

# French court questions one-sided jurisdiction clauses

The highest French court has decided that a commonly used form of jurisdiction clause is ineffective. A clause that requires one party to sue only in a named court but that allows the other to sue anywhere does not, it concluded, comply with article 23 of the Brussels I Regulation. The *Cour de cassation's* decision is not binding, but it will be persuasive. As a result, until the Court of Justice of the European Union gives an authoritative decision, there is some uncertainty as to the effectiveness of this type of clause. Careful consideration therefore needs to be given in individual transactions as to what form the jurisdiction clause should take.

A Spanish customer made a large deposit with a bank in Luxembourg. The terms applicable to the deposit gave jurisdiction over any disputes about the deposit to the Luxembourg courts, but also allowed the bank to sue the customer in the courts of the customer's domicile or in any other court of competent jurisdiction. The customer sued the bank in France. The bank applied to stay the French proceedings in favour of the Luxembourg courts on the basis of the jurisdiction clause.

The case went to the highest French court, the *Cour de cassation*, which, in agreement with the lower court, decided that not only was the option given to the bank ineffective, but that the jurisdiction clause as a whole was invalid (decision no 11-26.022, 26 September 2012). Jurisdiction therefore fell to be decided by reference to the general rules, under which the French courts had jurisdiction.

The *Cour de cassation* referred to the concept of *conditions potestative*, one-sided terms that are invalid under French law, but ultimately the decision turned not on French law but on EU law, which is (or should be) the same in all EU member states. This is because the validity of jurisdiction clauses in these circumstances falls to be decided not by reference to the law that governs the contract as a whole but by whether the clause meets the requirements of article 23 of the Brussels I Regulation on jurisdiction and the enforcement of judgments (44/2001/EC). The *Cour de cassation* decided that clauses of this sort do not comply with article 23 and, as a result, are wholly ineffective.

The *Cour de cassation* did not even refer the case to the Court of Justice of the European Union (CJEU), something it is obliged to do unless it considers the outcome of a case turning on EU law to be entirely clear.

There are strong arguments that the *Cour de cassation's* decision should

## Key issues

- The French *Cour de cassation* has ruled that it is clear beyond dispute that one-sided jurisdiction clauses do not comply with the Brussels I Regulation.
- The interpretation of the Brussels I Regulation should be the same across the EU.
- English courts are unlikely to follow the *Cour de cassation*, but the decision is ultimately for the CJEU.
- Until the CJEU decides definitively whether the French court is right, there will be uncertainty as to the effectiveness of unilateral clauses.

not be followed. The decision is contrary to earlier decisions of other, lower, French courts, and does not reflect the wording of article 23. As

Professor Adrian Briggs, the leading English academic in this area, put it succinctly on [conflictoflaws.net](http://conflictoflaws.net), "Had the customer agreed in writing to the jurisdiction of the court of Luxembourg, the jurisdiction of which shall be exclusive unless the parties agree to different effect? She had. Why is that not the end of the story?"

Nevertheless, the decision of the *Cour de cassation* cannot be ignored. It is the highest court in France, and its decisions will be persuasive across the EU, at least until the CJEU gives an authoritative decision on the point. Anyone seeking to escape the effect of a jurisdiction clause in this form will inevitably run an argument based on the *Cour de cassation*'s decision.

It is highly unlikely that an English court would follow the lead of the *Cour de cassation*, but decision lies ultimately in Luxembourg rather than in London. Hostility to unilateral jurisdiction clauses is not confined to France either. For example, both Belgium and Luxembourg have similar (though not identical) laws relating to *conditions potestative*, and Poland and Spain have national laws striking down one-sided jurisdiction

provisions. No one can be absolutely sure what the CJEU will do.

## Conclusion

One-sided jurisdiction provisions are common in banking and capital markets documentation. Pending a decision from the CJEU, there is now some uncertainty as to the effectiveness of these clauses. If a clause is ineffective, jurisdiction will be determined according to the general rules applicable (which, within the EU, require a claimant to sue in the defendant's domicile, though there are exceptions to this rule).

Parties to a particular transaction will therefore need to consider whether to live with that uncertainty or to change the clause in order to give, for example, exclusive or non-exclusive jurisdiction to particular courts. Exclusive and non-exclusive clauses have advantages (including legal certainty), but also disadvantages. Where the balance lies will depend upon the dynamics of the transaction in question.

Further information about the *Cour de cassation*'s decision can be found in our earlier briefing, entitled *What*

*future for unilateral dispute resolution clauses?*

## Contacts

**David Dunnigan**  
Partner

T: +44 20 7006 2702  
E: [david.dunnigan@cliffordchance.com](mailto:david.dunnigan@cliffordchance.com)

**Simon James**  
Partner

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

**Tim Morris**  
Partner

T: +44 20 7006 2676  
E: [tim.morris@cliffordchance.com](mailto:tim.morris@cliffordchance.com)

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