

## Unilateral choice of jurisdiction clauses are void

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Authors: Andrew Tetley

On 26 September 2012, the French Supreme Court in civil and commercial matters decided that a jurisdiction clause in a contract providing for a competent forum, but which allowed one of the parties to elect to bring proceedings in another forum, was void.

### THE CASE

A Luxembourg bank faced a claim brought by one of its French customers in the French courts. The bank challenged jurisdiction based on a governing law and jurisdiction clause in the following terms (in translation):

“The relationship between the bank and the customer is subject to Luxembourg law. Any disputes between the customer and the bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The bank nevertheless reserves the right to bring proceedings in the customer’s home or any other court of competent jurisdiction in the absence of an election for the above-stated jurisdiction.”

The Supreme Court held that the jurisdiction clause effectively imposed no obligation on the bank, which was not restricted to bringing proceedings in Luxembourg. For this reason, the clause was “*potestative*” vis-à-vis the bank. Under general French law, a clause which operates solely based on the choice of one party may be considered “*potestative*” and in consequence void. While the agreement in question was governed by Luxembourg law, the Supreme Court nevertheless applied the “*potestative*” principle and refused to apply the jurisdiction clause. The Court further held that the clause in question infringed article 23 of the Brussels I Regulation in that it was contrary to the purposes of finality engendered in article 23.

### COMMENT

In many areas of commerce, it is not uncommon for the stronger party to insist on retaining the option to bring claims other than in the primary agreed forum. The reasons for this are many.

Often, a party wishes to be able to bring proceedings in a forum where enforcement is most likely to succeed and structures its jurisdiction clause accordingly.

However, where the other party is in a position to invoke French jurisdiction, in apparent breach of such a jurisdiction clause, the defendant may be unable to mount a successful jurisdictional challenge in France and will be required to defend the claim in the French courts.

In light of the Supreme Court's decision, parties should give consideration to whether contractually granting themselves an option in matters of jurisdiction is a sensible course to adopt, particularly where the co-contracting party is French or, generally, where it can be envisaged that the other party may be in a position to invoke the jurisdiction of the French courts.

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