

Party Autonomy in the Brussels I Recast Regulation and Asymmetric Jurisdiction Clauses

I Introduction

Party autonomy is given and bound by law. It allows private parties to step outside default jurisdiction rules to choose the court that will decide their (future) disputes. They are, however, not completely free in their choice. Within the EU, the Brussels I Recast Regulation regulates jurisdiction in civil and commercial matters.¹ Article 25 provides for the autonomy of the parties. When the parties have reached an agreement on jurisdiction, the chosen court is competent, unless the agreement is null and void under the law of the courts of the chosen Member States (hereinafter: the *lex fori prorogatum*) or if it was not concluded in accordance with the formal requirements of Article 25 Brussels I Recast. This is a complex provision that has been applied in different ways by the courts of various Member States, including Bulgaria,² France,³ Poland⁴ and England,⁵ where the validity of asymmetric jurisdiction agreements is concerned. These diverging approaches have led to legal uncertainty regarding the validity of these clauses.

In this contribution I first give a brief introduction to jurisdiction clauses and explain what constitutes an asymmetric clause. Second, I introduce the Brussels Regime, which aims to enhance the predictability of jurisdictional rules in the EU. Article 25 of the Brussels I Recast provides for procedural party autonomy but is very complicated. Third, I discuss the case law in France and England regarding the validity of asymmetric jurisdiction clauses.⁶

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¹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351/11 2012.

² Decision No. 71 under Commercial Case No. 1193/2010, Second Commercial Chamber of the Bulgarian Supreme Court of Cassation, 2 September 2011.

³ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

⁴ Decision of 19/10/2012, V CSK 503/11; Decision of 24/11/2010, II CSK 291/10.

⁵ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* [2019] EWHC 1747 (Comm) (05 July 2019).

⁶ Due to a language barrier I leave the Bulgarian and Polish cases out of this analysis.

Whereas in France such clauses are subject to scrutiny by the courts, the English have no compunctions about enforcing them. Courts in both jurisdictions, however, have applied Article 25 in ways that raise questions about its interpretation. I will argue that there is no reason that asymmetric jurisdiction agreements should be inadmissible under the Brussels I Recast Regulation, and that the Court of Justice of the European Union should clarify this matter. However, the problems with asymmetric choice of forum agreements highlight several issues that are inherent to the current Article 25.

II Jurisdiction Clauses

Choice of forum agreements or jurisdiction clauses occur when parties agree on the court that has jurisdiction over their (future) disputes.⁷ They may agree on a specific court in a particular jurisdiction, or they may designate multiple courts or an arbitral tribunal. Jurisdiction clauses generally have a dual effect: they convey jurisdiction to the chosen court – prorogation – and they exclude the jurisdiction of other forums – derogation.⁸ The most important reason for parties to choose a forum is legal certainty. International transactions can be complex and the predictability offered by a jurisdiction clause is a significant advantage.⁹

There are several types of jurisdiction clauses. The first are exclusive jurisdiction agreements, which designate a single forum to the exclusion of all other courts.¹⁰ Second are non-exclusive jurisdiction agreements, which only confer jurisdiction and do not exclude the competence of other forums.¹¹ The law is designed to fit jurisdiction agreements into this

⁷ For a comprehensive discussion see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008, Oxford); Hélène van Lith, *International Jurisdiction and Commercial Litigation* (TMC Asser Press 2009, The Hague) 597.

⁸ Pieter H. L. M. Kuypers, *Forumkeuze in Het Nederlandse Internationaal Privaatrecht* (Kluwer 2008, Deventer) 147; Rainer Hausmann, 'Vereinbarung über die Zuständigkeit (Art. 23–24)' in Thomas Simons and Rainer Hausmann (eds), *Brüssel I-Verordnung: Kommentar zur VO (EG) Nr. 44/2001 und zum Übereinkommen von Lugano 2007* (IPR Verlag 2012, Munich) 487.

⁹ Kuypers (n 8) 38–39.

¹⁰ An example of an exclusive jurisdiction clause: 'Any claim arising under or relating to this Agreement shall be governed by the internal substantive laws of [X] and the parties submit to the exclusive jurisdiction of the [X] courts'; also see Briggs (n 7) para 4.09.

¹¹ Hausmann (n 8) 487. An example of a non-exclusive agreement found in EWHC Civ. 725 (2009) Highland Crusader Offshore Partners LP v Deutsche Bank AG: 'This Agreement shall be governed by and construed in accordance with the laws of [X]. Buyer and Seller hereby irrevocably submit for all purposes of or in connection with this Agreement and each Transaction to the jurisdiction of the Courts of [X]. [...] Nothing in this paragraph shall limit the right of any party to take proceedings in the courts of any other country of competent jurisdiction.' The distinction between exclusive and non-exclusive agreements is important to both the Brussels I Recast and other international instruments on choice of forum. The Hague Convention on Choice of Court Agreements. Article 25 of the Recast creates an assumption of exclusivity by stating that 'Such jurisdiction shall be exclusive unless the parties have agreed otherwise'. In a similar vein, the CJEU ruled that a jurisdiction clause is exclusive under the Brussels regime if it excluded the jurisdiction of all other courts for both parties. Additionally, the reverse *lis pendens* rule of Article 31(2) applies only to exclusive agreements.

binary system of exclusive and non-exclusive clauses but not all jurisdiction agreements fit this framework.¹² In some areas of international commerce – banking and finance, for example – parties tend to include both exclusive and non-exclusive elements in their choice of forum agreement. A typical example of a hybrid clause can be found in the *Rothschild* case:

Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank nonetheless reserves the right to proceed against the client in the courts of the client's domicile or before any other court with jurisdiction in default of an election of the preceding jurisdiction.¹³

This clause is non-exclusive for the financial institution, giving it the advantage of choosing a court at a later date while covering its risks of being sued in an unexpected location by binding the other party to one court.¹⁴ Because they confer unequal procedural rights to the parties, hybrid clauses are also called asymmetric jurisdiction agreements.

The principle that gives effect to these agreements is called party autonomy.¹⁵ When the law recognises international procedural autonomy, parties may expect that their choice of forum will be enforced.¹⁶ Procedural party autonomy is central to European PIL and the subject of international instruments such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Hague Convention of 30 June 2005 on Choice of Court Agreements.¹⁷ Aided by these policies, choice of forum is fundamental to international dispute settlement.¹⁸

III Choice of Forum Under the Brussels Regime

1 Purpose

The goal of the Brussels I Recast Regulation is to enhance access to justice by providing highly predictable rules on jurisdiction¹⁹ and choice of forum plays an important part in this.²⁰

¹² David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, Sweet & Maxwell 2015, London) para 4.03; Briggs (n 7) para 4.23.

¹³ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

¹⁴ Richard Fentiman, 'Unilateral Jurisdiction Agreements in Europe' (2013) 72 (1) *The Cambridge Law Journal* 24.

¹⁵ Horatia Muir Watt, 'Party Autonomy' in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance* (2010) 6 (3) *European Review of Contract Law* 250–283.

¹⁶ Briggs (n 7) para 1.22.

¹⁷ David Paulus, Evgenia Peiffer, Max Peiffer, *Europäische Gerichtsstands- Und Vollstreckungsverordnung (Brüssel Ia): Kommentar Zur Verordnung (EU) Nr. 1215/2012 (EuGVVO)* (C. H. Beck 2017, Munich), 489–490; Peter Mankowski, Ulrich Magnus, *Brussels I Bis Regulation* (Verlag Otto Schmidt 2016, Cologne), 583.

¹⁸ van Lith (n 7) 7; Paulus, Peiffer and Peiffer (n 17) 489–490; Kuypers (n 8) 2.

¹⁹ Recital 1 and 15 of the Brussels I Recast.

²⁰ Recital 15 of the Brussels I Recast; Paulus, Peiffer and Peiffer (n 17) 490; Karl Kreuzer, Eva E Wagner, Wolfgang Reder, 'Gerichtsstandsvereinbarungen (Art. 25 EuGVVO)' in Manfred A. Daus, Markus Ludwigs (eds),

Article 25 protects the autonomy of the parties by giving effect to their agreements on jurisdiction.²¹ According to the CJEU, this deference to party autonomy ‘is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to disputes falling within the scope of the [Brussels regime]’²². Article 25 thus aims at a wide recognition of choice of court agreements.²³ This is only justified, however, if the parties truly consented and the choice of forum represents their unimpeded will.²⁴ Consent to choice of forum is key and must be clearly and precisely demonstrated.²⁵

Inherent to the recognition and protection of party autonomy is the need for boundaries to this principle.²⁶ Unbridled contractual freedom is likely to undermine broader public interests protected by the Regulation, such as the efficient allocation of cases and the protection of weaker parties. The Brussels I Recast sets out several restrictions in this regard. First, there are cases where the division of bargaining power between the parties is so unequal that the weaker parties should be protected.²⁷ Choice of forum with insurance policy holders, consumers and employees is only allowed under certain circumstances, such as that the parties concluded their jurisdiction agreement after a dispute arose.²⁸ Choice of forum with weaker parties is therefore only effective when the parties already disagree about a certain issue and intend to take it to court.²⁹ Jurisdiction clauses that create more forums for the weaker party are also allowed.³⁰ Second, Article 24 sets out several grounds for exclusive jurisdiction. These grounds are not aimed at the protection of weaker parties but rather at the factual and legal proximity of certain cases to a particular court, which ensures the effective settlement of these disputes.³¹

Handbuch des EU-Wirtschaftsrechts (Verlag C. H. Beck 2019, Munich) para 53; Reinhard Gaier, ‘Brüssel I-VO Art. 25: Zulässigkeit von Gerichtsstandsvereinbarungen’ in Volkert Vorwerk, Christian Wolf (eds), *BeckOK ZPO* (Verlag C. H. Beck 2019, Munich) para 1.

²¹ Andrew Dickinson, Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015, Oxford) para 9.06; Paulus, Peiffer, Peiffer (n 17) 489–490; Gaier (n 20) para 1.1.

²² Case C-23/78 *Meeth v Glacetal* [1978]; Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000].

²³ Mankowski, Magnus (n 17) 593.

²⁴ Para 7.

²⁵ Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rütwa Polstereimaschinen GmbH* [1976] para 7; Case C-25/76 *Segoura v Bonakdarian* [1976], para 6; Case C-106/95 *MSG v Gravières Rhénanes* [1997] para 15; Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] para 13.

²⁶ Briggs (n 7) para 1.22; Gaier (n 20) para 2.

²⁷ Gaier (n 20) para 2.1.

²⁸ Articles 15(1), 19(1) and 23(1) Brussels I Recast.

²⁹ Peter F Schlosser, Burkhard Hess, *EuZPR: EU-Zivilprozessrecht Mit EuGVVO, EuMahnVO, EuBagVO, EuZVO, EuBVO – Kommentar* (Verlag C. H. Beck 2015, Munich) 110.

³⁰ Articles 15(2), 19(2) and 23(2) Brussels I Recast.

³¹ Gaier (n 20) para 3.

2 Legislative History

Choice of forum was first addressed in the Brussels Convention of 1968, the original European instrument on jurisdiction in civil and commercial matters. Article 17 of this Convention dealt with prorogation of justice. The original text required only that choice of forum agreements should be ‘in writing or evidenced in writing’. This changed with the 1978 Accession Convention,³² adapting the Article to European case law to add international trade usages. The 1989 Accession Convention inserted a reference to practices between the parties.³³ Article 17(5) is especially noteworthy:

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

This paragraph therefore specifically included the possibility of asymmetric jurisdiction agreements. Article 17(5) was removed from the 2001 Brussels I Regulation.³⁴

Article 23 of the Brussels I Regulation provided that an agreement on jurisdiction was binding and must be given effect by the chosen court and by all other courts. The Article furthermore set out several standards for the validity of choice of forum agreements that mostly resembled that of Article 17 of the Convention. In theory, the validity of the choice of forum agreements was settled definitively by the court seized, in accordance with the European guidelines laid down in the Brussels I Regulation. However, Article 23 did not specify how to determine the material validity of choice of forum agreements. The CJEU created several uniform criteria to determine whether there was real consent between the parties on choice of forum agreements, for example where the agreement was part of the general terms and conditions.³⁵

For other matters concerning the substantive validity of jurisdiction agreements, the courts of the Member States were dependent on national contract laws. However, when

³² Article 11 of the 1978 Council Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (78/884/EEC).

³³ Article 7 of the 1989 Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC).

³⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 12/1 2001.

³⁵ Case C-214/89 *Powell Duffryn v Petereit* [1992], analysing whether a choice of forum clause in the by-laws of a company constitutes sufficient consent; Case C-106/95, *MSG Mainschiffahrtsgenossenschaft v Gravières Rhénanes SARL* [1997].

the question arose as to which national law should be applied, the Rome I Regulation did not provide an answer.³⁶ Several solutions were proposed by scholars across the EU.³⁷ Some favoured the application of the *lex fori* because, as a procedural contract, the choice of forum agreement should be subject to the law of the seized court.³⁸ Others argued for the application of the *lex contractus* unless the parties had chosen a different law for their choice of forum agreement.³⁹ These divergences suggested that a jurisdiction clause might be substantively valid in one Member State and inadmissible in another.

3 Article 25 Brussels I Recast

Article 25 aimed to solve this problem by regulating substantive validity as well as formal validity. It now requires that choice of forum agreements are based on real consent and that they meet certain formal requirements.

a) Formal validity

The formal validity of choice of forum agreements is an EU autonomous concept.⁴⁰ A jurisdiction agreement must be either: *a)* concluded in writing, *b)* in a form that is established between the parties, or *c)* in international commerce, in a form that corresponds with a trade usage. The effect of the formal requirements is twofold: they ensure the consent of the parties and provide proof of this consent.⁴¹ The main purpose of the formal requirements of Article 25 is to give effect to the free and independent will of the parties and to ensure that the consensus between the parties is established.

b) Substantive validity

The European legislator tried to tackle the issue of substantive validity in the Brussels I Recast but, in doing so, it created other problems.⁴² The new Article 25 provides the national courts

³⁶ Choice of forum agreements are explicitly excluded from its scope Article 1(2)(e) of Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (Rome I Regulation), OJ L177/6 2008.

³⁷ Thomas Rauscher, *Europäisches Zivilprozess- Und Kollisionsrecht EuZPR/EuIPR* (Verlag Otto Schmidt 2016, Cologne) 713–714; Dickinson, Lein (n 21) para 9.56–61; the Heidelberg Report on the Application of Regulation Brussels I in the Member States (2005); Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] opinion of Adv Gen Slynn 1697–1698; The negotiations of the Recast Regulation (e.g. Council Document 9474/11 ADD 14 [2011]).

³⁸ Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] Opinion of Advocate General Gen Slynn 1697–1698.

³⁹ This was proposed by the French and Danish delegations during the negotiations for the Recast Regulation, Council Document, 9474/11 ADD 14, 16 June 2011, p. 10-11.

⁴⁰ Schlosser, Hess (n 29) 154.

⁴¹ Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] para 26; Case C-221/84 *Berghofer GmbH v ASA SA* [1985] para 13; Case C-269/95 *Benincasa v Dentalkit Srl* [1997] paras 28–29; Case C-159/97 *Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] paras 34 and 48.

⁴² Mankowski, Magnus (n 17) 593.

with some guidelines regarding substantive validity: an agreement on jurisdiction is valid unless it is null and void as to its substantive validity under the law of the chosen court. This is also a reference to the conflict of laws rules of that jurisdiction.⁴³

The new rule on substantive validity is problematic for several reasons, especially where asymmetric choice of forum agreements are concerned.⁴⁴ First, the reference to the law of the chosen court includes a reference to the conflict of laws rules of that jurisdiction.⁴⁵ Choice of forum agreements, however, are excluded from the Rome I Regulation⁴⁶ and consequently there are diverging conflict of laws rules in the Member States. In this situation, it may be difficult to predict which law will eventually be designated to determine the substantive validity of an agreement on jurisdiction. Second, Article 25 creates difficulties when the choice of forum agreement confers jurisdiction upon courts in multiple Member States, as is the case with asymmetric choices of forum. Which of the chosen jurisdictions should determine the validity? Third, once the appropriate law has been found, determining the substantive validity can be a complicated affair. The uncertainty stems from the ambiguous nature of the scope of the reference.⁴⁷ It is not clear which issues regarding the agreement's validity fall within the autonomously determined requirements, and how they may affect the enforcement of choice of forum clauses. In principle, the reference to national law must be interpreted strictly. So far, it only includes the grounds for material invalidity based on defects of consent – and consequently the existence of the agreement – and generally not illegality or public policy.⁴⁸ In practice, it is left to the courts of the Member States to determine on a case-by-case basis in which category a certain issue falls.

IV Asymmetric Choice of Forum in France

While choice of forum agreements are generally valid in France, the status of asymmetric jurisdiction clauses is more complicated.⁴⁹ There have been several cases by the *Cour de*

⁴³ Recital 20 Brussels I Recast.

⁴⁴ Peter Mankowski, 'The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters' in Franco Ferrari and Francesca Ragno (eds), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a panacea?* (Wolters Kluwer 2015, Italy) 102.

⁴⁵ Recital 20.

⁴⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Official Journal of the European Union L 177/6.

⁴⁷ Dickinson, Lein (n 21) paras 9.35–9.36; Mankowski, Magnus (n 17) 628–631.

⁴⁸ Like fraud, mistake, duress and misrepresentation. See Trevor Hartley, Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013) <<https://www.hcch.net/en/publications-and-studies/details4/?pid=3959>> accessed 3 May 2020, para 126.

⁴⁹ François Mailhé, 'France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements Under French Case Law' in Mary Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020, New York) 197; Alexandre Bailly, Xavier Haranger, *Litigation and Enforcement in France: Overview* (Westlaw Practical Law 2018) para 26.

cassation (the French Supreme Court), which developed a test for the validity of such agreements.⁵⁰

1 The Rothschild doctrine

The first and most famous of the French cases is the *Rothschild* decision.⁵¹ In the winter of 2006, Mme X opened a bank account with the Banque Privée Edmond de Rothschild Europe through the bank's French branch, the Compagnie Financière Edmond de Rothschild. Clause 27-2 of the general conditions provided that:

Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The Bank nonetheless reserves the right to proceed against the client in the courts of the client's domicile or before any other court with jurisdiction in default of an election of the preceding jurisdiction.

After suffering significant losses on her investments, Mme X brought proceedings against the Bank and its French branch in Paris. The court of first instance and the *Cour d'appel* (French court of appeals) rejected the clause and assumed jurisdiction.⁵² The latter court reasoned that although the Brussels regime allows for clauses that favour one of the parties, the principle of Article 17 'does not allow for a clause to give to one party complete discretion to choose whatever court it pleases.'⁵³ The Bank appealed and submitted to the Cour de cassation that unilateral jurisdiction clauses are valid under Article 23 of the Brussels I Regulation. It argued that the Cour d'appel had misread the clause, as it was not intended to refer to any court in any jurisdiction, but only to courts competent under the Regulation.⁵⁴ Under this latter interpretation, the Bank deferred to the jurisdictional grounds set out by the Regulation and thus to its aims of securing foreseeability and legal certainty as to jurisdiction. Finally, the Bank submitted that the Cour d'appel had set aside the whole clause, while only the first phrase of the clause (i.e. Mme X's obligation to sue in Luxembourg) was at issue. The Cour de cassation dismissed the appeal:

⁵⁰ The French issue with asymmetric choice of forum agreements seemingly stems from the doctrine of the *condition potestative* (Article 1174 *Code Civil*). This doctrine prohibits conditions that are completely dependent on the will of the promisor for their existence.

⁵¹ Cour de cassation (French Supreme Court) 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe*.

⁵² Tribunal de grande instance (Paris) 18 January 2011, no. 09/16659, translation by Keyes and Marshall, 'Jurisdiction agreements: exclusive, optional and asymmetric' (2011) 15 (3) *Journal of Private International Law* 368; Cour d'appel de Paris 18 October 2011, no. 11/003572.

⁵³ Cour d'appel de Paris 18 October 2011, no. 11/003572.

⁵⁴ 'tout autre tribunal compétent'.

Having noted that the clause, under which the Bank reserved the right to sue in Mme X's domicile or before any other competent court, solely bound Mme X to bring proceedings in Luxembourg, the Cour d'appel correctly inferred that the clause had a *potestative character* with respect to the bank so that it was contrary to the objective and purpose of prorogation of jurisdiction under Article 23.⁵⁵

It seems the Cour de cassation applied national contract law to determine what was acceptable under the Brussels I Regulation. This approach was much criticised in practice, as well as by legal scholars.⁵⁶ For example, Ancel and Cuniberti rightly argue that, under French national law, the clause in *Rothschild* cannot be potestative.⁵⁷ Article 1174 CC provides for the nullity of a potestative clause, i.e. an agreement that is completely subjected to the will of one of the parties. However, in *Rothschild*, it is clear that the choice of forum agreement was binding, but that it gave Rothschild extra options with regard to the competent forum. As such, it was not the existence of the clause that was dependent on the will of Rothschild, but its implementation, and there was no potestativity under French law. More importantly, the Cour de cassation should not have applied French law at all. Although the substantive validity of the clause fell under Article 23, which contained no conflicts rule, the different theories regarding the law applicable to the choice of forum agreement would probably have led to the application of Luxembourg law.⁵⁸ Additionally, as argued by Keyes and Marshall, and Cobussen, the judgment destabilises a well-established international practice, resulting in legal uncertainty.⁵⁹ Cobussen further argues that the limited scope of the reference to national law does not allow for choice of forum agreements to be subjected to the doctrine of the *condition potestative*⁶⁰ and I agree with him. Asymmetry does not seem to be an issue of consent.

Despite the international critiques, the Cour de cassation confirmed its approach to asymmetric clauses, this time in relation to the *Lugano Convention*.⁶¹ In the 2015 *ICH v Crédit Suisse*⁶² case, the parties had agreed on a financing package under which returns on the clients

⁵⁵ Cour de cassation 26 September 2012, case no. 11-26.002, *Mme X v Banque Privée Edmond de Rothschild Europe* (emphasis added).

⁵⁶ Elisabeth Omes, 'Commentaire: La Clause Attributive de Jurisdiction Potestative, Ou Quand La Fin Justifie Les Moins' (2013) (51) *Bulletin Droit & Banque* 29–33; Pascal Ancel, Gilles Cuniberti, 'One Sided Jurisdiction Clauses – A Casenote on Rothschild' [2013] *Journal des Tribunaux Luxembourg* 9–12.

⁵⁷ Maxi Scherer, 'The French Rothschild Case: A Threat for Unilateral Jurisdiction Clauses?' (2013) <<http://kluwerarbitrationblog.com/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/>> accessed 3 May 2020; Omes (n 56) 29–33; Ancel, Cuniberti (n 56) 9–12; Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) 31 (1) *Journal of International Arbitration* 33; Mankowski (n 44) 117; R. A. B. Cobussen, 'Asymmetrische Forumkeuzes Binnen de Franse Rechtsfeer' (2017) 114 *Nederlands Tijdschrift voor Internationaal Privaatrecht* 24–28.

⁵⁸ The different theories regarding the law applicable to the choice of forum agreement probably lead to Luxembourg, see Kuypers (n 8) 204.

⁵⁹ Keyes, Marshall (n 52) 345–378; Mukarrum Ahmed, 'The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union' (2017) 28 *European Business Law Review* 410; Cobussen (n 57) 27.

⁶⁰ Cobussen (n 57) 26–27.

⁶¹ Article 23 *Lugano Convention* is a verbatim adoption of Article 23 *Brussels I Regulation*.

⁶² Cour de cassation 25 March 2015, case no. 13-27264 *ICH v Credit Suisse*.

investments were to be used to repay its secured loan to *Crédit Suisse*. The credit facility agreement contained a jurisdiction agreement, which provided that:

The borrower acknowledges that the exclusive forum for all procedures is Zurich or the place of the Bank's branch where the relationship [between the parties] was established. The Bank, however, reserves the right to take action against the borrower before *any other competent court*.⁶³

The investments were not as lucrative as hoped, and ICH brought proceedings against the bank before the *Tribunal de Grande Instance d'Angers*. The Tribunal held that it had no jurisdiction, as it was neither the court of the domicile of either bank nor the Court of Zurich. The *Cour d'appel d'Angers* confirmed this decision. It briefly addressed the asymmetric nature of the clause and stated that the imbalance in such an agreement, concluded between parties in different countries, does not suffice to make it irregular under the 2007 Lugano Convention. The Cour de cassation overturned this decision, reasoning that:

[W]ithout considering whether the jurisdiction clause – which required only ICH to bring its claims before the Swiss courts, while it reserved for the Bank the right to proceed against any court with jurisdiction and did not specify the objective elements on which this alternative jurisdiction was based – was potestative and contrary to the objectives of predictability and legal certainty of prorogation of justice opened by Article 23 of the Lugano Convention of 30 October 2007, the Cour d'appel has rendered its decision without a legal basis.

The Cour de cassation, as it did in *Rothschild*, incorporated French contract law in its decision by referencing the doctrine of the condition potestative. Furthermore, the decision seemed to be inspired by *Coreck Maritime v Handelsveem*. In this case, the CJEU ruled that, although a jurisdiction clause need not nominate a single judge, it must be sufficiently precise so that a seized judge can determine their competence on the basis of the clause.⁶⁴ The clause must therefore clearly state the objective criteria that establish jurisdiction.⁶⁵ The Cour de cassation's interpretation of *Coreck Maritime v Handelsveem* has been criticised in the literature because the bank is limited to the courts that are competent under the Brussels regime.⁶⁶ I agree that it should therefore not be contrary to its purpose of predictability.

The Cour de cassation further clarified its approach to asymmetric choice of forum agreements in its 2015 *eBizzuss* decision.⁶⁷ This case concerned a dispute between Apple Sales International, an Irish company and eBizzuss, an authorised reseller of Apple products seated in Paris. eBizzuss initiated proceedings before the *Tribunal de commerce de Paris* (the Paris commercial court), contending that Apple Sales International had made eBizzuss commercially and economically dependent and then violated this relationship by giving

⁶³ Emphasis added.

⁶⁴ Case C-387/98 *Coreck maritime v Handelsveem*, [2000]; Cobussen (n 57) 1, 24.

⁶⁵ Case C-387/98 *Coreck maritime v Handelsveem*, [2000], para 15.

⁶⁶ Cobussen (n 57) 31–32.

⁶⁷ Cour de cassation 7 October 2015, no. 14-16898 *Apple Sales International v eBizzuss*.

preference to its own Apple stores. The Tribunal did not follow this reasoning and declared that it had no jurisdiction on the basis of the relevant jurisdiction clause:

[T]he parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in *the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring*.⁶⁸

eBizzcuss appealed to the Cour d'appel, arguing that the clause was contrary to the objectives of predictability and legal certainty of the Brussels I Regulation. The Cour d'appel rejected this argument, holding that the clause was certain to the extent that it allowed for the identification of the courts before which disputes might be brought. eBizzcuss proceeded to file an appeal before the Cour de cassation. The Cour de cassation took the opportunity to clarify its earlier case law from *Rothschild* and *ICH* that asymmetric jurisdiction clauses can be valid as long as they provide objective elements that allow the parties to identify the courts which might hear disputes. In this case, the Cour de cassation considered that the clause contained objective elements that do not allow Apple Sales International to choose any competent jurisdiction it pleases. It was limited to the choice between the courts of eBizzcuss' domicile or the courts of the place where Apple incurred damages. It seems that the Cour de cassation required objective factors and that leaving the beneficiary of the clause the choice of 'any other competent court' was enough to render the jurisdiction agreement invalid.

2 Reversal and Confirmation of the Rothschild Doctrine

For a brief time in 2017, the Cour de cassation abandoned the Rothschild approach. The *Diemme Enologia* case⁶⁹ concerned a distribution contract for wine production machines. The distribution contract provided for the exclusive jurisdiction of the courts of Ravenna (Italy) but left Diemme the option to choose any other competent court in accordance with the legal procedural rules. The Cour d'appel had previously set aside the clause because of its potestative character but the Cour de cassation quashed the decision, stating that it did not matter that the clause bound only one of the parties.⁷⁰ This was widely believed to be the end of the Rothschild doctrine by French legal authorities.⁷¹

⁶⁸ Emphasis added.

⁶⁹ Cour de cassation, civile, Chambre commerciale, 11 May 2017, no. 15-18.758 *Diemme Enologia v Etablissements Chambon & fils*.

⁷⁰ 'Qu'en statuant ainsi, alors qu'elle avait constaté la volonté des parties de convenir d'une prorogation de compétence dans les termes du contrat, peu important que cette clause attributive ne s'impose qu'à l'une des parties, la cour d'appel, qui n'a pas tiré les conséquences légales de ses constatations, a violé le texte susvisé.'

⁷¹ François Maillé 'Les clauses attributives de compétence asymétriques dans les relations d'affaires' (2018) 1 *La revue de droit international d'Assas* 433; Alexandra Szekely, 'Asymmetric Jurisdiction Clauses: Now Valid Again?' (2017) <<https://www.linkedin.com/pulse/asymmetric-jurisdiction-clauses-now-valid-again-alexandra-szekely/>> accessed 15 November 2019; Marie-Élodie Ancel, Léa Marion, 'Case Note' (2017) 4 *Journal du droit international (Clunet)* 1338; Dominique Bureau, 'Confirmation du retour en grâce de la clause attributive de juridiction dissymétrique' (2017) (3) *Revue Critique de Droit International Privé* 483–498.

Then, in February and October 2018, the Cour de cassation reaffirmed its opposition to asymmetric clauses in *Crédit Suisse II*⁷² and *Saint-Joseph*.⁷³ In *Crédit Suisse II*, the Cour de cassation was asked to rule again on the clause between the bank and its client. The Cour stated that a jurisdiction clause must be sufficiently precise to ensure the Brussels Regime's objectives of predictability and legal certainty. The asymmetric clause in *Crédit Suisse II* did not contain any objective factors that would indicate where the Bank could bring proceedings, nor did it refer to a particular legal rule or system on which the alternative jurisdiction would be based. Therefore, the parties had not agreed in a clear and precise manner on the court or courts to which they intended to submit their disputes. The Cour de cassation further clarified this test in *Saint-Joseph*. Referring to *Coreck Maritime v Handelsveem*,⁷⁴ it first stated that, although a jurisdiction agreement need not identify the specific court to which it attributes competence, the clause must contain some objective elements on the basis of which the parties have agreed to choose the court or courts to which they will submit their disputes. These factors must be sufficiently precise so that a seized court can determine whether it has jurisdiction. This test is then applied to the jurisdiction clause:

If French law allows it, disputes relating to this contract are subjected to the courts of Luxembourg. However, the bank reserves the right to derogate from this attribution of jurisdiction if it considers it appropriate.

The Cour de cassation decided that this clause failed to meet the objective of predictability because it lacked an objective element; neither did it reference any rule of jurisdiction that was applicable in a Member State of the European Union.

At present, the *Rothschild* doctrine therefore requires asymmetric jurisdiction agreements to either contain an objective element – such as the place where damage was incurred (*eBizzcus*) – or to explicitly refer to a jurisdictional rule that is applicable in a EU Member State.⁷⁵

V Asymmetric Choice of Forum Agreements in England

Jurisdiction clauses are *prima facie* valid and strongly favoured by the English courts.⁷⁶ This affirmative attitude also extends to asymmetric choice of forum agreements, although there is some evidence that suggests that English courts may not have fully applied the conflicts rule of Article 25 Brussels I Recast.⁷⁷

⁷² Cour de cassation, civile, Chambre civile 1, 7 February 2018, 16-24.497 *Crédit Suisse II*.

⁷³ Cour de cassation, civile, Chambre civile 1, 3 October 2018 no. 17-21.309 *Saint-Joseph*.

⁷⁴ Case C-387/98 *Coreck maritime v Handelsveem* [2000].

⁷⁵ Mailhé (n 49) 208.

⁷⁶ EWHC 1970 2P 94-106 T *Eleftheria*; also see: Juan Alberto Salmerón Henríquez, *Freedom of Contract, Bargaining Power & Forum Selection in Bills of Lading* (Rijksuniversiteit Groningen 2016, Groningen) 283.

⁷⁷ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* [2019] EWHC 1747 (Comm) (05 July 2019).

1 *Continental Bank v Aekos Compania Naviera*

Continental Bank is the 1994 English landmark case on asymmetric jurisdiction agreements.⁷⁸ It was one of the first cases to address the issue of the validity of asymmetric choice of forum agreements in England under the (then) Brussels Convention.⁷⁹ A loan agreement between parties from England and Greece contained a choice of law and choice of forum agreement stating that '[e]ach of the borrowers [...] irrevocably submits to the jurisdiction of the English courts [...] but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof'⁸⁰. The borrowers defaulted and initiated litigation in Greece. Hoping to restrain these proceedings, the bank applied for an anti-suit injunction before the English Courts. The issue was whether the jurisdiction clause was exclusive so far as the borrowers were concerned. The Court of Appeal noted that the clause was simultaneously non-exclusive for the bank and exclusive for the borrowers.⁸¹ Continental Bank received its anti-suit injunction and the borrowers did not challenge the validity of the asymmetric agreement. Thus, the Court of Appeal implicitly assumed that asymmetric clauses are valid and enforceable against the non-option holder.

2 *Lornamead Acquisitions Ltd v Kaupthing Bank Hf*

In *Lornamead*, it was the option-holder that challenged the asymmetric choice of forum agreement.⁸² Kaupthing, an Icelandic bank, collapsed during the financial crises of 2008. Prior to its demise, the bank had provided loan facilities to Lornamead. The loan agreement provided for English law and stated that the English courts had exclusive jurisdiction, but that the jurisdiction clause was only binding for Lornamead. Lornamead complied with the clause, and brought proceedings in England, hoping to be released from its obligations to Kaupthing. However, Kaupthing challenged the jurisdiction of the English Courts. The Court held that Article 17 of the Lugano Convention, which at the time was the same as Article 17 of the Brussels Convention, did not entitle the option holder to 'unilaterally [...] challenge proceedings previously brought by Lornamead against Kaupthing in England in accordance with the terms of the English jurisdiction clause'⁸³. Kaupthing did not dispute this ruling and accepted that the *lis pendens* rule in the Lugano Convention restricted its freedom to litigate in Iceland, based on the clauses' relative non-exclusivity now that proceedings had been started before the English Courts.

⁷⁸ *Continental Bank NA v Aekos Compania Naviera SA* [1994] 1 WLR 588, 594.

⁷⁹ Keyes, Marshall (n 52) 373.

⁸⁰ *Continental Bank*, no 31.

⁸¹ Maura E. Wilson, 'Let Go of That Case – British Anti-Suit Injunctions against Brussels Convention Members' (2003) 36 (1) Cornell International Law Journal 217.

⁸² EWHC 18 October 2011, 2611 *Lornamead Acquisitions Ltd. v Kaupthing Bank HF*.

⁸³ EWHC 18 October 2011, 2611 *Lornamead Acquisitions Ltd. v Kaupthing Bank HF* no. 112.

3 *Commerzbank Aktiengesellschaft v Liquimar Tankers Management*

In *Commerzbank*, the High Court of Justice held that asymmetric choice of forum agreements are valid under the Brussels I Recast.⁸⁴ Commerzbank agreed to finance the building of ships by Liquimar. The loan agreement contained an asymmetric jurisdiction clause, giving the Bank the prerogative to commence proceedings in any competent court, while the non-option holders were limited to England. There were two parallel proceedings, one in England and the other in Greece. Liquimar sought to stay the English proceedings and, so, as to avoid triggering the reverse *lis pendens* rule of Article 31(2) of the Brussels I Recast, contended that asymmetric agreements are not compatible with Article 25. It argued that Article 25 requires the parties to have designated the courts of a Member State to enable the law applicable to the substantive validity to be identified and to provide certainty as to where a non-beneficiary can expect to be sued. Furthermore, Liquimar invoked the French *Rothschild* case. Cranston J. did not follow this argument:

There is nothing in Article 25 that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts. Article 17, penultimate paragraph, of the Brussels Convention recognised asymmetric jurisdiction clauses. To my mind, it would need a strong indication that the Brussels I Recast somehow renders what is a regular feature of financial documentation in the EU ineffective.⁸⁵

4 *LIC Telecommunications et al v VTB Capital et al.*

In 2019, the EWHC applied Article 25 Brussels I Recast to determine the validity of an asymmetric jurisdiction clause under Luxembourg law.⁸⁶ The case concerned ownership of the Vivacom Group, which is a major player in the Bulgarian telecommunications industry. Clause 19 of the Directorship Agreement provided that the courts of Luxembourg would have jurisdiction, but that the Manager could also bring proceedings ‘against the company in any other court of competent jurisdiction or concurrently in more than one jurisdiction’. Moulder J interpreted Article 25 in the following terms:

The issue in relation to the clause is whether such asymmetric clauses are valid as a matter of EU law. It is now common ground that it is a *question of autonomous EU law* and not a question of national law. (It was I believe accepted that the proviso ‘unless the agreement is null and void as to its substantive validity’ refers to issues such as capacity, fraud and mistake, not whether particular kinds of ‘choice of court’ agreements are permitted under the Regulation).⁸⁷

⁸⁴ EWHC 3 February 2017 WL 00430746, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc.*

⁸⁵ EWHC 3 February 2017 WL 00430746, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* no. 80.

⁸⁶ EWHC 5 July 2019 *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors.*

⁸⁷ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 254 (emphasis added).

The court next heard evidence on Luxembourg’s law’s position on asymmetric choice of forum agreements. Moulder J then stated that ‘in my view the evidence that Luxembourg courts, applying EU law, would not uphold such clauses was not made out on the evidence’⁸⁸.

VI Article 25 of the Brussels I Recast and the Validity of Asymmetric Choice of Forum Agreements

The Brussels I Recast Regulation serves several purposes that are relevant for asymmetric jurisdiction agreements, such as predictability, party autonomy, and the protection of weaker parties. Taking into account the findings from the previous paragraphs, I will now analyse how the French and English courts apply the Recast Regulation and their impact on the way Article 25 serves the objectives of the Brussels Regime.

1 Analysis of the Case Law

a) France

The Cour de cassation does not seem to refer to the conflicts rule of the *lex fori prorogatum* in its case law, and has instead created its own set of criteria for the validity of asymmetric jurisdiction clauses.⁸⁹ This development started with the *Rothschild* case, in which the Cour de cassation ruled that the unequal character of the jurisdiction clause was contrary to the purposes of the Brussels Regime. In later case law, it specified that it was referring to predictability and legal certainty.⁹⁰

In *Crédit Suisse II* and *Saint-Joseph*, the Cour de cassation ruled that an asymmetric jurisdiction clause must either contain objective elements or a reference to a specific set of jurisdiction rules. Fentiman,⁹¹ Ahmed,⁹² and Cobussen⁹³ have written that asymmetric clauses do not lead to unpredictability if they refer the beneficiary to any other competent court under the Brussels I Recast. I share their view. The option-holder may choose between the forums provided by the other Sections of the Recast Regulation. Relying on these jurisdiction rules can surely not result in unacceptable uncertainty as to the competent court. Additionally, EU-external situations may require further thought. When there is a real possibility that the beneficiary of an optional clause would choose the courts of a third country, it would be unclear which jurisdiction rules those courts would apply to determine their competence.⁹⁴

⁸⁸ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 261.

⁸⁹ The presence of objective elements or a referral to a jurisdiction rule that is applicable in a Member State.

⁹⁰ Although Mailhé believes that the protection of weaker parties also played a role. See Mailhé (n 49) 206–207.

⁹¹ Fentiman (n 14) 26.

⁹² Ahmed (n 59) 415.

⁹³ Cobussen (n 57) 31–32.

⁹⁴ Keyes, Marshall (n 52) 378 discuss the possibility that an asymmetric clause would not allow the parties to reasonably foresee where they may be sued but do not mention third countries.

That being said, the current French doctrine does not seem to be in accordance with Article 25 Brussels I Recast.⁹⁵ The French courts do not apply the *lex fori prorogatum* to determine the substantive validity of asymmetric choice of forum clauses, and require that the jurisdiction clause either contains objective factors or that it refers to a specific set of jurisdictional rules. Although there may have been some room for interpretation under the Brussels I Regulation, the Recast clarified the issue by providing the appropriate conflicts rule. The general objectives of the Brussels regime should not be used to bypass Article 25 Brussels I Recast. I agree with Fentiman,⁹⁶ Ahmed⁹⁷ and Mailhé⁹⁸ that the CJEU should get the opportunity to rule on the interpretation of Article 25 in relation to asymmetric choice of forum agreements, although it is unlikely that the Cour de cassation will make such a request after recently confirming its *Rothschild* doctrine.

b) England

Under English law, the validity of asymmetric choice of forum agreements is not problematic.⁹⁹ It is, however, interesting to see how the EWHC interprets the scope of the reference to the *lex fori prorogatum* and how it applies this conflicts rule to the asymmetric clause in *LIC Telecommunications*. Moulder J observes that

The issue in relation to the clause is whether such asymmetric clauses are valid as a matter of EU law. It is now common ground that it is a *question of autonomous EU law and not a question of national law*.¹⁰⁰

Is the Court stating that it believes asymmetry to fall outside the scope of ‘null and void’? To my knowledge, this matter has not yet been clarified in EU case law concerning Article 25, nor is there consensus as to the scope among legal scholars.¹⁰¹ There is a growing group of authors that favours the view that unreasonability and public policy also fall within the referral.¹⁰² As such, there remains some room for discussion as to whether asymmetry would fall under

⁹⁵ Mailhé (n 49) 209–210.

⁹⁶ Fentiman (n 14) 26.

⁹⁷ Ahmed (n 59) 418–420.

⁹⁸ Mailhé (n 49) 209–210.

⁹⁹ Louise Merrett and Janeen Carruthers, ‘United Kingdom: Giving Effect to Optional of Court Agreements—Interpretation, Operation and Enforcement’ in Keyes (n 49) 458–462.

¹⁰⁰ EWHC 5 July 2019 *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* para 254 (emphasis added).

¹⁰¹ Geert van Calster, ‘LIC Telecommunications et Al v VTB Capital et Al. High Court Suggests Autonomous EU Approach to Asymmetric Choice of Court. Also Discusses Contract and Tort Distinction, and Abuse of Process.’ (17 July 2019) <<https://gavclaw.com/2019/07/17/lic-telecommunications-et-al-v-vtb-capital-et-al-high-court-suggests-autonomous-eu-approach-to-asymmetric-choice-of-court-also-discusses-contract-and-tort-distinction-and-abuse-of-process>> accessed 14 November 2019.

¹⁰² See Mankowski, Magnus (n 17) 592 with reference to P. Gottwald in Münchener Kommentar zur ZPO Art. 23 EuGVÜ note 15 and 60; R. Hausmann in Staudinger IntVertrVerf note 294; Hk-ZPO/Dörner Art. 23 note 23; Hüßtege in Thomas/Putzo, Art. 23 note 18; Kropholler/von Hein Art. 23 note 89 (cautiously); Leible/Röder, RIW 2007, 481; Mankowski in Rauscher Art. 23 note 12h; Musielak/Stadler Art. 23 note 1; Pfeiffer in FS Rolf A. Schütze (1999) 671, 675 et seq and for Art. 25 Brussels Ibis Magnus in FS Dieter Martiny (2014) 785, 801.

‘null and void’. And, if the Court believes that asymmetry is not a matter for the *lex fori prorogatum*, Moulder J in theory may have investigated whether there are defects in consent that she would consider to fall within the scope of the reference. This did not happen, however. The Court heard evidence on Luxembourg’s position on asymmetric jurisdiction agreements, and on that basis concluded that it did not believe the Luxembourg courts would invalidate the clause in *LIC Communications*.¹⁰³ How does this approach correspond to the Court’s apparent opinion that asymmetry does not fall within the scope of the reference? Moreover, it does not appear from the judgment that the Court heard evidence on Luxembourg’s private international law, nor is it clear whether the Court applied Luxembourg PIL to find the law that determines the substantive validity of the clause. This decision has not yet received much attention in the legal literature,¹⁰⁴ but it demonstrates the complexity of (the scope of) the conflicts rule for the substantive validity of asymmetric clauses.

2 Article 25 Brussels I Recast and Asymmetric Jurisdiction Agreements

From the above, it has become clear that there are some issues with Article 25 Brussels I Recast and its application. It should first be noted, however, that asymmetric choice of forum agreements are, in theory, compatible with Article 25.¹⁰⁵ Asymmetric clauses were expressly provided for in the original Brussels Convention. According to Fentiman, the provision was removed from the Brussels I Regulation because the new instrument endorsed non-exclusive agreements in general and there was no need to mention asymmetric clauses specifically.¹⁰⁶

In practice, however, the issues of Article 25 Brussels I Recast seem to be magnified by asymmetric choice of forum agreements.¹⁰⁷ Article 25 refers the clause to the national law of the chosen court for its substantive validity, including that jurisdiction’s PIL. There are two problems that underlie this rule. The first relates to the nature of the conflicts rule. Article 25 requires the seized court to apply the national law, including conflict of laws, of the prorogated court. This raises the question of which of the potential courts’ law should decide the substantive validity of the clause. The Brussels I Recast Regulation does not provide a solution for this matter, as it operates under the assumption that only one Member State will be nominated in any given choice of forum agreement. Second, the scope of the reference to national law is also unclear: a jurisdiction agreement is invalid if it is ‘null and void’ under the *lex fori prorogatum*. The scope of this reference, however, is unclear. It is generally understood to refer to matters of consent or capacity of the parties,¹⁰⁸ but there is no

In this context, it would be interesting and useful to compare the (scope of the) conflicts rule for substantive validity from Article 25 Brussels I Recast to similar rules found in other European PIL Regulations.

¹⁰³ *LIC Telecommunications SARL & Anor v VTB Capital Plc & Ors* paras 254–261.

¹⁰⁴ See van Calster (n 101).

¹⁰⁵ Ahmed (n 59) 411–412.

¹⁰⁶ Fentiman (n 14) 26.

¹⁰⁷ Dickinson, Lein (n 21) para 9.65.

¹⁰⁸ Dickinson, Lein (n 21) para 9.69.

consensus on the issue.¹⁰⁹ It is therefore uncertain whether asymmetry falls within the scope of the reference.

The next issue is not a result of Article 25 itself but rather of the lack of an autonomous conflicts rule for choice of court agreements. In the current situation, the Member States should apply the PIL of the chosen court to asymmetric jurisdiction agreements, and the connecting factors and the subsequent referral may vary. However, from what I have gathered from the above case law, the Cour de cassation applied French contract law even if the French courts were not chosen and it also did not apply PIL to determine the validity of the clause. The EWHC did apply Luxembourg law, but did not look at Luxembourg PIL as required by the Brussels I Recast.¹¹⁰ Considering that the purpose of the referral to the law of the chosen court was to ensure ‘a similar outcome on this matter whatever the court seized’¹¹¹, it seems that the conflicts rule of Article 25 misses its goal in this regard. One possible solution is to exclude *renvoi*, but I believe it would be better to create a EU conflicts rule for finding the *lex causae* of choice of forum agreements. The nature and formulation of such a rule require further research, but ideally it would lead to the application of the law that is most closely connected with the jurisdiction clause, while taking other objectives of the Brussels Regime into account.

VII Conclusion

Party autonomy is one of the underlying principles of the Brussels I Recast Regulation. Choice of forum agreements are presumed to be valid if they meet the formal requirements of Article 25 Brussels I Recast unless they are ‘null and void as to [their] substantive validity’ under the law of the chosen court. This is a complicated rule that makes it difficult to determine the status of asymmetric jurisdiction agreements in the EU. The judicial application of Article 25 differs in the Member States. In France, the Cour de cassation developed a doctrine based on French contract law and EU case law to determine whether asymmetric jurisdiction agreements are valid. Its arguments for doing so are that these clauses are unequal and/or that their outcome is insufficiently predictable. I do not agree with this assessment: the Brussels Regime does not prohibit unequal clauses nor does the optionality of the clause lead to unacceptable uncertainty in the EU. Although the English courts do not perceive any issues with

¹⁰⁹ Mankowski, Magnus (n 17) 592 with reference to P. Gottwald in Münchener Kommentar zur ZPO Art. 23 EuGVÜ note 15 and 60; R. Hausmann in Staudinger IntVertrVerf (n 102); Hk-ZPO/Dörner Art. 23 note 23; Hüßtege in Thomas/Putzo, Art. 23 note 18; Kropholler/von Hein Art. 23 note 89 (cautiously); Leible/Röder, RIW 2007, 481; Mankowski in Rauscher Art. 23 note 12h; Musielak/Stadler Art. 23 note 1; Pfeiffer in *FS Rolf A. Schütze* (1999) 671, 675 et seq and for Art. 25 Brussels Ibis Magnus in *FS Dieter Martiny* (2014) 785, 801.

¹¹⁰ Recital 20 and Article 25 Brussels I Recast; *LIC Telecommunications* paras 244-261.

¹¹¹ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)’ COM (2010) 0748 Final, para 3.1.3.

asymmetric choice of forum agreements, the EWHC gave an interesting interpretation of Article 25. On the basis of these observations, I make two recommendations. The first is that the CJEU should rule on the interpretation of Article 25 in relation to the admissibility of asymmetric clauses and the *Rothschild* doctrine. The second is that further research is required to look into the possibility, nature and text of a EU conflicts rule for choice of court agreements.