

Fund Finance Friday



EU Jurisdictional-Clause Gymnastics – The Enforceability of Asymmetric Jurisdiction Clauses

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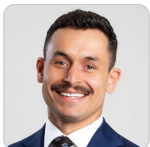
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A recent decision of the Court of Justice of the European Union (the EU's highest court) has clarified some of its views on 'asymmetric jurisdiction clauses'. An asymmetric jurisdiction clause is one that allows one party (typically a lender) a greater choice of forum for initiation of legal actions and enforcement than another party (typically a borrower).

The CJEU decision is of course quite technical and touches upon a number of EU laws, conventions and regulations (avid readers of CJEU materials can find the full text under reference C-537-23). While this isn't the forum to explore its details in full, the decision has already begun to ripple into the fund finance world. This note explains why.

What did the CJEU find?

The case in question turned on whether a jurisdiction clause that allowed an open-ended choice of jurisdiction for one party (which in this case provided Party A with a choice of "*the court of Brescia... another competent court in Italy or elsewhere*") while limiting the other party's choice of jurisdiction (in this case limiting Party B to just the court of Brescia) was valid under EU law.

In summary, the CJEU's ruling confirmed that asymmetric jurisdiction clauses are valid and enforceable under EU law, but only if they meet certain conditions.

From the CJEU's perspective these conditions are met by the asymmetric jurisdiction clause specifying, for the party that will have the benefit of it, that proceedings can be initiated before: (i) a specified EU court, the courts of an EU member state or a state party to the Lugano Convention 2007; and (ii) that the clause is sufficiently objective and precise that it can be determined what court falls within its remit.

How does this affect Fund Finance?

The two primary areas that this has begun to materialise in are: (I) Luxembourg law governed security agreements; and (II) Luxembourg legal opinions.

Luxembourg Security Agreements

A common feature of almost all fund finance transactions with a Luxembourg nexus are Luxembourg law governed security agreements over: (i) capital call rights contained in Luxembourg law governed LPAs; or (ii) Luxembourg situated bank accounts. In Luxembourg law governed security agreements the choice of forum has typically been asymmetric in that the lender (or agent) may choose to enforce in Luxembourg or before any other court of its choice.

While it remains to be seen how the Luxembourg courts will interpret and apply the conditions set forth by the CJEU, we now expect (and are already seeing) lenders undertake a more detailed consideration of the choice of jurisdictions that they may wish to have access to in the event of a dispute or default – seeking to balance their commercial preferences with the certainty provided by falling within the guidance of the CJEU decision.

Given that most fund finance transactions with a Luxembourg nexus are documented by New York or English law governed credit agreements, the obvious question is whether asymmetric jurisdiction clauses that allow the lender the option of one of those (non-EU) courts, in addition to the courts of an EU member state, are enforceable?

Unfortunately, the answer to that question is not clear and, while inclusion of the courts of either New York or England as a choice of forum would not fall within the CJEU's view of an enforceable asymmetric jurisdiction clause, a national court could still seek to give effect to such a clause by declining jurisdiction in favour of a NY/English court which had accepted jurisdiction over proceedings or to enforce the foreign judgment.

Luxembourg Legal Opinions

In Luxembourg legal opinions it is now likely (and already the case in many instances) that legal opinions will include a legal reservation or qualification regarding asymmetric clauses. This reservation usually provides that a choice of forum may be deemed invalid by a Luxembourg court if the contract in question contains an asymmetric jurisdiction clause which does not follow the principles set out by the CJEU.

Does this affect Cayman Islands law governed agreements?

The Cayman Islands courts typically look to the courts of the UK and other Commonwealth nations in respect of precedent. As the UK is no longer part of the EU, and the CJEU ruling will be of limited (if any) precedential value in its courts, this ruling is unlikely to have any direct effect on Cayman law or legal practise. That said, if a party sought to enforce a Cayman law governed agreement in Luxembourg — for example, by initiating proceedings there or seeking recognition of a Cayman judgment — and the agreement contained an asymmetric jurisdiction clause, it is unclear how a Luxembourg court would view such a situation and whether it would accept jurisdiction and/or enforce the agreement.

Conclusion

While the increase in certainty as to the CJEU's approach is welcome, a number of grey or complex areas remain (most notably how the Luxembourg courts would treat a choice of non-EU courts in an asymmetric jurisdiction clause or a non-EU law governed contract containing an asymmetric jurisdiction clause). The additional reservations in Luxembourg legal opinions reflect this.

The solution that provides relative certainty of drafting of these clauses for Luxembourg law governed agreements is now clear and consists of ringfencing the choice of forum for the beneficiary of the asymmetric jurisdiction clause to the courts of Luxembourg, an EU member state or a state party to the Lugano Convention 2007 and specifying objective and precise factors enabling the court to determine its jurisdiction. For non-EU (notably New York or English) law governed contracts where a party wishes to have an asymmetric clause and may in the future foresee seeking a forum or enforcement in Luxembourg, the position is less clear and, as noted above, parties will now need to balance the benefits of falling within the certainty of the CJEU's position against that of any commercial desires to maintain a wider discretion of choice.