

Asymmetric jurisdiction clauses upheld

An English court has decided that an asymmetric jurisdiction clause is valid and, further, that it is exclusive for the purposes of the Brussels I Regulation (recast).

An asymmetric jurisdiction clause requires one party to an agreement to sue in a specific court whilst allowing the other party (generally a financial institution) to sue in that court or in any other court with jurisdiction under its local rules. Clauses of this sort were expressly permitted by the 1968 Brussels Convention, and became common in financial documentation in the light, amongst other matters, of uncertainty over the validity under the Convention of more conventional non-exclusive jurisdiction clauses.

That uncertainty ceased when the Convention was replaced by the Brussels I (Regulation 44/2001/EC) in 2002, but asymmetric clauses have remained widespread in financial agreements. Their validity was, however, called into question by the French Cour de cassation in *Mme X v Société Banque Privé Edmond de Rothschild* (26 September 2012), which appeared to decide that asymmetric clauses were ineffective under the Regulation, ie they did not operate to confer jurisdiction on the chosen court.

Commerzbank AG v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm) is the first English case to address the point directly. Doubtless in recognition of the likely response from the court, the issue was only raised as a "subsidiary argument". Cranston J did not disappoint, giving short shrift to the argument that an asymmetric jurisdiction clause is invalid. The judge concluded that it would require

a strong indication in the Brussels I Regulation or its successor, the Brussels I Regulation (recast) (Regulation 1215/2012/EU), to render a regular feature of financial documentation in the EU ineffective. There was no such indication. The asymmetric clauses in question were therefore effective to confer jurisdiction on the English courts.

Exclusive or non-exclusive?

Liquimar Tankers concerned proceedings brought in Greece against a bank in breach of asymmetric jurisdiction clauses in the relevant agreements. The bank subsequently started proceedings in England, the courts specified in the jurisdiction clauses.

In addition to deciding whether the jurisdiction clauses were valid at all, the judge had to determine whether an asymmetric clause was an exclusive jurisdiction clause for the purposes of the recast Regulation. This mattered because, if the clause was exclusive, the English courts could proceed to decide the case, with the Greek courts being obliged to stay their proceedings under article 31(2); but if the clause was not exclusive, the judge would have been obliged to stay the English proceedings under article 29, allowing the Greek courts, as the courts first seised, to go ahead.

Cranston J concluded that an asymmetric clause is an exclusive clause for the purposes of the recast

Key issues

- An English court has refused to follow the French Cour de cassation
- The Court held that an asymmetric jurisdiction clause is effective to confer jurisdiction
- The Court gave the clause greater effect by concluding that it was an exclusive jurisdiction clause
- The English court will proceed with the case despite another court being first seised

Regulation despite allowing one party to sue in courts other than the court named. The issue was, he thought, one of characterisation of the clause under EU law, not a question of English law as the law applicable to the relevant agreements. The aims of the Brussels I Regulation (recast) include enhancing the effectiveness of jurisdiction clauses and avoiding abusive tactics. The judge considered that these aims would only be achieved if asymmetric clauses were treated as exclusive and thus within the scope of article 31(2). The English courts could therefore hear the case even though seised after the Greek courts.

The judge did not consider that the Hague Convention on Choice of Court Agreements, which only applies to

exclusive jurisdiction agreements, was relevant to his analysis of the Brussels I Regulation (recast). Nevertheless, he added that, despite the rapporteurs to the Convention taking the view that an asymmetric clause was not exclusive for Convention purposes, there were good arguments that the Convention applied to asymmetric clauses as well as to pure exclusive jurisdiction clauses.

Conclusion

The decision in *Liquimar Tankers* will be welcomed as, hopefully, further reducing the uncertainty over the validity of asymmetric jurisdiction clauses, a move already underway in France as a result of *Société eBizzuss.com v Apple* (7 October 2015). Courts in some other EU member states have also upheld asymmetric clauses. It is no surprise that a judge in the English Commercial Court should follow suit and take a stern approach. The ultimate decision on the meaning of the Brussels I Regulation (recast) will,

however, rest with the Court of Justice of the European Union.

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