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Unilateral (or asymmetrical) jurisdiction clauses: Where does the Cour de Cassation (French Supreme Court) stand?

Unilateral (or asymmetrical) jurisdiction clauses may vary in form and nature. However, such clauses always provide for an option to only one of the parties allowing it to choose the court that will be competent in case of a dispute.

The validity of such unilateral jurisdiction clauses has been brought into question by several jurisdictions, starting with the *Cour de Cassation* (French Supreme Court). In its *eBizcuss* decision dated October 7, 2015[1], the *Cour de Cassation* has provided an answer to the following question: Can a jurisdiction clause allow/enable one of the parties to bring its claims before a court other than the court it designates?

In the commented case, eBizcuss, an authorized reseller of Apple products, had entered into a contract with Apple Sales International, which included the following jurisdiction clause : "*The company eBizcuss shall bring any claims arising from the present contract before the Irish Courts, while Apple reserves the right to bring such claims before the competent courts of its own choice and those shall be either the Irish Courts, or the Courts of the State where eBizcuss is headquarted, or the Courts of the State where the tort occurred*".

EBizcuss, complaining about an abuse of dominant position, an abuse of economic dependency, and unfair competition practices, had taken the companies Apple Sales International, Apple Inc. and Apple Retail France to the French commercial court in order to seek compensation for the damage suffered, pursuant to Article 1382 of the French Civil Code, Article L. 420-2 of the French Commercial Code and Article 102 of the Treaty on the Functioning of the European Union.

Since the Apple companies relied on the abovementioned jurisdiction clause to argue that the French court

lacked jurisdiction, the question arose as to the validity of such a clause that forces a party to initiate proceedings before a specific court while offering to the other party the option of bringing claims in other courts.

Such a clause is subject to Article 23 of the European Regulation n°44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Bruxelles I" Regulation), not to French law. Paragraph 1 of Article 23 provides in particular that "*If the parties, one or more of whom is domiciled in a Member State, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise*."

Without any reference to a legal basis, the *Cour de Cassation* upheld the decision of the Court of Appeals that, having noted that "*the jurisdiction clause forced the eBizcuss company to bring an action before the Irish courts while it reserved the right for the other party , as an option, to bring an action before another court*", had ruled that "*this clause, which allows the identification of the courts to which may be referred any dispute arising out of the performance or interpretation of the contract, meets the predictability objective that any jurisdiction clause must meet*."

While the conclusion reached by the *Cour de Cassation* seems to be the most appropriate, i.e. the clause is valid because it allows the identification of the competent courts, its reasoning is less convincing.

Although it first described the clause by reference only to its asymmetrical nature (one party commits to bring an action exclusively before one court, while the other reserves the right to bring an action before one or several other court(s)), it seemed only to consider the predictability of the choice of the competent courts by the holder of the option to assess the validity of the clause.

One can remember the *Banque Edmond de Rothschild* case[2] in which the *Cour de Cassation* showed for the first time mistrust on jurisdiction clauses in international contracts, these clauses being very often unilateral.

In that *Banque Edmond de Rothschild* case, the clause in the contract between a borrower and a bank was only binding for the borrower who was obliged to sue the bank before the Luxemburg courts, while the bank reserved the right to bring an action before "*any other competent court*".

The *Cour de Cassation* considered such clause to be "*contrary to the objective and aim of the prorogation of jurisdiction offered by Article 23 of the Brussels I Regulation*" because of its "*potestative*" nature.

Its decision remains highly controversial. Brussels I Regulation is supposed to apply uniformly in all the Member States of the European Union and only the European Court of Justice ("ECJ") is competent to interpret its provisions by reference to autonomous concepts of European Union law.

Yet, in disregard with these fundamental principles of the European legal order, the *Cour de Cassation* misinterpreted the objective and aim of Article 23 by using a French concept, the "potestativité", which does

not relate to the issue of jurisdiction. "Potestativité" is a French law concept that describes a situation in which performance of a contract is made subject to the occurrence of a condition precedent entirely within the power of only one of the contracting parties to cause to occur or to prevent.[3]

This decision appeared to be all the more regrettable that Brussels I Regulation was adopted in view that "*The rules of jurisdiction must be highly predictable*" and "*The autonomy of the parties to a contract (…) must be respected (…).*"[4]

A few years later, in the *Danne Holding* case[5], the *Cour de Cassation* again disregarded a unilateral jurisdiction clause similar to the clause in the *Banque Edmond de Rothschild* case. It ruled that the clause – which provided for the jurisdiction of the Courts of Zurich while reserving the right of one party to bring an action before "*any other competent court*" without specifying "*the objective elements on which this alternative jurisdiction was grounded*" – was contrary to the predictability and legal certainty objectives pursued by Article 23 of the Lugano Convention[6] (which is identical to Article 23 of Brussels I Regulation).

It gave up the French concept of "potestativité" in favor of the concept of "objective elements" precisely referred to by the ECJ.

When asked about the meaning of the terms "have agreed" set forth in Article 23 of Brussels I Regulation, the ECJ specified that this Article does not mean *"that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone",* but simply that *"it is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them"*. According to the Court, those objective factors "*must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, and may, where appropriate, be determined by the particular circumstances of the case.*"[7]

The consequences of this decision on the validity, as a principle or on a case by case basis, of unilateral jurisdiction clauses remain uncertain.

It is within this context that the *Cour de Cassation* issued its ruling in the *eBizcuss* case. Should we infer from this decision that only a clause, the wording of which allows the identification – based on objective elements – of the courts that may have jurisdiction, is likely to meet the predictability requirement, and would thus be valid? It is tempting to say yes, although one cannot be affirmative about it. If consideration is only given to the identification of the courts that may have jurisdiction, why was the *Cour de Cassation* careful to describe the clause as offering an option to one of the parties?

Any person who drafts a jurisdiction clause is now informed. Considering the *Cour de Cassation* case law, it is preferable to not use a unilateral jurisdiction clause unless it is an absolute necessity. Other options than asymmetry should be considered when drafting a jurisdiction clause.

It remains to be seen how the *Cour de Cassation* case-law will evolve with the new Regulation n°1215/2012 of December 12, 2012 ("Brussels Bis" Regulation[8]) applicable to legal proceedings instituted after January 10,

2015. Article 25 of this Regulation indeed provides that "*If the parties (…) have agreed that a court or the courts of a Member State are to have jurisdiction (…), 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*", which Article 23 of Brussels I Regulation does not. The *Cour de Cassation* would be legitimate to disregard a unilateral jurisdiction clause under French law.

Please note that even if the clause which designated either the court of the place of the reseller's headquarters or the place where the damage occurred is considered to meet the predictability objective, it was eventually considered to be non-applicable in the *eBizcuss* case. The *Cour de Cassation* applied the ruling of the European Court of Justice in the recent *Cartel Damages Claims* case: With respect to anti-competitive practices, a jurisdiction clause is applicable provided that it refers to disputes concerning liability incurred as a result of an infringement of competition law.[9] In the present case, the clause referred to any dispute arising out of the performance or interpretation of the contract.

[1] 1st Civil Chamber of the *Cour de Cassation*, October 7, 2015, n°14-16898.

[2] 1st Civil Chamber of the *Cour de Cassation*, , September 26, 2012, n°11-26022.

[3] Article 1170 of the French Civil Code: "*A potestative condition is one which makes the execution of the agreement depend upon an event that one or the other of the contracting parties has the power to bring about or to prevent*".

[4] Whereas 11 and 14 of Brussels I Regulation.

[5] 1st Civil Chamber of the *Cour de Cassation*, March 25, 2015, n°13-27264.

[6] The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters determines jurisdiction between EU Member States and Switzerland, Norway and Iceland.

[7] ECJ, November 9, 2000, Coreck Maritime, C-387/98.

[8] Cf. our article entitled "**Recast of the "Brussels I" (European) regulation**" published on our Blog in December 2012: https://www.soulier-avocats.com/en/blog/recast-of-the-brussels-i-european-regulation/.

[9] ECJ, May 21, 2015, *Cartel Damages Claims*, C-352/13.

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