

**C L I F F O R D
C H A N C E**

JURISDICTIONAL ASYMMETRY APPROVED

The CJEU has decided that asymmetric jurisdiction clauses in favour of the courts of an EU member state are in principle valid under the Brussels I Regulation. However, the Court said that this will only be the case if the party benefiting from the asymmetry is limited to bringing proceedings in EU or Lugano Convention member states. This limitation has left many uncertainties.

Asymmetric, or one-sided, jurisdiction clauses are common, particularly in financial transactions. They provide that specific named courts have jurisdiction over disputes arising from the relationship in question, limit one party (invariably the obligor) to taking proceedings in those named courts, but allow the other party to take proceedings in those courts or in any other court with jurisdiction under its local rules.

Since 2012, and the case of *Madame X v Rothschilds*, the French Cour de cassation has been questioning the validity of asymmetric jurisdiction clauses under the Brussels I Regulation (Regulation EU No 1215/2012, sometimes referred to as Brussels Ia), which governs the jurisdiction of courts in EU member states. The Cour de cassation's approach was not followed by a number of other courts, and now the Court of Justice of the European Union has decided in *Società Italiana Lastre SpA v Agora Sarl* (Case C-537/23) that asymmetric clauses are in principle valid under the Brussels I Regulation. But the CJEU added an awkward proviso as to the validity of asymmetric clauses, which has left considerable doubt over what kind of clause will meet the CJEU's requirements.

We discuss later in this briefing the potential, if uncertain, implications of the decision for various types of jurisdiction clause.

The decision in Lastre

Lastre concerned a contract between Lastre (Italian) and Agora (French) for the supply of panelling for use in a project in France. Their contract provided that the courts of Brescia, Italy had jurisdiction over disputes between them, but went on that Lastre "reserves the right to bring proceedings against [Agora] before any other competent court in Italy or elsewhere". The jurisdiction clause was therefore asymmetric in that it confined Agora to sue in Brescia but allowed Lastre to sue either in Brescia or in any other court that had jurisdiction under its local jurisdictional rules.

The owner of the project sued both Agora and Lastre in the tribunal de grande instance de Rennes in France. Agora then brought a claim in Rennes against Lastre under their contract. Lastre objected in vain that this claim was in breach of the asymmetric jurisdiction clause in the contract, eventually taking the case to the Cour de cassation which in turn requested clarification from the CJEU as to whether the validity of an asymmetric jurisdiction clause should be assessed under EU law (the Brussels I Regulation) or national law.

Article 25(1) of the Brussels I Regulation provides that:

"If the parties ... have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is

null and void as to its substantive validity under the law of that Member State."

In *Lastre*, the CJEU decided that the intrinsic validity of an asymmetric jurisdiction clause was a matter of EU law, not of national substantive law. National law was relevant so far as general causes of invalidity of the contract were concerned, such as error, deceit, violence or fraud, but the question of whether an asymmetric clause was in principle valid was a matter of EU law. Consistency in application of the Brussels I Regulation requires that a jurisdiction clause that is valid (or invalid) in one member state must also be valid (or invalid) in all other member states.

The CJEU decided that there was no objection in principle under EU law to asymmetric jurisdiction clauses. The cornerstone of article 25 of the Brussels I Regulation is freedom of choice, and there is no reason for that freedom to be limited by a requirement of symmetry. However, the CJEU added that the clause must state the "objective factors" on the basis of which the parties have agreed on any courts. Those factors must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction in the particular circumstances.

The CJEU then added a significant proviso. It said that:

"... if, in referring to 'another competent court ... elsewhere', the agreement conferring jurisdiction at issue must be interpreted as meaning that it also designates one or several courts of one or more States which are not members of the European Union or parties to the Lugano II Convention, it would be contrary to the Brussels Ia Regulation. In that case, that agreement conferring jurisdiction would not be consistent with the objectives of foreseeability, transparency and legal certainty..."

The CJEU may have regarded an asymmetric jurisdiction clause as providing a submission to the jurisdiction of the named court and also a submission to the jurisdiction (or designation) of all other courts worldwide with jurisdiction under their local rules.

The CJEU also seems to have considered that designating the courts of a specific EU member state is only valid if the other courts designated are also EU member states or parties to the Lugano Convention (the Lugano Convention is similar to the Brussels I Regulation but includes some non-EU states, such as Switzerland and Norway). The freedom of choice granted to one party by an asymmetric jurisdiction clause may therefore need to be limited to EU or Lugano member states. If this is not the case, it appears that the clause as a whole is invalid (as contrary to the Brussels I Regulation) rather than merely the licence to bring proceedings elsewhere than in the designated court falling away, though there may be arguments in favour of partial invalidity.

Implications of Lastre for EU courts

The CJEU's decision upholds the validity in principle of asymmetric jurisdiction clauses which designate the courts of an EU member state, but the CJEU declined to say whether the clause in *Lastre* complied with the CJEU's proviso. That issue was referred back to the French courts. On its face, the clause does not limit *Lastre* to bringing proceedings in Brescia or other courts

in EU or Lugano member states, but given the entirely EU nexus, perhaps it should be construed in that way.

If the French courts decide that the jurisdiction clause is valid, Agora's claim against Lastre in Rennes will have been brought in breach of that clause, and the French courts should decline jurisdiction over Agora's claim. But if the French courts decide that the jurisdiction clause is not valid because it does not comply with the CJEU's proviso, there would appear to be no obstacle to Agora pursuing its claim against Lastre in Rennes.

In general terms, there is a risk that any asymmetric jurisdiction clause in favour of courts in an EU member state will be invalid unless the freedom to bring proceedings other than in the designated court is confined to EU/Lugano member states. Few current clauses will be limited in this way.

Implications of Lastre for jurisdiction clauses

Jurisdiction clauses come in many forms. We set out very briefly below how various kinds of clause might be affected by *Lastre*, but the actual position will inevitably depend upon the facts as they arise (eg where is the counterparty based? where are its assets? who else might sue?) and the drafting of the clause itself. And there are many uncertainties arising from the judgment in *Lastre*.

In the summary below, Party A is the party with the benefit of an asymmetric jurisdiction clause and Party B is the party subject to the asymmetry. We also assume that there are no other grounds upon which to call into question the validity of the clause or the contract or that might affect the bringing of proceedings.

1. An asymmetric clause in favour of the courts of a named EU member state but which allows Party A to bring proceedings in any other EU or Lugano member state with jurisdiction:

- (a) will this clause confer jurisdiction on the courts of the named EU member state for proceedings brought by Party A? Yes.
- (b) will this clause prevent Party B bringing proceedings in another EU member state with jurisdiction? Yes.
- (c) will this clause allow Party A to bring proceedings in courts outside the EU? Prima facie no as to do so would be in breach of the clause, but it will depend upon the local rules of the court in question.

2. An asymmetric clause in favour of the courts of a named EU member state but which allows Party A to bring proceedings in any other court, whether inside or outside EU/Lugano member states, with jurisdiction under its local rules:

- (a) will this clause confer jurisdiction on the courts of the named EU member state for proceedings brought by Party A? Probably not if *Lastre* treats these clauses as wholly invalid. However, the EU court might in any event have jurisdiction under general rules.
- (b) will this clause prevent Party B bringing proceedings in another EU member state with jurisdiction? Probably not.
- (c) will this clause allow Party A to bring proceedings in another EU member state with jurisdiction? Yes. If the clause were treated as valid, the party's proceedings are in accordance with the clause; and if

the clause is treated as invalid, jurisdiction will depend upon general rules.

- (d) will this clause prevent Party B from bringing proceedings in courts with jurisdiction outside the EU? Perhaps, depending on the rules the court in question. If it regarded the clause as invalid under applicable law, then no; but if it regarded the clause as valid under applicable law (notwithstanding the position within the EU), the court could enforce compliance with the clause.
- (e) will this clause allow Party A to bring proceedings in courts outside the EU with jurisdiction? Prima facie yes. Even if valid, there is nothing in the clause to prevent Party A from doing so but it will depend upon local rules.

3. An asymmetric clause in favour of the courts of a non-EU state (eg the courts of England and Wales) but which allows Party A to bring proceedings in any other courts with jurisdiction:

- (a) will this clause confer jurisdiction on the courts of the named non-EU state for proceedings brought by Party A? Prima facie yes, depending upon local jurisdictional rules.
- (b) will this clause prevent Party B from bringing proceedings in an EU member state with jurisdiction? Unclear. EU courts may regard the clause as wholly (as opposed to partially) invalid and/or consider that they can only decline jurisdiction in favour of non-EU courts if the requirements of articles 33 or 34 of the Brussels I Regulation are met (eg the non-EU court was seised first). The named court may, however, be able to grant an anti-suit injunction to seek to restrain Party B from proceeding in breach of the clause.
- (c) will this clause allow Party A to bring proceedings in courts with jurisdiction in an EU member state? Prima facie yes. If the clause were treated in the EU as invalid, jurisdiction will turn on general rules; but if the clause were treated as valid, it does not prevent Party A from bringing proceedings against Party B in EU member states with jurisdiction under those rules.
- (d) will this clause prevent Party B from bringing proceedings outside the EU? Perhaps, depending on the local jurisdictional rules in the state in question (the position is unlikely to be affected by *Lastre*).
- (e) will the clause affect the ability of Party A to enforce within an EU member state a judgment against Party B given by the named court? Unclear. It will turn on the rules for enforcement in the EU state in question. If those rules depend upon Party B having submitted validly to the named courts, *Lastre* could be relevant.
- (f) more specifically, will the clause enable Party A to enforce within an EU member state a judgment against Party B given by the named court if the named court is in a state where the Hague 2019 Convention is in force? Unclear, but arguably yes since the validity of the designation of a court for Hague 2019 purposes should depend upon the proper interpretation of the Convention and the applicable law, not on whether the clause would have been valid to give jurisdiction under the Brussels I Regulation, and the official report on Hague 2019 appears to

recognise that the Convention applies to asymmetric clauses. But EU courts could take different view.

4. An asymmetric clause in favour of the courts of a non-EU member state (eg the courts of England and Wales) but which allows Party A to bring proceedings in a court with jurisdiction within the EU:

- (a) will this clause confer jurisdiction on the courts of the named non-EU state for proceedings brought by Party A? Prima facie yes, depending upon the local jurisdictional rules.
- (b) will this clause prevent Party B from bringing proceedings in an EU member state with jurisdiction? Unclear. EU courts may regard the clause as wholly, as opposed to partially, invalid because it mixes EU and non-EU courts contrary to the requirements of *Lastre* (but there are opposing arguments) and/or consider that they can only decline jurisdiction in favour of non-EU courts if the requirements of articles 33 or 34 of the Brussels I Regulation are met (eg the non-EU court was seised first). The named court may, however, be able to grant an anti-suit injunction to seek to restrain Party B from proceeding in breach of the clause.
- (c) will this clause allow Party A to bring proceedings in courts with jurisdiction in an EU member state? Prima facie yes. If the clause were treated as invalid under EU law, jurisdiction will turn on the general rules; but if the clause were treated as valid, it does not prevent Party A from bringing proceedings against Party B in EU member states.
- (d) will this clause prevent Party B from bringing proceedings in a court outside the EU? Perhaps, depending on the local jurisdictional rules in the state in question (the position is unlikely to be affected by *Lastre*).
- (e) will the clause affect the ability of Party A to enforce within an EU member state a judgment against Party B given by the named court? Unclear. It will turn on the rules for enforcement in that state. If those rules depend upon Party B having submitted validly to the named courts, *Lastre* could be relevant.
- (f) more specifically, will the clause enable Party A to enforce within an EU member state a judgment against Party B given by the named court if the named court is in a state where the Hague 2019 Convention is in force? Unclear, but arguably yes since the validity of the designation of a court for Hague 2019 purposes should depend upon the proper interpretation of the Convention and the applicable law, not on whether the clause would have been valid to give jurisdiction under the Brussels I Regulation, and the official report on Hague 2019 appears to recognise that the Convention applies to asymmetric clauses. But EU courts could take different view.

5. Exclusive jurisdiction clause in favour of the courts of a non-EU state:

- (a) will this clause confer jurisdiction on the courts of the named non-EU state for proceedings brought by Party A or Party B? Prima facie yes, depending upon the local jurisdictional rules.
- (b) will this clause prevent Party A or Party B from bringing proceedings in an EU member state with jurisdiction? Depends. If the non-EU state is

a party to the Hague 2005 Convention (such as the UK), yes in accordance with that Convention. Otherwise perhaps yes but unclear as EU courts may consider that they can only decline jurisdiction in favour of non-EU courts if the requirements of articles 33 or 34 of the Brussels I Regulation are met (eg the non-EU court was seised first).

- (c) will this clause allow Party A and Party B to bring proceedings in a court with jurisdiction outside the EU? Depends. If named court and the court seised are in states that are parties to the Hague 2005 Convention, no in accordance with that Convention. If one of the states is not a party to the Hague 2005 Convention, *prima facie* not but it will depend upon the local rules in the court seised.
- (d) will a judgment given by the named courts be enforceable in EU member states? If the named court is a party to the Hague 2005 Convention, yes in accordance with that Convention. If the named court is not a party to the Hague 2005 Convention, it will depend on the local laws in the relevant EU member state.

6. Non-exclusive jurisdiction clause in favour of the courts of an EU member state:

- (a) will this clause confer jurisdiction on the courts of the named EU member state? Probably, but if EU law were to interpret this clause as designating both the named court and all other courts (both within and outside the EU) with jurisdiction in the same way that the clause in *Lastre* seems to be treated as doing so, perhaps not.
- (b) will this clause prevent either party from bringing proceedings in another EU member state with jurisdiction? No.
- (c) will this clause prevent either party from bringing proceedings in courts with jurisdiction outside the EU? *Prima facie*, not but it will depend upon the local jurisdictional rules in question.

7. Non-exclusive jurisdiction clause in favour of the courts of a non-EU state:










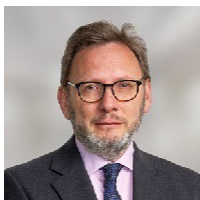
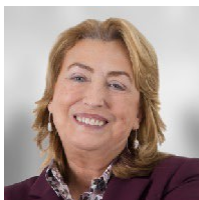
- (a) will this clause confer jurisdiction on the courts of the named non-EU state? *Prima facie* yes, depending upon the local jurisdictional rules.
- (b) will this clause prevent either party from bringing proceedings in an EU member state with jurisdiction? No.

Conclusion

The CJEU's acceptance in principle of asymmetric jurisdiction clauses designating courts in the EU is welcome. Freedom of contract is fundamental. However, the CJEU's limitation of that asymmetric freedom to other EU/Lugano member states will cause considerable uncertainty for some time to come. One or more visits to the CJEU may prove necessary.

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