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What future for unilateral dispute resolution clauses?

It is common practice to insert into contracts unilateral choice-of-court clauses, granting to one party only the option to refer the dispute to one of several jurisdictions. Until now, the validity of this type of clauses did not seem problematic. However, their effectiveness has just been undermined by a decision from the *Cour de cassation* (n°11-26.022) dated 26 September 2012.

In the case submitted to the *Cour de cassation*, the forum selection clause contained in the contract was drafted as follows:

"*Potential disputes between the client and the bank shall be subject to the exclusive jurisdiction of the Courts of Luxembourg. Failing such election of jurisdiction, the Bank reserves the right to act before the courts of the client's domicile or any other court of competent jurisdiction*".

The clause notwithstanding, one of the parties, a natural person domiciled in Spain, but not a consumer, filed a claim before the French courts against both the Luxembourg bank and the French financial institution through which it opened its bank account in Luxembourg.

Key issues

- **First conclusion:** the suspicion of the *Cour de cassation* with regard to unilateral choice-of-court clauses
- **Second conclusion:** French law can be applicable to choice-of-court clauses contained in contracts governed by the law of a foreign jurisdiction
- Numerous questions left unresolved

As expected, the bank raised a plea of lack of jurisdiction on the grounds of the abovementioned clause, claiming the exclusive jurisdiction of the courts of Luxembourg. The plea was however dismissed by the Paris Court of appeal. Although the Court confirmed that letting a party benefit from an option to choose a competent jurisdiction was in principle not to be condemned[1]. It also underlined that this could not

[1] Art. 17 of the Brussels Convention explicitly recognized this type of clauses (Article 17.3). This precision was removed from the wording of Article 23 of Regulation Brussels I. However, the provision now states that dispute

lead to granting one party only the "*discretionary right to choose whatever court it wishes*", such as in the case in hand. According to the Court of appeal, the choice-of-court clause was thus contrary to the purpose of Article 23 of the Brussels I Regulation[2] , which sets out the validity rules for forum selection clauses in the European legal area.

The bank then brought the case to the *Cour de cassation*, which dismissed the appeal. For the Supreme Court, the clause had a binding effect on the client only, since the bank was free to file a claim at the place of client's domicile or before "*any other court of competent jurisdiction*". The Court ultimately concluded that "*the Court of appeal was correct in finding that the clause was potestative in favour of the bank*".

The reasoning followed by the *Cour de cassation* is rather surprising. At first glance, the Court seems to adopt the same reasoning as the Court of appeal judges. Yet, whereas the decision of the court of second instance was solely founded on an interpretation of Article 23 of the Brussels I Regulation, the *Cour de cassation* makes also reference to the notion of potestativity. A careful reading of the Court of appeal decision shows however that not only the appellate judges failed to refer to this notion, but also that it was not even discussed by the parties. The potestativity argument is therefore used by the *Cour de cassation*, but it is not possible to determine where it really originated based on the reading of the appellate decision, nor on the grounds submitted by the parties.

Be that as it may, the *Cour de cassation* infers from the potestative nature of the clause that it is contrary to the purpose of Article 23 of Regulation n°44/2001 of 22 December 2000.

Although numerous questions are left unresolved, two important conclusions are to be drawn from the decision.

1. **First conclusion:** the suspicion of the *Cour de cassation* with regard to unilateral choice-of-court clauses

Following the reasoning of the *Cour de cassation*, the clause is to be considered as potestative because "*it binds, in reality, only* [the client]", whereas the bank retains the possibility to act at the place of the client's domicile, or before "*any other court of competent jurisdiction*".

It is thus the unilateral nature of the clause that seems to confer upon it its potestative nature.

However, until now, most courts rejected such qualification when facing similar cases, even when the clause was explicitly criticized as being potestative[3] .

Thus, the Court of appeal of Aix-en-Provence adopted a very classical approach to the notion of potestativity with regard to a clause offering to one party only the option to choose among several courts, by ruling that:

"the question here is not to, […] for a party wishing to file a claim, subject the performance of an obligation to an event which he or she could be the only capable of preventing or provoking, but rather to enforce the said provision"[4] .

Similarly, the allegation of potestativity was rejected in the case of a clause granting the seller an additional option to refer the dispute to the courts of the place of the buyer's domicile, on the ground that the clause could not be seen as a conditional obligation in favor of only one party[5] .

In legal terms, the reasoning adopted by the various courts of appeal seems more meticulous than the one adopted by the *Cour de cassation*. Under French law, an obligation is concluded under a potestative condition when "*it makes the performance of the agreement subject to an event the occurrence of which only one party can provoke or prevent*"[6] . A forum selection clause cannot, in essence, have such an effect on the contract in which it is contained. On the contrary, it is the performance of the contract that will lead the parties to solve their dispute before a given court. The option to choose a jurisdiction offered to one party cannot thus affect the validity of the whole contract

resolution clauses may validly derogate from the exclusive jurisdiction of designated courts. Thus, the article was interpreted as having the same legal effect as Article 17.3 of the Brussels Convention.

[2] Council Regulation n°44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[3] For a dissenting decision, see CA Aix-en-Provence, 11 October 2007, n°2007/389 and 07/1566. In this decision, rendered in a shipping case, the clause granted to its beneficiary the option to choose any court of its choice, without the other party being allowed to object to the chosen jurisdiction. This clause thus granted its beneficiary full discretion in the exercise of the option.

[4] Court of appeal of Aix-en-Provence, 8 December 2011, n°2011/520

[5] Court of appeal of Paris, 28 October 2010, n°10/12534.

[6] Article 1170 of the French Civil Code

and should not be seen as a potestative condition, void under French law.

The legal grounds retained by the *Cour de cassation* in its ruling are therefore questionable. Pending future clarification or refinement however, the decision and its potential consequences must be taken into account, especially when drafting forum selection clauses.

2. **Second conclusion:** French law can be applicable to choice-of-court clauses contained in contracts governed by the law of a foreign jurisdiction

Following the adoption of the Brussels Convention (now replaced by the Brussels I Regulation), the interpreters saw in Article 17 (which is now Article 23) a material rule of validity of choice-of-court clauses[7] . If a clause complies with the requirements set out by the provision, which in practice aim at verifying whether the parties gave their valid consent to the clause, it is to be considered as valid.

In the case at hand, the *Cour de cassation* does not specify under which law it examines the forum selection clause. It is however highly doubtful that the Court could have applied the law of Luxembourg without expressly mentioning it, even if the concept of potestativity is also present in the Luxembourg legal system.[8]

Thus, by ruling, on the basis of French law, on the validity of a jurisdiction clause contained in a contract governed by the law of Luxembourg, the Court decided to set aside the law applicable to the contract and apply the *lex fori*.

Is this an infringement of Article 23 of the Brussels I Regulation? It might be, unless we consider that potestativity goes to the legality of the clause, rather than to its validity [9]. The Court of Justice of the European Union will probably rule on this someday. Until then, it is to bear in mind that, from the moment a French court may be seized, unilateral jurisdiction clauses seem endangered.

3. **Numerous questions left unresolved**

- Scope of the decision - *rationae personae*?

The dispute brought before the *Cour de cassation* involved a natural person seeking the liability of a private Luxembourg bank. It is tempting to justify the decision by these specific circumstances, and to limit its scope to the given factual hypothesis. However, nothing in the wording of the *Cour de cassation*'s decision provides certainty on this point. On the contrary, the decision could as well be part of a general movement against unilateral clauses, illustrated (i) in French law, by Article L.442-6, I, 2° of the Commercial Code, which prohibits situations resulting in a significant imbalance between the parties, (ii) abroad, by the Russian jurisprudence which does not allow a clause to impose arbitration, while at the same time granting to one party only the option to bring its case before state courts. Russian courts consider that such a clause violates procedural fairness. In order for fairness between the parties to be restored, Russian courts will therefore "bilateralize" the option, meaning that they will offer its benefit to both parties[10]. As is, it is thus advisable to be cautious in the assessment of the future significance of the decision.

- Scope of the decision – *rationae materiae*?

The wording of the appellate decision, affirmed by the decision of 26 September 2012, indicates that the clause has been set aside because it offered to one party only the "*discretionary right to choose whatever court it wishes*". The Court of appeal's disapproval may thus be limited to clauses offering to one party a choice that is not expressly limited to certain precisely identified jurisdictions. Concerning the *Cour de cassation*, its decision concentrates more on the unilateral nature of the clause, rather than on the number of courts that could potentially retain jurisdiction. In practice, the bank in the case at hand could choose between the courts of the client's domicile or any other court otherwise competent in the absence of a forum selection clause – that is among a limited number of jurisdictions[11]. However, the clause did not provide it

[7] This doctrinal position was confirmed by the CJEU, 3 July 1997, C-296/95, *Denkavit*.

[8] Articles 1170 and 1174 of the Luxembourg Civil Code.

[9] The *Cour de cassation* has indeed already ruled that the law applicable to the question of the legality of the clause is the l*ex fori*, Cass. 1ère civ., 3 December 1991, *Rev. Crit. DIP* 1992, p. 340, note by H. Gaudemet-Tallon.

[10] See CC Moscow Client Briefing "The RF Supreme Arbitrazh Court rules on the validity of dispute resolution clauses with a unilateral option" dated September 2012.

[11] However, in this situation the bank had a choice between the jurisdiction of the defendant's domicile, that is to say, Spanish courts (article 2 of Regulation Brussels I), or the Luxembourg courts of the place where the services have been rendered (article 5§1,b) of Regulation Brussels I). The

expressly. Here again, interpretation is not easy, but it seems that a unilateral optional dispute resolution clause designating eligible courts could escape the sanction of French law.

- Which sanction?

Under French law, an obligation concluded under a potestative condition is traditionally considered as void[12]. In the present case, the *Cour de cassation* refuses to enforce the dispute resolution clause because of this potestative nature, saying nothing about the mechanism used. However, the Court approves the appellate decision which clearly ruled that the clause was void[13]. This matter does not seem to be clearly established for the moment, although, in any case, the clause here effectively ceased to have any binding effect on the parties. From this perspective, it is also worth noting one of the bank's alternative propositions, included in its criticism of the appellate decision. On a subsidiary basis, the bank argued that, whatever the Court might think about the option as such, the part of the clause that designated the courts of Luxembourg jurisdiction was perfectly valid and enforceable. The bank maintained that, even if the Court was to set aside the option offered to it in the clause, it should still enforce the non-optionable part of the clause. By rejecting the plea, the *Cour de cassation* ruled out the possibility of limiting the ineffectiveness of the clause to the mere option given to one party.

- Risk of a spillover effect on clauses providing for arbitration proceedings?

The decision rendered on 26 September 2012 is explicitly based on a provision of the Brussels I Regulation which deals with forum selection clauses designating state courts and does not govern arbitration agreements[14]. Nonetheless, by setting aside the dispute resolution clause in its entirety because of the potestative nature of its optional part only, the *Cour de cassation* also threatens arbitration clauses which grant to one party only the option to file a claim before state courts, even though such clauses were until now considered as valid under French law[15]. Would the *Cour de cassation* go however as far as to declare the clause as void in its entirety, together with the arbitration agreement it contains [16]? If the control exercised by the *Cour de cassation* over this type of clauses were to continue, could it not instead adopt the more moderate approach of the Russian courts, by "bilateralizing" the option so as to put the parties on an equal footing? Only time will tell if this will be the case.

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It is difficult to gauge the scope of this decision. However, the decision to publish it in the *Bulletin* shows that the *Cour de cassation* meant to give it a wide press. It is thus necessary to exercise extreme caution when inserting this type of unilateral dispute resolution clauses into contracts.

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bank had therefore just one additional possibility as compared to the client: choosing the Spanish courts of the place of the "client"'s (as by the terms of the clause), or the "defendant"'s (as by the terms of article 2 of Regulation Brussels I) domicile. The options offered to the bank were thus *in fine* limited.

[12] Article 1174 of the Civil Code. If the potestative condition was decisive for the conclusion of the contract, its voidness may entail the voidness of the entire contract.

[13] One must bear in mind that the Court of appeal did not mention any potestativity and reached its decision on the sole grounds of the aim and purpose of Article 23 of the Brussels I Regulation.

[14] Arbitration is excluded from the scope of the Brussels I Regulation, Article 2, §2 d). This exclusion is however questioned in the discussions relating to the reform of this regulation. Moreover, according to the CJEU, "*when such [arbitration] proceedings prevent a court from another member State to exercise the jurisdiction granted by the regulation n° 44/2001*", the seized state court has to ascertain its own jurisdiction on the basis of said Regulation (CJEU, 10 February 2009, C 185/07, §24: "*Although proceedings do not fall within the scope of the Regulation nº 44/2001, they may have consequences affecting the effectiveness of the latter, that is to say preventing the realization of the objectives of unification of the conflict rules in civil and commercial matters, as well as the free circulation of decisions in these matters*").

[15] J J. Barbet and P. Rosher, Optional dispute resolution clauses, *Rev. Arbitrage* 2010, p. 45 et s.

[16] Both the principle of autonomy of the arbitration agreement of Article 1447 of the French Civil Procedure Code, as well as the principle of "competence-competence" of Article 1448 of the same Code may add further complexity to this discussion.

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