brussels I) contained no express wording entitling them to do so.

13. The answer to that question would depend upon whether "reflexive effect" could be given to certain rules in the 2007 Lugano Convention[10] which, on their face, only served to allocate jurisdiction as between the Courts of Lugano States.

C. *Owusu* and the "reflexive effect" issues – a reminder

14. As explained in more detail in our Cross-Border Disputes Case Law Update on *Gulf International*[11]:

   - Pursuant to the principle in *Owusu v Jackson*[12], where the Courts of EU/Lugano States had jurisdiction under the Brussels/Lugano regime they had no discretion to decline jurisdiction or stay their proceedings in favour of the Courts of a non- "EU/Lugano" country on the basis that such non-"EU/Lugano" Courts were the more appropriate forum.

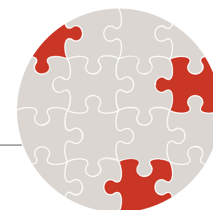
8 See Articles 33-34 of Recast Brussels I. Article 33 concerns proceedings involving the same cause of action and between the same parties, whereas Article 34 concerns "related" proceedings.

9 Per *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460 - see, for example, *MacShannon v Rockware Glass Ltd* [1978] A.C. 795; *The Abidin Daver* [1984] A.C. 398, 411-412; *Cleveland Museum of Art v Capricorn International SA* [1990] 2 Lloyd's Rep. 166.

10 In this case, Articles 27-30 concerning parallel proceedings, and specifically Article 28 regarding "related" proceedings.

11 *Gulf International Bank BSC v Sheik Badr Fahad Ibrahim Aldwood* [2019] EWHC 1666 (QB).

12 *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02); [2005] Q.B. 801, ECJ.



- However, it was the generally accepted view in England (at least before the Brussels I Regulation was re-cast) that, despite the *Owusu* principle, rules in Brussels/Lugano which on their face allocated jurisdiction as between EU/Lugano States could be given "reflexive effect" so as to oblige, or entitle, the Courts of an EU/Lugano country to decline jurisdiction, or stay their proceedings, in favour of the Courts of the non- "EU/Lugano" country where:
  - » the claim was of a particular (specified) nature such that there was a special connection with the non- "EU/Lugano" country (the "**nature of claim scenario**")[13]; or
  - » there was an exclusive choice of court agreement in favour of the non- "EU/Lugano" country (the "**exclusive jurisdiction clause scenario**")[14]; or
  - » there were prior-existing parallel equivalent or related proceedings pending in the Courts of the non- "EU/Lugano" country (the "**parallel proceedings scenario**")[15].
- When the Brussels I Regulation was re-cast, rules were added which expressly permitted the granting of a stay in the "parallel proceedings scenario" in certain instances[16]. However, nothing was added in respect of the other two scenarios.
- In the recent decision of *Gulf International*, the Judge was of the view that the rules in Recast Brussels I could not be applied reflexively so as to oblige or entitle the Courts of an EU State to decline jurisdiction or stay their proceedings in favour of the Courts of a non- "EU/Lugano" country in the "exclusive jurisdiction clause scenario".
- The Judge's view in *Gulf International* was partly based on:
  - » the fact that Recast Brussels I included express wording addressing the "parallel proceedings scenario" but not the "exclusive jurisdiction clause scenario" (nor the "nature of claim scenario"); and
  - » the fact that one of the considerations, when considering whether to exercise the discretion in the "parallel proceedings scenario", was stated to be the question of whether the non- "EU/Lugano" country would have exclusive jurisdiction were it a Member State[17], which suggested that such a circumstance would not have justified a stay in its own right.
- However, he also considered that:
  - » *Owusu* had excluded the possibility of a discretionary stay under national rules, even if applied in such a way as to be consistent with the broad aims of Recast Brussels I;
  - » English case law to the contrary had been based on a mistaken interpretation of a case called *Coreck*[18] and the Schlosser Report that it referenced, and had been decided in the context of the pre-recast wording;
  - » it was important that there was continuity as between incarnations of the Regulation/Conventions.

13 I.e. by means of a "reflexive" application of Article 22 of the Brussels I Regulation in its pre-recast form (now Article 24 in Recast Brussels I), or of Article 22 of the 2007 Lugano Convention.

14 I.e. by means of a "reflexive" application of Article 23 of the Brussels I Regulation in its pre-recast form (now Article 25 in Recast Brussels I), or of Article 23 of the 2007 Lugano Convention.

15 I.e. by means of a "reflexive" application of Articles 27-30 of the Brussels I Regulation in its pre-recast form (now Articles 29-32 in Recast Brussels I), or of Articles 27-30 of the 2007 Lugano Convention.

16 Articles 33-34 of Recast Brussels I.

17 Recital (24) of Recast Brussels I.

18 *Coreck Maritime GmbH v Handelsveem BV* (C-387/98); [2000] ECR I-9337.

D. The issues for the Court of Appeal

15. In essence, the issues for determination by the Court of Appeal in *Privatbank* in relation to the Defendants' stay applications were the following:

- Under the 2007 Lugano Convention, could Article 28 of the 2007 Lugano Convention be applied "reflexively" so as to give the English Courts a discretion to stay proceedings against a (non-EU) Lugano-domiciled Defendant in the "parallel proceedings scenario"?
- Were the English proceedings "related" to the Ukrainian proceedings for the purposes of Article 34 of Recast Brussels I and any reflexive application of Article 28 of the 2007 Lugano Convention in that it was "*expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*"? In particular, in order to meet the test under those provisions:
  - » was it a requirement that the English proceedings could in fact be consolidated with the Ukrainian proceedings; or
  - » was it merely a requirement that such consolidation would be desirable?[19]
- Should any discretion to stay the proceedings against UK Defendants, the Swiss Defendants and the BVI Defendants (under Article 34 of Recast Brussels I, via a "reflexive" application of Article 28 of the 2007 Lugano Convention, and under the common law respectively) be exercised in the circumstances at hand?

E. The decision of the Court of Appeal

16. The Court of Appeal made the following unanimous decisions on the issues identified above:

The "reflexive effect" issue

17. In agreement with the first instance Judge, the Court of Appeal ruled that Article 28 could be applied "reflexively" so as to give the English Courts a discretion to stay proceedings against a Lugano-domiciled Defendant in the parallel proceedings scenario[20].

18. Importantly, the Court of Appeal also said (*obiter*) that Articles 22 and 23 of the 2007 Lugano Convention could also be applied "reflexively" so as to give the English Courts a discretion to stay proceedings against a Lugano-domiciled Defendant in a "nature of claim scenario"[21] and an "exclusive jurisdiction clause scenario"[22] respectively.

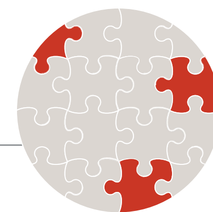
---

19 As noted by the Court of Appeal, there had been conflicting first instance decisions on this issue.

20 As noted by the Court of Appeal, its decision in this respect was consistent with the analysis of Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), but ran contrary to the decision of Barling J in *Catalyst Investment Group Ltd v Lewinsohn* [2009] EWHC 1964 (Ch) - which had been criticised, at least implicitly, by the Court of Appeal in *Lucasfilm v Ainsworth* [2009] EWCA Civ 1328, and not followed in *JKN v JCN* [2010] EWHC 843 (Fam).

21 As noted by the Court of Appeal, its views in this respect were consistent with the decision of Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm), the *obiter* views expressed by the Court of Appeal in *Masri v Consolidated Contractors International* [2008] EWCA Civ 303 and the view of Floyd LJ in *Huawei Technologies Co Ltd v Conversant Wireless Licencing S.A.R.L* [2019] EWCA Civ 38 (although the point had been conceded in that case).

22 As noted by the Court of Appeal, its views in this respect were consistent with the *obiter* views expressed by the Court of Appeal in *Masri v Consolidated Contractors International* [2008] EWCA Civ 303. It is also consistent with the decisions in *Winnetka Trading Corp v Julius Baer International Ltd and Anor* [2008] EWHC 3146 (Ch) and *Plaza BV v The Law Debenture Trust Corporation PLC* [2015] EWHC 43 (Ch).



19. Indeed, it suggested by implication that a reflexive application of the rules in those scenarios was even more justified than a reflexive application of the rules in a "parallel proceedings scenario". Thus:

- it commented that Counsel for the bank:

  "*… would, if necessary, go so far as to submit that reflexive effect could not be given either to article 22 of the Lugano Convention (specific cases of exclusive jurisdiction)* [i.e. because of the nature of the claim] *or article 23 (exclusive jurisdiction clauses) though he contended that it was not necessary to go that far for his argument in relation to article 28* [parallel proceedings] *to be correct.*" [23] (emphasis added); and

- it said that, as Counsel for the bank "*was constrained to recognise*", the "*logical consequence of the submission*" that "*the application of articles of the Conventions by analogy is impermissible because each of the relevant Conventions is an exclusive code*" was that:

  "*even article 22 (the various cases of exclusive jurisdiction) and article 23 (exclusive jurisdiction clauses) could not have reflexive effect*"[24] (emphasis added).

20. Importantly, the Court of Appeal also said that:

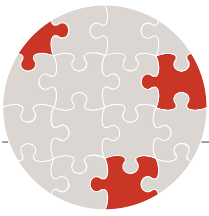
  "*We do not consider that there is any significance in the fact that article 34 of the Recast Brussels Regulation now specifically addresses pending proceedings in a third state, whereas the Lugano Convention continues not to do so. Not only is there nothing to indicate why the amendment to what is now article 34 of the Recast Brussels I Regulation was made …, but it simply does not follow that, prior to the amendment, there could not have been a reflexive application of what was then article 28 of Brussels I or article 28 of the Lugano Convention to the proceedings in a third state. …* [A]*mendments to the wording of European Conventions are often clarifications of matters previously addressed in the case law. We would also not read anything into the fact that the Steering Committee did not make any recommendations as to the amendment of the Lugano Convention, as there is no material available from which we could deduce what the rationale was for its position.*"[25]

The meaning of "related" and, in particular, "expedient" in the context of consolidation

21. The Court of Appeal decided that, for the purposes of triggering Article 34 of Recast Brussels I (in respect of the UK Defendants) and a "reflexive" application of Article 28 of the 2007 Lugano Convention (in respect of the Swiss Defendants), it was only a requirement that consolidation with the Ukrainian proceedings was "desirable", and not that it was in fact "practicable" or "possible".

22. As a consequence, it ruled (in agreement with the first instance Judge) that the English proceedings were "related" to the Ukrainian proceedings for the purposes of those provisions, and that it therefore did have a discretion to stay the English proceedings against the UK and Swiss Defendants.

23 See para [174].
24 See para [179].
25 See para [180].



The exercise of any discretion in the circumstances

23. The Court of Appeal exercised afresh its discretions (under Article 34 of Recast Brussels I, and under Article 28 of the 2007 Lugano Convention applied "reflexively") since the first instance Judge had erred in a number of ways when he had purported to do so. It decided (contrary to the view of the first instance Judge) that, in the circumstances at hand, the discretion to stay the proceedings should not be exercised. That was primarily because:

- the claims could not be consolidated with the Ukrainian proceedings (since they would have to be brought in the Ukrainian Commercial Court rather than the Court in which the defamation claims were proceeding); and
- in the Court of Appeal's view:

  "… it would be entirely inappropriate to stay an English fraud claim in favour of Ukrainian defamation claims, in circumstances where the fraud claim involves what the judge found was fraud and money laundering on an "epic scale" and where … the Bank had a good arguable case to recover the pleaded sum of US$1.9 billion.".

24. Since the claims against the UK and Swiss Defendants would proceed in England, the Court of Appeal found (also contrary to the decision of the first instance Judge) that the BVI Defendants were necessary or proper parties to those claims and thus the proceedings against the BVI Defendants should also proceed in England.

F. The effect of the decision and its practical and commercial implications

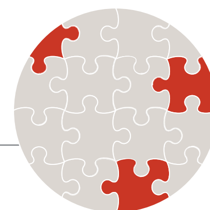
25. The Court of Appeal decision resolves the conflicting case law on the meaning of "expediency" (in the context of consolidation) when assessing whether parallel proceedings are "related" under the Brussels/Lugano regimes.

26. Even more importantly however, it clarifies that:

- Articles 27-30 of the 2007 Lugano Convention can be given "reflexive effect" in a "parallel proceedings scenario" so as to give the Courts of a Lugano State a discretion to stay proceedings in favour of a non-Lugano country; and
- that is so regardless of the fact that express wording has since been added into the recast version of the Brussels I Regulation to address such a scenario but such wording has not yet been added to the 2007 Lugano Convention.

27. The Judgment also confirms (albeit *obiter*) the various previous decisions[26] that Articles 22 and 23 of the 2007 Lugano Convention can also be applied "reflexively" in similar fashion in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario" respectively.

26 Albeit that those decisions were made in respect of equivalent wording in the pre-recast Brussels I Regulation, rather than the 2007 Lugano Convention itself.



28. Further, and importantly, whilst the *ratio* concerned the "reflexive effect" of provisions:

    - under the 2007 Lugano Convention, rather than under Recast Brussels I; and
    - relating to parallel proceedings rather than exclusive jurisdiction clauses,

    the decision, together with the reasoning and *obiter* comments in the Judgment, nevertheless creates a tension with, and undermines, various aspects of the recent first instance decision in *Gulf International* in which the Judge decided that Article 25 of Recast Brussels I could not be applied reflexively in an "exclusive jurisdiction clause scenario"[27]. That is for a number of reasons.

29. First, the Judge in *Gulf International* appeared to be of the view that none of the provisions of Brussels/Lugano, even under the pre-recast wording, had or could be given "reflexive effect". Such a view is now clearly contrary to both the *ratio* of the Court of Appeal's decision in *Privatbank* in relation to the "parallel proceedings scenario" and also its *obiter* comments in respect of the "nature of claim scenario" and the "exclusive jurisdiction clause scenario".

30. Secondly, the specific points made by the Judge in *Gulf International* on the effect of *Owusu* and the interpretation of *Coreck* and the Schlosser Report[28] would apply equally to an interpretation of the 2007 Lugano Convention, and they are thus at odds with the Court of Appeal's reasoning and *obiter* views as well as the *ratio* of *Privatbank* too.

31. Thirdly, even if the Judge's views on the effect of Recast Brussels I in *Gulf International* on Recast Brussels I itself were instead accepted on the basis of his points of interpretation on the recast wording alone[29], that would still be problematic in view of the Court of Appeal's *obiter* view that the pre-recast wording permitted "reflexive" application of the rules in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario". That is because:

    - it would mean that the addition of the express provisions in Articles 33-34 of Recast Brussels I not only replaced the previously-existing "reflexive effect" of provisions in the "parallel proceedings scenario" with express provisions to address that scenario more specifically[30], but also had the dramatic effect of simply removing the previously-existing "reflexive effect" of provisions in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario"; and
    - that would not only be bizarre in view of the absence of any express indication that the addition was to have this effect, but it would also undermine the desire for continuity as between incarnations of the Regulation/Conventions, the importance of which the Judge himself emphasised[31].

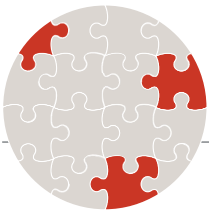
27 Although the Judgment in *Gulf International* was handed down on 1 July 2019, and the appeal in *Privatbank* was heard on 22-25 July 2019, it does not appear that *Gulf International* was cited to the Court of Appeal – it is not referenced in its Judgment.

28 See the first two sub-bullets within the sixth bullet point in paragraph 14 above.

29 See the fifth bullet point in paragraph 14 above.

30 The Court in *B.B. Energy (Gulf) DMCC v Amoudi and Ors* [2018] EWHC 2595 (Comm) at [23] considered (sensibly) that the "reflexive effect", if any, of provisions in the pre-recast wording in a "parallel proceedings scenario" was replaced by the express wording (Articles 33-34) that was inserted to address such a scenario such that no other "reflexive effect" discretion remained in respect of such a scenario.

31 The Judge considered that his ruling that under Recast Brussels I there was no discretion to stay in an "exclusive jurisdiction clause scenario" accorded with the desire for such continuity. However, that would only be so if the pre-recast provisions have no reflexive effect (at least in a "nature of claim scenario" or an "exclusive jurisdiction clause scenario"), and the Court of Appeal has now expressed the view (subsequent to the changes having been made to Recast Brussels I) that such pre-recast provisions can be applied "reflexively".



32. Fourthly, it is apparent from the Judgment in *Privatbank* that the Court of Appeal considered that the justification for a discretion to stay (under the 2007 Lugano Convention) was even greater in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario" than it was in a "parallel proceedings scenario". In those circumstances, it would be curious indeed if the effect of the recast wording was to retain such a discretion in the latter scenario but remove it in the other two scenarios.

33. There are four potential ways to "square this circle". Either:

- none of the pre-recast provisions could be applied "reflexively" so as to justify a stay in any of the three scenarios, and Recast Brussels I simply introduced an express discretion to stay in limited circumstances in a "parallel proceedings scenario"; or
- the pre-recast provisions could be applied "reflexively" only to permit a stay in a "parallel proceedings scenario", and Recast Brussels I simply replaced that with express provisions setting out precisely when that might be possible and the criteria to be applied; or
- the pre-recast provisions could be applied "reflexively" but only in a "nature of claim scenario" or an "exclusive jurisdiction clause scenario", and Recast Brussels I added a further express ability to stay in limited circumstances in a "parallel proceedings scenario"; or
- the pre-recast provisions could be applied "reflexively" in all three scenarios but, since the circumstances in which that was so in a "parallel proceedings scenario" were unclear, Recast Brussels I replaced the "reflexive effect" of the rules in that scenario with express provisions setting out precisely when that might be possible and the criteria to be applied.

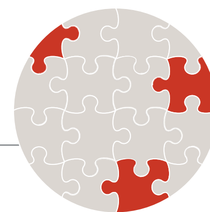
34. The first of these options reflect the apparent views of the Judge in *Gulf International*, but its problems are twofold:

- first, it now conflicts with the *ratio* of the Court of Appeal decision in *Privatbank*, as well as with all the previous case law on the pre-recast wording in respect of the "nature of claim scenario" and the "exclusive jurisdiction clause scenario", and with most of the previous case law on the pre-recast wording in respect of the "parallel proceedings scenario";
- secondly, it is at odds with the views of the Court of Appeal and many others[32] that the justification for a discretion to stay is even greater in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario" than it is in a "parallel proceedings scenario".

35. The second option conflicts with the *obiter* views of the Court of Appeal in *Privatbank*, with the previous case law on the pre-recast wording in respect of the "nature of claim scenario" and the "exclusive jurisdiction clause scenario" and also with the idea that the ability to stay is more justified in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario" than in a "parallel proceedings scenario".

36. The third option has some attraction, including because it enables a stay to be granted in a "nature of claim scenario" and an "exclusive jurisdiction clause scenario" under both the pre-recast and recast wording. However, it conflicts with the *ratio* of the Court of Appeal decision in *Privatbank* (as well as the Judge's decision in *Gulf International*).

32 See, for example, paragraph 12-021 of the 15th Edition of Dicey, Morris & Collins – "The Conflict of Laws".



37. The fourth option is also attractive. It enables a stay to be granted in all three scenarios under both the pre-recast and recast wording and also has the added benefit of according with the Court of Appeal's decision in *Privatbank* (and with the decision of the Judge in *B.B. Energy*[33]). It would also follow (as it also would from the third option) that *Gulf International* was wrongly decided, and that would avoid the various and numerous difficulties that would flow from its application[34].

38. However, there remain three problems with this fourth option (which apply equally to the third option too)[35]:

   - first, as the Judge in *Gulf International* highlighted, it is difficult to square this conclusion with the wording of Recast Brussels I itself (including Recital (24));
   - secondly, it remains difficult to nail down a precise legal route for establishing the existence of any discretion (albeit that this did not deter the Court of Appeal);
   - thirdly, it is difficult to ascertain how a discretion facilitated by a "reflexive" application of the provisions should operate in practice.

39. As a consequence, there is still much uncertainty in respect of these issues.

40. It remains the case, therefore, that the best way to resolve matters, for the benefit of all EU/Lugano States, would probably be to amend Recast Brussels I and the 2007 Lugano Convention further by the introduction of express rules which are certain, predictable and uniform (albeit that they envisage the exercise of discretions)[36].

41. In the meantime, such issues are likely to arise again. They may well have to be resolved in the Court of Appeal or the Supreme Court[37] and/or by means of a reference to the Court of Justice of the EU.

November 2019

33 See footnote 30 above.

34 See paragraphs 5-6, 48-52, 55 and 60-61 of our previous Case Law Alert in the Cross-Border Disputes series on the *Gulf International* decision.

35 See paragraphs 34 and 53-54 of our previous Case Law Alert in the Cross-Border Disputes series on the *Gulf International* decision.

36 See paragraph 63 of our previous Case Law Alert in the Cross-Border Disputes series on the *Gulf International* decision.

37 It is currently unclear whether there is any possibility of an appeal to the Supreme Court in *Privatbank*.

Daniel Hart

Counsel
Commercial Litigation, International Arbitration and Dispute Resolution

Direct Line: +44 20 3130 3219
Email: dhart@mayerbrown.com

Sam Prentki

Senior Associate
Commercial Litigation, International Arbitration and Dispute Resolution

Direct Line: +44 20 3130 3342
Email: sprentki@mayerbrown.com

Mayer Brown International LLP

201 Bishopsgate
London EC2M 3AF

www.mayerbrown.com

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2019 Mayer Brown. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.