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Commercial Litigation

April 2015

Asymmetrical Jurisdiction Clauses: Where Are We Heading?



On 25 March 2015, France's highest court, the *Cour de cassation*¹, once again ruled against the validity of a contractual asymmetrical jurisdiction clause, this time on the basis that it was contrary to Article 23 of the 2007 Lugano Convention². Asymmetrical jurisdiction clauses, also known as "one-sided"; "one-way" or unilateral option clauses, are clauses in which one party can bring proceedings in one jurisdiction only, whilst one or more other contracting parties have the option to bring proceedings in other jurisdictions. Given their common use in certain industries, such as the banking and finance sectors, this decision, as well as the *Cour de cassation's* earlier *Rothschild*³ decision, which found a similar clause, in the context of the Brussels Convention, to be invalid, merits significant attention. It is also worth looking at the position in a more global context in which case one sees how uncertain the situation is.

Recent case of the *Cour de cassation*

This decision relates to the application of asymmetrical jurisdiction clauses within the scope of Article 23 of the 2007 Lugano Convention⁴.

In this case, the *forum* selection clause contained in the contracts concluded between a French company and a Swiss bank provided that potential disputes between the company and the bank shall be subject to the exclusive jurisdiction of the Courts of Zurich or the Court having jurisdiction over the branch of the bank where the business relationship was established, with the bank reserving the right to commence proceedings before "any other court of competent jurisdiction". In other terms, the clause required disputes to be submitted to the exclusive jurisdiction of the Courts of Zurich, but reserved the bank alone the right to bring proceedings elsewhere. In spite of this clause, the French company initiated proceedings before a French court against both the Swiss bank and a British company that participated in the business funding. The Swiss bank argued that the French Court did not have jurisdiction and the Paris Court of Appeal agreed.

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¹ First Civil Chamber of the Cour de Cassation, 25 March 2015, Case N° 13-27264.

² Lugano Convention of 21 December 2007 on Jurisdiction and the recognition of judgments in civil and commercial matters.

³ First Civil Chamber of the Cour de Cassation, 26 September 2012, Case N° 11-26.022, *Mme 'X' v. Banque Privée Edmond de Rothschild Europe*. See [here](#) for decision.

⁴ Art. 23(1) provides, in relevant parts, that: "If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

The *Cour de cassation*, however, reversed the decision of the Paris Court of Appeal⁵, holding that a clause allowing only one party to file a claim before any other court of competent jurisdiction than the designated court does not respect the objective of Article 23 of the 2007 Lugano Convention – that is of predictability and legal certainty – since it does not justify the other court’s jurisdiction by means of “*objective elements*”.

The decision applies earlier cases of the European Court of Justice⁶ which deal with “*objective elements*” and the necessity for predictability and legal certainty under Article 17 of the 1968 Brussels Convention⁷ and Article 23 of the 2000 Brussels I Regulation⁸. Both Articles are similar to Article 23 of the 2007 Lugano Convention.

Regarding the notion of “*objective elements*”, the European Court of Justice⁹ considers that it is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case. Hence, this implies an *in concreto* analysis of the clause.

It is also worth noting that the new Article 25 of the recast Brussels I Regulation does not depart from Article 23 of the 2000 Brussels I Regulation in that regard¹⁰. Thus, the principles that the *Cour de cassation* has laid down for the application of asymmetrical jurisdiction will likely also apply within the scope of new Article 25 of the recast Brussels I Regulation.

The decision also supports the *Rothschild* case¹¹. The *Cour de cassation*, unlike the *Rothschild* case however, did not need to refer to the French theory of potestative clauses as it based its reasoning on the necessity of “*objective elements*” for allowing another court’s jurisdiction¹². Hence, this latest decision will

likely find greater acceptance among commentators (whether academics or practitioners) than the *Rothschild* decision¹³ which, as seen below, has been subject to much criticism.

The *Rothschild* decision

The Paris *Cour de cassation* decision of September 2012 (*Rothschild*) was the forerunner to the recent March *Cour de cassation* decision by striking down an asymmetrical jurisdiction clause which was governed by Article 23 of the Brussels I Regulation, going against earlier case law.

The case involved a French national and resident of Spain (Mrs X), who deposited a significant sum of money with a bank of the Rothschild group in Luxembourg under an agreement. The relevant jurisdiction clause provided that: “*The relations between the bank and the client are subject to the laws of Luxembourg. Any dispute between the client and the bank will be subject to the exclusive jurisdiction of the courts of Luxembourg. Notwithstanding the above, the bank reserves the right to start proceedings in the client’s place of domicile or before any other competent court.*”¹⁴ Mrs X commenced proceedings against the bank in France on the basis that having joined a third party who was domiciled in France to the proceedings, she was entitled to do so. The bank objected to the French courts hearing the case in breach of the jurisdiction clause. The clause was found to be invalid by the French courts both at first instance and on appeal.

The *Cour de cassation* dismissed the appeal, ruling that the clause was invalid. It applied the following two-step reasoning:

- First, the *Cour de cassation* held that the bank was not effectively bound by the clause as it had the right to disregard it. It was thus void for being “*potestative*”, i.e. discretionary. This was an implicit reference to the French law of obligations which provides that obligations conditional upon an event that one party totally controls is void¹⁵.

5 Paris Court of Appeal, 10 September 2013.

6 ECJ, 3 July 1997, C-269/95, ECJ, 9 November 2000, C-387/98.

7 Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

8 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

9 ECJ, 9 November 2000, C-387/98.

10 Council Regulation (EC) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

11 First Civil Chamber of the Cour de Cassation, 26 September 2012, Case N° 11-26.022, *Mme 'X' v. Banque Privée Edmond de Rothschild Europe*. See [here](#) for decision.

12 The decision is available [here](#).

13 See, *Dalloz Actualité, Clause attributive de juridiction et Convention de Lugano de 2007, François Mélin, 16 avril 2015*.

14 Author’s translation.

15 Articles 1170 and 1174 of the French Civil Code.

- The *Cour de cassation* also found that such “potestative” clauses contradict the rationale and purpose of Article 23 of the Brussels 1 Regulation, that being of finality.

This decision has been heavily criticised, essentially for there not having been a referral to the European Court of Justice, for going against the principle of freedom of contract, for ignoring the fact that the Brussels I Regulation allows such clauses and the implicit application of French law which was not the governing law. The Paris Court of Appeal had declared that this type of clause is in general terms valid but considered this clause too broad since it allowed the bank to discretionary select whatever jurisdiction it wishes. The *Cour de cassation*, however, focused on the “potestative” nature of the clause, thereby ruling that the clause was invalid¹⁶. This was notwithstanding the fact that such French law concept was neither raised by the Court of Appeal nor the parties themselves. The finding also goes against an earlier French *Cour de cassation* decision in which it was held that where the parties’ common intention was to provide only one of them with the right to choose whether to litigate or arbitrate, such a clause was not objectionable¹⁷.

Other jurisdictions

The doubt cast by these two decisions of France’s highest court on asymmetrical jurisdiction clauses stands in contrast to the steady position in common law countries to accept such clauses, such as the United Kingdom,¹⁸ the United States¹⁹ and Australia,²⁰ as well as in some civil law countries like Spain²¹ and Italy²². It does though follow the trend set by national court decisions in Bulgaria,²³ Russia,²⁴ Poland²⁵ and China²⁶ that have struck down asymmetrical clauses on grounds of unconscionability.

Practical consequences

Given the current position not only in France but in other jurisdictions, parties need to carefully consider whether to use asymmetrical jurisdiction clauses in their contracts and, if so, to pay particular attention to their drafting. Parties with existing asymmetrical jurisdiction clauses should be aware of the risk of enforcement challenges in some jurisdictions to judgments and arbitral awards. A referral to the European Court of Justice would be a welcome way of obtaining clarification on this issue.

16 The French law concept of “potestativité” relates to a situation where performance of a contract is made subject to the occurrence of a condition precedent entirely within the power of only one of the contracting parties to cause to occur or to prevent. See Art. 1170 of the French Civil Code.

17 See, e.g., First Civil Chamber of the Cour de Cassation, 15 May 1974, Case N° 72-14.706, *Société Sicaly v. Société Grasso Stacon NV*. See also, First Civil Chamber of the Cour de Cassation, 4 December 1990, Case N° 89-16.047, *Société Edmond Coignet v. COMIT*.

18 See the following English High Court decisions: *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2005] 1 Lloyd’s Rep 509; *Law Debenture Trust Corporation plc v. Elektrim Finance BV and others* [2005] EWHC 1412; and *Mauritius Commercial Bank v. Hestia Holdings Limited and another* [2013] EWHC 1328 (Comm).

19 See e.g., *M.A. Mortenson Co. v. Saunders Concrete Co., Inc.*, 676 F.3d 1153, 1158 (8th Cir. 2012); *Sablowsky v. Edward S. Gordon Co.*, 535 N.E.2d 643 (N.Y. 1989); *Kalman Floor Co. v. Jos. L. Muscarelle*, 481 A.2d 553 (N.J. Super. 1984); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, 656 P.2d 1184 (Alas. 1983).

20 See *PMT Partners Pty. Ltd. (In Liq.) v. Australian National Parks & Wildlife Service* [1995] H.C.A. 36.

21 See Provincial Court of Appeal, Madrid, 18 October 2013, *Camimalaga S.A.U. v. DAF Vehiculos Industriales, S.A.*

22 See Corte di Cassazione, 22 October 1970; Corte di Cassazione, 11 April 2012, *Grinka in liquidazione v. Intesa San Paolo, Simest, HSBS*, Case N° 5705; Corte D’Appello di Milano, 22 September 2011, *Sportal Italia v. Microsoft Corp.*

23 See, Bulgarian Supreme Court, 2 September 2011, Judgment No. 71 in commercial case No. 1193/2010.

24 See, e.g., Supreme Arbitrazh Court of the Russian Federation, 19 June 2012, Case No. A40-49223/11-112-401, *CJSC Russian Telephone Company v. Sony Ericsson Mobil Communications Rus LLC*, which actually goes against Russia’s earlier tolerance of such clauses.

25 See Supreme Court of Poland, 19 October 2012, Case N° V CSK 503/11; Supreme Court of Poland, 24 November 2010, Case N° II CSK 291/10.

26 See e.g. Decision of Beijing Higher People’s Court, 1999.