Cross-border issues and disputes: Jurisdiction, forum selection and parallel proceedings

French Supreme Court decides that a jurisdiction clause providing for “one-way” exclusivity is invalid under Article 23 of the Brussels I Regulation

The French Supreme Court has ruled that a jurisdiction clause providing for exclusivity for the benefit of one party only is contrary to the object and purpose of Article 23 of the Brussels I Regulation, and is therefore invalid (Ms “X” v Banque Privée Edmond de Rothschild, No 11-26.022; 26 September 2012).

The decision will be of considerable concern to commercial entities – and in particular to banks. Even if the Court of Justice of the EU ultimately disagrees on the issue, it raises the prospect of uncertainty and confusion in the meantime, throughout EU and Lugano States.

Summary top tips on jurisdiction clauses providing for “one-way” exclusivity:

• When drafting, consider whether such a clause will be upheld - not only by the chosen court, but also by other courts in which proceedings might be commenced or which might refuse to enforce a judgment of the selected court. If they might not consider the clause to be valid, it may be better to make it exclusive for both parties.

• Ensure that your preferred court within EU/Lugano is “first seised” of any dispute which is subject to such a clause (especially if there is a French nexus). Currently, it will be that court which will determine the validity of the clause – and some States (e.g. the UK) are more likely to uphold it than others.

The scenario:

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The parties:

Ms “X” (French national; Spanish resident) v. (1) Compagnie Financière Edmund de Rothschild (French) (2) Banque Privée Edmund de Rothschild Europe (Luxembourg)

Nature of proceedings: Contractual
Jurisdiction clause: Luxembourg courts – exclusive for the benefit of the Luxembourg bank only
Alternative jurisdiction: Another EU Member State
Parallel proceedings?: No (French courts “first seised”)
The issue:

1. Ms “X” (a French national and resident of Spain) had opened an account with a Luxembourg bank via its French sister company. When the account failed to yield expected returns, she sued both the French and Luxembourg banks in the French courts.

2. However, there was a Luxembourg jurisdiction clause in the contractual documentation with the Luxembourg bank. Under its terms, although the bank remained able to sue elsewhere, Ms “X” could not. Its precise wording was as follows:

   “(p)otential disputes between the client and the bank shall be submitted to the exclusive jurisdiction of the Luxembourg courts. The bank reserves the right to bring its claim before the courts of the client’s domicile or any other competent court should it not make use of the clause provided for in the previous sentence.”

3. Under the Brussels I Regulation (“Brussels I”), the French courts were able to hear the claim against the French bank because it was domiciled in France. Since the Luxembourg bank was a joint defendant, the French courts would have jurisdiction over the claim against it too, but only if the jurisdiction clause failed to confer exclusive jurisdiction on the Luxembourg courts.

4. The issue for the French courts was therefore whether the Luxembourg jurisdiction clause was valid - in which case they would have to decline jurisdiction in favour of Luxembourg, or invalid - in which case they could hear the claim.

5. The clause was found to be invalid by the French courts both at first instance and on appeal. Whilst the French Court of Appeal found that one-way jurisdiction clauses are in principle valid, it considered this clause too broad – since it permitted the Luxembourg bank to sue in “any other competent court”. On a further appeal, the issue came before the “Cour de Cassation” (the French Supreme Court).

The decision:

6. The French Supreme Court dismissed the appeal, ruling that the clause was invalid and therefore dismissing the Luxembourg bank’s application to contest jurisdiction.

7. Its reasoning was as follows:

   (a) Since the clause was, in effect, only binding on Ms X, it was “potestative”. (*Potestativité* is a French concept, derived from legislation concerning conditions precedent - a “potestative” condition making the fulfilment of the agreement dependent upon an event in the control of one of the parties.)

   (b) Such a clause was in conflict with the object and purpose of jurisdiction clauses as set out in Article 23 of Brussels I, and therefore invalid.

8. Importantly, the French Supreme Court did not just hold invalid (1) that part of the clause which gave the Luxembourg bank the option to sue in any other competent court, or (2) the portion preventing Ms X from so doing. Instead, it decided that the jurisdiction clause was invalid in its entirety.

9. Following that logic, neither party could have relied on the clause as a basis for commencing proceedings in Luxembourg instead, although Ms X at least could have done so on other grounds.

10. Taking the approach of the French Supreme Court further, presumably its ruling also means that the French courts would also consider that they were unable to take jurisdiction on the basis of French clauses like these which purported to confer jurisdiction on them.

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1 Article 2.
2 Article 6.1.
3 Article 23 – such a clause would override the operation of Article 6.1.
4 On the basis that the bank was domiciled in Luxembourg - Article 2.
**Comment:**

**Basis of the decision**

11. The ruling is curious for a number of reasons:

   (a) Although the decision concerned the interpretation of an autonomous EU provision, it was made using a domestic French law concept.

   (b) The decision runs contrary to the key principle of freedom of contract. Recital (14) of Brussels I itself expressly states that "the autonomy of the parties ... must be respected", save in limited circumstances which did not arise here.  

   (c) The decision apparently conflicts directly with the express terms of the Brussels Convention (the predecessor to Brussels I). The penultimate paragraph of Article 17 of the Brussels Convention expressly stated:

   "If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention."

   The ability of the parties legitimately to make express provision to this effect is further bolstered by a related ruling of the (then) European Court of Justice that, for the purposes of the penultimate paragraph of Article 17, such one-way exclusivity could not be inferred from certain circumstances.

   (d) Although equivalent wording does not also appear in Article 23 of Brussels I, there is a simple explanation:

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5 Brussels I Articles 8-14 (matters relating to insurance), 18-21 (individual contracts of employment) and 22 (exclusive jurisdiction) were irrelevant, and Articles 15-17 of Brussels I (consumer contracts) did not apply.

6 The equivalent of Article 23 of Brussels I.

7 This wording was mirrored in Article 17(5) of the 1988 Lugano Convention.


9 This wording does not appear in the new Lugano Convention of 2007 either – which instead mirrors the wording in Brussels I.

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12. In its decision, the French Supreme Court stated:

   "... given that the Court of Appeal noted that the clause, according to which the bank reserved the right to sue at Ms X’s domicile or ‘before any other competent court’, was, in reality, only binding upon Ms X, who was the only one bound to apply to the Luxembourg courts, the Court of Appeal accurately deduced that the clause was ‘potestative’ for the bank, so that it was in conflict with the object and purpose of a choice of jurisdiction clause contemplated under article 23 of the Brussels I Regulation."

13. On its face, this suggests that the French Supreme Court considered that clauses providing for exclusivity for the benefit of one party only are, as a matter of principle, “potestative” and thus invalid.

14. Nevertheless, it is possible that it was merely the particular wording of the clause in this case which fell foul of the concept of potestativité. Thus, it remains to be seen whether other, more carefully drafted, clauses with a similar effect might yet be upheld.
Potential implications

15. The decision of the French Supreme Court will be of considerable concern for commercial entities desirous of having their contractual bargains upheld, and in particular to banks - which commonly use such clauses.

16. That is because many transactions (such as loans) envisage that only one party would ever need to make a “positive” claim in the event of breach. It is therefore common for such a party to seek to preserve its forum options (since its preference may depend upon the location of the other party’s assets), whilst also restricting those of the counterparty (which might otherwise use spoiling tactics designed to delay payment, by seeking declarations of “non-liability” elsewhere).

17. There has recently been a similar ruling in Russia, albeit that it was in relation to an arbitration clause\(^\text{10}\). Whilst such decisions made by courts outside the EU/Lugano pose a number of problems (in particular, the risk of parallel proceedings in such countries and difficulties associated with the enforcement of judgments), the decision of the French Supreme Court is even more concerning. That is for a number of reasons:

(a) Its decision concerns the meaning of an EU/Lugano provision on jurisdiction clauses - a provision to which all EU Member States are subject.

(b) Although the French decision on the interpretation of that provision does not of itself bind other EU/Lugano States, they may take account of it when encountering similar issues. Whilst the courts of some such States (such as the UK) will almost certainly come to a different view, others may be persuaded or influenced by the French decision.

(c) If the French courts (or those of any like-minded EU/Lugano State) are “first seised” of a dispute involving such a clause, and they otherwise would have jurisdiction, then (currently) it will be their view which counts – the courts of other EU/Lugano States will be unable to interfere\(^\text{11}\). Further, those other States will be obliged to recognise/enforce judgment(s) of the court “first seised” – both on the question of its jurisdiction and the validity of the clause\(^\text{12}\), and also (if any is given) on the merits of the claim\(^\text{13}\).

18. Many will therefore hope that the issue is quickly referred to the Court of Justice of the EU - and that it disagrees with the French ruling. In the meantime, however, the French courts (at least) will have regard to the decision, and there will be considerable uncertainty and confusion throughout EU/Lugano States.

Addressing the issues – some top tips

19. When considering including a jurisdiction clause in your contractual documentation which confers “one-way” exclusivity, it is important to be aware of the following:

(a) Such a clause might be held to be invalid – if not by the selected court, then perhaps by the courts of other countries in which proceedings might be commenced, or which might refuse to enforce a judgment of the selected court. If that is a real risk, then consider whether it would be preferable to make the clause exclusive for both parties.

(b) The validity of such clauses is now uncertain even in EU/Lugano States. Unless and until the Court of Justice of the EU says otherwise, the French courts may well hold a clause like this invalid, and some other EU/Lugano States may adopt a similar approach.

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\(^\text{10}\) See the decree of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 183/12 dated 19 June 2012 in Russian Telephone Company (“RTC”) v Sony Ericsson Mobile Communications Rus (“Sony Ericsson”). The arbitration clause in question gave Sony Ericsson (only) the option to sue instead in the courts of any competent jurisdiction. The Supreme Arbitration Court of the Russian Federation disagreed with the lower courts and decided that such a clause was invalid - on the basis that violated “equality” of rights and deprived RTC of its right to “judicial protection” and “fair justice”.

\(^\text{11}\) Article 27 of Brussels I, and of the 2007 Lugano Convention.

\(^\text{12}\) See the decision of the Court of Justice of the EU of 15 November 2012 in Krones AG v Samskip GmbH [2012] EUECJ C-456/11 – in which the Court decided that the decision of the courts of one Member State on the validity of a jurisdiction clause was binding on the courts of another.

\(^\text{13}\) Articles 32-56 of Brussels I, and of the 2007 Lugano Convention.
20. When a dispute arises which is subject to such a clause and possible forums include a number of EU/Lugano States, then note the following:

(a) The question of where proceedings are commenced first is, currently, crucial - particularly if there is a nexus with France or a like-minded EU/Lugano State. That is because it is currently the court “first seised” that will determine the clause’s validity, and some States (e.g. the UK) are more likely to uphold it than others. It is therefore important to ensure that your preferred court within EU/Lugano is “first seised” of any dispute 14.

(b) That said, the position on “court first seised” in these circumstances is set to change. The recast version of Brussels I envisages, instead, that the EU/Lugano court which is selected in an exclusive jurisdiction clause will usually determine its validity and effect (and that the law of that State will be applied to determine its substantive validity). This would mean that, irrespective of the order of seisin:

(i) clauses like these purporting to confer jurisdiction on the courts of France or like-minded EU/Lugano States may well be declared invalid; but

(ii) such clauses conferring jurisdiction on other States such as the UK are likely to be upheld.

(c) However, these reforms will not take effect until at least 2015 15.

(d) Ideally, of course, a further amendment would be made to the recast Brussels I ahead of its enactment - to address the validity issue itself, and thereby ensure a uniform approach across the EU.

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14 This is just one of a number of reasons for taking that approach. Others include: (i) to ensure that the court selected in any jurisdiction clause determines its scope and effect; (ii) to avoid a delay whilst another court determines whether it has jurisdiction; (iii) to ensure that, in cases where the parties have a choice of possible forums (e.g. where there is no jurisdiction clause, or where the clause is non-exclusive), it will be your preferred court which ultimately hears the claim; and (iv) so that, where there are “related” proceedings in another court, any submissions regarding a possible stay or transfer of venue may be deployed not in relation to your claim, but instead only as against the related action (see generally Articles 27-30 of Brussels I).

15 The recast Brussels I received the backing of the European Parliament on 20 November 2012, and on 6 December 2012 the Economic and Monetary Affairs Council adopted it at first reading. It will now be published in the Official Journal in the coming weeks and will then enter into force 20 days later. However, it will only start applying two years after its entry into force.