Commercial Court confirms that asymmetric jurisdiction clauses may be exclusive for the purposes of EU law

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Asymmetric jurisdiction clauses - also known as one-sided or 'for the benefit' clauses - are common in international financial services agreements, but their validity under EU law has been questioned in recent years by the French Supreme Court. The English High Court has now confirmed their validity and, in particular, that they are capable of benefiting from the protection given to all exclusive clauses by new provisions in the Brussels Regulation Recast EU 1215/2015 (Brussels Recast). This decision is reassuring for banks and other financial institutions, although courts in other EU Member States may side with the French rather than English courts on the issue, and the Court of Justice of the European Union (CJEU) has yet to consider it. The defendants are seeking the Court of Appeal's permission to appeal the High Court decision.

Background

Asymmetric jurisdiction clauses ordinarily require a borrower or guarantor to bring proceedings in a specified jurisdiction whilst allowing the lender to bring proceedings in any court of competent jurisdiction. Financial institutions have historically included these clauses in finance documentation to ensure that they retain control over where they are sued, whilst retaining the freedom to sue a borrower or guarantor wherever its assets are located.

The status of asymmetric jurisdiction clauses in Europe and elsewhere has been uncertain since the decision of the French Supreme Court (Court de Cassation) in 2012 in Mme X v Société Banque Privé Edmond de Rothschild, in which it was held that asymmetric jurisdiction clauses may be invalid under EU as well as French national law, depending on how they are drafted. More recently, the French Supreme Court has issued further decisions that qualify that view, but doubts as to the validity of asymmetric clauses persist.

Even if such clauses are valid under EU law, it is not obvious that they enjoy the special protection afforded by Brussels Recast to exclusive jurisdiction clauses in general. The basic lis pendens rule is that jurisdiction issues should be decided by the court first seised of a matter while other courts stay proceedings pending the first court's decision (Articles 29 and 30). However, Article 31(2) creates an exception where exclusive clauses are concerned, allowing the chosen court to decide these questions itself, regardless of when it was seised. This new exception has been widely welcomed because it limits the scope for delaying tactics, in particular the 'Italian torpedo': pre-emptive proceedings commenced in an EU Member State where the wheels of justice are known to turn slowly and/or jurisdiction questions are decided at the end rather than the beginning of litigation.
Facts

In Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar Tankers 2017 EWHC 161 (Comm) (Commerzbank), Pauline was the borrower under a loan agreement with Commerzbank for the construction of a vessel. Liquimar was the guarantor of that loan and other loans made under separate loan agreements for the construction of other vessels. The loan agreements and guarantee agreements contained asymmetric jurisdiction clauses obliging Pauline and Liquimar to bring proceedings in the English courts, but allowing Commerzbank to commence proceedings in any other court of competent jurisdiction.

The loans went into default and, following discussions, Commerzbank notified Liquimar of its intention to commence proceedings in England. Liquimar subsequently issued proceedings in Greece in June 2015 seeking a declaration of non-liability, and Liquimar and Pauline together commenced additional proceedings in December 2015, also in Greece. In May 2016 Commerzbank commenced proceedings in England seeking declarations and damages in respect of the loan agreements and guarantees.

Decision

Commerzbank argued in England that the asymmetric jurisdiction clauses were exclusive jurisdiction clauses for the purposes of Article 31 of Brussels Recast, whereas Liquimar and Pauline sought to set aside or stay the English proceedings on lis pendens grounds, arguing that the Greek court should decide jurisdiction questions as it was the court first seised of the matter, and that the asymmetric jurisdiction clause was at best irrelevant and possibly invalid under the Regulation.

Mr Justice Cranston rejected this argument, holding that asymmetric jurisdiction clauses are valid and may be exclusive for the purpose of Article 31, even where they restrict only one party. He did not see the need to follow Mme X v Société Banque Privé Edmond de Rothschild, stressing instead that an autonomous approach was required when interpreting Brussels Recast's provisions.

The judge noted that the declared aims of Brussels Recast supported his analysis. Recital 19 of Brussels Recast states that the autonomy of the parties should be respected subject to limited exceptions. In this case the parties had agreed that Liquimar and Pauline were only entitled to sue under the agreements in the English courts. The specific purpose of Article 31 was to enhance the effectiveness of exclusive jurisdiction clauses and neutralise Italian torpedoes (Recital 22). To treat all asymmetric clauses in effect as non-exclusive jurisdiction clauses would both undermine the agreement reached by parties and frustrate the policy objectives set out in the Recitals.

Comment

The decision of the Commercial Court in Commerzbank is not unexpected, and does not carry the weight of a Court of Appeal or Supreme Court decision, but it is welcome nonetheless. However, clarity can ultimately be provided only by the CJEU, if and when it is asked to decide the issue. By then the UK may have left the EU, of course, and both asymmetric and regular exclusive jurisdiction agreements in favour of English courts could have limited force in the remaining EU Member States if they are regarded then as agreements favouring courts of 'third states' and therefore unsupported by EU law.

Whether they will in fact have that status depends on the form that Brexit takes. The UK may remain subject to a version of the EU rules by re-joining the 2007 Lugano Convention, for example - something it can theoretically do whether or not it joins the European Free Trade Association. Unfortunately, the 2005 Hague Convention on Choice of Court Agreements, containing the new global regime that sometimes overrides EU law in this area, is unlikely to be of assistance since it does not appear to support asymmetric jurisdiction agreements in the normal course of events (see Articles 3(a) and 22 and paragraph 32 of the accompanying Explanatory Report). Financial institutions should therefore consider now whether asymmetric jurisdiction agreements serve their interests in the longer term, however the issues discussed in Commerzbank are finally resolved.

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