

# UNILATERAL JURISDICTION CLAUSES IN INTERNATIONAL FINANCIAL CONTRACTS

## POSITION PAPER

Prepared by the Legal Committee of the ICC Banking Commission

### **Summary and highlights**

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**Background:**

Unilateral (or asymmetrical) jurisdiction clauses may vary in form and nature. However, such clauses all provide an option to only one of the parties (e.g. a lender in a financial transaction) allowing it to choose the forum for resolving disputes between the parties. Some unilateral jurisdiction clauses offer one party the ability to bring an action against the other party in any national or state court. Other clauses may contain an arbitration option, allowing only one party the ability to require arbitration of disputes.

The enforceability of unilateral jurisdiction clauses has been upheld in many jurisdictions. However, their validity has been brought into question in a number of European jurisdictions in recent court decisions<sup>1</sup>.

The most significant of those decisions was rendered by the French Supreme Court in *Mme X v. Rothschild*<sup>2</sup> on 26<sup>th</sup> of September 2012. It ruled that a unilateral jurisdiction clause was “potestative” and therefore void according to Article 23 of the Brussels Regulation on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters (“Brussels I”). This decision is significant because Brussels I is applied in all 29 Member States of the European Union (“EU”).

The decision by the French Supreme Court has been criticized on a number of grounds. Although the issue has never been considered by the European Court of Justice (the “**ECJ**”), some commentators are of the view that, had the matter been referred to the ECJ, it may well have concluded that the French Supreme Court misinterpreted Article 23 of the Brussels Regulation for the following reasons:

- The French Supreme Court did not indicate the respect in which the clause in dispute violated Article 23 of the Regulation, making the basis for its judicial reasoning unclear.

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<sup>1</sup> Judgment No. 1831/12 of June 19, 2012 of the Supreme Commercial Court of the Russian Federation, in which the Supreme Court ruled that the unilateral jurisdiction clause in casu was violating “common principles for protection of civil rights” and Judgment No. 71 of September 2, 2011 of the Bulgarian Supreme Court of Cassation on commercial case No. 1193/2010. In this case the Bulgarian Supreme Court ruled that “the arbitration clause by which one of the parties to a contract is given, in contradiction with the law, the possibility to unilaterally chose the body of jurisdiction to which it would refer for resolution a civil dispute arising out of a specific contractual relationship, shall be null and void (...)”

<sup>2</sup> ECLI:FR:CCASS:2012:C100983.

- The validity of Article 23 should be assessed by reference to the autonomous requirements of this Article, not in reference to concepts of member state laws.<sup>3</sup>
- In relation to the validity of a unilateral jurisdiction clause, Article 23 of the Regulation explicitly states that the parties may agree on a type of jurisdiction other than exclusive jurisdiction.<sup>4</sup>
- Furthermore, commentators have found it to be remarkable that the French Supreme Court has relied on the concept of “potestativité” as this does not relate to jurisdictional issues per se. In addition to this, the use of domestic legal principles of member states to interpret an EU provision has been described as “regrettable”, especially since the purpose of European regulations is to provide for an uniform and predictable legal framework.
- In its plea against the invalidity of the unilateral jurisdiction clause, it was argued that the court should not invalidate the entire clause even if it concluded that a portion of the clause was invalid. The designation of the court of Luxembourg as the choice of forum was perfectly valid and enforceable by both parties. However, the French Supreme Court ruled out the possibility of partial invalidity and determined that the clause was void in its entirety. In that, its decision is similar to the ones previously rendered by the supreme courts in the Russian Federation and in Bulgaria and referred to earlier in this paper.

In a subsequent decision<sup>5</sup> in 2013, in his defense of unilateral jurisdiction clauses, English High Court Justice Popplewell J. referred to the French decision in *Mme X v. Rothschild* as “controversial.” In 2014, the Luxembourg District Court<sup>6</sup> also upheld the use of a unilateral jurisdiction clause under Article 23 of the Brussels Regulation, and refused to follow the reasoning of *Mme X v. Rothschild*, noting that the precursor to Brussels I, the Brussels Convention<sup>7</sup>, expressly permitted such clauses.

In a decision in 2015 the French Supreme Court has decided, again, that unilateral jurisdiction clauses are unenforceable.<sup>8</sup> The decision was given in the context of the Lugano Convention, which determines jurisdiction between EU member states and Switzerland, Norway and Iceland but which, so far as relevant, is the same as the Brussels I Regulation. In a very short judgment, the Court followed suit with its previous decision reached in 2012. The Court criticised the Court of Appeal in that it did not examine the respect in which the unbalance was contrary to the objectives of predictability and legal certainty in Article 23 of the Lugano Convention. The case is now sent back to

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<sup>3</sup> *Elefanten Schuh GmbH v Jacqmain* C-150/80 [1981] ECR 1671, *Sanicentral GmbH v Collin* C-25/79 [1979] ECR 3423, *Benincasa v Dentalkit Srl* C-269/95 [1997] ECR I 3767 at paragraph 17.

<sup>4</sup> “Such jurisdiction shall be exclusive unless the parties have agreed otherwise”. In addition, the legislative intent behind the current wording of Article 23 was stated to be respect for the “autonomous will” of the parties, COM (1999) 348 at page 18.

<sup>5</sup> *Mauritius Commercial Bank Limited v Hestia Holdings Limited & Another* (2013) EWHC 1328 (Comm)

<sup>6</sup> Tribunal d’arrondissement de Luxembourg dated January 29, 2014, ref. no 217/14 and 128/14

<sup>7</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

<sup>8</sup> *Danne v Credit Suisse* (Case 13-27.264, 25 March 2015)

trial with possibly the new decision to be rendered by the new Court of appeal being itself appealed again to the Court of Cassation. This latest ruling provides some clarity although much uncertainty remains. For example, the ruling does not refer to the protection of consumers (the dispute relates to an international financing agreement) but more in general a prohibition of imbalanced clauses, irrespective of the status of the contracting parties. However, it remains unclear whether forms of asymmetry are banned or whether a more restricted form of a unilateral option could be upheld. An example could be offering the bank, but not the borrower or the guarantor, the option of bringing action either at the place of performance or before its own home country courts.

Considering the recent decisions above, the likelihood that further decisions should be expected from French courts and that earlier European Court decisions upheld unilateral jurisdiction clauses (ECJ, 24 June 1986, C-22/85, *Anterist*; ECJ, 9 November 1978, C-23/78, *Meeth*), there is uncertainty as to whether *Mme X v. Rothschild* and *Danne v. Credit Suisse* should be considered as binding precedents throughout the EU on the interpretation of European law. Legal certainty would be enhanced if a competent court in the EU were to seek an interpretive ruling from the ECJ on the correct interpretation of EU law in this respect. In the meantime, courts in EU member States should remember that EU law, including the Lugano Convention, ought to be interpreted uniformly according to the rationale of the statute, and certainly not as mere domestic laws. However, the above-mentioned rulings may be considered as persuasive authority for other European jurisdictions, particularly of civil law tradition, in the future and may create legal uncertainty with regards to unilateral jurisdiction clauses.

### **Why unilateral jurisdiction clauses should be upheld in commercial contracts (and especially trade finance contracts)?**

The Bulgarian, Russian and French Supreme Court rulings mentioned above suggest that unilateral jurisdiction clauses were considered unfair and against public policy. A common challenge to a unilateral jurisdiction clause is that it is susceptible to create a fundamental inequality of procedural rights between the parties to a dispute. In a consumer contract or employer/ employee context, unequal bargaining power between the parties could lead to a concern about one party's right to dictate how and where such disputes can be resolved.<sup>9</sup>

However, commercial transactions such as a contract between two commercially sophisticated parties to a financing transaction should not raise a comparable concern. Instead, the primary consideration should be to uphold the commercial terms of the parties' agreement including a unilateral jurisdiction clause with a view to fostering legal certainty *ex ante* in international trade.

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<sup>9</sup> It should be noted that many United States federal and state courts have upheld asymmetrical forum clauses even in the consumer or employee context. Such decisions have been rendered on the basis that contractual provisions should be enforced unless the terms or circumstances under which they were agreed were so grossly unfair as to be unconscionable.

The use of unilateral jurisdiction clauses in financial transactions has a clear economic purpose: enabling the lender to bring an action and enforce a judgment or arbitration award in the jurisdiction where assets of the obligor, collateral security for the payment obligations, or a guarantor is located. In case of a borrower's failure to pay amounts when due, the lender has a legitimate interest in being able to bring an action in a court which can determine the parties' rights and obligations pursuant to underlying financing agreements and expedite enforcement of rights to any collateral.

In addition, the lender's option to arbitrate pursuant to internationally accepted rules may be necessary for effective enforcement of the lender's rights. This is particularly essential if local courts in the jurisdiction in which the obligor has assets would not recognize a foreign court's judgment. If the obligor's jurisdiction has ratified the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards, an award may be more easily enforceable internationally than a judgment of a foreign court, which depends on the existence of bilateral or multilateral treaties for reciprocal enforcement. The risks, and therefore the costs, of cross-border lending would significantly increase if a unilateral right to refer a dispute to arbitration is not recognized and the lender could be unable to enforce a judgment for unpaid amounts in the jurisdiction in which the obligor's assets are located.

Limiting a lender's right to initiate enforcement actions could also result in delays and increased costs of enforcement. The absence of a consistent approach amongst national courts to jurisdiction clauses, including unilateral ones, forces lenders to undertake a detailed analysis of the choice of jurisdiction at the outset of the transaction which adds time and expense to the closing process, increases the bank's operational risk and adversely affects its recovery rate which is an essential component of its regulatory capital consumption. This will negatively affect the availability and cost of cross-border credit, including trade finance. This could in turn impair economic growth derived from exports.

While the lender needs the ability to bring an enforcement proceeding in any jurisdiction in which the obligor's assets are located, the obligor does not have a comparable need to avail itself of a wide range of enforcement locations. In most cases it is the lender who has to take resort to litigation against non performing obligors and in these situations a greater flexibility for the lender in initiating an enforcement proceeding seems reasonable. In the event the obligor has grounds to bring or enforce a claim against the lender, it should be able to obtain access to adequate assets in the head office jurisdiction of the lender or other specified financial centers in which the parties have agreed the lender would be subject to suit or arbitration.

### **Recommendations:**

As discussed above, there are strong policy reasons for unilateral jurisdiction clauses to be upheld.

However, in light of the uncertainty arising out of recent rulings, the ICC Legal Committee proposes:

- For the ICC Banking Committee to call on the competent European authorities to provide clarity on the validity of unilateral jurisdiction clauses
- Meanwhile, for banks and their customers to exercise caution when relying on these clauses pending clarification by the European Court of Justice or a next revision of the Brussels 1 Regulation. Particularly where there is a continental European nexus, lenders should consider using asymmetrical clauses (i) only if necessary and (ii) after determining that these clauses are valid under the laws of the jurisdictions concerned i.e. the law of the agreement, the laws of the jurisdictions where claims can be filed under the agreement and the law of the jurisdictions where the award or the judgment are to be enforced.
- Alternatively, other options than unilateral jurisdiction clauses could be considered, such as (i) symmetrical (mutual) submission by the lender and obligor to the exclusive jurisdiction of courts of a specified country or arbitration body; (ii) symmetrical (mutual) submission to non-exclusive jurisdiction of courts of a specified country or arbitration body and/or (iii) an option for either party to bring an enforcement action against the other party in any jurisdiction in which such other party has assets.



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