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On 26 September 2012, in *Mme. X v. Banque Privée Edmond de Rothschild*,¹ the French Supreme Court, the Cour de Cassation, ruled that a “one-sided jurisdiction clause” – the type of jurisdiction clause frequently found in aviation finance agreements – was invalid. This decision has created a degree of uncertainty as to how European courts will interpret such clauses.

The Loan Market Association (the LMA) published a considered response to the *Rothschild* case, suggesting three options to assist in avoiding a declaration of invalidity by a local court.

**Nature of the Clause**

One-sided jurisdiction clauses, which are often included in aviation financing and leasing agreements, typically provide that:

1. Each of the parties to the agreement submits to the exclusive jurisdiction of the courts of a specified jurisdiction; but
2. Any finance party under a finance agreement, or the lessor under a lease
agreement, (in either case, Party A) may also pursue the borrower (in the case of a finance agreement) or lessee (in the case of a lease agreement) (in either case, Party B) in any other court.

The primary purpose of such a clause is: (a) to provide certainty to Party A that litigation will be conducted in a jurisdiction that is acceptable to it, and (b) to allow Party A to pursue Party B in any jurisdiction in which Party B has any assets.

The Rothschild Case

Mme. X entered into a private banking relationship with the Edmond de Rothschild Private Bank (the Bank) in Luxembourg, which was subject to standard terms and conditions of the Bank. These standard terms and conditions were governed by the law of Luxembourg, and Mme. X submitted to the exclusive jurisdiction of the Luxembourg courts, subject to the Bank’s right to take action before the courts of the domicile of Mme. X, or any other competent court.

The relationship deteriorated, and Mme. X brought a claim for damages in Paris. The Bank objected to the jurisdiction of the French courts on grounds that, pursuant to the standard terms and conditions of the Bank, Mme. X had submitted to the exclusive jurisdiction of the Luxembourg courts (and only the Bank had the option to bring a claim in an alternative jurisdiction). The Bank’s objections to jurisdiction were ultimately dismissed, after it appealed the verdicts of successive lower courts to the Cour de Cassation.

The Cour de Cassation ruled that the jurisdiction clause was of “a potestative nature as regards the bank” and that it was “contrary to the object and finality of prorogation of jurisdiction under Article 23 of the Brussels Regulation.”

Under Article 1174 of the French Civil Code, any obligation assumed pursuant to a “potestative” condition is void. A potestative condition is one that is entirely within the power and control of one party, which renders the applicable agreement unenforceable for lack of mutuality of obligations. Although the Cour de Cassation’s judgment did not set forth a detailed rationale behind its characterisation of the jurisdiction clause, the lower court, the Cour d’Appel in Paris, analysed the right of the parties to choose a jurisdiction pursuant to Article 23 of the Regulation and the principle of autonomy set out in Recital 14 to the Regulation (which states that the autonomy of the parties to choose a jurisdiction should be respected). Notwithstanding this right and the overarching principle, the Cour d’Appel found that there was no agreement on a jurisdiction (as contemplated by Article 23) to be respected because the Bank was able to choose any jurisdiction at its discretion, and Mme. X’s right to choose was restricted. Presumably the Cour de Cassation concurred with this analysis in reaching its decision.

From an outsider’s perspective, it may be hard to reconcile this analysis with the working realities of agreements containing one-sided jurisdiction clauses. Parties understand the purpose of these clauses, why they are in place and what the consequences of entering into the same might be. If the autonomy of the parties is to be respected, then it might be reasonable to expect that such clear and certain clauses be respected.
The LMA'S Response

On 24 January 2013, in direct response to the Rothschild case, the LMA produced a note which set out three alternative forms of jurisdiction clauses intended to address the risks presented as a result of the decision:

1. **One-sided Jurisdiction Clause with Fallback Provision.** This alternative would incorporate a fallback provision which, in the event that the one-sided element was declared invalid, would cause the exclusive jurisdiction clause to take precedence. Of the LMA’s three alternatives, this clause is closest in form to the existing one-sided jurisdiction clause.\(^5\)

2. **Single Court Exclusive Jurisdiction Clause.** This alternative provides that the courts of one jurisdiction have exclusive jurisdiction. This removes the Rothschild risk but, as a consequence, removes the ability of Party A to pursue Party B in any other jurisdiction chosen by Party A.

3. **Multiple Court Exclusive Jurisdiction Clause.** Under this alternative, several courts would be identified as having jurisdiction. Whilst this alternative reduces the risk that Party A may be subjected to litigation in a jurisdiction that it would rather avoid, it gives rise to the following issues:
   - there is little advantage in specifying multiple EU jurisdictions due to the recognition of judgments between Member States within the EU;
   - if extra jurisdictions are listed outside the EU, it is unclear what the impact would be if, for example, Party A brings proceedings within a Member State, whilst Party B brings proceedings outside the EU (but within a specified and agreed jurisdiction); and
   - any further flexibility in pursuing Party B in as-yet-to-be determined jurisdictions is lost.

**Ongoing Risks**

Within France, the Rothschild decision will have strong persuasive influence over lower French courts, but the decision is not strictly binding. Nonetheless, the decision at best creates uncertainty as to how one-sided jurisdictional clauses will be treated by courts located in France and other European jurisdictions,\(^6\) and at worst gives rise to a number of risks.

There is a risk that parties seeking leverage in litigation may attempt to: (i) bring proceedings outside the jurisdiction stipulated in the relevant agreement so as to have the court in the third country declare the jurisdiction clause invalid and assume jurisdiction, or (ii) challenge the jurisdiction of the courts when brought within the jurisdiction stipulated in the relevant agreement. If any such clause is found to be void and if any of the parties is domiciled in the EU, the fallback provision under the Regulation is that the defendant must be sued in the courts of the country in which it is domiciled.

If (i) an agreement is governed by French law, (ii) one of the parties is located in France, or (iii) there is another connection between the relevant contract and France, there is a distinct risk that a French court, recognising the Rothschild decision as precedent, would not respect a one-sided jurisdiction clause. Outside of
France but within the EEA, it has been suggested that courts, for instance those in England and Germany, would be unlikely to follow Rothschild. As a result, the decision may have a limited impact since, in theory, the interpretation of EU law should be uniform across all Member States. It may ultimately take a European Court of Justice decision to clear the uncertainty created by the Rothschild decision.

1 *Cour de cassation*, Civil Division 1, 26 September 2012, 11-26022 (Rothschild).

2 Mme. X ultimately lost her claim for damages. It is not entirely clear why, even if the jurisdiction clause was void, the French courts had jurisdiction to hear the case. Perhaps the connection arises because Mme. X received some financial services from the Bank in France or because she was advised through a French branch of the Bank.

3 *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (as amended) (the Regulation).*

4 Interestingly, the *Cour de Cassation* applied French law when determining the validity of the jurisdiction clause, rather than Luxembourg law, the law chosen by the parties under the agreement. While an agreement on choice of law is normally governed by the *Rome I Regulation* (Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations), which permits commercial parties to agree on a governing law, that regulation excludes agreements on the choice of court (at Article 1.2(e)). This then allowed the French courts to apply French law, but it is not clear why they chose to apply French law when the express intention of the parties was that the law of Luxembourg should apply to the entire contract.

5 The LMA did not provide a draft of this alternative form of jurisdiction clause but it did provide proposed drafts of the Single Court Exclusive Jurisdiction Clause and the Multiple Court Exclusive Jurisdiction Clause.

6 The provisions of the Regulation, which bind EU members except Denmark, apply to non-EU members of the EEA and to Denmark by virtue of certain treaty obligations.

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