Feature

KEY POINTS

- The Commercial court has confirmed that where a borrower brings proceedings in England, asymmetric jurisdiction clauses (which are typical in finance documents) operate to confer exclusive jurisdiction on the court under Art 25 of the Recast Brussels Regulation.[1]
- While this judgment is not in a scheme of arrangement context it has direct application to the schemes jurisdiction. As such, it will be interesting to see whether the next foreign company that proposes a scheme expressly seeks to rely on Art 25 in preference to Art 8.

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Foreign company schemes: is an asymmetric jurisdiction clause for choice of English law enough for jurisdiction?

This article considers the decision in the *Liquimar* case that asymmetric jurisdiction clauses have been held to be exclusive jurisdiction clauses under the recast Judgments Regulation and the possible implications for recognition for creditor schemes of arrangement of foreign companies.

THE FACTS

In *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc and another* [2017] EWHC 161 (Comm) (the *Liquimar* case), a German bank lender had brought two actions in the English courts against a Greek shipbuilding borrower relating to the repayment of loans and the enforcement of a guarantee entered into by another company in the group.

In breach of a clause requiring the borrower to sue exclusively in England and enabling the lender to sue in any other court of competent jurisdiction, the borrower brought proceedings in Greece before the lender commenced the English actions. The lender sought a stay in England of the Greek proceedings and damages for breach of the jurisdiction clause in the agreements.

WHAT ARE ASYMMETRIC JURISDICTION CLAUSES?

A typical asymmetric jurisdiction clause permits party A to sue party B in any competent jurisdiction but requires party B to bring proceedings in one designated jurisdiction only. These clauses are commonly used in international finance documents. In these instances, party A is commonly the lender(s) and party B the borrower. Below is an extract of such a clause from the Loan Market Association loan agreement standard form.[2]

"1. Jurisdiction of English courts

- "1.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement [or any non-contractual obligation arising out of or in connection with this Agreement]) (a *Dispute*).
- 1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- 1.3 This Clause [x] 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. To the extent allowed by law, the Finance Parties and Secured Parties may take concurrent proceedings in any number of jurisdictions."

The jurisdiction clauses in the *Liquimar* case differ from the standard LMA clause. The clause in the guarantee in the *Liquimar* case is set out below for comparison (the clauses in the relevant loan agreements are materially similar to this clause), the main difference from the LMA clause being that the Liquimar clause does not contain the sentence which says:

"The parties agree that the courts of England are the most appropriate and convenient courts ... ."

It is also just the guarantor who makes an express submission to the exclusive courts of England, the lender does not:

"16 Law and Jurisdiction

- 16.1 This Guarantee and Indemnity shall in all respects be governed by and interpreted in accordance with English law.
- 16.2 For the exclusive benefit of the Lender, the Guarantor irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Guarantee and Indemnity and that any proceedings may be brought in those courts.
- 16.3 Nothing contained in this Clause shall limit the right of the Lender to commence any proceedings against the Guarantor in any other court of competent jurisdiction nor shall the

> commencement of any proceedings against the Guarantor in one or more jurisdictions preclude the commencement of any proceedings in any other jurisdiction, whether concurrently or not."

ARE ASYMMETRIC JURISDICTION CLAUSES VALID?

Whilst the courts of certain member states[3] have previously cast some doubt on the validity of asymmetric jurisdiction clauses, the English courts have generally considered them to be valid and enforceable (there are many English court decisions treating them as valid).[4]

IS AN ASYMMETRICAL JURISDICTION CLAUSE AN EXCLUSIVE JURISDICTION CLAUSE?

If an asymmetric jurisdiction clause is considered to be an *exclusive* jurisdiction clause (under Art 25), then Art 32(1) of the Recast Brussels Regulation provides, to use our example from above, that if party B (the borrower) sues in courts of the non-designated jurisdiction, those courts must stay proceedings in favour of the courts of the designated jurisdiction, even if they and not the courts of the designated jurisdiction were first-seized of the matter (ie this is an exception to the *lis pendens* rule in Art 26).

The court in the *Liquimar* case held that an asymmetrical jurisdiction clause operates to confer exclusive jurisdiction on the designated court under Art 25. The judgment is in line with *obiter* comments that Walker J made in *Perella v Codere*[5] where he said that Art 31(2) applies to asymmetrical jurisdiction clauses – a point that had previously been uncertain. This is also consistent with the approach taken in *Nikolaus Meeth v Glacetal Sarl*[6] (decided under Art 17 of the Brussels Convention, whose equivalent now is Art 25 of the Recast Brussels Regulation).

This position is however contrary to the Explanatory Report to the Hague Convention on Choice of Court Agreements (such Convention applies to exclusive choice of court agreements concluded in civil or commercial matters and was drafted around the same time that the Brussels Regulation was recast) which records that it was agreed by the Diplomatic Session that asymmetric jurisdiction clauses "are not exclusive choice of court agreements for the purposes of the Convention".

THE *LIQUIMAR* DECISION

Cranston J (agreeing with the borrower) decided that in determining whether an asymmetric jurisdiction clause could confer exclusive jurisdiction on the courts of a EU member state within Art 31(2), it was necessary to take an autonomous approach to interpretation (it was not a question for English law). The concept of exclusive jurisdiction has frequent use as a term in the Recast Brussels Regulation which Cranston J says is suggestive that it has a consistent, autonomous meaning and an autonomous approach avoids the divergent application of the *lis pendens* rule[7] in different member states.

The borrower's case was that asymmetric jurisdiction clauses do not satisfy the required exclusivity in Art 31(2) since they permit one party, here the bank, to bring proceedings in any court of competent jurisdiction. It submitted that such clauses must be read as a whole since Art 25 refers to "an agreement" conferring exclusive jurisdiction and not part of an agreement. The borrower also submitted that, even if an asymmetric clause could be split, with one part considered as establishing exclusive jurisdiction, this was not the part of the clause that formed the basis for the bank's proceedings.

The borrower also garnered further support from the Hague Convention (relying on the wording in the Explanatory Report to the Hague Convention as mentioned above) and said that treating asymmetric jurisdiction clauses as exclusive for the purpose of the Recast Brussels Regulation would create anomalies. The example stated was one where the bank chose to sue in Greece but the borrower then sued in England which then, although the English court was second-seized, would have frustrated the other proceedings because the English court would not be obliged to stay its proceedings.

Cranston J did not agree with any of the borrower's arguments and held that asymmetric jurisdiction clauses, when considered as a whole, are agreements conferring exclusive jurisdiction on the courts of an EU member state, namely England. He held that the fact this applies in respect of a claim by the lender alone does not detract from this effect (contrast this with Snowden J's views as discussed in the following section).

Although Cranston J acknowledged that an exclusive jurisdiction clause could mean that a borrower might deprive a bank of its right to sue in any competent court by starting proceedings in England, the designated jurisdiction, he stated that it would be even more anomalous if the borrower could start proceedings elsewhere than England in breach of what it agreed and could cause proceedings by the bank in the designated jurisdiction to be stayed.

With regard to the Hague Convention, Cranston J said *obiter* that there were "good arguments" that the definition of exclusive jurisdiction clauses in Art 3(a) of the Convention covered such clauses and that even if it was to be read as excluding them, it was no assistance to the present case as he was considering a separate issue under Art 31(2).

Finally, Cranston J was clear that an exception to the *lis pendens* rule was required to enhance the effectiveness of the choice of court agreements and avoid fostering abusive tactics.

DISCUSSION IN RELATION TO SCHEMES AND IMPLICATIONS FOR SCHEME RECOGNITION

This case is of significance for creditor schemes of arrangement of foreign companies where the scheme company needs to set out the basis on which the English court has jurisdiction in respect of the scheme under the Recast Brussels Regulation. By way of background, it is not clear whether the Recast Brussels Regulation applies to schemes at all but instead of ruling on this, all such scheme cases to date have proceeded on the assumption that the Recast Brussels Regulation applies and the English courts have then sought to find jurisdiction under it; Art 25 having been, until recently, the basis most often cited for establishing jurisdiction.

Feature

Biog box
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In the *Van Gansewinkel Groep*[8] case, the scheme company sought to rely on Art 25 on the basis that the asymmetrical jurisdiction clause in the facility agreement was an exclusive jurisdiction clause. The clause was materially identical to the clause in the *Liquimar* case (with both clauses differing slightly from the LMA clause). Snowden J held that the jurisdiction clause did not confer jurisdiction on the courts because the scheme creditors had not submitted to the jurisdiction of the English courts. This differs from Cranston J's view, which was clear that the words should be taken as whole, ie it is an agreement conferring exclusive jurisdiction on the courts of England and the fact that the express statement submitting to the English courts exclusive jurisdiction is only given by the borrower does not negate this.

More recently, in the *Global Gardens Products Group*[9] case in June 2016, Snowden J gave an *obiter* and provisional view that an asymmetric jurisdiction clause would not fall within Art 25. This clause was materially identical to the LMA clause.

However, in the *CBR Holdings* case in September 2016, Asplin J was satisfied that the asymmetrical jurisdiction clause in the facility agreement (again, materially identical to the LMA clause) gave the court jurisdiction under Art 25.

The *Van Gansewinkel* and *Global Garden Products* cases had cast some doubt on the ability to rely on Art 25 and there had been a shift towards reliance on Art 8 instead (finding jurisdiction on the basis of creditors' domicile). This judgment is welcomed to give clarity on the point albeit that there remain differing views between first instance judges. Additionally, it should be noted that the *Liquimar* case was a contested hearing (all the scheme cases cited above were unopposed). A foreign company proposing a scheme which does not have a sufficient number of English domiciled creditors (to satisfy Art 8 jurisdiction) may need to rely on Cranston J's views. ■

1 Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
2 LMA Senior Multicurrency Term and Revolving Facilities Agreement for Leveraged Acquisition Finance Transactions.
3 In particular, see the decision in *Mme X v Banque Privee Edmond de Rothschild* (French Supreme Court, First Civil Chamber, 26 September 2012, Case No 11-26022) (however note the French Supreme Court has refined its stance since the *Rothschild* case in *Apple* (French Supreme Court, First Civil Chamber, 7 October 2015, Case No 14-16.898)).
4 See, most recently, *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another* [2013] EWHC 1328 (Comm) and *Black Diamond Offshore Ltd and others v Fomento de Construcciones Y Contratas SA* [2015] EWHC. 1035. See also article: 'Scheme jurisdiction: no revolution here' (2015) Corporate Rescue and Insolvency 8(5), 187.
5 *Perella Weinberg Partners UK LLP and another v Codere SA* [2016] EWHC 1182 (Comm).
6 [1979] CMLR 520.
7 This aims to preclude subsequent actions in other member states if a court that has proper jurisdiction over that matter is already seized.
8 *Van Gansewinkel Groep B.V* [2015] EWHC 2151 (CH).
9 *Global Gardens Products Italy S.p.A.* [2016] EWHC 1884 (CH).

Further Reading:

- *Global Garden Products*: new hurdles for companies seeking creditors' schemes [2016] 9 JIBFL 520.
- Schemes of arrangement: "sufficient connection" in cross-border restructurings [2013] 11 JIBFL 708.
- LexisNexis RANDI blog: Schemes of arrangement: pushing the boundaries of jurisdiction.