

Validity and effectiveness of Jurisdiction and Arbitration Clauses

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Belgium

- A clause in B2B contracts is deemed abusive when, considered in itself or in combination with other, it creates a manifest imbalance between the parties' respective rights and obligations (Art. VI.91/3 BCEL). If so the clause is null & void (Art. VI.91/6 BCEL)
- Recently (2019) introduced in the BCEL
- Only one published decision in respect of choice of jurisdiction clause: *Commercial Court Tongeren, 9 May 2022*:
«When an enterprise imposes on its contractual partner a choice of forum justified only by the place of intermediary, while the parties' respective centre of interests are located in different places, such imposition creates a manifest imbalance between parties and the choice of forum clause is null» !!!???

Belgium

- Specific protection for:
 - Commercial agents: «Subject to the application of international conventions to which Belgium is a party and notwithstanding clauses to the contrary in the commercial agency contract, any activity of a commercial agent having his principal place of business in Belgium shall be governed by Belgian law and the jurisdiction of Belgian courts» (art. X.25 BCEL)
 - Exclusive distributors: A distributor who is prejudiced by the termination of a distribution agreement with effect in all or part of the Belgian territory may in any case sue the granter in Belgium, [...] (art. X.39 BCEL)
- No requirement of manifest imbalance (!)
- Superseded by Brussels I (Recast) (Bel. Cass., 23 June 2016) (and 2005 Hague Convention)
- Quid arbitration clauses?
 - **Belgian Cassation Court, 7 April 2023: Spectacular reversal of the 50-year-old restriction on arbitrability of disputes regarding termination of distribution agreements – The «*atomic bomb*» has exploded!!!**

Saudi Arabia

(1) Complete Overhaul of Judicial System

Judiciary Law 2007 – Arbitration Law 2012 – Enforcement Law 2012 - Civil Procedure Law 2013 – Establishment of Commercial Courts 2017 - Commercial Courts Law 2020

(2) (Very) Limited Protection of Agent/Distributor/Franchisee






Commercial Agency Law 1962 - Franchise Law 2020 - Draft Commercial Distribution and Agency Law – Draft Commercial Transaction Law

(3) Liberal Court Decisions

- **Arbitration Clauses (consistent and settled case law - BoG 22 June 2011??)**
- **Jurisdiction Clauses (BoG 5 July 2015, CCA 23 May 2019, 17 February 2021, 24 October 2021)**

(4) Freedom of Contract – Unfair Terms/Imbalance?

Other GCC Jurisdictions

| | UAE | Kuwait | Qatar | Bahrain | Oman |
|--|---|---|--|---|---|
| |  |  |  |  |  |
| (International?) Arbitration Clauses | Registered under CAL 1981: X Unregistered: ✓ New CAL 2022? | ✓ (CAL 2016) | ✓ (CAL 2002) | ✓ (CAL 1992) | ✓ (CAL1977) |
| Jurisdiction Clauses | X (Public Order) | X (CAL 2016, Commercial Code, Public Order) | X (CAL 2002, Public Order) | X (Public Order?) | X (CAL1977) |

France

International Jurisdiction clause (IJC)

Principle of validity of IJC : C. Cass (*Sorelec 1985*) and art. 25 of Brussels I recast Reg. (B1R).

Sudden termination : IJC (in favor of foreign courts) not set aside to allow French courts to apply French OMR (*Monster Cable, 2008*)

Significant Imbalance : art. L442.1.2. Comm. code is not an OMR and as such cannot set aside IJC (to Irish courts) + Not proven that IJC would be nul as regards Irish law (*Meta Platforms Irland / VRT, 2023*)

Predictability and Security in case of Asymmetrical IJC:

- Lux. court + option for «any other competent court»: IJC voided as it is subject to a so-called «potestative» precedent condition (*Edmond Rotshild, 2012*)
- Irish court + option for «court of domicile of client» and «court of damage suffered by Apple» : IJC not voided as it meets the principle of foreseeability of B1R (*Apple/ Ebizcuss, 2015*)
- Zurich court + option for «any other competent court»: IJC set aside for breach of predictability of Lugano Convention (*Credit Suisse, 2015*)

France

Future of Asymmetrical IJC : Request by supreme court for preliminary ruling of ECJ (c. Cass, *Societa Italiana Lastre / Agora* , April,13, 2023)

- IJC for Brescia court + option for SIL to bring its claim to «*another competent court in Italy or abroad*»
- Q1 : is validity of AIJC should be checked as regards B1R or national law?
- Q2 : if AICJ validity controled by B1R, does a clause stipulating an option to «any other competent court» can be enforced?
- Q3 : if AIJC validity controled by national law : which one ?
- Large impact of the future preliminary ruling for all A-IJC designating a judge in the EU (even between parties from non EU member states).

France

International Arbitration clause (IAC)

Principle of Validity of IAC : autonomous from contract and from governing law.

Procedural effect of IAC : positive effect : competenz-competenz and negative effect : French court has no power unless IAC is obviously nul or obviously inapplicable

- **Significant Imbalance rejected** to set aside IAC as «not blatantly void»:
 - Arbitration in Sweden / Swedish law (*Babybjörn*, 2014, appeal Paris)
 - Arbitration OMPI, Geneva (*Invest In / LVMH Swiss*, 2023, appeal Paris)
 - Arbitration Uncitral in NY, USA (*Subway International*, 2019, appeal Paris)
- **Significant Imbalance ruled** : *Min. of finances vs Subway* (2020, Paris trib)
 - Arbitration in NY, in English + governing law : Dutch law.
 - No condemnation per se of IAC neither of foreign law clause.
 - Combination of both clauses = SI ; but reasoning quite weird and poor.
 - Limited to action of Ministry : obvious nullity needs to be proven by claimant.