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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2017

Before:

THE HON. MR. JUSTICE CRANSTON

- -

Claim No. CL 2016-000316

BETWEEN

COMMERZBANK AKTIENGESELLSCHAFT
Claimant/Respondent

and

LIQUIMAR TANKERS MANAGEMENT INC.
Defendant/Applicant

AND

Claim No. CL 2016-000564

BETWEEN

COMMERZBANK AKTIENGESELLSCHAFT
Claimant/Respondent

and

(1) PAULINE SHIPPING LIMITED
(2) LIQUIMAR TANKERS MANAGEMENT INC.
Defendants/Applicants

- -

Ms Poonam Melwani QC (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Mr James Brocklebank (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing dates: 12 January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR. JUSTICE CRANSTON

Mr Justice Cranston:

INTRODUCTION

1. The central issue in this case is whether so-called asymmetric jurisdiction clauses confer exclusive jurisdiction on the court or courts of a Member State within the terms of Article 31(2) of *Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("Brussels 1 Recast" or "the Regulation"). As described in greater detail below, asymmetric jurisdiction clauses are clauses which contain different provisions regarding jurisdiction depending on whether the proceedings are initiated by one party to the agreement rather than the other. They are widely used in international financial markets.

2. Under a typical asymmetric jurisdiction clause X (say a bank) and Y (say a borrower) agree that Y may sue X in the courts of jurisdiction A only but that X may bring proceedings against Y elsewhere. If such a clause is an exclusive jurisdiction agreement under Brussels 1 Recast, Article 31(2) provides that if Y sues in the courts of jurisdiction B in the above example, those courts must stay proceedings in favour of the courts of jurisdiction A, even if they and not the courts of jurisdiction A were first-seized of the matter. There is no EU jurisprudence on the issue.

3. The present applications of the defendants are being made in the course of proceedings in this court by Commerzbank Aktiengesellschaft ("the Bank") in two separate actions in relation to the repayment of loans which the Bank extended for the building of a number of ships. The applications are made in circumstances where there are ongoing proceedings taken by the defendants against the Bank in the Court of First Instance of Piraeus in Greece concerning the same and/or related issues.

4. What the defendants apply for at this point in the two applications is for a stay of the Bank's case until the Greek cases are heard. They also apply for the setting aside of the service of process on them in Liberia. The applications are made in reliance on Brussels 1 Recast and under the Civil Procedure Rules ("CPR") 11.1.

BACKGROUND

5. The claimant in the proceedings initiated in this court is a German bank, which has had a presence in London for some four decades. It is the successor to the rights of Deutsche Schiffsbank Aktiengesellschaft, which entered into various loan agreements and related contracts with the defendants. For present purposes nothing turns on the distinction between the Bank and its predecessor.

6. Liquimar Tankers Management Inc ("Liquimar"), a defendant in this case, is a ship management company registered in the Republic of Liberia but with its principal place of business in Athens, Greece. In the second action, Pauline Shipping Ltd ("Pauline"), a ship owning company managed by Liquimar, is also a defendant. It is the former owner of a vessel named *Adriadni*.

7. During the period 2006-2008, the Bank entered into three loan agreements to finance the building of ships. The first was between the Bank and Islander Maritime SA, a

ship owning company managed by Liquimar. It was dated 26 May 2006 and, as with the other agreements in this case, was signed by all parties in Greece. The loan was in respect of a vessel, *High Nefeli*. There was no guarantor of that loan.

8. The second loan agreement was dated 4 July 2008 between the Bank and Androniki Navigation Limited, another of Liquimar's ship owning companies. The loan was for a new build vessel which Androniki was to acquire. Over US$ 7.6 million was drawn down under that agreement. With repayments the Bank claims that around US$ 6.6 million is outstanding. In the event the construction contract was cancelled and the vessel was never built. The second loan agreement was guaranteed by Liquimar and it is Liquimar's guarantee which has given rise to what are described below as the First Greek and First English proceedings.

9. The Liquimar guarantee contained a governing law and an asymmetric jurisdiction clause, which was essentially similar to that in this and the other loan agreements. It provided:

> "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 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.
>
> 16.4 The Guarantor irrevocably waives any objection which it may now or in the future have to the laying of the venue of any proceedings in any court referred to in this Clause and any claim that those proceedings have been brought in an inconvenient or inappropriate forum, and irrevocably agrees that a judgment in any proceedings commenced in any such court shall be conclusive and binding on it and may be enforced in the courts of any jurisdiction …".

10. The third loan agreement was between the Bank and Pauline and dated 9 October 2008. It was for a new build vessel, the *Adriadni*, which was completed in the early part of 2009 and registered in Liberia. As with the second loan agreement, it was guaranteed by Liquimar. The loan agreement and the guarantee contained a proper law and a jurisdiction clause along the same lines as in the documentation for the second transaction. The third loan was discharged with the sale, as explained shortly,

of the *Adriadni* but the transaction is the basis of what are outlined later as the Second Greek and the Second English proceedings.

11. From December 2009, Androniki fell into arrears in the repayment of the loan, as did Pauline from mid-2012. These failures constituted events of default, which were notified by the Bank pursuant to the loan agreements. They culminated in demands for repayment of the moneys lent and for payment under the guarantees.

12. On 30 September 2014 the Bank entered forbearance agreements with the ship-owning companies in respect of the amounts owed under the loan agreements. The construction and effect of these forbearance agreements, in particular the release provisions, are in issue in the Greek and English actions. As part of their terms the forbearance agreements cross-refer to and incorporate the jurisdiction clauses of the underlying loan agreements.

13. Under the forbearance agreements the vessels had to be sold by the end of 2014 to discharge the Bank's loans. The *High Nefeli* was sold by that date, but not the *Adriadni*. On 29 December 2014 the Bank had the *Adriadni* arrested in South Africa. There were legal proceedings in that jurisdiction but it was sold there in April the following year by Pauline.

14. The proceeds from the sale of the two vessels satisfied the sums due from Pauline. There were sums still outstanding from Androniki, but Pauline did not agree to the surplus moneys from the sale of *Adriadni* being used towards repayment. The Bank's case is that over US$ 6 million is due to the Bank in respect of that loan and is payable by Liquimar under the guarantee. On 9 June 2015 the Bank warned Liquimar of its intention to commence proceedings in England if no proposals for settlement were received by 16 June 2015. No such proposals were received by that deadline.

15. On 16 June 2015 Liquimar issued proceedings against the Bank in the Piraeus Court of First Instance ("the First Greek Action") seeking orders that the guarantee of the loan was discharged and it was not liable to the Bank. Then in December 2015, Liquimar and Pauline issued proceedings against the Bank in the same court (the "Second Greek Action"). In the Second Greek Action, Pauline seeks damages from the Bank in tort and under the Greek Civil Code for loss of the use of the *Adriadni* consequent on the arrest, and Pauline and Liquimar seek moral damages under Article 919 of the Greek Civil Code for reputational loss.

16. There was some delay in the service of these proceedings on the Bank, but on 23 May 2016 the Bank commenced action against Liquimar in this court ("the First English Action") under the Androniki guarantee. That is for the amount outstanding under the Androniki loan, as well as an indemnity or damages in the same amount and interest, together with an indemnity in respect of associated costs and expenses. The Bank also seeks declarations and damages and/or an indemnity regarding breach by Liquimar of the jurisdiction clause in the Androniki guarantee by suing in Greece.

17. On 19 September the Bank commenced the Second English Action in which it seeks declarations of non-liability in respect of the matters advanced by Pauline and Liquimar in their claims in the Second Greek Action, and for declarations and for damages and/or an indemnity in respect of the breach by Pauline and Liquimar of the

jurisdiction clauses in the Pauline loan agreement, guarantee, and/or forbearance agreement.

18. Thus there are four proceedings, comprising two pairs of parallel proceedings in Greece and in this court. In each case, the Bank's actions here are essentially mirror-images of the proceedings in Greece, but with the added claims for damages and/or an indemnity for breaches of the jurisdiction clauses in the loan agreements, guarantees, and forbearance agreements.

19. For convenience I refer in the judgment to the defendants' case in the two applications being advanced by Liquimar, although in the second it is also being made by Pauline.

20. Phillips J granted permission to serve Liquimar outside the jurisdiction in the First English Action on 24 May 2016. On 25 July 2016, Liquimar made its application under CPR Part 11.1 for a stay of the First English Action and/or to set aside the permission granted the Bank to serve the defendants outside the jurisdiction.

21. In the Second English Action Leggatt J granted permission to serve outside the jurisdiction four days after the Bank had commenced proceedings. That led to an application by Liquimar and Pauline for a stay of the Second English action on 14 November 2016 and/or to set aside the permission granted to the Bank to serve the defendants outside the jurisdiction.

22. At a hearing on 16 December 2016 I ordered that both applications for the stay and set aside should be heard together on 12 January 2017.

LEGAL FRAMEWORK

Brussels 1 Recast

23. The background to the treatment of exclusive jurisdiction clauses in Brussels 1 Recast is well-known. Article 17 of the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968* ("the Brussels Convention"), the forerunner of Article 25 of Brussels 1 Recast, provided in its opening words, as amended:

> "If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting 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 exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing…"

Later in Article 17, in its penultimate paragraph, was this provision:

> "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."

24. Among the lis pendens provisions of the Brussels Convention was Article 21:

> **"**Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
>
> Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court."

25. The approach of the Brussels Convention in Articles 17 and 21 was carried through to Articles 23 and 27 respectively of *Council Regulation (EC) 44/2012 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("Brussels 1").

26. In Case C-116/02, *Erich Gasser GmbH* v. *MISAT Srl* [2005] QB 1, the Austrian court was designated in an agreement between the Austrian and Italian parties as having jurisdiction. Proceedings were taken first in Italy by the Italian party so that when legal action was later taken by the Austrian party in the Austrian court the latter was second seized of the matter. The European Court of Justice ("the ECJ") held that the court second seized of the matter which claimed jurisdiction under Article 17 of the Brussels Convention was obliged under Article 21 to stay proceedings until the court first seized had determined whether it had jurisdiction. If the court first seized decided that it did have jurisdiction, the court second seized had to decline jurisdiction in its favour.

27. Until then English courts had considered, notably in *Continental Bank NA* v. *Aeakos Compania Naviera SA* [1994] QB 588, that under the Brussels Convention the court designated under a clause agreed by contracting parties as having jurisdiction should have primacy and that the question of a stay on its part did not arise. In passing it can be noted that the *Continental Bank NA case* involved an asymmetric jurisdiction clause.

28. The outcome in *Erich Gasser* was criticised and ultimately led to the recasting of Brussels 1. In its *Proposal of 12 December 2012*, 2010/0383 (COD), the European Commission stated that there was large support among stakeholders to improve the effectiveness of choice of court agreements, and that such an approach would accord with the system established by the *Convention of 30 June 2005 on Choice of Court Agreements developed by the Hague Conference on Private International Law* ("the Hague Convention").

29. The EU adopted the Hague Convention by Council Decision 2014/887/EU. The Recitals to the Decision state that with the adoption of Brussels 1 Recast the EU "paved the way for the approval of the [Hague] Convention on behalf of the Union, by ensuring coherence between the rules of the Union on the choice of court in civil and commercial matters and the rules of the Convention".

30. Brussels 1 Recast came into effect on 10 January 2015, replacing Brussels 1. Among its recitals, Recital 19 provides that party autonomy should be respected subject to the exclusive grounds of jurisdiction laid down in the Regulation. Recital 21 refers to the interests of the harmonious administration of justice and the necessity to minimise the

possibility of concurrent proceedings and irreconcilable judgments in different member states.

31. The purpose of the recast provisions on exclusive jurisdiction clauses is set out in Recital 22. It reads:

> "(22) However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seized of proceedings and the designated court is seized subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seized should be required to stay its proceedings as soon as the designated court has been seized and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings. This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seized first. In such cases, the general lis pendens rule of this Regulation should apply."

32. New substantive provisions in Brussels 1 Recast are found, in part, in the opening words of Article 29 ("without prejudice to Article 31(2)"), as well as in new Articles 31(2) and (3). These articles fall within Section 9 of the Regulation, entitled "Lis Pendens-related actions". Article 29 provides:

> "Article 29
>
> 1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established..."

33. It is common ground that apart from the claims in relation to breach of the jurisdiction clauses, the claims in the two London Actions involve the same causes of action as the claims in the Greek Actions and are within Article 29 of Brussels 1 Recast.

34. Article 31 reads:

> "Article 31
>
> …
>
> 2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.
>
> 3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court."

35. Earlier in Brussels 1 Recast is section 7, entitled "Prorogation of jurisdiction". Falling within section 7 is Article 25, which is essentially identical to Article 23 of Brussels 1, except for a new provision clarifying that it is the law of the chosen court which should determine the substantive validity of the jurisdiction agreement. Article 25(1) provides:

> "Article 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing;
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

The Hague Convention and exclusive jurisdiction clauses

36. The Hague Convention applies to exclusive choice of court agreements concluded in civil or commercial matters: Article 1(1). For the purposes of the Convention an exclusive choice of court agreement is defined in Article 3(a) as:

> "an agreement concluded by two or more parties that … designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts".

Article 3(c) provides that an exclusive jurisdiction clause must be concluded or documented in writing or other means of communication which renders the information accessible for subsequent reference.

37. The Explanatory Report to the Hague Convention by Professors Trevor Hartley and Masato Dogauchi noted that asymmetric jurisdiction clauses are often used in international loan agreements. However, they continued, the Diplomatic Session had agreed that they:

> "are not exclusive choice of court agreements for the purposes of the Convention."

38. The Explanatory Report added that such clauses may be subject to the rules of the Convention if the States in question have made declarations under Article 22, which is the clause which provides for reciprocal declarations by Contracting States on the recognition and enforcement of judgments under non-exclusive jurisdiction clauses.

39. An earlier report by Professors Dogauchi and Hartley, at the time of the drafting of the Convention, suggested that to make it clear that asymmetric jurisdiction clauses were excluded from the definition in what is now Article 3(a) "it might be desirable to add…the words, 'Such an agreement must be exclusive irrespective of the party bringing the proceedings'." That was not done.

Asymmetric jurisdiction clauses in English and civil law jurisprudence

40. The jurisdiction clauses in the various loan agreements, guarantees and forbearance agreements in this case are what are known as asymmetric jurisdiction agreements. As we have seen such clauses contain different provision as to jurisdiction depending on whether proceedings are initiated by X on the one hand or by Y on the other. In an asymmetric jurisdiction clause Y is limited to jurisdiction A but X may proceed in that jurisdiction or in other courts which have competent jurisdiction: *Mauritius Commercial Bank Ltd* v. *Hestia Holdings Ltd* [2013] 2 Lloyds Rep 121, [37], per Popplewell J. X can sue anywhere under such a clause but only if and to the extent that a court other than in A has jurisdiction. Moreover if Y sues in A, X is not able to challenge the court's jurisdiction since it has agreed to it. In this situation X may not be able to sue elsewhere: *Lornamead Acquisitions Ltd* v. *Kaupthing Bank* [2011] EWHC 2611, [112].

41. Asymmetric jurisdiction agreements are a long established and practical feature of international financial documentation: *Barclays Bank Plc* v. *Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri* 2015] EWHC 2857 (Comm); [2015] 2 Lloyd's Rep. 527, per Blair J. There are many English court decisions treating them as valid and enforceable: *Credit Suisse First Boston (Europe) Ltd* v. *MLC (Bermuda) Ltd* [1999] 1 All ER 237, p.249G-250A; *Bank of New York*

Mellon v. *GV Films* [2009] EWHC 2338, [14]; *Black Diamond Offshore Ltd* v. *Fomento de Construciones Y Contratas SA* [2015] EWHC 1035, [43]. Some, but not all, of these cases have involved the forerunners of Brussels 1 Recast and the parallel Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the EU and countries in the European Free Trade Association, [EU] *Official Journal*, 21 December 2007, L339/3): e.g., *Continental Bank* v. *Aeakos SA* [1994] 1 WLR 588, 593H-594F (a Brussels Convention case).

42. In its paper, *Issues of Legal Uncertainty Arising in the Context of Asymmetric Jurisdiction Clauses*, July 2016, the Financial Markets Law Committee of London discusses the law on asymmetric jurisdiction clauses in European jurisdictions other than England. It notes what appear to be conflicting decisions of the French Cour de cassation.

43. In *Mme X* v. *Société Banque Privé Edmond de Rothschild 13*, First Civil Chamber, 26 September 2012, Case No. 11-26022, the Cour de cassation ruled that an asymmetric jurisdiction clause in a loan agreement was invalid since it was potestatif and contrary to the purpose of Article 23 of the Brussels 1 Regulation (Article 25 of Brussels 1 Recast).

44. However, in *Société eBizcuss.com* v. *Apple*, First Civil Chamber, 7 October 2015, Case No. 14-16898, the Cour de cassation rejected the argument that the clause was discretionary and contrary to the object and purpose of Article 23. The jurisdiction clause in that case provided that Apple could sue in Ireland or "where a harm to Apple is occurring". The Financial Markets Law Committee suggests that that limit might explain the ruling.

45. The Financial Markets Law Committee adds this about asymmetric jurisdiction clauses in the courts of Luxembourg, Spain and Italy:

> "3.11 Courts in other European jurisdictions have also taken the approach adopted by the English courts. For example, the *Cour de cassation*'s decision and interpretation of the Brussels 1 Regulation in *Rothschild* was contradicted by the *Tribunal d'Arrondissement* of Luxembourg in a commercial case in 2014 [Commercial judgments 127/14 and 128/14, 29 January 2014]. The Tribunal held that an asymmetric jurisdiction clause was valid and noted that the: (i) *Rothschild* decision had been widely criticised; (ii) asymmetric jurisdiction clauses were expressly permitted by the Brussels Convention and the Brussels 1 Regulation implicitly permits them; and (iii) the contracting parties had similar negotiating power so freedom of contract should prevail. The Court of Appeal of Madrid has also considered an asymmetric jurisdiction clause and held it to be valid and consistent with international norms. [Court of Appeal of Madrid, 18 October 2013, *Camimalaga SAU* v. *DAF Vehículos Industriales, S.A*]. Similarly, the Italian courts have upheld the validity of asymmetric jurisdiction clauses broadly on the principle of freedom of contracting parties to choose and on the understanding that the Brussels Regulation permits

> asymmetric jurisdiction clauses [See, for example, Corte di Cassazione, 11 April 2012, *Grinka in liquidazine . Intesa San Paolo, Simest, HSBS*, Case No 5705; Corte D'Appello di Milano, 22 September 2011, *Sportal Italia* v. *Microsoft Corp*]."

46. More recently there is a case in the Piraeus Court of First Instance, Maritime Disputes Department, No 954/2016, decided under the 2007 Lugano Convention. That case involved an asymmetric jurisdiction clause between a bank and a shipping company, registered in the Marshall Islands but based in Greece. Under it the shipping company agreed to the jurisdiction of the English court. When the shipping company sued the bank in the Greek court, the court dismissed the claim.

STAY UNDER ARTICLE 29

47. Liquimar contended that this court should apply the ordinary lis pendens rules in Article 29(1) of Brussels 1 Recast and should stay further substantive proceedings pending the ruling by the Greek court, as the first-seized court, on its own jurisdiction. Its core argument was that asymmetric jurisdiction clauses do not qualify within Article 31(2) of Brussels 1 Recast as agreements conferring exclusive jurisdiction on a court of a Member State. Secondly, it argued, even if asymmetric jurisdiction clauses come within Article 31(2) this court must apply Article 29(1) since on the plain words of Article 31(2) it applies only to what the first-seized court, in our case the Greek court, must do. Finally, in what it termed its subsidiary argument, Liquimar submitted that asymmetric jurisdiction clauses are invalid under Brussels 1 Recast in the light of Article 25.

48. In the present applications no issue arises as to the interpretation or validity of the asymmetric jurisdiction clauses in the various agreements.

First argument: asymmetric jurisdiction clauses and Brussels 1 Recast

49. Article 31(2) of Brussels 1 Recast has effect where there is a jurisdiction agreement which confers exclusive jurisdiction on the courts of an EU member state. The issue is whether asymmetric jurisdiction clauses can be characterised in this way. If so the asymmetric jurisdiction clauses in the agreements between the Bank and the defendants in this case mean that this court has jurisdiction and stays are not appropriate.

Autonomous interpretation

50. The Bank argued that the issue of whether the asymmetric jurisdiction clauses in this case fall within the description in Article 31(2) of a clause conferring exclusive jurisdiction on a court is one for determination according to principles of English law, the governing law of the agreements. The Bank pointed to the words of Article 25, that jurisdiction is exclusive unless the parties agree otherwise. Thus whether an asymmetric jurisdiction agreement is exclusive or not is a matter of contractual interpretation.

51. In support of its case, that an asymmetric jurisdiction agreement is regarded as exclusive in English law, the Bank cited a number of authorities. *Berisford* v. *New Hampshire* [1990] 1 Lloyd's Rep 454 is one, although Hobhouse J's remarks there

were *obiter* since the jurisdiction clause in that case was not asymmetric. *Perella Weinberg Partners UK LLP* v. *Codere SA* [2016] EWHC 1182 is another, which was decided in the context of Article 31(2) of Brussels 1 Recast. There Walker J held that, where one party agreed for the benefit of the other that the English courts would have non-exclusive jurisdiction to settle any dispute arising in connection with their agreement, that could not be construed as an exclusive jurisdiction clause.

52. To my mind Liquimar was correct in submitting that whether an asymmetric jurisdiction agreement can be characterised as conferring exclusive jurisdiction on a court of a Member State within the terms of Article 31(2) is a question not of English law but the autonomous interpretation of the Regulation. The issue is not the interpretation of an asymmetric jurisdiction clause or whether in some domestic English law context such a clause will be treated as conferring exclusive jurisdiction on the English court. Rather the context is the characterisation of a clause of this nature under the provisions of Brussels 1 Recast. That to my mind demands an autonomous approach.

53. The concept of exclusive jurisdiction has frequent use as a term in the Regulation, which is at least suggestive that it has a consistent, autonomous meaning. There is support as well in Article 25(1), which carves out questions of substantive validity as a matter subject to the law of the Member State designated in the agreement. By implication other issues such as whether a jurisdiction clause falls under Brussels 1 Recast are for EU law. Finally, an autonomous approach avoids the divergent application of the lis pendens provisions of the Regulation in different Member States. In other words, legal policy offers important support for an autonomous approach: see Case 144/86, *Gubisch Maschinenfabrik KG* v. *Palumbo* [1987] ECR 4861, [10]-[11].

Liquimar's case

54. Liquimar submitted that with its first-seized principle Article 29 of Brussels 1 Recast was the default rule. It reflected the crucial legal policies of certainty and predictability and avoiding conflicts between the courts of Member States. Since Article 31(2) was an exception to the default rule in Article 29, Liquimar submitted, it should be given a narrow application.

55. As to the meaning of an exclusive jurisdiction agreement as a matter of EU law, Liquimar contended that it is one that excludes bases of jurisdiction which would otherwise be available under it, apart from the jurisdiction specifically designated by the agreement. It cited Case 25/78, *Nikolaus Meeth* v. *Glacetal Sarl* [1979] CMLR 520, at paragraph [5], a case decided on Article 17 of the Brussels Convention, the forerunner of Article 25 of Brussels 1 Recast.

56. On Liquimar's case asymmetric jurisdiction clauses do not satisfy the notion of exclusivity in Article 31(2) since they expressly permit one party, in the present case the Bank, to bring proceedings in any court of competent jurisdiction. In its submission such clauses must be read as a whole, since the Article refers to "an agreement" conferring exclusive jurisdiction, not part of an agreement.

57. Considering their impact on both parties, Liquimar contended, such clauses do not create a single, exclusive jurisdiction for the determination of all disputes. In enabling one party to sue in any competent jurisdiction, and in contemplating

concurrent proceedings in different jurisdictions, they do not exclude the standard bases of jurisdiction under the EU legislation. Asymmetric jurisdiction clauses, Liquimar submitted, are the antithesis of agreements conferring exclusive jurisdiction.

58. Liquimar added that there was no support for any other approach, as the Bank suggested, in Recital 22 of the Regulation. On its face that recital was unconcerned with asymmetric jurisdiction clauses. The recital added nothing to Article 31(2) itself.

59. Further support for its approach, Liquimar submitted, derived from the Hague Convention. It contains a definition of an exclusive choice of court agreement, which does not extend to asymmetric clauses. It was the intention of the European Union that its rules in Brussels 1 Recast should be harmonised with the Hague Convention, in anticipation of the EU's accession to the Convention. Liquimar submitted that a different approach to asymmetric jurisdiction clauses in the two instruments would produce arbitrary distinctions depending on the domicile of the parties, rather than any distinguishing feature of such clauses. Thus if both parties were EU-domiciled, the Bank's argument would imply that a court first seized of proceedings in breach of an asymmetric jurisdiction agreement would be obliged to stay its proceedings under Brussels 1 Recast, whereas if one of the parties was domiciled in a non-EU, Hague Convention state, the first-seized court could continue its proceedings.

60. In Liquimar's submission, Article 31(2) is impossible to apply here for another reason. The English court under the asymmetric jurisdiction agreements in this case is not seized on the basis of any exclusive jurisdiction provision since the Bank's right under them is to sue in any competent jurisdiction. Even if an asymmetric jurisdiction clause could be divided, with one part considered as establishing exclusive jurisdiction, Liquimar submitted that it is not the element of those clauses forming the basis of the Bank's proceedings in this court. As to the Greek actions, this court is not concerned, nor can it be, with their status: Case C-351/89, *Overseas Union Insurance Ltd* v. *New Hampshire Insurance Co*. [1991] ECR I-3317, [23]-[24].

61. A further argument for Liquimar was that treating asymmetric jurisdiction agreements as exclusive for the purposes of Brussels 1 Recast would create anomalies. That was illustrated by reference to the Bank having decided under the clause to sue in an EU Member State other than England. If Liquimar and Pauline had then sued in England that would have frustrated those other proceedings because, although second-seized, the English court would not be obliged to stay its proceedings. The result would be that the Bank would be bound to litigate in England, notwithstanding that under the jurisdiction clause it had chosen to do so elsewhere. This would undermine, rather than give effect to, party autonomy and be inconsistent with the first-seized principle.

Analysis

62. There is no warrant, in my judgment, for giving Article 29 of Brussels 1 Recast primacy and treating Article 31(2) as somehow an exception to it. Nor is there any warrant for giving Article 31(2) a narrow meaning. Whatever may have been the legislative history of the first-seized rule in the Brussels Convention and Brussels 1, there is nothing in Brussels 1 Recast indicating this approach. In my view, ordinary principles apply and both articles should be read together and given effect according to their language and purpose.

63. On its face Article 29 (1) is without prejudice to Article 31(2), which can only mean that Article 29 (1) gives way to Article 31 (2) when the latter applies. A similar result obtains with Article 31(2) itself, which is without prejudice to Article 26: generally speaking, if a defendant enters an appearance before a court of a Member State, under Article 26 that court shall have jurisdiction even though an agreement confers exclusive jurisdiction on another court. While "subject to" is used elsewhere in the Regulation to achieve the effect that one article takes precedence over another, the terms "without prejudice to" and "subject to" are to my mind equivalent in the outcome they produce.

64. The natural meaning of the words in Article 31(2) - "an agreement [which] confers exclusive jurisdiction"- to my mind includes asymmetric jurisdiction clauses such as those in the various agreements in this case between the Bank and the defendants. Considered as a whole, they are agreements conferring exclusive jurisdiction on the courts of an EU member state, namely, England. That this applies in respect of a claim by the defendants alone does not detract from this effect.

65. Case 25/78, *Nikolaus Meeth* v. *Glacetal Sarl* [1979] CMLR 520, was decided under the first paragraph of Article 17 of the Brussels Convention (the predecessor of Article 25 in Brussels 1 Recast). The case involved a French party and a German party. There the jurisdiction clause provided that if Meeth sued Glacetal, the French court alone had jurisdiction, while if Glacetal sued Meeth, the German courts alone had jurisdiction.

66. The ECJ held that the first paragraph of Article 17 could not be interpreted as having no application to a clause under which two parties to a contract, domiciled in different states, could be sued only in the courts of their respective states. In effect it was an exclusive jurisdiction clause even though which court had exclusive jurisdiction turned on which party sued.

67. For our purposes the reasoning of the ECJ is important: an agreement such as the one it was considering, designating the courts of two states, could still be regarded under the first paragraph of Article 17 as one where a court or courts "*of one Contracting State*" had "exclusive jurisdiction". The court said:

> "That wording [of Article 17], which is based on the most widespread business practice, cannot, however, be interpreted as intending to exclude the right of the parties to agree on two or more courts for the purpose of settling any disputes which may arise…[I]t excludes, in relations between the parties, other optional attributions of jurisdiction, such as those detailed [elsewhere in the Convention]: [5].

68. To my mind the case provides further support for the view that where a clause confers exclusive jurisdiction on the court or courts of a Member State when one party sues, the clause will still be an exclusive jurisdiction clause for the purposes of Article 31(2) even where, if the other party to the clause sues, the clause shows the parties to have agreed that jurisdiction is to be conferred differently, or allowed to engage differently.

69. The conclusion that an asymmetric jurisdiction clause cannot be treated as non-exclusive under Brussels 1 Recast is also consistent with the Regulation's aims. There is the aim of party autonomy in Recital 19, although that may be counterbalanced by the aims in Recital 21 of avoiding concurrent proceedings and irreconcilable judgments. But Recital 22, which is the specific background to Article 31(2), is clear: there needs to be an exception to the general lis pendens rule to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive tactics.

70. Thus with the asymmetric jurisdiction clauses in the present case, the defendants agreed to sue only in the courts of one EU Member State, England. Instead, they have enabled another court, the Greek court, to be seized of the matter. It would undermine the agreements of the parties, and foster abusive tactics, if the jurisdiction clauses in these agreements were to be treated not as exclusive, but as non-exclusive.

71. The Hague Convention, in my view, offers no assistance in the characterisation of asymmetric jurisdiction clauses under Article 31(2) of Brussels 1 Recast. There is no reference to the Hague Convention in Brussels 1 Recast, although the drafting of both occurred in tandem and Council Decision 2014/887/EU referred to ensuring coherence between the rules of the EU on the choice of court in civil and commercial matters and those of the Hague Convention.

72. While there is an overlap between the two instruments, however, there are important divergences. Thus there are differences between the two in the formal requirements for exclusive jurisdiction clauses, the Hague Convention in Article 3(c) requiring writing or an accessible form, Brussels 1 Recast in Article 25 allowing agreements to be established on a wider basis, through the practices of the parties or by commercial usage.

73. Further, there is a definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention, whereas there is no definition in Brussels 1 Recast. The reporters record that the Diplomatic Session adopting the Hague Convention accepted that the definition in Article 3(a) did not extend to asymmetric jurisdiction clauses, something the reporters themselves do not seem to have regarded as clear.

74. There are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention cover asymmetric jurisdiction clauses. For present purposes, however, there is no need to reach a concluded view on the ambit of the definition. Even if it were to be read as excluding asymmetric jurisdiction clauses, however, that in my view is of no assistance as to the quite separate issue of their characterisation under Article 31(2) of Brussels 1 Recast.

75. There is nothing in my view to Liquimar's submission that the English actions are not brought in this court pursuant to any exclusive jurisdiction agreement or that the exclusive element of such a clause only governs proceedings in Greece. The fact is that the clause confers exclusive jurisdiction on the English court when the defendants sue, they have instituted proceedings elsewhere, and that is why the English actions are being pursued.

76. Nor do I give credence to the argument that characterising asymmetric jurisdiction clauses as conferring exclusive jurisdiction gives rise to unacceptable anomalies.

Even if under an asymmetric jurisdiction clause a borrower could deprive a Bank of its right to sue in any competent court by starting proceedings in England, the designated jurisdiction, it would be even more anomalous if Liquimar is correct and by starting proceedings elsewhere than England in breach of what it agreed the borrower could cause proceedings by the Bank in the designated jurisdiction, namely England, to be stayed.

Second argument: Article 31(2)'s limited reach

77. Assuming that it was wrong on the first argument, Liquimar next submitted that what Article 31(2) provides is that the non-designated court (the Greek court in our case) should stay its proceedings, but it contains nothing about how the designated court (the English court in our case) should proceed. Even if the last sentence of Recital 22 could be read as enabling the English court (in our case) to go further than ruling on the validity of the jurisdiction clause, despite the Greek court not having stayed its proceedings, a recital cannot constitute a rule when it is not reflected in the words of Article 31(2). In the result, Liquimar submitted, this court should apply the ordinary lis pendens rules in Article 29(1) and stay further substantive proceedings pending the decision of the Greek court, as the first-seized court, ruling on its own jurisdiction.

78. To my mind this argument would make a nonsense of Article 31(2). If correct it would emasculate the Article, requiring (in our case) the English court having to stay proceedings under Article 29 and the Greek court to stay proceedings if the prerequisites of the Article are met. In fact, Article 29(1) is without prejudice to Article 31(2). As explained earlier that means that it gives way to Article 31(2) when the latter applies. If the English court decides it has jurisdiction, in my view it is able to proceed with the case irrespective of how far advanced the Greek proceedings are. The last sentence of Recital (22) does not establish a rule, but it sets out the policy of the Regulation and informs a sensible interpretation of Article 31(2). It is clear what it intends despite any infelicities of expression.

Third argument: invalidity of asymmetric clauses under Brussels 1 Recast

79. In what it entitled a subsidiary argument, Liquimar contended that the asymmetric jurisdiction clauses in the agreements between the Bank and the defendants are not compatible with Article 25 of Brussels 1 Recast and therefore cannot trigger Article 31(2). Article 25 requires the parties to have designated the courts of a Member State to enable the law applicable to the substantive validity of a jurisdiction clause to be identified and to provide certainty as to the forum in which a putative defendant can expect to be sued. That is not achieved by a clause which designates the courts of all other competent states, including those of non-Member States, outside the territorial competence of the EU, which could mean suits in multiple jurisdictions. The French cases considered earlier in the judgment, in particular *Mme X* v. *Société Banque Privé Edmond de Rothschild 13,* First Civil Chamber, 26 September 2012, Case No. 11-26022, were also invoked.

80. This argument seems to overlook that in these asymmetric jurisdiction clauses the parties have designated the English court as having exclusive jurisdiction when the defendants sue. There is nothing in Article 25 that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts. Article 17, penultimate paragraph, of the Brussels Convention recognised asymmetric jurisdiction clauses. To my mind

it would need a strong indication that Brussels 1 Recast somehow renders what is a regular feature of financial documentation in the EU ineffective.

81. Any assistance which the defendants might garner from the decision of the French case, *Mme X* in 2012, comes up against the legal justification which the Cour de cassation in that case offered, the French concept of potestativité, not an autonomous concept in EU law. Quite apart from that there are the later French cases, and those in other European jurisdictions, outlined earlier in the judgment, which have taken a supportive approach to asymmetric jurisdiction clauses. I reject Liquimar's so called subsidiary argument.

Service out

82. Liquimar's applications about setting aside service of the Bank's claims outside the jurisdiction were that the relevant CPR provisions were not satisfied for essentially the same reasons as advanced in relation to Brussels 1 Recast. Since the Bank succeeds as regards Brussels 1 Recast the issue as to service out falls away.

ARTICLE 30/CASE MANAGEMENT STAY

83. Liquimar submitted that, whatever the conclusion on its claim for a stay under Article 29 of Brussels 1 Recast, the court should stay the related claims under Article 30 of the Regulation. These are the claims that the proceedings in Greece are in breach of the jurisdiction clauses and for damages for that breach. Liquimar conceded that if my conclusion is correct that there are relevant exclusive jurisdiction agreements for the purposes of Brussels 1 Recast that would be a significant factor in refusing a stay under Article 30.

84. If the structure or effect of Brussels 1 Recast somehow stood in the way of a stay, Liquimar added, the court retained a discretion to stay the proceedings for case management reasons on essentially the same grounds as set out for Article 30, and should do so given factors such as the close connections to Greece in these proceedings and their advanced state.

The law

85. Article 30 of Brussels 1 Recast provides as follows:

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.
>
> 2. Where the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient

> to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

86. In Case C-129/92, *Owens Bank* v. *Bracco* [1994] QB 509, Advocate General Lenz identified three non-exhaustive factors bearing on the exercise of discretion under the forerunner of Article 30:

> "(1) the extent of the relatedness and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings, and (3) the proximity of the courts to the subject matter of the case": [76].

87. Advocate General Lenz said that it went without saying that in the exercise of discretion regard could be had to which court was in the best position to decide the particular question: [79]. Earlier in his Opinion he indicated that there is a strong presumption in favour of allowing an application for a stay, an approach which would reflect the *Jenard Report* [1979] OJ C59/1 (the commentary on the Brussels Convention).

88. The European Court of Justice itself considered what is now Article 30(3) in Case C-406/92, *The Tatry* [1999] QB 515. It said that the purpose of the article was avoiding conflicting judgments in the EU, and that consequently the interpretation of "related actions" must be given a broad interpretation: [52]-[55].

89. In *Starlight Shipping Co* v. *Allianz Marine & Aviation Versicherungs AC* [2013] UKSC 70; [2014] Bus LR 873 Lord Clarke adopted, albeit obiter, Advocate General Lenz's analysis and then, after citing Cooke J in *JP Morgan Europe Ltd* v. *Primacom AG* [2005] EWHC 508 (Comm); [2005] 2 All ER (Comm) 764, said:

> "[95]… I can see no reason why, in exercising that discretion under article [30], the court second seized should not take into account the fact that the parties had previously agreed (or arguably agreed) an exclusive jurisdiction clause in favour of that court. On the contrary, depending on the circumstances of the particular case, that seems to me to be likely to be a powerful factor in support of refusal of a stay…"

90. Contrary to what seemed to be the implication of Liquimar's submission, what Lord Clarke said is not inconsistent with the European jurisprudence. *Owens Bank* did not involve an exclusive jurisdiction clause, and Advocate General Lenz explained that his three factors were not the only ones to be considered. What Lord Clarke said does not mean that the existence of an exclusive jurisdiction clause is determinative in the exercise of discretion, just that it is a powerful factor in considering a stay.

Liquimar's case

91. Considering Advocate General Lenz's three factors in relation to the First English action, Liquimar submitted that there is a high degree of relatedness with the First Greek Action and corresponding risk of mutually irreconcilable decisions. Both actions raise issues as to the scope and effect of the jurisdiction clause in the Androniki guarantee, being relevant in particular to the determination of the proper law of the claims advanced in the First Greek Action. Moreover, essentially the same

arguments will arise in both jurisdictions as to Liquimar's liability under the Androniki guarantee given that the Bank's damages claims here correspond to the amount of any award against it in Greece.

92. As for the stage of the proceedings, the First Greek Action will be heard on 21 February 2017 to determine all issues before it and the Second Greek Action will be heard on 14 February 2017. (It seems to be common ground that as a rough estimate judgment would ordinarily be expected four to five months after that.) So a distinguishing feature of this case is the imminence of the Greek actions.

93. Proximity of the courts to the subject matter of the case, Advocate General Lenz's third factor, is in Liquimar's submission clearly in favour of a stay. Greece simply has a closer connection than England. Indeed, submits Liquimar, there is no substantive connection with England whatever, whereas there are real connections with Greece when the defendants' personnel (and thus witnesses) and banking facilities are based there, the loan and guarantee documentation were signed there, and negotiations and communications have been with Liquimar in Athens.

94. With respect to the Second English Action, Liquimar's case for a stay is in its submission even stronger than with the First English Action. That is firstly because the relatedness of the London and Greek actions is more pronounced. Declarations sought by the Bank in the Second English Action concern the validity and import of the jurisdiction clauses, the same issues as raised in the Second Greek Action. In both proceedings the Bank's argument arises that, albeit that the *Adriadni* forbearance agreement expired in early December 2015, its subsequent conduct is governed by the jurisdiction and applicable law provisions of that agreement. Further, consideration will need to be given to the merits of the outcome of Pauline's and Liquimar's claims in Greece in relation to the Bank's claim for damages and an indemnity.

95. In Liquimar's submission, while the progress factor is broadly the same as with the First actions, the proximity factor is stronger because the loss claimed by it and Pauline for moral damage is one that was predominantly felt in Greece as the place where those entities operated.

96. As regards both actions, Liquimar further submitted that the general policy of the Regulation supports a stay, especially when the decisions of the Greek court following the hearings on 14 and 21 February will affect the scope and significance of the English Actions.

Analysis

97. In my view Liquimar's case under Article 30 fails to face up to the parties having agreed to an exclusive jurisdiction clause in favour of this court which, as Lord Clarke said in the *Starlight Shipping Co case,* is likely to be a powerful factor against a stay. Quite apart from that, the other factors which Advocate General Lenz identified make it inappropriate in my judgment to grant a stay in this case.

98. First, it seems to me that at this stage the degree of relatedness between the English and Greek actions is in fact very small, being mainly matters of construction according to English law, a matter Blair J took into account in *Barclays Bank Plc* v. *Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri* 2015]

EWHC 2857 (Comm); [2015] 2 Lloyd's Rep. 527, [95]. In the first English action all the Bank needs to do is to demonstrate that there is a breach of the jurisdiction clause in the defendants suing in Greece. At first blush interpreting and applying the jurisdiction clause in that regard seems a very simple and straightforward task. It is no disrespect to the Greek court to say that this court seems best placed to perform that task.

99. As regards the Second English action, there is the potential issue of whether any tortious defences raised fall within the jurisdiction clause and of the continued effect of the clauses in the forbearance agreements. But again it seems to me that as a matter of applying English law to interpret the metes and bounds of the jurisdiction clause this court is better placed than the Greek court and can do this within a narrow compass.

100. The points on timing which Liquimar raised are to an extent undercut since the Greek court will have this court's judgment before its hearing on 14 and 21 February. Moreover, I am minded to order a hearing for the Bank to apply for summary judgment, which should take place within six-eight weeks. I accept the Bank's submission that, given the fact that English Law is the applicable law governing the related issues, it is the English court which should give its decision first.

101. Liquimar's case on proximity is unpersuasive. The agreements are governed by English law, the jurisdiction clause is clear, and these factors are fortified by the defendants also undertaking not to take points on the English forum. In any event, the factors which are said to connect to Greece do not really bear on the related issues in the First and Second actions. Where the various agreements were signed seems irrelevant, and that the witnesses are in Greece has very little weight when the related issues are primarily, if not completely, issues of construction. England in my judgment is most proximate to the related issues.

102. There is simply no basis for a stay under Article 30 of Brussels 1 Recast. For similar reasons there is no basis in case management terms to order a stay.

CONCLUSION

103. For the reasons I have given I am satisfied that the court should refuse the defendants' applications for a stay. It should also decline to set aside service out of the jurisdiction.