Related Actions and Jurisdiction Clauses

On 19 June 2008, the Supreme Court of Luxembourg for private and criminal matters (*Cour de cassation*) delivered a judgment in an interesting case involving related actions and a jurisdiction clause.

The related actions were pending before Belgian and Luxembourg courts. Bonds had been issued by a Luxembourg financial institution and sold by a Belgian bank to a Belgium couple, who had then resold them to a member of their family, who lived in Belgium. The new holder of the bonds initiated proceedings to set aside the initial sale and decided to sue both the issuer and the seller of the bonds.

Understandably, it seems that the plaintiff wanted to have both actions tried by one single court. However, he did not directly sue both defendants before the Belgian court. Instead, he sued the Belgian seller in Belgium and the Luxembourg issuer in Luxembourg, but only then to argue that the Luxembourg court ought to decline jurisdiction in favor of the Belgian court on the ground of the law of related actions. The actions were certainly similar, since they each aimed at setting aside the sale, but they did not meet the conditions of *lis pendens*, as the parties were different. Article 28 of the Brussels I Regulation clearly controlled.

The judgment of the Luxembourg *Cour de cassation*

The first instance court of Luxembourg (*tribunal d'arrondissement*) had resolved the dispute by ruling that the claim was inadmissible. It was reversed by the Court of appeal of Luxembourg, which first addressed the issue of jurisdiction and agreed to decline jurisdiction in favor of the Belgian court. The defendant appealed to the *Cour de cassation*.

The first issue that the *Cour de cassation* had to resolve was that the Belgian Court was the first instance court of Liège. The language of Article 28, however, seemed to imply that its scope is limited to actions pending before courts of first instance ("Where these actions are pending at first instance"), and that it does not apply to an appeal court. The *Cour de cassation* dismissed the argument by ruling that the purpose of this condition is to protect the right of the parties to an appeal. In other words, the Court held that there was no real issue as long as the

parties would not lose the opportunity to appeal, which would not be the case when an appeal court would decline jurisdiction in favor of a first instance court. The Luxembourg *Cour de cassation* does not cite the authorities on which it relies, but a judgment of the French *Cour de cassation* of 27 October 1992 which had reached the same solution was relied upon in the proceedings and clearly influential.

The second issue was the extent to which the Luxembourg Court had cared about the consequences of its decision in respect of the dispute which it would not handle. Article 28 rightly requires that any European court willing to decline jurisdiction on the ground of related actions verify "if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof". In that case, that meant that the Luxembourg court ought to have verified whether the Belgian court would have had jurisdiction over the action initiated in Luxembourg against the Luxembourg defendant. The *Cour de cassation* found that the court of appeal had explored neither the jurisdiction of the Belgian court, nor whether Belgian law allowed consolidation, and thus allowed the appeal. The solution seems obvious, so much so that one wonders how the court of appeal could have missed it.

The jurisdiction clause

Although the *Cour de cassation* did not care to mention it, there was a jurisdiction clause in the bonds' prospectus. It had been drafted by a clever lawyer, so clever that it was not easy to understand what the clause meant.

> *Any dispute arising between the bond holders and the Issuer and/or the Guarantor will be settled by the courts of Luxembourg and/or Belgium as far as the Guarantor is concerned (translation from the French)*

The clause could be construed in at least two ways. First, it could have provided for the exclusive jurisdiction of the courts of two countries for two different kinds of disputes. In other words, Luxembourg courts could have had jurisdiction over actions against the Luxembourg party (the Issuer), while Belgian courts would have had exclusive jurisdiction over disputes against the Belgian party (the seller and possibly the Guarantor). If the plaintiff construed the clause that way, that might explain why he decided to sue each of the defendants in their own courts: because he thought the jurisdiction clause actually compelled him to.

Alternatively, the clause could have meant that the parties had an option, and could choose to sue before either court. In particular, the plaintiff could have sued the issuer either in Luxembourg or in Belgium. That is how the court of appeal interpreted the clause. And this simplified any issue of jurisdiction of Belgian courts the Court of appeal of Luxembourg might face. Obviously, if the clause allowed the parties to choose between the courts of both countries, this meant that each of these courts had jurisdiction. So, the Court of appeal of Luxembourg had not applied so badly article 28.

However, the Court of appeals of Luxembourg went on to rule that there was no evidence that the clause had actually been accepted by both parties, and that it was part of their agreement. The clause had thus been found unenforceable. It could not confer jurisdiction on any court. And the *Cour de cassation* was therefore right to allow the appeal.

So the case is not as interesting as it could have been. Article 28 still awaits its *Gasser* case.