FINANCIAL MARKETS LAW COMMITTEE

ISSUES OF LEGAL UNCERTAINTY ARISING IN THE CONTEXT OF ASYMMETRIC JURISDICTION CLAUSES

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[1] Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

[2] The FMLC Secretariat would like to thank Tolek Petch of Slaughter and May for preparing the first draft of this paper.

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1 INTRODUCTION AND EXECUTIVE SUMMARY[3]

Introduction

1.1 The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2 An asymmetric jurisdiction clause (also known as unilateral jurisdiction clause or one-sided jurisdiction clause)[4] is exclusive as regards one party and non-exclusive as regards the other. For example, borrowers in finance transactions may contractually be required to bring proceedings exclusively in a named court, while lenders are given the right to bring proceedings in the named court, or any other court of competent jurisdiction. Asymmetric jurisdiction clauses are used worldwide in financing agreements and in debt and equity market transaction documents and may, as in the example above, favour the party to the transaction with the greater exposure.

1.3 In contrast with the approach taken by the courts in, for example, England and Wales,[5] Spain,[6] Italy[7] and Luxembourg,[8] certain national courts[9] within the European

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3 This paper was prepared prior to the UK holding the referendum on the whether to leave or remain in the European Union and does not take in to account the implications (if any) of the UK's vote to leave the European Union.

4 An example of such a clause can be found in the Loan Market Association ("LMA") Facility Agreements, which provide that:

(a) The courts of England have exclusive jurisdiction to settle any dispute…

(b) The Parties agree that the courts of England are the most appropriate and convenient courts… and accordingly no Party will argue to the contrary.

(c) 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. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.

5 See *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 Lloyds Rep 509 and *Law Debenture Trust Corporation plc v Elektrim Finance BV and others* [2005] EWHC 1412.

6 See Provincial Court of Appeal, Madrid, 18 October 2013, *Camimalaga S.A.U. v DAF Vehículos Industriales, S.A.*

7 See Corte di Cassazione, 22 October 1970; Corte di Cassazione, 11 April 2012, *Grinka in liquidazine . Intesa San Paolo, Simest, HSBS*, Case N° 5705; Corte D'Appello di Milano, 22 September 2011, *Sportal Italia v. Microsoft Corp*.

8 See the decision of the Tribunal d'Arrondissement of Luxembourg in commercial case 127/14 and 128/14, 29 January 2014.

9 See the Bulgarian Supreme Court on 2 September 2011 in Judgment No. 71 in commercial case No. 1193/2010 held that a unilateral jurisdiction clause was void on grounds similar to the reasoning of the French Supreme Court – see section 3 of this paper for a discussion of the French Supreme Court's decisions. See also the Supreme Court of Poland, 19 October 2012, Case N° V CSK 503/11; Supreme Court of Poland, 24 November 2010, Case N° II CSK 291/10.

Union have held asymmetric jurisdiction clauses to be invalid as a matter of European law. This has given rise to legal uncertainty concerning the validity and enforceability of such clauses as a matter of European law.[10]

1.4 By way of background, the FMLC notes that prior to the entry into force of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the "Brussels Convention") the standard form of a jurisdiction clause in financial documents, governed by English law, was a two sided non-exclusive clause. Article 17 of the Brussels Convention then made it unclear whether such clauses were permitted. Article 17 did, however, permit one side to a contract (but probably not both) to retain the flexibility to sue "in any… court which has jurisdiction". Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation") then removed the uncertainty created by Article 17 of the Brussels Convention. The Brussels I Regulation left out the text of Article 17 but did not, however, provide any explanation as to why. Perhaps Article 17 was no longer necessary since two-sided non-exclusivity was expressly permitted under the Brussels I Regulation (and now permitted under Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Recast Brussels Regulation")).

Executive Summary

1.5 In the hope of encouraging a speedy EU-wide clarification of the law on asymmetric jurisdiction clauses, this paper considers, in particular: (i) the French courts' approach to asymmetric jurisdiction clauses; (ii) the English (and other European) courts' approach; and (iii) the commercial rationale for such clauses.[11]

[10] A summary of the relevant European legislation relating to asymmetric jurisdiction clauses is set in the Annex hereto.

[11] This paper addresses the issue of asymmetric jurisdiction clauses solely in the context of agreements entered into between commercial parties. Accordingly it does not touch on the special rules provided by Recast Brussels Regulation on jurisdiction in matters relating to insurance, jurisdiction over consumer contracts, and jurisdiction over individual contracts of employment. Neither is national or EU law relating to the protection of consumers (including the Unfair Terms in Consumer Contracts Directive) considered in this paper. This paper is in no way a comprehensive analysis of the approaches to asymmetric jurisdictions taken by the courts in Europe

2 CASE LAW OF THE *COUR DE CASSATION*[12]

2.1 In *Mme X v Société Banque Privé Edmond de Rothschild*[13] ("*Rothschild*") the *Cour de cassation* (French Supreme Court) ruled that an asymmetric jurisdiction clause in a loan agreement was wholly invalid. Mme X had opened a bank account with Banque Privé Edmond de Rothschild and filed a suit alleging the mismanagement of her account by the bank. The clause in question provided that the bank could only be sued by the client in the courts of its domicile (Luxembourg) whereas the bank could sue the client either in the courts of her domicile or before any other court of competent jurisdiction.

2.2 During proceedings before the French courts, the bank sought to rely on its exclusive right to be sued in Luxembourg. The *Cour de cassation* held that the jurisdiction clause was null and void because it was discretionary (*potestativité*) and contrary to the purpose of Article 23 of the Brussels I Regulation.

2.3 Further light was thrown on the matter by the subsequent decision of the *Cour de cassation* in *Société Danne v Crédit Suisse*.[14] Danne had concluded two framework contracts with Crédit Suisse for loans. The framework agreements included a jurisdiction clause, which provided that the court of Zurich had exclusive jurisdiction but that the bank was entitled to take action before any competent court.

2.4 The *Cour d'appel d'Angers* (French Court of Appeal) upheld the validity of the clause but its judgment was annulled by the *Cour de cassation*. The *Cour de cassation* held that the clause was unenforceable because it did not set out an objective basis for the alternative jurisdictions that the bank could choose and was, therefore, contrary to the goal of having certainty in jurisdictional matters under the Lugano Convention of 30 October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters (the "Lugano Convention").

2.5 It is unclear from the judgment whether the *Cour de cassation* interpreted the clause as seeking to confer jurisdiction (in favour of the bank) on any court in the world as opposed to just any court with jurisdiction. Although it is clear that, as a matter of English law,[15] the correct interpretation of such a clause is the latter, it is possible that

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12 The relevant European law provisions are set out in the Annex to this paper.

13 French Supreme Court, First Civil Chamber, 26 September 2012, Case No. 11-26022.

14 French Supreme Court, First Civil Chamber, 25 March 2015, Case No. No 13-27264.

15 See paragraphs 3.6 to 3.8 of this paper.

the *Cour de cassation* interpreted the clause as having the former meaning, namely that the clause sought to confer jurisdiction on any court in the world.

2.6 The final judgment of the *Cour de cassation* is *Société eBizcuss.com v Apple.*[16] The jurisdiction clause in question stated that:

> …parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat [Ireland] or in any jurisdiction where a harm to Apple is occurring.

2.7 The *Cour de cassation* rejected the argument that the clause was discretionary and contrary to the object and purpose of Article 23 of the Brussels I Regulation. It held that the clause satisfied the requirements of predictability and legal certainty required by the Brussels I Regulation.

2.8 The difference between *Danne* and *Apple* appears to lie in the fact that, in the former, Crédit Suisse reserved the right to institute proceedings in "any other competent court" whereas Apple was limited to suing in Ireland or "where a harm to Apple is occurring".

2.9 It is, however, not entirely clear why the two cases were decided differently as "any jurisdiction where harm to Apple is occurring" is not necessarily more certain than "any other competent court". In both cases the proceedings may be brought inside or outside Member States of the European Union or Contracting States to the Lugano Convention, the court seised must have jurisdiction under its rules of private international law and, in both cases, it is unclear *ex ante* which court will have jurisdiction.

3 CASE LAW OF THE ENGLISH (AND OTHER EUROPEAN) COURTS

3.1 In contrast with the approach taken by the French courts, on every occasion that the English courts have considered asymmetric jurisdiction clauses they have given effect to them.

[16] French Supreme Court, First Civil Chamber, 7 October 2015, Case No. No 14-16898.

3.2 In *NB Three Shipping Ltd v Harebell Shipping Ltd*[17] the Commercial Court upheld a jurisdiction and arbitration clause, which provided that:

> the courts of England shall have jurisdiction to settle any disputes… but the Owner shall have the option of bringing any dispute hereunder to arbitration...

3.3 In Law Debenture Trust Corporation PLC v Elektrim Finance B.V., Elektrim S.A. and Concord Trust[18] the contract between the parties provided that:

> [t]he agreement by all the parties to refer all disputes…. to arbitration… is exclusive such that [Elektrim] shall [not] be permitted to bring proceedings in any other court or tribunal... [Elektrim] hereby agree[s] that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes…

3.4 Mann J. held that, as Law Debenture had not participated in an arbitration notified by Elektrim, it was entitled to rely on its right under the contract to litigate in court.

3.5 In 2011, an asymmetric jurisdiction clause was again upheld by Gloster J. in *Lornamead Acquisitions Limited v Kaupthing Bank HF*.[19] The relevant clause in a senior term and revolving facilities agreement provided that:

> [t]he courts of England have exclusive jurisdiction to settle any dispute... This [clause] is for the benefit of the Finance Parties and Secured Parties only. As a result, no Finance Party or Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction…

3.6 In 2013, *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited ("Mauritius")*[20] confirmed the validity of asymmetric jurisdiction clauses (as a matter of English law) following the uncertainty created by the *Cour de cassation's* decision in the *Rothschild* case.

3.7 The jurisdiction clause in the *Mauritius* case was similar to the clause in the *Kaupthing* case. The defendants argued that the clause was ineffective (as per the *Rothschild* case)

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17 [2004] EWHC 2001 (Comm) Judgment dated 13 October 2004.

18 [2005] EWHC 1412 (Ch) Judgment dated 1 July 2005.

19 [2011] EWHC 2611 (Comm) Judgment dated 18 October 2011.

20 [2013] EWHC 1328 (Comm) Judgment dated 24 May 2013.

because: (a) it was one-sided in allowing the bank to issue proceedings in any court in the world; and/or (b) it should not be upheld as its one-sided nature was incompatible with the right of access to justice under Article 6 of the European Convention on Human Rights (the "ECHR").

3.8 The High Court held that the clause did not allow the bank to sue in any court in the world, but only permitted the bank to sue in "those courts which regard themselves under their own rules of private international law as having competent jurisdiction". The court went on to say that even if the clause were to be read as the defendants argued, it would give effect to the bargain as "[a]symmetric provisions have regularly been enforced by the court". The court also dismissed the ECHR argument on the basis that Article 6 related to equal access to justice within the particular forum chosen, as opposed to equal choice as to the forum itself.

3.9 In *Barclays Bank PLC v Ente Nazionale de Previdenza ed Assistenza dei Medici degli Odontoiatra*[21] the High Court again confirmed that asymmetric jurisdiction clauses that provide for a primary jurisdiction but allow one party to bring proceedings in another jurisdiction are valid under English law. Blair J. made it clear that such clauses are "frequently agreed for good practical reasons in financing transactions".

3.10 Three principles can be drawn from the cases referred to above. First, it will be seen that on every occasion that the English courts have considered asymmetric jurisdiction clauses, the clauses have been upheld. Second, the courts have rejected the submission that such clauses operate as a choice of the jurisdiction of all the courts in the world (*Mauritius Commercial Bank Limited*). Third, such asymmetric clauses are regarded as being agreed for good practical reasons in financing transactions (*Barclays Bank PLC*).

3.11 Courts in other European jurisdictions have also taken the approach adopted by the English courts. For example, the *Cour de cassation*'s decision and interpretation of the Brussels I Regulation in *Rothschild* was contradicted by the *Tribunal d'Arrondissement* of Luxembourg in a commercial case in 2014.[22] The Tribunal held that an asymmetric jurisdiction clause was valid and noted that the: (i) *Rothschild* decision had been widely criticised; (ii) asymmetric jurisdiction clauses were expressly permitted by the Brussels Convention and the Brussels I Regulation implicitly permits them; and (iii)

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21 [2015] EWHC 2857 (Comm) Judgment dated 9 October 2015.

22 Commercial judgments 127/14 and 128/14, 29 January 2014.

the contracting parties had similar negotiating power so freedom of contract should prevail. The Court of Appeal of Madrid has also considered an asymmetric jurisdiction clause and held it to be valid and consistent with international norms.[23] Similarly, the Italian courts have upheld the validity of asymmetric jurisdiction clauses broadly on the principle of freedom of contracting parties to choose and on the understanding that the Brussels Regulation permits asymmetric jurisdiction clauses.[24]

4 COMMERCIAL REASONS FOR ASYMMETRIC JURISDICTION CLAUSES

4.1 There are good commercial reasons for using asymmetric jurisdiction clauses in financial market transactions. Such clauses ensure that a creditor can always sue a debtor in the chosen court whilst preserving the creditor's right to bring proceedings where the debtor's assets may be located at the time a dispute arises. Asymmetric jurisdiction clauses thereby increase the prospect of a creditor successfully recovering a debt owed to it, which in turn contributes to the willingness of creditors to provide finance and reduces the cost of borrowing.

4.2 Also, since a creditor is the party with the greater exposure, asymmetric jurisdiction clauses provide greater certainty and protection to the creditor by ensuring that a debtor has only limited (or, indeed, no) opportunities for forum shopping.

5 CONCLUSION

The approach taken by, for example, the French and Bulgarian courts to asymmetric jurisdiction clauses stands in stark contrast to the approach taken by the courts in England, Spain, Italy and Luxembourg. This divergence in the interpretation of the law—now transposed in the Recast Brussels Regulation—risks causing commercial and legal uncertainty. The FMLC would, therefore, recommend a speedy clarification of the position under European law, whether by way of an amendment to the Recast Brussels Regulation or by way of a reference to the European Court of Justice.

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23 Court of Appeal of Madrid, 18 October 2013, *Camimalaga S.A.U. v DAF Vehículos Industriales, S.A*

24 See, for example, Corte di Cassazione, 11 April 2012, *Grinka in liquidazine . Intesa San Paolo, Simest, HSBS*, Case N° 5705; Corte D'Appello di Milano, 22 September 2011, *Sportal Italia v. Microsoft Corp*.

ANNEX

EUROPEAN LAW PROVISIONS RELEVANT TO ASYMETRIC JURISDICTION CLAUSES

1 Article 25(1) of the Recast Brussels Regulation, which came into force on 10 January 2015, states that:

> 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. The agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing;
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2 Article 23 of the Brussels I Regulation was drafted in similar terms except that one of the parties had to be domiciled in a Member State. Where such an agreement was concluded by parties, none of whom was domiciled in a Member State, Article 23(3) provided that "the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction". Article 23 applied from 1 March 2002.

3 Article 23 of the 2007 Lugano Convention is to the same effect as Article 23 of the Brussels I Regulation except the reference to a Member State is replaced by a State bound by the Lugano Convention.

4 Article 17, third sub-paragraph of the Brussels Convention that applied prior to the entry into force of the Brussels I Regulation, stated that:

[i]f 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.

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