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Asymmetric jurisdiction clauses in finance agreements

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Catherine Gibaud and Devon Airey look at recent cases in the English and EU courts on how asymmetric jurisdiction clauses affect the likelihood that EU courts will decline jurisdiction or stay proceedings in favour of the English courts. They also consider how changes to the Hague convention will affect recognition and enforcement of English judgements based asymmetric jurisdiction clauses.

What is an asymmetric jurisdiction clause?

Asymmetric jurisdiction clauses are a prominent feature of financing transactions. The term describes clauses where one party has a choice of court in which to initiate proceedings and the other party does not. This asymmetry has made such clauses popular with lenders. They give lenders flexibility to sue borrowers in multiple jurisdictions where those obligors may have assets, whilst restricting borrowers to commencing proceedings exclusively in one, designated, jurisdiction.

While asymmetric jurisdiction clauses are valid as a matter of English law, the validity of asymmetric clauses has recently been questioned by the courts of some EU Member States, particularly France, on the grounds that they are unconscionably one-sided. This article considers recent developments in the recognition of asymmetric jurisdiction clauses in favour of English courts and the enforcement of resulting English judgments.

In particular, it considers two issues:

- How will EU Member States treat asymmetric jurisdiction clauses where one party is required to bring proceedings in the English courts? In particular, would courts in EU Member States give effect to such a clause, such that they would decline jurisdiction or stay proceedings in favour of the English court? (the "**Jurisdiction issue**")
- Will judgments of English courts based on an asymmetric jurisdiction clause be recognised and enforced by courts in EU Member States? (the "**Enforcement issue**").

The Jurisdiction Issue

Approach of English courts

In *Etihad Airways PJSC v Lucas Flöther [2020] EWCA Civ 1707*, the Court of Appeal held that an asymmetric jurisdiction clause could be interpreted as an exclusive jurisdiction clause for the purposes of the recast Brussels Regulation.

Following the UK's departure from the EU, the recast Brussels Regulation no longer applies to the UK. Instead, the UK became a member of the 2005 Hague Convention on Choice of Court Agreements (the "Hague 2005 Convention") in its own right with effect from the end of the transition period on 31 December 2020. Under the Hague 2005 Convention, where proceedings are commenced in a court other than the "chosen court" (i.e., the court designated by the parties in the jurisdiction clause) that court "shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies" (Article 6).

However, the Hague 2005 Convention only applies to agreements containing exclusive jurisdiction clauses (see also Article 1(1) and Article 3(a)). A key issue is therefore whether asymmetric jurisdiction clauses can be interpreted as "exclusive" jurisdiction clauses for the purposes of The Hague 2005 Convention.

In *Commerzbank Aktiengesellshcaft v Liquimar Tankers Management and another [2017] EWHC 161 (Comm)*, Cranston J considered, *obiter*, that there were good arguments that the definition of exclusive jurisdiction clauses in the Hague 2005 Convention included asymmetric clauses. At first

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instance in *Etihad*, Jacobs J (also *obiter*) agreed. In his view, this position was supported by academic commentaries and Bryan J's judgment in *Clearlake Shipping Pte Limited v Xiang Da Marine Pte Ltd [2019] EWHC 536 (Comm) at paragraphs [62]-[64].*

However, the Court of Appeal in *Etihad* disagreed. It noted (*obiter*) that there was a "*strong indication*" that the intention was to exclude asymmetric clauses from The Hague 2005 Convention. Henderson LJ stated at [85]:

> "I am prepared to proceed on the basis that the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction clauses, although I emphasise that it is unnecessary for us to decide that question, and I do not do so. A strong indication that this was the deliberate intention of the framers of the Convention is provided by the Explanatory Report of Professors Trevor Hartley and Masato Dogauchi, who in their discussion of asymmetric agreements said at paragraph 106:
>
> 'It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph [i.e. asymmetric agreements] are not exclusive choice of court agreements for the purposes of the Convention."

The result is uncertainty as to whether asymmetric jurisdiction clauses will be construed as exclusive jurisdiction clauses by English courts for the purposes of the Hague 2005 Convention. Given the indications from the Court of Appeal, albeit *obiter*, that they would *not* fall within its scope, the safer view until this issue is the subject of full argument and decision of the English courts is to assume that asymmetric jurisdiction clauses will not be construed as exclusive jurisdiction clauses under the Hague 2005 Convention.

Approach of EU courts

In the recent CJEU decision in Societa Italiana Lastre SpA (SIL) v Agora SARL (27 February 2025) (C-537/23) ('Agora'),the French Cour de Cassation referred questions to the CJEU following a dispute concerning the validity of an asymmetric jurisdiction clause in a supply contract in favour of the courts of Brescia, Italy but which also set out that one of the parties *"reserves the right to bring proceedings against [the counterparty] before another competent court in Italy or elsewhere*". The questions for the CJEU included (1) which law applies to govern the validity of an asymmetric jurisdiction clause – EU law or the law of the applicable EU Member State; and (2) if EU law is the applicable law, whether an asymmetric jurisdiction clause is valid.

As to the first question, the CJEU held that validity is to be assessed by reference to autonomous EU law principles under the recast Brussels Regulation (the "**Regulation**").

As to the second, the CJEU held that, provided an asymmetric clause is otherwise within the scope of the Regulation (because it designates a court or the courts of a Member State), it will be valid pursuant to Article 25 of the Regulation provided that:

- The asymmetry of the clause confers jurisdiction only on the courts of one or more EU Member States or Lugano Convention states. This is because if courts of a third country applied their own rules of private international law it would increase the "*risk of conflicts of jurisdiction arising*", which would "*not be consistent with the objectives of foreseeability, transparency and legal certainty*".
- The clause identifies the relevant court(s) by reference to objective factors that are sufficiently precise to allow a court to determine whether it has jurisdiction; and
- The clause does not fall foul of the mandatory exclusive jurisdiction rules under Article 24 of the Brussels Regulation or the special rules under Articles 15, 19 and 23 concerning consumer, employment and certain insurance contracts.

The decision has several important implications for finance parties and their advisers:

- Despite the CJEU's promotion of "*legal certainty*" and *"transparency*" the decision presents significant risks for parties including asymmetric jurisdiction clauses in finance contracts.
- By limiting the validity of such clauses to courts of EU Member States or those party to the Lugano Convention, the decision increases the likelihood that asymmetric jurisdiction clauses in favour of English courts (falling outside of the EU and the Lugano Convention) will not be recognised by an EU Member State court. It is uncertain whether an EU or Lugano Convention court seized of a dispute in breach of such a clause would now stay proceedings or decline jurisdiction in favour of a non-EU or Lugano Convention court.
- It follows that where the contract contains an asymmetric jurisdiction clause, the *Agora* decision

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places greater significance on parties being the first to commence proceedings in English courts. The recast Brussels Regulation grants the courts of Member States a discretion to stay proceedings in favour of a non-EU court first seized. However, it is just that – a discretion – and there is no guarantee the Member State court will do so.

- Further, the requirement that there are objective factors which are sufficiently precise could impair clauses commonly used in practice which allows one party to bring proceedings in "*any competent court*".

The Enforcement Issue

The enforcement of English judgments given under asymmetric jurisdiction clauses will be much more straightforward once the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("**Hague 2019**"), comes into force in England and Wales on 1 July 2025.

Hague 2019 applies to jurisdiction clauses "*other than an exclusive choice of court agreement*" and therefore does apply to asymmetric jurisdiction clauses. Provided one of the bases set out in Article 5 of Hague 2019 is satisfied and there are no grounds to refuse enforcement under Article 7(1), an English court judgment will be recognised and enforced by EU courts.

Hague 2019 therefore brings clarity and consistency to the enforcement of English judgments in EU Member States post-Brexit (and plugs an important gap in the Hague 2005 Convention which only applies to exclusive jurisdiction clauses) by providing a uniform framework for the recognition and enforcement in EU Member States of English judgments covering civil and commercial matters. Hague 2019 is also likely to enhance enforceability of English judgments in a wider range of jurisdictions once it gains increased acceptance internationally and more states ratify Hague 2019 as a result.

Hague 2019 is silent on the rules on jurisdiction. It therefore does not assist with the jurisdiction issues outlined above. There are some potential complexities courts are likely to face in making assessments as to whether Hague 2019 applies, and therefore we can expect it to generate a significant amount of case law over time. For example:

- Hague 2019 requires the recognition and enforcement of judgments from contracting states whose courts may have taken jurisdiction on a completely different basis than set out in Article 5. The relevant court may therefore have to engage in some fact finding to determine if one of the bases in Article 5 is met. This may be particularly difficult in the case of default judgments.
- Further, the grounds for refusal under Article 7(1) are permissive rather than mandatory. A court may refuse recognition or enforcement but is not required to do so. We can therefore expect cases to test the factors that could be relevant to the exercise of the court's discretion in this respect.

Practical points for lenders

Where the flexibility of an asymmetric jurisdiction clause is not strictly required, finance parties seeking to ensure proceedings are commenced in the English courts are best served by using exclusive jurisdiction clauses, which will provide more certainty. Where a dispute falls within an exclusive jurisdiction clause in favour of the English court under the Hague 2005 Convention, an EU court will be obliged to suspend or dismiss any proceedings brought in breach of the clause.

Alternatively, where finance parties wish to include an asymmetric jurisdiction clause (because, for example, a lender considers the flexibility of such a clause is to be preferred over legal certainty), the requirements set out in Agora should be considered carefully when drafting and parties should avoid adopting "boilerplate" clauses without a careful analysis of the drafting of asymmetric jurisdiction clauses on a case-by-case basis.

Where relevant, it would also be prudent for risk factor disclosures outlining the above to be included in prospectuses.

Hague 2019 is likely to enhance the enforceability of English judgements, but some uncertainty remains particularly about the circumstances in which EU courts will choose to exercise their discretion to enforce English judgements.

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