

# Another knock for unilateral jurisdiction clauses in Europe

The French *Cour de cassation* has decided, again, that unilateral jurisdiction clauses are unenforceable.

Unilateral, or one-sided, jurisdiction clauses are common in financial agreements. Typically, they provide that the borrower can sue the finance parties in one specified court only, that the finance parties can sue the borrower in that same court, but that the finance parties can alternatively sue the borrower in any other court with jurisdiction if they wish. The French *Cour de cassation* decided in 2012 that jurisdiction clauses of this sort were unenforceable in their entirety as a matter of EU law, and it has recently reiterated that conclusion in another case.

The decision in *Mme X v Rothschild* (Case 11-26.022) in September 2012 caused a stir. The Court concluded that unilateral jurisdiction clauses are unenforceable because they are "potestative" under French law, ie they bind only the borrower but not the banks. However, the decision was not made under French domestic law but under EU law. The EU's Brussels I Regulation governs the enforceability of jurisdiction clauses in favour of courts in EU member states, and the decision was formally that one-sided clauses do not meet the requirements of the Regulation. (See our briefing entitled *What future for unilateral dispute resolution clauses*, October 2012, in relation to this decision.)

The *Cour de cassation* has recently looked again at this issue. The decision in *Danne v Credit Suisse*

(Case 13-27.264, 25 March 2015) was given in the context of the Lugano Convention, which determines jurisdiction between EU member states and Switzerland, Norway and Iceland but which, so far as relevant, is the same as the Brussels I Regulation.

In a very short judgment, the Court reached a similar conclusion to that it had reached in 2012. The Court said that the clause "ne précisait pas sur quels éléments objectifs cette compétence alternative était fondée, n'était pas contraire à l'objectif de prévisibilité et de sécurité juridique", ie the clause was unenforceable because it did not set out an objective basis for the alternative jurisdictions that the banks could choose, which was contrary to the Convention's aspiration of certainty in jurisdictional matters.

The Court's reliance in 2012 on a French domestic law concept was hard to follow, and its appeal in 2015 to the need for objectivity and certainty is similarly difficult to grasp. Clauses of this sort are, so far as claims by the banks are concerned, non-exclusive clauses. Non-exclusive clauses are permitted by the Convention, which does not suggest that the non-exclusivity must be bilateral. Further, the objective basis for the alternative jurisdictions available to the banks are those set out in the Convention itself since the banks can only take proceedings in

## Key issues

- The French courts have reiterated their view that one-sided jurisdiction clauses are invalid
- Some other EU courts also take this line, while others have upheld unilateral clauses
- Ultimately, the Court of Justice of the European Union must resolve the issue
- Until then, uncertainty over unilateral jurisdiction clauses will remain

alternative forums that have jurisdiction under the Convention.

Be that as it may, the highest court in an EU member state has now decided on two separate occasions that one-sided jurisdiction clauses are invalid. These decisions are not binding on courts in other EU member states, but the French courts are not alone in taking this view. For example, the highest Bulgarian court has reached the same conclusion, and there have long been concerns about unilateral clauses in Poland and Spain. Equally, courts in Italy and Luxembourg have upheld unilateral jurisdiction clauses.

Ultimately, the Court of Justice of the European Union, whose decisions are binding on all EU courts, must decide whether unilateral jurisdiction clauses

meet the requirements of the Brussels I Regulation. The risk that the CJEU will follow the *Cour de cassation* cannot be discounted. If the CJEU does take the French lead, all unilateral jurisdiction clauses conferring jurisdiction on a court in an EU member state will be ineffective. This uncertainty is, therefore, a factor that needs to be taken into account when considering what form of jurisdiction clause is appropriate for any particular agreement.

### Postscript

The two decisions of France's *Cour de cassation* related to the Brussels I Regulation (Regulation 44/2001/EC) and the Lugano Convention, which are substantially the same. Both set out the requirements for a jurisdiction clause: if the clause does not meet those requirements, it is unenforceable; if the clause meets the requirements, it is enforceable. Domestic law is irrelevant.

However, the Brussels I Regulation considered by the *Cour de cassation* was replaced on 10 January 2015 by the Brussels I Regulation (recast) (Regulation 1215/2012/EU). This provides that a jurisdiction clause must meet the requirements of the Regulation (largely the same as under

the old Regulation) but also sets out a further requirement that is not in the Lugano Convention and was not in the old Regulation: the clause must not be "null and void as to its substantive validity" under the law of the member state whose courts have been chosen. The relevant law includes the member state's conflict of laws rules.

As a result, a court hearing a case commenced after the recast Regulation became applicable and potentially subject to a jurisdiction clause must decide, in accordance with the chosen court's conflict of laws rules, what law governs the jurisdiction clause. Having determined the governing law, the court must then decide whether the clause is null and void as to its substantive validity under that law. A clause could, therefore, meet the requirements of the Regulation but still be invalid if it infringed the requirements of that law, whether for reasons of potestativity or otherwise.

## Contacts

**Simon James**  
Partner

T: +44 20 7006 8405  
E: [simon.james@cliffordchance.com](mailto:simon.james@cliffordchance.com)

**Kate Gibbons**  
Partner

T: +44 20 7006 2544  
E: [Kate.Gibbons@cliffordchance.com](mailto:Kate.Gibbons@cliffordchance.com)

**Habib Motani**  
Partner

T: +44 20 7006 1718  
E: [habib.motani@cliffordchance.com](mailto:habib.motani@cliffordchance.com)

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ  
© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.

35242-5-141-v0.3