CENTRE DE DROIT
BANCAIRE ET FINANCIER

**Cross-border financial services**

# Jurisdiction of French courts notwithstanding a choice-of-court clause

Par Philipp Fischer le 27 November 2024

On September 18, 2024, the First Civil Chamber of the French Court of Cassation handed down ruling no. 23-13.732, which addresses the notion of*activity directed towards a Member State* within the meaning ofart. 17, § 1, c) of the Brussels I bis Regulation (RBI bis), in the context of banking services rendered by a Lebanese bank to a customer resident in France. This decision confirms that customers based in the EU who enjoy “consumer” status may bring their claims before the courts of their place of residence if the bank has directed its activities to that State.

The dispute was between a French customer and a Lebanese bank. In 2021, the customer brought an action for restitution of her assets before the French courts. The bank, which has neither a subsidiary nor a branch in France, contests the jurisdiction of the French courts. The Cour de cassation then had to determine whether the provisions of RBI bis could be applied, focusing on the question of whether the bank had “directed” its activities to France. The customer’s status as a “consumer” was not disputed in this case.

The concept of*activity directed towards a Member State* is analyzed in the light of CJEU case law (cf. in particular case C-218/12, Lokman Emrek v. Vlado Sabranovic). To determine whether the Lebanese bank was directing its activities towards France, the Court relies on “an overall analysis of the factual circumstances of the dispute in order to assess whether a player wishes to direct its activities towards a Member State, which cannot be made conditional, in banking matters, on proof of the establishment in the European Union of a subsidiary or branch duly authorized by a regulatory authority of a Member State”.

In this case, the Cour de cassation took into account a number of indicators which, in its view, enabled it to conclude that the bank had directed its activities towards France :

1. The bank offered its customers the management of accounts in various currencies other than the Lebanese pound, including the dollar, and allowed international transfers.
2. The bank allowed its customers to contact its representatives via e-mail addresses with a neutral “.com” domain name, and via telephone numbers with an international prefix.
3. Both the website and banking documentation were available in English.
4. The bank’s customer had signed her contract in France, in the presence of bank representatives who had collected the information needed to open the accounts.
5. The representatives spoke French and could be reached on French numbers.
6. One of the bank representatives had worked for the bank’s former French branch.

On the basis of this evidence, the Court concluded that the bank had indeed “directed” its activities to France. Consequently, the client could legitimately rely on art. 17, § 1, c) RBI bis to bring her action in France.

What implications does this ruling have for a Swiss bank or asset manager ? Like the Lebanese bank in question, Swiss providers of financial services who “direct” their services to EU member states could also be sued before the courts of a member state, the only difference being that this jurisdictional competence will fall underart. 15 al. 1 let. c CL and not art. 17 §1, c) RBI bis. However, the scope of these two texts is similar.

In Switzerland, banks’ general terms and conditions generally contain a choice-of-court clause, conferring exclusive jurisdiction on Swiss courts for all future disputes. However, underart. 17 CL, any clause derogating from the forum of the consumer’s domicile before the dispute arose is ineffective. The validity of the choice-of-court clause contained in the general terms and conditions is therefore questionable if the bank’s activities are deemed to be “directed” (cf. on the validity of a choice of forum clause in the case of a “consumer” bank client, see also Meregalli Do Duc : cdbf.ch/255/, cdbf.ch/424/, cdbf.ch/520/ and Fischer : cdbf.ch/871/, cdbf.ch/885/).

The question of the consumer’s place of jurisdiction is closely linked to that of the applicable law. When a consumer brings a case before a court in the EU, the latter will base itself on the Rome I Regulation (RRI) to determine the applicable law. This regulation stipulates that in the case of a consumer contract concluded between a European consumer and a professional acting in the course of his or her business, the contract between the two parties is governed by the law of the country where the consumer has his or her habitual residence, provided that the professional “directs” his or her activity to this country (art. 6 § 1 let. b RRI). This rule enables consumers to invoke their national law despite the presence of a choice-of-law clause in favor of Swiss law in the general terms and conditions. However, a choice of law agreed between the parties remains possible under art. 6 §2 RRI, provided that the chosen law does not derogate from the mandatory norms provided by the applicable law, in the absence of choice, under art. 6 § 1 RRI.

Over and above considerations relating to the LC and the RRI, which are no doubt well known to Swiss financial services providers, the Cour de Cassation’s ruling highlights the fact that the criteria used to conclude that a financial service is “directed” to an EU member state appear very tenuous (at least in the eyes of the Swiss jurist), apart from the criterion of the banking documentation being signed in the customer’s country of residence. The issue of risk management for cross-border activities (now anchored in a regulatory perspective in FINMA Circular 2023/1 Operational Risks and Resilience, §§ 97-100) thus also includes a civil law dimension. In our view, these risks (of a regulatory and civil nature) need to be taken into account with particular care when deploying *digital onboarding* solutions that facilitate account opening, but also remove certain safeguards which, in the context of “face-to-face” relationship entries, limit *cross-border* risks.

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