

The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?

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On 26 September 2012, the French *Cour de Cassation* handed down a judgment in the *Rothschild* case which invalidated a unilateral jurisdictional clause under Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Regulation").[fn]Judgment of 26 September 2012, *X v Banque Privée Edmond de Rothschild Europe*, Cass. Civ. (1ère) (French Cour de cassation).[/fn] Running counter to the evolution seen in common law countries, for instance the United Kingdom and the United States, the French ruling is preceded by national court decisions in Bulgaria and Russia that have struck down unilateral arbitration clauses on grounds of unconscionability – in what has been described as a judicial 'power grab'.[fn]See *Russian Court Move Seen as Power Grab*, Financial Times, 4 December 2012.[/fn]

This series of cases has attracted great attention and stirred concern as to the effectiveness and validity of unilateral dispute resolution clauses which are commonly used in certain industries, such as the banking and finance sectors. This post is based on a presentation given by one of the authors at a recent conference dedicated to the discussion of the *Rothschild* judgment which took place at the British Institute of International and Comparative Law (BIICL).[fn]Maxi Scherer on 'Unilateral jurisdiction and arbitration clauses – valid or not?', see http://www.biicl.org/private_international_law/.[/fn]

Although unilateral dispute resolution clauses vary in shape and nature, they have in common that they offer a unilateral (or one-sided) option granting to only one party a choice in which forum to bring the dispute. Building on this common feature, one can distinguish between different types of unilateral clauses. While some are 'pure' unilateral jurisdictional clauses (offering one party the choice between various national state courts), others may contain an arbitration option (giving one party the choice between arbitration and national courts).

In the *Rothschild* case, the *Cour de Cassation* was asked to consider the validity of a unilateral jurisdiction clause obliging only one of the parties to bring its case in a specific court, while the other was free to select "any other court of competent jurisdiction". Mrs X, a French national residing in

Spain, had opened a bank account at the Luxembourg based private bank Edmond de Rothschild Europe (“Rothschild”) through an intermediary finance company affiliated with Rothschild and based in Paris. Following an alleged decline in the financial performance of her investments, Mrs X brought an action for damages against both Rothschild and the intermediary before the Paris courts.

The defendants challenged the jurisdiction of the Paris courts relying on the following jurisdiction clause:

“Potential disputes between the client and the Bank shall be subject to the exclusive jurisdiction of the Courts of Luxembourg. In the event the Bank does not rely on such jurisdiction, the Bank reserves the right to bring an action before the Courts of the client’s domicile or any other court of competent jurisdiction.”[fn]In the original: *“Les litiges éventuels entre le client et la banque seront soumis à la juridiction exclusive des tribunaux de Luxembourg. La banque se réserve toutefois le droit d’agir au domicile du client ou devant tout autre tribunal compétent à défaut de l’élection de juridiction qui précède.”*[/fn]

Rothschild argued that this clause was entirely compatible with Article 23 of the Brussels Regulation which provides at paragraph 1:

“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.”

Following the first instance court, the Paris Court of Appeal, on 18 October 2011, rejected this analysis and found the unilateral jurisdiction clause to be null and void.[fn]Judgment of 18 October 2011, *Banque Privée Edmond de Rothschild Europe v X*, No 11/03572 (Paris Cour d’appel).[/fn] According to the Paris Court of Appeal, although the Brussels Regulation permits a clause which gives one party an option to choose between different jurisdictions, such a clause may not allow one party to have “discretion to select whatever jurisdiction it wishes.”[fn]“*Il n’autorise pas une clause à abandonner à une partie le choix d’une quelconque juridiction à sa discrétion*”, *ibid.*[/fn]

The *Cour de Cassation* upheld the Court of Appeal’s decision, but shifted the focus from the discretionary to the “*potestative*” nature of the clause:

“... by reserving the Bank’s right to bring an action in Mrs X’s place of domicile or ‘in any other court of competent jurisdiction’, the clause only restricted Mrs X, who was the only party obligated to commence proceedings in Luxembourg; accordingly, the Court of Appeal correctly determined that the clause was potestative in nature, for the sole benefit of the Bank, and therefore was contrary to the objectives and the finality of the prorogation of jurisdiction provided for in Article 23 of the [Brussels] Regulation.”[fn]“*Mais attendu qu’ayant relevé que la clause, aux termes de laquelle la banque se réservait le droit d’agir au domicile de Mme X... ou devant “tout autre tribunal compétent”, ne liait, en réalité, que Mme X... qui était seule tenue de saisir les tribunaux luxembourgeois, la cour d’appel en a exactement déduit qu’elle revêtait un caractère potestatif à l’égard de la banque, de sorte qu’elle était contraire à l’objet et à la finalité de la prorogation de*

compétence ouverte par l'article 23 du Règlement Bruxelles I", Judgment of 26 September 2012, *X v Banque Privée Edmond de Rothschild Europe*, Cass. Civ. (1ère) (French Cour de cassation).[/fn]

Under French law, the doctrine of "*potestativité*" 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.[fn]French Civil Code, Art. 1170.[/fn] In applying the concept of "*potestativité*" and holding that the unilateral jurisdictional clause was invalid, the ruling presents a departure from an earlier decision of the *Cour de Cassation*: the court had held that where it was the common intention of the parties to provide only one of them with the right to choose whether to litigate or go to arbitration such a clause was not objectionable.[fn]See, e.g., Judgment of 15 May 1974, *Société Sicaly v. Société Grasso Stacon NV*, Bull. 1974 I No 143, p. 122 Cass. Civ. (1ère) (French Cour de cassation). Cf. Judgment of 4 December 1990, *Société Edmond Coignet v. COMIT*, Bull. 1990 I No 273, p. 193, Cass. Civ. (1ère) (French Cour de cassation).[/fn]

The different view taken by the French Supreme Court in the *Rothschild* decision is surprising, and arguably ill-founded for the following reasons.

First, in applying the French concept of "*potestativité*", the court seemed to have implicitly ruled that French law governed the substantive validity of the jurisdictional clause. It did so notwithstanding the fact that Luxembourg law was both the law of the designated court and the law chosen by the parties to govern the contract. While the law governing the substantive validity of jurisdictional clauses under the current version of the Brussels Regulation is far from certain,[fn]Magnus and Mankowski, *Brussels I Regulation*, 2nd ed., Sellier European Law Publishers, Art. 23, para. 76.[/fn] the application of French law seems far-fetched and has rightly been criticized.[fn]See, e.g., Cuniberti, *Journal des tribunaux Luxembourg*, 2013, 7 (8ff.); Vidal, *Des pièges de la rédaction des clauses non exclusives d'attribution de juridiction*, LeBlogCarler, 13 February 2013; Tahri, *Illicéité d'une clause attributive de juridiction purement potestative*, Dalloz Actualités, 15 October 2012; Martel, *A la découverte de la clause attributive de juridiction potestative*, Dalloz 2012, 2876 (2876ff.).[/fn] Under the recast Brussels Regulation, due to enter into force in 2015, Article 25 will replace Article 23 to the effect that the substantive validity of a jurisdiction clause will be governed by the law of the chosen forum which would in this case have pointed to Luxembourg law rather than French law.[fn]Regulation No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Art. 25 (1) ("If the parties, regardless of their domicile, 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, unless the agreement is null and void as to its substantive validity under the law of that Member State.").[/fn]

Second, the French court seems not to have considered, or at least not discussed, the fact that Article 23 expressly provides that a choice of jurisdiction "shall be exclusive **unless the parties have agreed otherwise**" (emphases added). Article 23 of the Brussels Regulation thus recognises the parties' right to provide for non-exclusive choice of jurisdiction agreements.[fn]Magnus and Mankowski, *Brussels I Regulation*, 2nd ed., Sellier European Law Publishers, Art. 23, para. 144.[/fn] The question whether, or to what extent, the parties' autonomy under Article 23 also includes the possibility to provide for unilateral jurisdictional clauses was simply not discussed in the French decision.[fn]The possibility of such unilateral clauses was permitted prior to the adoption of the Brussels Regulation. Article 17 of the Brussels Convention of 1968 states that "if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention." This provision was removed from the text of Article 23 because it was deemed to unnecessarily

introduce uncertainty and unpredictability as it was difficult to precisely determine if a clause would benefit only one party or not. Arguably, such a deletion was all the more justified since Article 23 of the Regulation now provides: “unless the parties have agreed otherwise” which allows the parties to alter the exclusive nature and effect of their jurisdiction clause. See, e.g., Magnus and Mankowski, *Brussels I Regulation*, 2nd ed., Sellier European Law Publishers, Art. 23, at paras. 7-9.[/fn]

Third, what may have influenced the French Supreme Court’s decision is that the clause in dispute lacked specificity in granting Rothschild the right to bring an action “in any other court of competent jurisdiction” (echoing the Paris Court of Appeal’s emphasis on the full discretion granted to the bank “to select whatever jurisdiction it wishes”). The *Rothschild* case could therefore be read as prohibiting only such unilateral jurisdictional clauses where the party benefiting from the option has an unlimited choice of fora, whereas unilateral clauses arguably remain valid if the unilateral option is circumscribed to a limited number of precisely defined jurisdictions (for example, the domicile of the investor).[fn]See, e.g., Judgment of 22 May 2008, *Société de Ruiter’s new Roses International BV et alia v Société STAR 2000 SHA*, No 07/13465 (Aix en Provence Cour d’appel) (invalidating a unilateral jurisdictional clause in which one party could designate, without any restrictions, the place where to bring the dispute).[/fn]

Applying this rationale to the jurisdictional clause in the contract between Mrs X and Rothschild, one might argue, however, that the clause at hand did not contain an unlimited choice of fora. The clause designated “the client’s domicile or any court of **competent** jurisdiction” (emphasis added), which arguably limited Rothschild’s options to those courts having jurisdiction under the Brussels Regulation, i.e. most probably the courts of Spain where Mrs X was domiciled or the courts of Luxembourg where the services were performed. The French Supreme Court did not discuss whether the addition of the “**competent** jurisdiction” language was a sufficiently precise criterion to limit the party’s jurisdictional options.[fn]See, e.g., Judgment of 9 November 2000, *Coreck Maritime GmbH v Handelsveem BV and Others*, Case C-387/98, ¶15 (European Court of Justice, 5th Chamber) (it suffices if the clause provides for “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. Those factors, which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, may where appropriate, be determined by the particular circumstances of the case.”).[/fn]

Fourth, the *Rothschild* decision may also be explained by the court’s desire to protect an arguably weaker party, Mrs X, against a counter-party of unequally bigger bargaining power. However, the Brussels Regulation contains a specific regime for the protection of weaker parties (in particular, Articles 15-17 concerning consumers), including concerning abusive jurisdictional clauses, and such regime was not applied and not even discussed in the French decision.

For all the above mentioned reasons, the French decision seems ill-founded and it is unclear whether the Court of Justice of the European Union, on a similar matter brought before it, would follow the French approach.

The French courts, however, are not alone in having recently invalidated unilateral dispute resolution clauses. Mirroring the French decision, in September 2011, the Bulgarian Supreme Court struck down a unilateral choice of court clause in a loan agreement on the grounds that such clauses may be interpreted as purporting a “potestative right” which is not permitted under Bulgarian law.[fn]See, Judgment of 2 September 2011, No. 71 in commercial case No. 1193/2010 (Bulgarian Supreme Court), on file with author.[/fn]

Adopting a different approach, the Russian courts have also recently held that a unilateral arbitration clause in the context of standard form contracts was invalid on grounds of unconscionability.[fn] See,

e.g., Judgment of 19 June 2012, *CJSC Russian Telephone Company v Sony Ericsson Mobil Communications Rus LLC*, No. A40-49223/11-112-401 (Supreme Arbitrazh Court of the Russian Federation) (The court held, “that unilateral dispute resolution clauses are contrary to the basic principle of procedural equality of the parties, adverse to the nature of the dispute resolution process, and breach the balance between the interests of the parties.”). See <http://kluwerarbitrationblog.com/?s=supreme+arbitrazh+court>.[/fn] The disputed agreement between CJSC Russian Telephone Company (“RTC”) and Sony Ericsson Mobile Telecommunications Rus LLC (“Sony Rus”) for the sale of mobile telephone equipment contained a dispute resolution clause which provided Sony Rus with the right to commence arbitration or litigation to resolve disputes between the parties, while RTC only had a right to arbitrate. Unlike the *Cour de Cassation* in *Rothschild* which invalidated the clause in its entirety, the Supreme Court of the Russian Federation turned the unilateral option into a bilateral one. Consequently, both parties had the options provided for unilaterally in the clause, i.e. both parties were able to bring the dispute either to arbitration or before the Russian courts.

Previously, Russian courts had considered several cases commenced by foreign banks on the basis of a relevant optional jurisdiction clause and upheld such clauses as valid and binding. The hope was that these decisions constituted a trend indicating that Russian courts were increasingly willing to respect “freedom of contract” principles embedded in the Russian Civil Code. Instead, commentators have expressed concern that the Russian courts may strike down optional jurisdiction clauses in an attempted “power grab” to defend the sovereignty of Russian courts from encroachment by foreign jurisdictions.[fn]See *Russian Court Move Seen as Power Grab*, Financial Times, 4 December 2012.[/fn]

In contrast, the English courts have confirmed the validity of unilateral jurisdictional clauses under English law.[fn]See, e.g., *Three Shipping LTD v Harebell Shipping Ltd* 2004 All ER (D) 152 (English High Court); *Debenture Trust Corp plc v Elektrim Finance BV and others* 2005 1 All ER (Comm.) 476 (English High Court).[/fn] Indeed, courts in the UK appear to have taken the view that rendering the parties’ unilateral dispute resolution clauses unenforceable would be an unacceptable interference with the principle of party autonomy, as long as the parties’ intention to provide for an unilateral option is clearly established. The situation in the US is similar.[fn]The approach of US courts appears to have evolved in tandem to that of the United Kingdom – away from the “mutuality doctrine”. See Drahozal, *Non-mutual Agreements to Arbitrate*, 27 J. Corp. L. 537 (2002). A few early U.S. decisions had relied on mutuality in refusing to enforce an arbitration clause giving one party, but not the other, the right to demand arbitration. See, e.g., *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) (refusing to require arbitration where only one party to employment contract (i.e., the employee) was bound to arbitrate). However, the doctrine of mutuality has since been criticized in U.S. contract law doctrine gen, and unilateral arbitration clauses are now considered an appropriate exercise of the parties’ autonomy with regard to the mode of resolving their disputes, which is entitled to full effect, save where unconscionable under applicable law. Accordingly, U.S. courts have rejected application of the mutuality doctrine in the context of unilateral arbitration agreements, generally upholding arrangements permitting one (but not the other) party to commence arbitration. See, e.g., *M.A. Mortenson Co. v. Saunders Concrete Co., Inc.*, 676 F.3d 1153, 1158 (8th Cir. 2012); *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643 (N.Y. 1989); *Kalman Floor Co. v. Jos. L. Muscarelle*, 481 A.2d 553 (N.J. Super. 1984); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, 656 P.2d 1184 (Alas. 1983).[/fn]

In sum, while national courts in common law jurisdictions have upheld the validity of unilateral dispute resolution clauses, the recent decisions of the highest courts in Bulgaria, Russia and France have gone in the opposite direction of invalidating unilateral option clauses. An uneven landscape has thus emerged and parties with existing unilateral jurisdiction clauses should be put on notice that judgments or arbitral awards rendered on the basis of a unilateral jurisdiction clause may face

enforcement challenges in some jurisdictions. It remains to be seen whether the question will be referred to the Court of Justice of the European Union, and in the meantime, parties should be advised that unilateral options will have to be carefully drafted and exercised.