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Global Banking & Finance Practice
April 3, 2013

# Jurisdiction Clause in Cross-Border Finance Transactions

## New Risks Presented by Court Decisions in Russia and France

By: Paula Howard and Svetlana Sorokina-Wilson

The so called "one-sided jurisdiction clauses" are widely used in cross-border transactions. In particular, they are often seen in finance documentation with Russian and CIS based counterparties.

As the name suggests, such clauses are intended to put one party to the agreement (usually the lender) in a more advantageous position than another party (usually the borrower) in two ways. It is not an uncommon practice for the borrower to agree to resolve any dispute under the financing agreement by arbitration, while the lender retains the right to choose between using arbitration or court proceedings. Further, the lender's option to commence court proceedings extends to any courts having jurisdiction. In contrast, the borrower's rights are restricted to only one forum.

The recent court decisions in Russia and France, however, seem to declare war on the perceived inequality between parties created by one-sided jurisdiction clauses.

In *Russian Telephone Company v. Sony Ericsson Mobile Communications Rus*[1] the Supreme Commercial Court of the Russian Federation decided that the one-sided jurisdiction clause was against the civil law principle which guarantees to both parties equal rights to protect their interests and, therefore, this clause could not be enforced in the Russian Federation.

The clause in question provided that all disputes between the parties must be settled by arbitration in accordance with the ICC Rules in London. At the same time, Sony Ericsson retained the option to sue Telephone Company in any competent court having jurisdiction. In breach of this provision, Telephone Company commenced a claim before a Moscow court. Given that only one party under the agreement had the option to start court proceedings, the Supreme Commercial Court ruled that such agreement "disturbs the balance of the parties' rights" and, as a result, both parties should be entitled to bring their claims to the Russian court. In declaring the clause invalid, the Supreme Commercial Court did not give any special consideration to the fact that the agreement between Telephone Company and Sony Ericsson was governed by English law, which recognises one-sided jurisdiction clauses (provided that the party which benefits from the option is bound by its decision once it has initiated and/or participated in the chosen proceeding). The Supreme Commercial Court also left open the question whether the arbitration agreement between the parties remained in force, notwithstanding the invalidity of the jurisdiction prorogation agreement and the decision appears to undermine the parties' freedom to resolve disputes in accordance with the mechanism of their choice.

It is most likely that the Supreme Court decision will be followed by the lower courts in Russia and, will consequently, change the practice of such courts which had previously recognised one-sided jurisdiction clauses.[2]

To avoid undesirable litigation in Russian courts as well as potential risks associated with the recognition and enforcement of foreign courts' decisions and arbitration awards based on one-sided jurisdiction clauses, alternative forms of jurisdiction clauses may need to be considered for finance transactions with Russian counterparties. Any existing agreements, however, will continue to pose a concern to lenders. Renegotiation of the clause is not especially attractive due to the obvious risk of any Russian counterparty discovering the rationale for such renegotiation. But if the counterparty has assets outside of Russia, arbitration may be appropriate on the basis that any such award can be enforced.

Additional grounds to strike down one-sided jurisdiction clauses were also cited in another tricolor jurisdiction. In *Mme X v. Rothschild*[3] the French Cassation Court decided that the unilateral nature of the clause in question was "contrary to the object and to the finality of prorogation of jurisdiction under Article 23 of Regulation 44/20012."

The agreement between Mme X and Banque Privée Edmond de Rothschild provided that all disputes between the parties should be subject to the exclusive jurisdiction of the Luxembourg courts. Rothschild Bank, however, reserved the right to take actions before any courts having jurisdiction.

When Mme X sued Rothschild Bank for damages in France, the latter challenged the French court's jurisdiction based on Mme X's submission to the exclusive jurisdiction of the Luxembourg courts. In reviewing Rothschild Bank's appeal, the Cassation Court supported the decision of the Paris Court of Appeal and refused to give effect to the one-sided jurisdiction clause in question. The Cassation Court appears to have reached its decision by interpreting Article 23 of EU Regulation 44/2001 in light of the French law doctrine of "potestativité" (under which the contract is void if it depends entirely on the actions of one party) rather than basing its decision on the exact language of Article 23. This is perhaps all the more surprising since the concept of "potestativité" derives from French legislation governing conditions precedent and does not relate to jurisdictional issues.

Since the issue of one-sided jurisdiction clauses has never been considered by the Court of Justice of the European Union, the Cassation Court decision has created uncertainty with regard to the enforceability of one-sided jurisdiction clauses within the EU and EEA. It certainly isn't binding on courts outside France and it is doubtful English courts will follow it but it may well be used by borrowers as a negotiating tactic in litigation. In response to the legal and practical risks associated with the decision in *Mme X v. Rothschild*, LMA has recently published alternative forms of jurisdiction clauses to be considered for LMA-recommended facility agreements.

The recent court practice in Russia and France has created further risks associated with one-sided jurisdiction clauses. While drafting such clauses in cross-border finance documentation, the parties and their counsel should carefully examine whether shifting the balance of rights to one party would work exclusively to the benefit of such party.

*Endnotes*

1 *Resolution of the Supreme Commercial Court Presidium 19 June 2012, No. 1831/12*

2 *Resolution of Federal Arbitrazh Court of Moscow Region 21 December 2009, No. КГ-А40/11967-09, Resolution of Federal Arbitrazh Court of Moscow Region 23 December 2009, No.КГ-А40/13340-09, Resolution of Federal Arbitrazh Court of Moscow Region 25 December 2009, No.КГ-А40/13327-09 etc.*

3 *Cassation Court, Civil Division 1, 26 September 2012, 11-26.022*

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact:

**Paula Howard** | +44 (0) 20 7861 9017 | phoward@lockelord.com
**Svetlana Sorokina-Wilson** | +44 (0) 20 7861 9047 | ssorokina@lockelord.com