

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance



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Asymmetric Jurisdiction Clauses - an update -

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Asymmetric jurisdiction clause

- (1) The courts of England have exclusive jurisdiction to settle any disputes ...
- (2) The parties agree that the courts of England are the most appropriate forum ...
- (3) This clause is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction.



Effect

- The borrower is limited to jurisdiction “A” but the bank may proceed in that jurisdiction or any other courts which have competent jurisdiction.
- The bank can sue anywhere but only if and to the extent that a court other than in “A” has jurisdiction.
- If the borrower sues in “A”, the bank is not able to challenge the court’s jurisdiction since it has agreed to it.



Use

Commerzbank AG v Liquimar Tankers Management Inc. [2017] EWHC 161 (Comm) per Cranston J at [41].

“Asymmetric jurisdiction agreements are a long-established and practical feature of international financial documentation”

- LMA documentation.
- International bond issues.
- Securitisations.



Art.25(1) Brussels Recast Regulation

“If the parties, regardless of their domicile, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”



Recital (19) Brussels Recast

“The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.”



Anterist v Lyonnais

ECJ Case 22/85

- Article 17(3) of Brussels Convention

“If the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention”.
- ECJ at [15]

“Clauses which expressly state the name of the party for whose benefit they were agreed and those which, whilst specifying the courts in which either party may sue the other, give one of them a wider choice of courts, must be regarded as clauses whose wording shows they were agreed for the exclusive benefit of one of the parties.”



Authorities - France

- MME X v Banque Privee Edmond de Rothschild Europe (Societe) (11-26022)
“.. It had an option character (*caractère potestatif*) only for the bank, so that it was contrary to the object and the purpose of prorogation of jurisdiction provided for by art.23 of the Brussels I Regulation”.
- ICH v Credit Suisse (13-17264)
- eBizcuss v Apple (14-16898)
- Diemme Enologia v Etablissements Chambon (15-18758)
- Credit Suisse II (16-24497)
- Saint-Joseph (17-21309)



Authorities - England

- Continental Bank NA v Aekos Compania Naviera [1994] 1 WLR 588 (CA)
- Barclays Bank Plc v Ente Nazionale [2015] EWHC 2857
- Commerzbank v Liquimar [2017] 1 WLR 3497



Potential consequences

- Etihad Airways PJSC v Prof. Dr. Lucas Flöther [2019] EWHC 3107 at [163] Richard Jacobs J:
“If correct, this would have the consequence that neither party could use the jurisdiction agreement in the Facility Agreement, whatever its scope, as the basis for establishing the jurisdiction of the English court ...”



Art.31 Brussels Recast

1. ...
2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.”



Recital (22) Brussels Recast

“However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid litigation abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently or proceedings involving the same cause of action and between the same parties ... This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which it applies to the dispute pending before it.”



Authorities

Asymmetric jurisdiction clauses are within Art.31(2):

- Perella Weinberg Partners v Codere (2016)
- Commerzbank AG v Liquimar Tankers Management Inc. (2017) Cranston J
- Etihad Airways PJSC v Prof. Dr. Lucas Flöther (2019) Richard Jacobs J



Consequences

If an asymmetric clause is not an exclusive jurisdiction agreement within Art.31(2) and (3):

- The non-designated court will have priority to decide on the validity and scope of the clause
- The “Italian torpedo” is still available.



Hague Convention (2005)

- Article 1(1)

“This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.”

- Article 3(a)

For the purposes of this Convention “exclusive choice of court agreement” means an agreement concluded by two or more parties that ... designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.”



Hartley/Dougauchi Report

- [106] “It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So [asymmetric] agreements of the kind referred to in the previous paragraph are not exclusive choice of court agreements for the purposes of the Convention.”



Authorities

- Commerzbank AG v Liquimar Tankers Management Inc. [74]

“There are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in article 3(a) of the Hague Convention cover asymmetric jurisdiction clauses”.

- Etihad Airways PJSC v Prof. Dr. Lucas Flöther (2019) at [217].



Brexit

Position following Brexit:

- Brussels Recast Regulation.
- Hague Convention.

