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Paris Client Alert.
One-way exclusive jurisdiction clause held void by *Cour de Cassation*.

On 26 September 2012, the *Cour de Cassation*, France's highest court in civil and commercial matters, held that a jurisdiction clause which granted exclusive jurisdiction to the courts of Luxembourg was void where it also allowed a bank to sue in any other competent jurisdiction.

This surprising case raises important issues for all contracts which contain similar jurisdiction clauses, in particular international financing agreements and mandate letters where they are typical. We set out below a summary of the case and its consequences.

Summary of the case

On 16 October 2009, a French individual client of *Banque privée Edmond de Rothschild Europe*, a bank registered in Luxembourg, (the "**Bank**") filed a suit before the Paris Court of First Instance (*Tribunal de grande instance*) against the Bank and its French agent, *Compagnie Financière Edmond de Rothschild*, (together, the "**Defendants**") for damages resulting from losses sustained from the poor performance of the client's financial investments managed by the Defendants.

Both Defendants challenged the jurisdiction of the French court on the basis of the jurisdiction clause included in the general conditions to their client account agreement which, they argued, should have been given effect under Article 23 of EU Regulation n° 44/2001 (the "**Brussels I Regulation**")[1] . The clause provided that "*any potential dispute between the Client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank however reserves the right to go before the courts of the client's domicile or before any other competent court absent the aforementioned choice of jurisdiction*"[2].

Contents

[1] Article 23 of the Brussels I Regulation provides, inter alia, that if the parties, one or more of whom is domiciled in a Member State, have agreed that the courts of an EU Member State are to have jurisdiction to settle any disputes which may arise in connection with their agreement, then those courts shall have jurisdiction and that such jurisdiction shall be exclusive unless the parties have agreed otherwise.

[2] "*Les litiges éventuels entre le client et la banque seront soumis à la juridiction exclusive des tribunaux du Luxembourg. La banque se réserve toutefois le droit d'agir au domicile du client ou devant tout autre tribunal compétent à défaut de l'élection de juridiction qui précède*".

The Paris Court of First Instance rejected their arguments on 18 January 2011. The Defendants appealed but the Paris Court of Appeal (*Cour d'appel*) rejected this on 18 October 2011 (*CA Paris 18 octobre 2011: n° 11/03572*). The Defendants then challenged the Paris Court of Appeal's decision before the *Cour de Cassation*.

On 26 September 2012 (*Cass Civ 1e 26 septembre 2012: n° 11-26022*), the *Cour de Cassation* dismissed the Defendants' case, holding that the jurisdiction clause only really bound the client who was the only party obliged to bring its case to Luxembourg, whilst the Bank was free to choose where to bring an action. Accordingly, in its view, the clause was discretionary (*potestative*) and contrary to the purpose of Article 23 of the Brussels I Regulation. It was thus held null and void.

Analysis of the *Cour de Cassation*'s reasoning

The decision is based on a French legal principle according to which no party to an agreement may be vested with an absolute discretion as to the performance of its own obligations. Any such obligations may be held null and void by the court on the ground that they were assumed subject to a condition "*purement potestative*" (purely discretionary).

The application of this to the present circumstances is difficult to justify on a number of grounds.

First and foremost, the jurisdiction clause was governed by Article 23 of the Brussels I Regulation (as is any such clause in favour of an EU Member State court where one or more of the parties is domiciled in the EU). Under this Article's regime, the effect and validity of the clause is to be assessed by reference to the Article's autonomous requirements; not national law concepts[3]. In any event, even if this French law principle had been relevant, it is highly debateable that the *Cour de Cassation* was correct in the manner in which it was applied.

Second, to the extent that the *Cour de Cassation* can be understood to imply that such clauses are not permitted *within the scheme of Article 23 itself*, this is just as contentious. Article 23 itself expressly envisages that the parties may, and permits them to, agree a type of jurisdiction other than exclusive jurisdiction[4]. Further, the ECJ has held that this Article is to be interpreted in a way that respects and gives effect to party autonomy[5]. This is further reflected in the preambles of the Regulation[6]. Widespread practice in European

[3] Elefanten Schuh GmbH v Jacqmain C-150/80 [1981] ECR 1671, Sanicentral GmbH v Collin C-25/79 [1979] ECR 3423, Benincasa v Dentalkit Srl C-269/95 [1997] ECR I 3767 at paragraph 17.

[4] It states that "Such jurisdiction shall be exclusive *unless the parties have agreed otherwise"* (emphasis added). In addition, the legislative intent behind the current w ording of Article 23 w as stated to be respect for the "autonomous w ill" of the parties, COM (1999) 348 at page 18.

[5] Meeth v Glacetal Sarl 23/78 [1978] ECR 2133 at paragraph 5, Anterist v Credit Lyonnais C-22/85 [1986] ECR 1951 at paragraph 14.

[6] Preamble 14.

financing deals, where such clauses are routinely used[7], reflects this interpretation of the law.

These reasons give valid grounds for considering that the *Cour de Cassation*'s decision was flawed. Nonetheless, it is necessary to consider the implications of the decision.

Practical consequences

The decision reflects the approach of the French courts to "one-way" exclusive jurisdiction clauses which allow one party to sue in any other competent jurisdiction and, as such, it will principally need to be taken into account in any circumstances where litigation in France is either a possibility or positively desired (for example where a French counterparty is involved or where the parties wish to confer jurisdiction on the French courts).

In such circumstances, what is a party that would ordinarily have sought the benefit of such a clause to do? There are a number of options.

No change?

It is not impossible to envisage scenarios where this could remain a viable option. Take the example of a lender contracting with a French borrower and the English courts being named as exclusive jurisdiction with option for the lender to sue in any other competent jurisdiction. In such a case, the English courts would give effect to the clause as intended so the real concern for the lender would be that the French counterparty may, irrespective of the clause, be able to sue in France and/or that enforceability of an English judgment in France might be prejudiced. Depending on the circumstances, it may not be that these risks are regarded as unworkable. For the French courts to accept jurisdiction, should the French counterparty commence proceedings, there would have to be a basis upon which those courts could do so, which may or may not exist depending on the facts. In addition, if the English court were seized first, the *lis pendens* provisions of the Brussels I Regulation would more than likely freeze out the French court in any event. Further, enforcement of an English judgment in France would likely not be a problem due to the effect of Article 35(3) of the Brussels I Regulation.

To take another example which contrasts with the above, a French bank lending to a borrower in another EU Member State which uses such a clause and nominates the French courts hoping to be able to sue there may find itself having to sue the borrower in, say, the borrower's home courts if the only effective connection to France is the clause (and the French courts refuse to give effect to the choice of jurisdiction in favour of it).

Indeed, the rationale of the decision of the *Cour de Cassation* could apply equally to a clause submitting jurisdiction to a French court in a purely French domestic transaction. For example, it would be common practice for a borrower based in, say, Toulouse, to be required by its lenders to submit to the jurisdiction of the Paris Commercial Courts on the understanding that the

[7] For example, clauses of this type are included in LMA standard forms and are common in bond issue documentation.

lenders would retain the ability to sue the borrower in any other court of a competent jurisdiction, such as the courts of Toulouse, as the city where the borrower has its registered office. In this example, it cannot be excluded that the Paris Commercial Courts may decline jurisdiction on the ground that the submission was void.[8]

It may also be possible to consider specifically naming a *limited* number of courts that one party is to be permitted to sue in (as opposed to granting an open-ended right). Whether such an approach escapes the *Cour de Cassation*'s reasoning is however, not entirely free from doubt.

However, as the above should illustrate, drawing generalisations in this respect is difficult and the exact risk profile of retaining the use of such a clause will depend on the circumstances of each case (including which court is chosen, where the parties are domiciled, where other relevant jurisdictional factors lie and what the potential benefit of the "one-way" flexibility is).

Accordingly, in the event that there is uncertainty with using a "one-way" exclusive jurisdiction clause other, more conventional, solutions that might be preferred include as follows.

Fully exclusive jurisdiction clause

The validity of such a clause from the perspective of the French courts would not be affected by the *Cour de Cassation*'s decision but there is a loss of flexibility for the party that would otherwise have been able to choose to sue elsewhere (assuming, of course, that an alternative forum with jurisdiction would have existed).

Fully non-exclusive jurisdiction clause

Again, the *Cour de Cassation*'s decision would not affect the use of such a clause as is permitted by Article 23. Parties considering this solution would need to consider whether the flexibility granted to both of them is acceptable.

[8] Interestingly, on the same day as the day on which the *Cour de Cassation* rendered its controversial decision, the Paris Court of Appeal decided in another matter that a similar clause in a domestic contract signed between two French companies was valid (*Cour d'appel de Paris 26 septembre 2012: n°12/1010*)!

Linklaters

Contacts

For further information please contact:

Arnaud de La Cotardière
Partner
(+33) 1 56 43 58 36
adelacot@linklaters.com

Bertrand Andriani
Partner
(+33) 1 56 43 57 80
bertrand.andriani@linklaters.com

Philippe Herbelin
Partner
(+33) 1 56 43 58 66
philippe.herbelin@linklaters.com

Cenzi Gargaro
Partner
(+33) 1 56 43 58 80
cenzi.gargaro@linklaters.com

or your usual Linklaters contact(s).

25 rue de Marignan
75008 Paris

Telephone (+33) 1 56 43 56 43
Facsimile (+33) 1 43 59 41 96

Linklaters.com

Authors: Bertrand Andriani, Cenzi Gargaro