

## client alert

INTERNATIONAL DISPUTE RESOLUTION | LONDON & PARIS

23 FEBRUARY 2017

### ASYMMETRIC JURISDICTION CLAUSES EMPOWER ENGLISH COURTS TO DEFEAT ABUSIVE LITIGATION TACTICS

On 3 February 2017, the Commercial Court handed down judgment in *Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar* [2017] EWHC 161 (Comm) confirming that asymmetric jurisdiction clauses are valid exclusive jurisdiction clauses for the purposes of Article 31 of the Brussels 1 Recast Regulation (EU) 1215/2012 (the "*Recast Regulation*").

In making this determination, the Court confirmed that asymmetric clauses can be relied on to defeat abusive litigation tactics, and that the Recast Regulation empowers the English court to proceed in spite of on-going proceedings in another member state.

"Asymmetric" or "unilateral" jurisdiction clauses are extremely common in international transactional documents. They bind both parties to one method of dispute resolution and/or forum, while enabling one of the parties to unilaterally issue proceedings in another.

They are particularly common in international finance transactions, where a bank may wish to prevent a borrower from bringing proceedings in an unfamiliar jurisdiction whilst also maintaining the freedom to bring proceedings in another more convenient forum in the event of a dispute, for example the location of the borrower's assets.

Generally speaking, however, choice of jurisdiction agreements can be undermined by abusive litigation tactics - termed "*torpedo litigation*" - where a party to a dispute acts first to issue proceedings in a different member state court in breach of the relevant jurisdiction clause.

Under Article 27 of the Brussels I Regulation - which preceded the Recast Regulation - the court where proceedings are first brought has the right to determine its own jurisdiction, and all subsequent proceedings must be stayed in the meantime. This legal principle is called *lis pendens*.

Therefore, even if parties agree to the English courts having exclusive jurisdiction, if one party brings proceedings in another member state first, any proceedings brought in England must be stayed pending the decision of that court.

The Recast Regulation, which came into effect on 10 January 2015, sought to enhance the effectiveness of exclusive court agreements and avoid abusive litigation tactics.

Although the Recast Regulation includes the same *lis pendens* principle (Article 29), this is now subject to Article 31, which states that where any action falls within the "exclusive jurisdiction" of another member state court, any other court first seised must decline jurisdiction.

Until recently, it remained to be seen whether asymmetric clauses would fall under this protection: could an agreement which provides one entity with the unilateral option to litigate anywhere be described as "exclusive"?

This question came before the Commercial Court in *Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar*. In this case, the parties had entered into a guarantee which provided that the English courts would have exclusive jurisdiction, but also permitted the Bank to bring proceedings in any other jurisdiction. The Bank called on the guarantee. Liquimar struck first, and issued proceedings in Greece for a declaration that the guarantee was invalid (among other things). The Bank subsequently issued proceedings in England pursuant to the exclusive jurisdiction clause.

Liquimar then applied for a stay in the proceedings in accordance with the *lis pendens* rule under Article 29 of the Recast Regulation on the basis that Greece was the court first seised. Liquimar further argued that the protection provided by Article 31 did not apply as an asymmetric clause could not be deemed to be "exclusive".

Mr Justice Cranston held that the asymmetric jurisdiction clause conferred exclusive jurisdiction on the court or courts of a Member State, even if that exclusive jurisdiction is at the option of one party, and therefore fell within the meaning of Article 31 of the Recast Regulation.

In coming to his decision, the Judge sought support from:

- a) the analysis of the ECJ in *Nikolaus Meeth v Glacetal Sarl* [1979] CMLR 520: There the jurisdiction clause provided that the French party was bound to sue in Germany alone and the German party was bound to sue in France alone. The EJC held that such a clause was valid and provided for the exclusive jurisdiction of Germany in proceedings brought by the French party and the exclusive jurisdiction of France in proceedings brought by the German party; and
- b) the aim of the Recast Regulation to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive tactics.

Accordingly, the Judge dismissed Liquimar's application for a stay in the English proceedings.

In addition, Liquimar sought to argue that even if Article 31 applied it provided that the non-designated court (i.e. the Greek court) should stay its proceedings, but contained nothing about how the designated court (the English court) should proceed. It argued that, in the absence of any direction, the English proceedings should be stayed pending the decision of the Greek court.

The Judge held that this interpretation would "make a nonsense" of Article 31 and would "emasculate" the article: "If the English court decides it has jurisdiction, in my view it is able to proceed with the case irrespective of how far advanced the Greek proceedings are."

This decision removes some uncertainty that had existed under English law as to the protection an asymmetric jurisdiction clause would be given under Article 31 of the Recast Regulation. It also confirms that, where an English court is expressly designated, it may proceed irrespective of on-going proceedings elsewhere.

It should be noted that this is a robust approach taken in a jurisdiction in which asymmetric clauses are regularly used and have long been recognized and upheld by the English courts.

It will remain to be seen how courts in other member states will approach this issue; and whether differences in judicial interpretation as to the meaning of "exclusive" and the validity of certain jurisdiction clauses could lead to contradictory decisions in concurrent proceedings.

For example, in France there is some debate as to whether asymmetric clauses are valid, with the *French Cour de cassation* famously deeming one of such clauses as invalid both under the French civil code and the Brussels I Regulation in *Mme X v. Société Banque Privé Edmond de Rothschild 13*, First Civil Chamber, 26 September 2012 (No. 11-26022). In this case, the clause granted one of the parties the right to bring its claims before "any competent court".

By contrast, more recently, in *Société eBizcuss.com v. Apple*, First Civil Chamber, 7 October 2015 (No. 14-16898), the *French Cour de cassation* approved the validity of a clause which required *eBizcuss* to bring proceedings in a specified jurisdiction and Apple in a certain number of enumerated jurisdictions on the grounds that it complied with the requirement of predictability under the Brussels 1 Regulation (now the Recast).

The combination of the *Rothschild* and *eBizcuss* rulings confirms that asymmetric jurisdiction clauses are valid and effective in France if they comply with the requirement of foreseeability, i.e. if the clause sets out an objective basis for the determination of the competent courts.

However, one might imagine a scenario where a court seised in one member state accepts jurisdiction on the basis of a choice of jurisdiction agreement under Article 31, whereas another deems that agreement invalid, and determines that it has jurisdiction as the court first seised under Article 29.

---

## CONTACTS

### RUPERT REECE

tel. +44 (0)20 7382 5768  
reece@gide.com

### DIMITRIOS LOGIZIDIS

tel. +44 (0)20 7382 5755  
logizidis@gide.com

### KARINE IMBROSCIANO

tel. +44 (0)20 7382 5755  
imbroschiano@gide.com

### HANNAH MCIRVINE

tel. +44 (0)20 7382 5768  
hannah.mcirvine@gide.com

### PIERRE RAOUL-DUVAL

tel. +33 (0)1 40 75 61 34  
raoulduval@gide.com

### MICHEL PITRON

tel. +33 (0)1 40 75 61 49  
pitron@gide.com

### CHRISTIAN CAMBOULIVE

tel. +33 (0)1 40 75 36 04  
camboulive@gide.com

### CAROLE MALINVAUD

tel. +33 (0)1 40 75 36 66  
malinvaud@gide.com

### BRUNO QUENTIN

tel. +33 (0)1 40 75 36 70  
quentin@gide.com

You can also find this legal update on our website in the News & Insights section: [gide.com](http://gide.com)

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department ([privacy@gide.com](mailto:privacy@gide.com)).