

## **The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union**

**Mukarrum Ahmed\***

### **Abstract**

This article examines the legal regulation and enforcement of asymmetric choice of court agreements under the Brussels I Regulation (Recast). The two significant and related issues of the effectiveness of asymmetric jurisdiction agreements under Article 25 of the Recast Regulation and whether proceedings commenced in the primary non-exclusive court identified in the agreement should trigger the application of Article 31(2) of the Recast Regulation are analyzed. Notwithstanding, the rulings of the French Cour de Cassation in *Rothschild* and *ICH v Credit Suisse*, it will be argued that asymmetric choice of court agreements should in principle be effective under Article 25 of the Recast Regulation from the perspectives of validity, certainty, form and fairness. The validity and effectiveness of asymmetric jurisdiction agreements in the jurisprudence of the English courts is already well established. There also exists some support for the argument that proceedings initiated in the English courts (as the primary non-exclusive court identified in the clause) may invoke the protective cover of Article 31(2) of the Recast Regulation where the borrower in an international finance agreement has breached his obligation to sue exclusively in the English courts.

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\* PhD (Aberdeen), Barrister (Lincoln's Inn) and Lecturer in Business Law at Lancaster University Law School.

## **The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union**

### **Introduction**

This article examines the legal regulation and enforcement of asymmetric choice of court agreements under the Brussels I Regulation (Recast) [or 'Recast Regulation'].<sup>1</sup> The two significant and related issues of the effectiveness of asymmetric jurisdiction agreements under Article 25 of the Recast Regulation and whether proceedings commenced in the primary non-exclusive court identified in the agreement should trigger the application of Article 31(2) of the Recast Regulation are analyzed. It will be argued that asymmetric choice of court agreements should in principle be effective under Article 25 of the Recast Regulation from the perspectives of validity, certainty, form and fairness. The validity and effectiveness of asymmetric jurisdiction agreements in the jurisprudence of the English courts is already well established. There also exists some support for the argument that proceedings initiated in the English courts (as the primary non-exclusive court identified in the clause) may invoke the protective cover of Article 31(2) of the Recast Regulation where the borrower in an international finance agreement has breached his obligation to sue exclusively in the English courts.

After considering the preliminary issue of characterization of jurisdiction agreements as exclusive or non-exclusive, we will proceed to assess the validity and effectiveness of asymmetric jurisdiction agreements under Article 25 of the Recast Regulation, Article 23 of the Brussels I Regulation<sup>2</sup> and under national law.<sup>3</sup> This will be followed by an analysis of whether Article 31(2) of the Recast Regulation may under the guise of interpretation be extended to provide protective cover for English asymmetric choice of court agreements. The conclusion will draw upon the differing attitudes of the French courts and the English courts on the issue of the validity of such clauses. It will be argued that a solution focused on enforcing the rights and obligations of the parties to the asymmetric jurisdiction agreement is arguably defensible from the perspective of business efficacy,<sup>4</sup> lowering the opportunity cost associated with entering into the transaction for both the borrower and

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<sup>1</sup> See Articles 25 and 31(2)-(3) of the Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. In accordance with Article 81 of the Brussels I Regulation (Recast), the Regulation applies as of 10 January 2015 to legal proceedings instituted (and to judgments rendered) on or after that date.

<sup>2</sup> Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1. ('Brussels I Regulation')

<sup>3</sup> Article 25(1) of the Recast Regulation has widened the scope of the legal regulation of jurisdiction agreements in the EU as the provision applies even if both parties to the agreement are non EU domicillaries. Now both the prorogative and derogative effect of such agreements are governed by the Recast Regulation in contrast to Article 23(3) of the Brussels I Regulation which only regulated the derogative effect of jurisdiction agreements concluded by non EU domicillaries. As a result, the common law jurisdictional regime has become increasingly less relevant. See Q Forner-Delaygua, *Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast*, 11 *Journal of Private International Law* 379, 381 (2015).

<sup>4</sup> See R Fentiman, *Unilateral Jurisdiction Agreements in Europe*, 72 *Cambridge Law Journal* 24, 24 (2013).

the lender<sup>5</sup> and minimizing the enforcement risk for the lender in an international finance agreement.<sup>6</sup> One way jurisdiction clauses have become the market standard in finance and aviation agreements, and are included in the Loan Market Association's ('LMA') recommended form of facility documentation.<sup>7</sup>

### **Characterization of a Choice of Court Agreement as Exclusive or Non-exclusive**

In practice the most significant distinction to be drawn when considering the nature of a choice of court agreement is whether the agreement is properly to be classified as exclusive or non-exclusive. Briggs has suggested that it might be useful to cast aside what he terms a 'binary distinction' and 'the unhelpful terminology of non-exclusive jurisdiction agreements' by recalibrating the focus instead on construing what obligations the parties wished to create and impose on one another.<sup>8</sup>

However, as a matter of logic, it is important that the courts treat disputes subject to non-exclusive jurisdiction clauses as being different from disputes subject to exclusive jurisdiction clauses. The idea of a unified category for both types of choice of court agreements is not without doubt as it all too easily blurs into relative insignificance the existing boundary in theory and practice between exclusive and non-exclusive jurisdiction agreements.<sup>9</sup> In practice, the categories exclusive and non-exclusive jurisdiction agreement and the distinction between them are of central importance to the application of Article 25 of the Recast Regulation.<sup>10</sup> The distinction retains its importance in relation to the Hague Convention on Choice of Court Agreements ('Hague Convention') which excludes non-exclusive choice of court agreements from the scope of the Convention.<sup>11</sup> Recital 22 and

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<sup>5</sup> In terms of favourable interest rates which lower the transaction cost.

<sup>6</sup> See FN 23 below for a definition of 'enforcement risk'.

<sup>7</sup> N Beale and C Clayson, *One-way jurisdiction clauses: a one-way ticket to anywhere?*, 28 *Journal of International Banking Law and Regulation* 463, 464 (2013).

<sup>8</sup> A Briggs, *Agreements on Jurisdiction and Choice of Law*, 110-121, 120 (OUP 2008); A Briggs, *The Subtle Variety of Jurisdiction Agreements*, *Lloyd's Maritime and Commercial Law Quarterly* 364, 375-376 [2012]; A Briggs, *Private International Law in English Courts*, 398 (OUP 2014); TM Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 *Singapore Academy of Law Journal* 306, 351 (2005); See L Collins et al. (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, Chapter 12, 603 (15<sup>th</sup> Edition, Sweet and Maxwell 2012).

<sup>9</sup> See CJS Knight, *Anti-suit Injunctions and Non-exclusive Jurisdiction Clauses*, 69 *Cambridge Law Journal* 25, 26 (2010); D Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement*, 102-105 (2<sup>nd</sup> Edition, Sweet and Maxwell 2010).

<sup>10</sup> Article 25(1) of the Recast Regulation and Article 23(1) of the Brussels I Regulation create a presumption of exclusivity by providing that: 'Such jurisdiction shall be exclusive unless the parties have agreed otherwise.'; See PR Beaumont and PE McEleavy, *Anton's Private International Law*, 241 (SULI, 3<sup>rd</sup> Edition, W Green 2011); T Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States*, 226 (OUP 2008).

<sup>11</sup> See Article 1(1) and Articles 3(a)-3(b) of the Hague Convention on Choice of Court Agreements in Permanent Bureau of the Conference, *Convention of 30 June 2005 on Choice of Court Agreements: Text and Explanatory Report by Trevor Hartley and Masato Dogauchi*, <http://www.hcch.net/upload/expl37final.pdf> (accessed 1 January 2014); On 1 October 2015, the Hague Convention on Choice of Court Agreements entered into force in 28 Contracting States (Mexico and all the Member States of the EU, except Denmark). The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, SI 2015/1644, have brought the Hague Convention into force in the UK.

Article 31(2) of the Recast Regulation also rely on the distinction and a literal reading of the provision and the recital limits the reverse *lis pendens* rule to exclusive choice of court agreements.<sup>12</sup> Similarly, the distinction between the two types of agreement is of significance in relation to the enforcement of the jurisdiction agreements by the courts, including enforcement by way of a claim for damages for breach of contract.<sup>13</sup>

It is significant to note that the notion of breach of a choice of court agreement is predominantly relevant in relation to exclusive jurisdiction agreements, because non-exclusive jurisdiction agreements by their very nature do not lend themselves towards the finding of an *inter partes* obligation not to sue in a non-elected forum.<sup>14</sup> Non-exclusive jurisdiction agreements may attribute jurisdiction to a court which would otherwise not be competent. Thus, they have the effect of widening the range of courts that can potentially be seised by the parties.<sup>15</sup>

The characterization of a jurisdiction agreement as exclusive or non-exclusive has now become more significant in the European Union ('EU') with the Hague Convention coming into effect, because the classification determines which regime (Recast Regulation or Hague Convention) must be applied by a Member State court. The objective of the Hague

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<sup>12</sup> See U Magnus, *Gerichtsstandsvereinbarungen unter der reformierten EuGVO* in N Witzleb, R Ellger, P Mankowski, H Merkt and O Remien (eds.), *Festschrift für Dieter Martiny zum 70. Geburtstag* 797, 799 (Tübingen, Mohr Siebeck 2014); P Neilson, *The New Brussels I Regulation*, 50 *Common Market Law Review* 503, 521 (2013).

<sup>13</sup> See *Donohue v Armco Inc.* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425, [24] (Lord Bingham of Cornhill) and [45] (Lord Hobhouse of Woodborough) (Lord Bingham at [24]: 'the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it'); *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598 (CA) (Steyn LJ) (delivering the judgment of the Court of Appeal) (an anti-suit injunction case, referring to the injunction defendant's 'clear breach of contract'); For the development of the damages remedy for breach of exclusive jurisdiction agreements by the English courts, see, *Union Discount Co Ltd v Zoller and Others* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 (Schiemann LJ); *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [36] (Lord Bingham of Cornhill) and [48] (Lord Hobhouse of Woodborough); *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) (Julian Flaux QC J); *National Westminster Bank plc v Rabobank Nederland* (No 3) [2007] EWHC 3163 (Comm), [2008] 1 All ER (Comm) 266 (Sir Anthony Colman J).

<sup>14</sup> J Fawcett, *Non exclusive jurisdiction agreements in private international law*, *Lloyd's Maritime and Commercial Law Quarterly* 234, 253 [2001]; T Raphael, *The Anti-Suit Injunction*, Chapter 9, 223 (OUP 2008); L Merrett, *The Enforcement of Jurisdiction Agreements within the Brussels Regime*, 55 *International and Comparative Law Quarterly* 315, 316 (2006); J Steinle and E Vasiliades, *The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy*, 6 *Journal of Private International Law* 565, 577 (2010); K Takahashi, *Damages for Breach of a Choice of Court Agreement*, 10 *Yearbook of Private International Law* 57, 59 (2008); D Tan, *Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation*, 40 *Texas International Law Journal* 623, 627 (2005); R Butler and B Weijburg, *Do Anti-Suit Injunctions Still Have a Role to Play?: An English Law Perspective*, 24 *University of San Francisco Maritime Law Journal* 257, 277-279 (2011-2012); cf *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, [36]-[37] (Waller LJ) has reduced the importance of the distinction between exclusive and non-exclusive jurisdiction agreements. The Court of Appeal decided that it is a breach of contract to act in a manner so as to prevent a party from bringing proceedings in the non-exclusive forum; TM Yeo, *Breach of Agreements on Choice of Law*, *Lloyd's Maritime and Commercial Law Quarterly* 194, 195-196 [2010].

<sup>15</sup> Raphael, *supra*, Chapter 9, 223; Merrett, *The Enforcement of Jurisdiction Agreements within the Brussels Regime*, *supra*, 316; Steinle and Vasiliades, *supra*, 577; Takahashi, *supra*, 59.

Convention is to regulate the enforcement of choice of court agreements and resulting judgments globally and it only applies to exclusive choice of court agreements.<sup>16</sup> It was inspired by and seeks to emulate the success of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.<sup>17</sup> Following the approach of the New York Convention, the Hague Convention requires the strict enforcement of exclusive jurisdiction agreements.<sup>18</sup>

### **Effectiveness of Asymmetric Jurisdiction Agreements and the French Cour de Cassation's Recent Decisions**

A choice of court agreement may be bilateral and exclusive, allowing each party to sue the other in the same court or courts of a Member State, or asymmetric, whereby one party alone submits to the agreed Member State court's jurisdiction and the other party has a wider choice of forum.<sup>19</sup> Asymmetric or unilateral choice of court agreements are very common in cross border finance transactions, where the rights of one party to a jurisdiction agreement are at least partly unilateral. For instance, a borrower and lender in an international loan agreement will submit to the exclusive jurisdiction of a designated court, but the lender will reserve the right to sue the borrower in any other court of competent jurisdiction.<sup>20</sup> The jurisdiction of any alternative court depends on whether that court has personal or subject matter jurisdiction and not on consent.<sup>21</sup> Where the counterparty's obligation is the repayment of a debt, such clauses are less a mechanism for resolving disputes, and more an avenue for facilitating the enforcement of the debt.

The lender may rely on a summary enforcement procedure available under national law to recover the debt in any alternative court.<sup>22</sup> A unilateral jurisdiction agreement allows a creditor the flexibility to seek enforcement wherever a borrower's assets are for the time being located.<sup>23</sup> By minimizing enforcement risk they reduce the cost of the transaction to borrowers and enhance the readiness of lenders to provide finance. Asymmetric clauses are

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<sup>16</sup> See generally, P Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, 5 *Journal of Private International Law* 125, 134 (2009).

<sup>17</sup> The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 UNTS 4739. ('New York Convention')

<sup>18</sup> See Articles 5 and 6 of the Hague Convention.

<sup>19</sup> See TC Hartley, *International Commercial Litigation*, 164 (CUP 2009); ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law*, 10-12 (Routledge 2014); R Fentiman, *International Commercial Litigation*, 79-88 (2<sup>nd</sup> Edition, OUP 2015).

<sup>20</sup> See *BNP Paribas SA v Anchorage Capital Europe LLP & ors* [2013] EWHC 3073 (Comm), [91]-[93], where Males J on a proper construction of the non-exclusive jurisdiction agreement, granted an anti-suit injunction to enforce the defendant's contractual obligation to sue exclusively in the English courts.

<sup>21</sup> Under the EU private international law regime, other courts of competent jurisdiction will be determined by the rules on jurisdiction in Chapter II of the Brussels I Regulation and the Brussels I Regulation (Recast).

<sup>22</sup> In the English law of civil procedure an action in debt enjoys the advantage of the ability to obtain a summary judgment under Part 24 of the Civil Procedure Rules.

<sup>23</sup> 'Enforcement risk is the risk that a judgment-debtor with worldwide assets will disperse or conceal those assets.....' and 'The extent of such risk depends on the effectiveness of jurisdiction agreements': Fentiman, *International Commercial Litigation*, *supra*, 6.

valid and enforceable in English law and have been upheld without challenge or reservation in a number of English decisions.<sup>24</sup> However, the validity and enforcement of such asymmetric provisions within the EU regime, and in many national legal systems, is uncertain.<sup>25</sup>

Doubt has arisen in particular because of the controversial decision of the French Cour de Cassation in *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* ('*Rothschild*').<sup>26</sup> In *Rothschild*, Ms X, a French national, commenced proceedings in Paris against Banque Rothschild, a Luxembourg bank with which she had an account. The contract between them provided that the Luxembourg courts should have exclusive jurisdiction over any claims brought by Ms X, but permitted the bank to sue either in Luxembourg or in the courts of the client's domicile or any other court of competent jurisdiction. Relying on the first limb of the clause, the bank argued that the French courts had no jurisdiction. Agreeing with the courts below, however, the Cour de Cassation held that Ms X was free to sue in France. The French Supreme Court held that, the jurisdiction agreement, purporting to confine her to suing in Luxembourg, was ineffective. Deploying a principle familiar in French contract law, the court held that the clause was *potestative*,<sup>27</sup> as it merely granted an option to the bank to sue in

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<sup>24</sup> See *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 (CA) (Steyn LJ); *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm) (Poplewell J); *Ocarina Marine Ltd v Marcard Stein & Co* [1994] 2 Lloyd's Rep 524; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579; *UBS AG and UBS Securities LLC v HSN Nordbank AG* [2008] EWHC 1529 (Comm); In *Lornamead Acquisitions Limited v Kapthing Bank HF* [2011] EWHC 2611 (Comm) a clause providing that the jurisdiction clause was for the benefit of one party was considered valid; In *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER 476, an arbitration agreement with option for one party to litigate was approved; In *Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm) a jurisdiction agreement coupled with a unilateral option to arbitrate was approved; See also, M Keyes and BA Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, 11 *Journal of Private International Law* 345, 373-377 (2015); Beale and Clayton, *supra*, 463.

<sup>25</sup> On 2 September 2011 (Judgment No. 71 in commercial case No. 1193/2010) the Bulgarian Supreme Court of Cassation (Commercial Chamber) struck down a one way arbitration/choice of court clause in a loan agreement and declared it void. The Russian Supreme Arbitrazh Court reached a similar conclusion concerning one way arbitration agreements on 2 September 2012 in *Russian Telephonic Company v Sony-Ericsson Mobile Communications* (Case No 1831/12).

<sup>26</sup> *Ms X v Banque Privée Edmond de Rothschild Europe (Société)* Cass civ, 1ere, 26.9.2012, No 11-26.022, [2013] ILPr 12; See M Ancel, L Marion and L Wynaendts, *Réflexions sur les Clauses de Jurisdiction Asymétriques*, N° 148 *Banque & Droit*, 3, mars-avril 2013; R Hausmann, *Invalidity of Unilateral Jurisdiction Clauses under Article 23 Brussels I Regulation?*, 13 *The European Legal Forum* 37, 41-43 (2013); A Briggs, *One Sided Jurisdiction Clauses: French Folly and Russian Menace*, *Lloyd's Maritime and Commercial Law Quarterly* 137 [2013]; Fentiman, *Unilateral Jurisdiction Agreements in Europe*, *supra*; Briggs, *Private International Law in English Courts*, *supra*, 245; Keyes and Marshall, *Jurisdiction Agreements*, *supra*, 366-372; G Cuniberti, *French Supreme Court Strikes Down One Way Jurisdiction Clause*, <http://conflictoflaws.net/2012/french-supreme-court-strikes-down-one-way-jurisdiction-clause/> (accessed 21 April 2014); Garcimartin, *Chapter 9 – Prorogation of Jurisdiction*, *infra*, 302, notes that the French Cour de Cassation decision has 'incorrectly' ruled against the validity of unilateral jurisdiction clauses.

<sup>27</sup> *Potestatif*: Depends on the will of one of the parties; See '*potestatif*' in *Harrap's Dictionnaire Juridique* (Daloz, Chambers Harrap Publishers Ltd 2004); '*Potestative condition*': a condition or term of a legal agreement that is completely within the power and control of one of the parties and that makes the agreement unenforceable for lack of mutuality of obligation; See Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/potestative%20condition> (accessed 2 May 2015).

Luxembourg.<sup>28</sup> As such the clause was held to be contrary to the objectives of Article 23 of the Brussels I Regulation. The effect of the decision is to destabilize a term frequently encountered in cross border commercial transactions. In future proceedings in EU Member States (including England) concerning asymmetric jurisdiction agreements, arguments based on the decision in *Rothschild* will inevitably be employed in an attempt to disable them. The effect is to generate uncertainty and expense, and to render a future preliminary reference to the CJEU under Article 267 TFEU more likely.

On 25 March 2015, the French Supreme Court for Civil and Criminal matters (*Cour de Cassation*) upheld its decision in *Rothschild* and ruled that an asymmetrical jurisdiction clause is not be enforceable in France.<sup>29</sup> The case concerned a French business and a Swiss bank. The clause provided that the bank could sue in ‘any other court of competent jurisdiction’. The lower court had validated the clause. The *Cour de Cassation* allowed the appeal and ruled that the clause could have been validated if it had made clear on which ‘objective elements’ it granted jurisdiction, which the lower court did not discuss. The decision lacked a reference to the French contract law concept of *potestative* clauses. Contrary to *Rothschild*, the case concerned Article 23 of the Lugano Convention (2007) and both parties were commercial entities.<sup>30</sup>

On 7 October 2015, the French Supreme Court (*Cour de cassation*) handed down a decision that has clarified its interpretation of the rules for jurisdiction clauses within the European Union.<sup>31</sup> In this case, a company incorporated in France (*eBizcuss*) and a company incorporated in Ireland (*Apple Sales International*) had signed a contract with a jurisdiction clause whereby the parties agreed that disputes would be settled in the courts of the Republic of Ireland. However, the same clause also reserved the right of the Irish company alone to apply to the courts with jurisdiction over the counterparty's registered office, or those in any country where it suffered a loss caused by the counterparty. The French

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<sup>28</sup> See Article 1170 of the French Civil Code: ‘A potestative condition is one which makes the fulfilment of the agreement depend upon an event which one or the other of the contracting parties has the power to make happen or to prevent.’; Article 1174 of the French Civil Code: ‘An obligation is void where it was contracted subject to a potestative condition on the part of the one who binds himself.’ (Translated into English by Georges Rouhette, Professor of Law, with the assistance of Dr Anne Rouhette-Berton, Assistant Professor of English - [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)).

<sup>29</sup> *ICH (Societe) v Credit Suisse (Societe)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39; See M Ancel, *Clause attributive de juridiction asymétrique – Clair-obscur sur les clauses d’élection de for asymétriques*, N° 163 *Banque & Droit*, 4, septembre-octobre 2015; J Strnad, *ICH (Societe) v Credit Suisse (Societe)*, 15 *The European Legal Forum* 72, 72-73 (2015); EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective*, 168 (4<sup>th</sup> Edition, W Green 2015); G Cuniberti, *French Supreme Court Confirms Rothschild*, <http://conflictolaws.net/2015/french-supreme-court-confirms-rotschild/> (accessed 21 April 2015).

<sup>30</sup> Article 23 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339/3, 21.12.2007, OJ 2009, L 147/5 (‘Lugano Convention’); See Official explanatory report on the Lugano Convention by Professor Fausto Pocar: OJ 2009, C 319/1.

<sup>31</sup> See *Apple Sales International v eBizcuss* Cass. 1ere Civ, 7.10.2015, No. 14-16.898; See Keyes and Marshall, *Jurisdiction Agreements*, *supra*, 371-372, discussing the *Cour d’appel de Paris* decision in *Apple Sales International v eBizcuss* (*Cour d’appel*, Paris, 08.04.2014, RG no 13/21121) which was upheld on appeal by the *Cour de Cassation*.

company complained that the Irish company was infringing competition law, and started proceedings before the Paris Commercial Court seeking compensation for the harm it had suffered. The Irish company successfully argued that the Commercial Court lacked jurisdiction, which belonged to the courts of Ireland. When the French company's appeal to the Paris Court of Appeal was also unsuccessful, it filed a Supreme Court appeal. The Cour de cassation took the opportunity in this decision to refine its jurisprudence in *Rothschild* and *ICH v Crédit Suisse* by upholding asymmetric jurisdiction clauses provided that they objectively identify the courts that may have jurisdiction. In the view of the French Supreme Court even though the French and Irish companies did not enjoy the same freedom in choosing which court would hear their dispute, the jurisdiction clause did abide by the predictability requirement by making it possible to objectively identify which courts could conceivably have jurisdiction. It is submitted that the French Supreme Court is distancing itself from the requirement of strict mutuality of terms (*potestative*) by focusing on objective criteria that help identify the courts possessing jurisdiction. In this particular case, the option to sue in 'any other court of competent jurisdiction' frequently attributed to asymmetric jurisdiction agreements was replaced by a more predictable clause which provided a narrower range of readily ascertainable courts.

The issue exposed in *Rothschild* and *ICH v Crédit Suisse* is whether, and if so in what circumstances, it is possible to advance an argument that asymmetric jurisdiction agreements are incompatible with what is now Article 25 of the Recast Regulation. Insofar as this is possible, the implications are serious and far-reaching. If such agreements are wholly ineffective and void neither party could rely on the agreement to found jurisdiction even in the primary non-exclusive court identified in the clause. Suppose that the parties to an international loan agreement confer jurisdiction on the English courts, but permit the lender to sue alternatively in any other court of competent jurisdiction. The borrower could now object even to proceedings brought by the lender in England. Again to challenge the validity of asymmetric jurisdiction agreements is to threaten a barrage of torpedo actions, in which counterparties, seeking to avoid a unilaterally exclusive jurisdiction agreement in favour of one court, commence pre-emptive proceedings elsewhere. Borrowers, contractually bound to litigate in England under English law, often seek to escape the pro-creditor approach of the English courts when applying English law by seeking a declaration of non-liability in legal systems offering them greater protection. Such pre-emptive strikes are destined to fail if both contracting parties have bilaterally agreed to the exclusive jurisdiction of the English courts. But pre-emptive proceedings may become a feasible or even a viable option if the debtor has grounds to challenge the validity of asymmetric jurisdiction agreements. The French Supreme Court decisions have meant that the likelihood of pre-emptive proceedings being initiated in an attempt to impugn the validity of an asymmetric jurisdiction agreement conferring jurisdiction on the English courts has increased. However, the ruling in *Apple Sales International v eBizcuss* indicates a possible change in the French Supreme Court's attitude towards such clauses and arguably reduces

the 'litigation risk'<sup>32</sup> arising from pre-emptive proceedings challenging the validity of an English asymmetric jurisdiction agreement. Under the circumstances and in the context of the Recast Regulation, an action for damages for breach of the jurisdiction agreement may play a significant role in both effectively deterring the onset of these torpedo actions and in responding to the actual breach by compensating the aggrieved party in relation to the costs and expenses incurred in litigating in a torpedo forum.

### **Effectiveness of Asymmetric Jurisdiction Agreements and Article 25 of the Recast Regulation**

At the outset it may be observed that asymmetric non-exclusive jurisdiction agreements are in principle compatible with Article 25 of the Brussels I Regulation (Recast).<sup>33</sup> First, Article 25 expressly provides that agreements within its scope are exclusive unless otherwise agreed, thereby recognizing that non-exclusive jurisdiction agreements are compatible with the Regulation.<sup>34</sup> Secondly, the decisions in *Rothschild* and *ICH v Crédit Suisse* are inconsistent with the assumptions underlying Article 25.<sup>35</sup> The choice of court agreement provision in the Brussels Convention expressly provided that:<sup>36</sup> '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'. Those words were omitted from Article 23 of the Brussels I Regulation not because such agreements are objectionable, but because (it was generally assumed) the endorsement of

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<sup>32</sup> For a definition of 'litigation risk' arising from multistate transactions, see Fentiman, *International Commercial Litigation*, *supra*, 42.

<sup>33</sup> U Magnus, *Article 25* in U Magnus and P Mankowski (eds.), *Brussels Ibis Regulation*, 659 (Köln, Verlag Dr Otto Schmidt 2016); Fentiman, *International Commercial Litigation*, *supra*, 81; F Garcimartin, *Chapter 9 – Prorogation of Jurisdiction* in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* 302 (OUP 2015); TC Hartley, *Choice of Court Agreements under the European and International Instruments*, 141 (OUP 2013); TC Hartley, *International Commercial Litigation*, 180-181 (2<sup>nd</sup> Edition, CUP 2015); A Layton and H Mercer (eds.), *European Civil Practice*, 706-707 (Volume I, 2<sup>nd</sup> Edition, Sweet & Maxwell 2004) (In relation to Article 23 of the Brussels I Regulation); cf Crawford and Carruthers, *supra*, 168-169, note that the validity of asymmetric choice of court clauses is more 'debatable' and 'contentious' as compared to 'harlequin' jurisdiction clauses (e.g. Case 23/78 *Meeth v Glacetal* [1978] ECR 2133) which are still 'permitted'.

<sup>34</sup> For example, see, Case 23/78 *Meeth v Glacetal* [1978] ECR 2133; See Article 25(1) of the Recast Regulation and Article 23(1) of the Brussels I Regulation; Layton and Mercer, *supra*, 706.

<sup>35</sup> Fentiman, *Unilateral Jurisdiction Agreements in Europe*, *supra*, 25-26.

<sup>36</sup> Article 17(4) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 299, 31.12.1972, p 32. ('Brussels Convention'); See Case C-22/85 *Anterist v Credit Lyonnais* [1986] ECR 1951 [14], underlying the need for a clear demonstration of the intention of the parties in favour of one of them; Layton and Mercer, *supra*, 741, lend support to an objective assessment of an asymmetric jurisdiction agreement and note that too wide an enquiry into the respective benefits of the agreement for each party is undesirable at the preliminary stage of deciding whether the court has jurisdiction and Article 17(4) of the Brussels Convention should be narrowly interpreted. In *Soc. Edmond Coignet S.A. v Banca Commerciale Italia*, French Cour de Cassation, 4 December 1990, [1992] ILPr 450, the court held that 'the common intention to confer an advantage on one of the parties must be clear either from the wording of the clause or from all the evidence to be found in the contract or from the circumstances in which it was concluded'; See also, Report on the Lugano Convention (2007), OJ 2009 C 3419/1, [106] which notes that 'there was no reason to restrict the parties' freedom by prohibiting them from agreeing in the contract between them that a non-exclusive forum should be available in addition to the forum or forums objectively available under the Convention.'

non-exclusive jurisdiction in Article 23 made explicit reference to unilateral agreements unnecessary.<sup>37</sup>

Apart from evidence of the recognition of non-exclusive jurisdiction agreements, it is proposed that the effectiveness of asymmetric jurisdiction agreements under Article 25 of the Recast Regulation should be examined from the perspectives of validity, certainty, form and fairness. The validity of unilateral jurisdiction agreements is perhaps uncontroversial as these agreements will be valid if valid under the law of the chosen court including its rules of private international law. However, it is to be observed whether such agreements comply with Article 25's requirements of form, certainty and fairness.

### **Validity**

The determination of the substantive validity of a jurisdiction agreement under Article 23 of the Brussels I Regulation is problematic. First, the question arises whether the requirements imposed by Article 23 are a sufficient guarantee of substantive validity.<sup>38</sup> If the answer is in the negative then the issue arises whether and to what extent may the law of a national legal system be applied to determine the issue. The exact identity of the national law used to determine substantive validity raises its own challenges.

At the outset, it may be argued that the compatibility of an asymmetric jurisdiction agreement with Article 25 of the Recast Regulation is not an issue of substantive validity but a question of the scope of an 'agreement' governed by an autonomous interpretation of Article 25 of the Recast Regulation. It is at least arguable that the *potestative* nature of a jurisdiction clause and the existence of objective criteria that helps identify the courts possessing jurisdiction may be characterized as issues of formal consent. The advantage of such a characterization would be that it automatically facilitates a pan-European solution to the issue of the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation. The choice of law hurdle including the burden of pleading and proving foreign substantive law, choice of law rules and rules on *renvoi* on the validity of such agreements in the *lex fori prorogatum* would be eliminated.<sup>39</sup> However, there is a contrary indication in the Official Explanatory Report of the Hague Convention that most 'consent' questions are governed by the choice of law rules established to determine substantive validity and capacity.<sup>40</sup> Beaumont has warned us about the perils in the argument that issues of 'consent' are governed by either 'the law of the forum – including its choice of law

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<sup>37</sup> Fentiman, *International Commercial Litigation*, *supra*, 81; Magnus, *Article 25*, *supra*, 659; Hartley, *Choice of Court Agreements under the European and International Instruments*, *supra*, 140.

<sup>38</sup> See L Merrett, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, 58 *International and Comparative Law Quarterly* 545 (2009).

<sup>39</sup> The preceding sentence assumes that the English common law 'foreign court' theory of *renvoi* applies which requires proof of the foreign court's theory of *renvoi* as well as the foreign choice of law rule; cf The continental 'single *renvoi*' theory only requires proof of the foreign choice of law rule. See Hartley, *Choice of Court Agreements under the European and International Instruments*, *supra*, 166-167.

<sup>40</sup> Hartley and Dogauchi Report, *supra*, [94]-[96].

rules<sup>41</sup> or even the law of the chosen forum including its choice of law rules.<sup>42</sup> It should be noted that in both the Recast Regulation and the Hague Convention, the general principle of consent applies independently of the law of any Member State or Contracting State and follows autonomously from the instrument itself.<sup>43</sup>

Whether or not an autonomous interpretation of Article 25 is of relevance to the compatibility of asymmetric jurisdiction agreements with Article 25 of the Recast Regulation, it will be argued here that the effectiveness of asymmetric jurisdiction agreements may still be characterized as an issue of substantive validity. Article 25 of the Recast Regulation provides that an agreement is ineffective if null and void as to its substantive validity under the law of the Member State whose court are designated under the agreement.<sup>44</sup> (*lex fori prorogatum*) Therefore, the effectiveness of asymmetric jurisdiction agreements in relation to their validity will depend on the law of the chosen forum, including its rules of private international law.<sup>45</sup> In practice, depending on the legal system in question, validity will therefore depend on the local law of the forum or on the law applicable of the main contract.

Where an agreement is valid *as per* the law of the agreed court, it will also be valid in the courts of another EU Member State. Article 25 stipulates that the law of the chosen court including its choice of law rules will govern substantive validity. Let's suppose that a bank and a borrower agree to the jurisdiction of the English courts, in which such agreements are valid, but the bank is permitted to sue in addition in any other court of competent jurisdiction. The borrower brings proceedings in Italy contrary to the agreement. If the bank then sues in the English courts, it may be argued that the English courts are deemed to have sole responsibility under Article 31(2) of the Recast Regulation for determining the validity of the agreement.<sup>46</sup> In the likely event that Article 31(2) is not engaged by the commencement of proceedings in England or the bank does not decide to sue in England at all, the Italian courts would still be obliged to refer the agreement's material validity to English law under Article 25 of the Recast Regulation. Conversely, let's suppose that the bank exercises its option to sue in any court of competent jurisdiction by initiating proceedings against the borrower in France. The borrower challenges the bank's right to do

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<sup>41</sup> RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents*, 79 (CUP 2008).

<sup>42</sup> Beaumont, *supra*, 139.

<sup>43</sup> Hartley, *Choice of Court Agreements under the European and International Instruments*, *supra*, 133; Beaumont, *supra*, 139.

<sup>44</sup> See Recital 20 and Article 25(1) of the Recast Regulation.

<sup>45</sup> J Strnad, *Determining the Existence of Consent for Choice-of-Court Agreements under the Brussels I-bis Regulation* 14 *The European Legal Forum* 113, 117-118 (2014); Fentiman, *International Commercial Litigation*, *supra*, 82.

<sup>46</sup> This, of course, is subject to whether an asymmetric jurisdiction agreement qualifies as an exclusive jurisdiction agreement for the purposes of Article 31(2) of the Brussels I Regulation (Recast). An asymmetric jurisdiction agreement has been held to be exclusive for the borrower in an international loan agreement by the English Court of Appeal in a leading case governed by the Brussels Convention: *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ).

so by relying on the argument that such agreements are invalid in French law. The borrower may also argue that such agreements are by necessary implication also contrary to EU law. The challenge will fail because under Article 25 English law alone governs the material validity of a jurisdiction agreement. The underlying logic is that the parties have agreed (although for the bank's sole benefit) to the non-exclusive jurisdiction of the English courts, making English law the law of the chosen court. Even if the bank opts to sue in France pursuant to the agreement, the jurisdiction of the French courts is not the agreed jurisdiction under Article 25 of the Recast Regulation. It will derive from whatever ground of personal or subject matter jurisdiction the bank relies on. There is no sense in which French law, as the law of the actual forum, is engaged.

Asymmetric jurisdiction agreements will be invalid if the parties select as the primary court designated in the agreement a court in a Member State which imposes strict requirements of mutuality on contractual terms. English law will refer the issue of the substantive validity of a jurisdiction agreement to the law governing the host contract. As observed above, asymmetric jurisdiction agreements have been upheld without challenge or reservation in numerous English decisions.

English law's positive treatment of asymmetric jurisdiction agreements is premised on three underlying principles.<sup>47</sup> First, such agreements are considered as imposing an obligation on beneficiaries and do not lack mutuality. The beneficiary is obliged to accept that the English courts have jurisdiction over any claim brought by the counterparty. Second, the principles of the freedom and sanctity of the contract are paramount in assessing the effect of such clauses.<sup>48</sup> Even a clause requiring the borrower to accept the jurisdiction of any court in which the bank elects to sue would be valid. Third, Article 6 of the European Convention on Human Rights ('ECHR') may not affect any restriction on a party's choice of forum. It has been judicially pronounced that it 'is directed to access to justice within the forum chosen by the parties, not to choice of forum'.<sup>49</sup>

## **Certainty**

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<sup>47</sup> See Fentiman, *International Commercial Litigation*, *supra*, 83.

<sup>48</sup> For a spirited exposition of the principle of freedom of contract and *pacta sunt servanda* in relation to the English private international law of jurisdiction agreements see Briggs, *Agreements*, *supra*; See also PE Nygh, *Autonomy in International Contracts*, Chapter 1 (OUP 1999). For the development of the interlinked ideas of freedom and sanctity of contract in the English and Scots substantive law of contract respectively see E McKendrick, *Contract Law*, 2-4 (9<sup>th</sup> Edition, Palgrave, Macmillan 2011); G Black, *Woolman on Contract*, 5-6 (4<sup>th</sup> Edition, W Green 2010).

<sup>49</sup> *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Poplewell J).

A jurisdiction agreement under Article 25 must be certain in the sense that the agreed court or courts must be ascertainable.<sup>50</sup> It may be argued that asymmetric jurisdiction agreements confer discretion on where one party might bring proceedings and hence undermine the legal certainty inherent in the Recast Regulation's jurisdictional regime. However, Article 25 itself recognises non-exclusive jurisdiction agreements and uncertainty as to venue are part and parcel of such agreements.<sup>51</sup> Apart from the specific case of Article 25, the Recast Regulation clearly makes provision for allowing claimants a fettered or limited choice of venue or forum shopping.<sup>52</sup> The special jurisdiction rules under Article 7 of the Recast Regulation are based on a connection between the subject matter of the dispute and the forum and are an alternative to personal jurisdiction under Article 4 of the Regulation.

Let's consider an asymmetric jurisdiction agreement providing that proceedings may be commenced in 'any other court of competent jurisdiction' from the perspective of certainty. It is submitted that determining the court of competent jurisdiction under the clear and precisely demarcated jurisdictional rules of the Recast Regulation is not an onerous task and does not lead to wanton uncertainty. Under the Recast Regulation, the parties to the asymmetric jurisdiction agreement will be in a position to predict with reasonable clarity and certainty where they may sue and where they may be sued, thereby eliminating the element of uncertainty.

### **Form**

It might be suggested that asymmetric jurisdiction agreements are incompatible with the requirements as to form of Article 25 of the Recast Regulation. First, the objection to asymmetric jurisdiction agreements may be said to lie in their unilateral form, whereby one party assumes obligations regarding jurisdiction, while the other does not. This line of reasoning fails on two distinct grounds. On the one hand it mistakes the nature of such agreements. While they are clearly asymmetric, by giving one party alone the right to sue other than in the designated court, they are not truly unilateral in nature. Far from imposing no obligation on the beneficiary under the agreement, such agreements oblige that party to accept the jurisdiction of the designated court if sued there by the counterparty.<sup>53</sup> Even if, as is common, such agreements are expressed to be for the benefit of one party, this does not entitle that party to renounce its agreement to proceedings in the designated court.<sup>54</sup>

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<sup>50</sup> Magnus, *Article 25, supra*, 621-622; Fentiman, *International Commercial Litigation, supra*, 84; cf In the English and Scots substantive law of contract, an agreement must be expressed with sufficient certainty before it will be enforced by the courts. However, a court will attempt to give effect to commercial contracts where possible, by means of a reasonable construction of the contract. See McKendrick, *supra*, 51; Black, *supra*, 40.

<sup>51</sup> Fentiman, *Unilateral Jurisdiction Agreements in Europe, supra*, 26.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [40].

<sup>54</sup> *Lornamead Acquisitions Limited v Kapthing Bank HF* [2011] EWHC 2611 (Comm), [112].

More significantly, whatever the nature of such agreements, there is nothing in the Recast Regulation or its objectives to suggest that any asymmetry or lack of mutuality is an objection to their effectiveness. Indeed, Article 25's language clearly suggests that such concerns about form are irrelevant. Article 25 expressly demands that jurisdiction agreements be in writing, or otherwise in a form evident to the parties, but says nothing more about their permitted structure. Any wider objections to the type of jurisdiction agreements which are permissible arguably belong to the law of contract, not to the law of jurisdiction, and are irrelevant to whether a given clause is compatible with Article 25.<sup>55</sup>

Second, it might be suggested that hybrid jurisdiction agreements are incompatible with Article 25, because the Recast Regulation governs only agreements to the jurisdiction of one Member State, being limited to agreements to submit to the court or courts of that Member State. This is misconceived for two reasons. There is no reason why the parties cannot agree to the jurisdiction of the courts of more than one Member State. More importantly, such an agreement misunderstands the nature of a typical asymmetric clause. Such clauses do not purport to confer jurisdiction on the courts of more than one Member State. The only jurisdiction agreement contained in such a clause is the agreement to the jurisdiction of the designated court. Whether any court has jurisdiction depends not on agreement, but on whether any other court is otherwise competent, by reason of the defendant's domicile, or because it has subject matter jurisdiction under Article 7. The language of the former Article 17(4) of the Brussels Convention is instructive here.<sup>56</sup> It provided that where: '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'.

Third, it may be said that only an agreement which excludes the possibility of proceedings in more than one Member State is exclusive. An asymmetric agreement is therefore inevitably non-exclusive. Although no such definition is provided by the Regulation, exclusive jurisdiction agreements are thus defined by the Hague Convention:<sup>57</sup> The parties agree to 'the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts'. In the context of the Hague Convention this narrow definition serves its purpose as only exclusive jurisdiction agreements are regulated by the Convention. In the context of the Regulation, however, the effect of regarding asymmetric agreements as non-exclusive is potentially problematic. There is nothing incoherent about concluding that such agreements are non-exclusive for the purposes of Article 31(2), but intractable problems arise in the context of Article 25. Such a conclusion is inconsistent with a counterparty's clear agreement that it will sue exclusively in the designated court, and it cannot have been intended to deny such an

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<sup>55</sup> Fentiman, *Unilateral Jurisdiction Agreements in Europe*, *supra*, 26.

<sup>56</sup> See Magnus, *Article 25*, *supra*, 658-659; Layton and Mercer, *supra*, 738-739.

<sup>57</sup> Article 3(a) of the Hague Convention.

agreement exclusive effect should a counterparty sue in another court in breach of the agreement.

Arguably, the solution is to draw a distinction between a jurisdiction clause and the distinct agreements it may compromise. It is coherent to say that asymmetric clauses are to be classified as non-exclusive, insofar as they do not confine proceedings to a single court. However, such clauses contain separate exclusive and non-exclusive jurisdiction agreements, whereby the counterparty's agreement to sue in the designated court is exclusive, and the beneficiary's agreement to sue in that court is non-exclusive.

Fourth, it may be argued that Article 25 allows for the possibility that a jurisdiction agreement may be either exclusive or non-exclusive, but not both. Certainly, Article 25 describes these as alternatives, but again, it is important to distinguish jurisdiction clauses, in the sense of terms or paragraphs in a contract, from jurisdiction agreements, being the legal binding promises contained in such clauses. A jurisdiction agreement cannot logically be both exclusive and non-exclusive simultaneously, but a single clause may incorporate distinct agreements on both types.

### **Fairness**

It may be suggested that asymmetric jurisdiction agreements are incompatible with the principle of equal access to justice enshrined in Article 6 of the ECHR.<sup>58</sup> This argument supplies a means for challenging such provisions for lack of mutuality otherwise lacking in the letter and spirit of the Brussels I Regulation, but it fails to convince. First, the requirement of equal access to justice cannot realistically be applied in a manner in which each party is actually placed on an equal footing in litigation. Such an altruistic supposition is necessarily divorced from the complex realities of high value international commercial litigation where equality of arms is at best an illusion. Second, it is difficult to countenance why a freely entered into contractual agreement, in the absence of malice or bad faith by the other party, could be regarded as infringing a party's rights. In a different but related context it appears that a party which has agreed to the exclusive jurisdiction of the English courts cannot complain that its Article 6 ECHR rights are infringed if an English court grants an injunction to prevent it from suing elsewhere.<sup>59</sup> Even if Article 6 ECHR engages in the present context, it is doubtful that it can be concerned with the extent of a party's choice of jurisdiction. As has been said:

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<sup>58</sup> Article 6(1) of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950); The first sentence of Article 6(1) of the ECHR reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Schedule 1 of the Human Rights Act 1998 incorporates into UK law the rights enshrined in the ECHR; See generally, Tom Bingham, *The Rule of Law*, Chapter 9 (Allen Lane 2010).

<sup>59</sup> *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* [2001] 1 Lloyd's Rep 76, [42].

Article 6 of the ECHR does not deal at all with where the right to a fair and public hearing before an independent and impartial tribunal established by law is to be exercised by a litigant. The crucial point is that civil rights must be determined somewhere by a hearing and before a tribunal in accordance with the provisions of Article 6.<sup>60</sup>

As this implies, the principle of equality of arms enshrined in Article 6 ECHR is concerned with the position of the parties before a particular court, not whether the parties have an equal choice of court prior to selecting a forum to litigate in.<sup>61</sup> It is possible that some involuntary restriction on a party's right to litigate, such as an anti-suit injunction which denies a claimant the opportunity to sue anywhere, might infringe the requirement of access to justice.<sup>62</sup> The principle would also be infringed if the effect of limiting a party's choice of forum is to force them into a court where they would not receive substantial justice,<sup>63</sup> but in such cases it is not any lack of equality in the choice of forum which is the source of the injustice. The source of injustice is rather the determination of the party's civil rights and obligations in a court which denies them a fair, just and impartial hearing resulting in a miscarriage of justice.

### **Interim Conclusions**

Building on the arguments above, principle suggests that unilateral or asymmetric non-exclusive jurisdiction agreements are compatible with Article 25 of the Recast Regulation. These are agreements whereby the parties agree to the jurisdiction of a given court, but one party alone has the right to sue in any other court of competent jurisdiction. Thus, one party submits to the exclusive jurisdiction of a given court, whereas the other party submits to that court's non-exclusive jurisdiction. Such provisions are a type of non-exclusive jurisdiction agreement, which are expressly permitted by Article 25.

Notwithstanding any arguments regarding the compatibility of an asymmetric non-exclusive jurisdiction agreement with Article 25, the potential for torpedo actions impugning the validity of such agreements in the wake of *Rothschild* and *ICH v Crédit Suisse* cannot be ruled out. However, the ruling in *Apple Sales International v eBizcuss* indicates a possible change in the French Supreme Court's attitude towards such clauses and arguably reduces the litigation risk arising from pre-emptive proceedings challenging the validity of an English asymmetric jurisdiction agreement. Whether any subsequent proceedings in the English courts will trigger Article 31(2) of the Recast Regulation is uncertain at the moment. However, it has been argued that the borrower in an international finance agreement is

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<sup>60</sup> Ibid.

<sup>61</sup> *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Popplewell J).

<sup>62</sup> *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* [2001] 1 Lloyd's Rep 76, [42].

<sup>63</sup> ECHR, 27 October 1993, *Dombo Beheer BV v Netherlands*, [33]; ECHR, 23 October 1996, *Ankerl v Switzerland*, [38]; *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43] (Popplewell J).

obliged to litigate in the primary forum and thus the jurisdiction agreement is exclusive in a sense. Hence, proceedings in the primary forum in response to the commencement of a torpedo action by the borrower should in principle be able to rely on Article 31(2).<sup>64</sup> In the event that Article 31(2) cannot be invoked or even otherwise, seeking damages for breach of the asymmetric jurisdiction agreement in the English courts may compensate the aggrieved party.<sup>65</sup> Thus, the common law's pragmatic damages remedy may be revitalized by augmenting the procedural mechanisms for the enforcement of jurisdiction agreements in the Recast Regulation.

From a systemic perspective, a future reference to the CJEU concerning the validity of such agreements may help clarify the waters muddied by the decisions of the Cour de Cassation in *Rothschild* and *ICH v Crédit Suisse*.<sup>66</sup> A positive development which may ameliorate the litigation risk created by the rulings in *Rothschild* and *ICH v Credit Suisse* is the incorporation of a new choice of law rule in Article 25 of the Recast Regulation which refers the substantive validity of a jurisdiction agreement to the law of the selected forum including its private international law rules. This will mean that the courts of any Member State seised with a dispute will refer the substantive validity of an asymmetric jurisdiction agreement to the law of the selected forum and that such agreements shall be valid, if valid under the *lex fori prorogatum*. The argument that the compatibility of asymmetric jurisdiction agreements with Article 25 is an issue of the scope of an 'agreement' governed by an autonomous interpretation of Article 25 of the Recast Regulation has also been explored. A clarification of the position by a CJEU decision would be most welcome.

### **Effectiveness of Asymmetric Jurisdiction Agreements and Article 23 of the Brussels I Regulation**

Jurisdiction agreements in disputes commenced before 10 January 2015 are subject to Article 23 of the Brussels I Regulation, if one party is domiciled in an EU Member State. The effect of asymmetric jurisdiction agreements is in principle the same as under Article 25 of the Recast Regulation, with the important exception that Article 23 makes no explicit

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<sup>64</sup> I Bergson, *The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union*, 11 *Journal of Private International Law* 1, 22 (2015).

<sup>65</sup> See *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010, [15]-[17] (Longmore LJ); Longmore LJ's landmark ruling on the compatibility of an award of damages for breach of an English exclusive choice of court agreement with EU law was endorsed and reiterated in *Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft MbH v AMT Futures Ltd* [2015] EWCA Civ 143, [61]-[62] (Christopher Clarke LJ); See also, M Ahmed, *The enforcement of settlement and jurisdiction agreements and parallel proceedings in the European Union: The Alexandros T litigation in the English courts*, 11 *Journal of Private International Law* 406, 433-439 (2015); cf In Case C-159/02 *Turner v Grovit* [2004] ECR I-3565 and then Case C-185/07 *West Tankers Inc v Allianz SpA* [2009] ECR I-00663, the CJEU held that the traditional legal technique used by the English courts to prevent a party from commencing or continuing proceedings in breach of a jurisdiction or arbitration agreement, the anti-suit injunction, could not be granted in circumstances in which the foreign proceedings are before the courts of another EU Member State and are within the scope of the Brussels I Regulation.

<sup>66</sup> Beale and Clayson, *supra*, 466.

reference to the law governing the substantive validity of jurisdiction agreements. The law governing the substantive validity of a jurisdiction agreement is therefore a controversial issue under the Brussels I Regulation.<sup>67</sup>

It is possible that the conditions of validity stipulated by Article 23 are complete and that a jurisdiction agreement is enforceable merely if the requirements of consensus, form and certainty are satisfied. The alternative is that substantive validity of such an agreement is within the remit of national law, with the effect that the law governing the agreement regulates such matters as the vitiation of consent by reason of fraud, duress or mistake. The English courts have accepted that no reference to national law is possible.<sup>68</sup> However, this view is not the norm elsewhere<sup>69</sup> and the opposite view has been adopted in some EU Member States.<sup>70</sup> Some Member States apply the law of the forum and others the law governing the contract.<sup>71</sup>

If Article 23 is an autonomous regime, not subject to national law, the issue of substantive validity becomes irrelevant and leaves asymmetric agreements to be decided by reference to considerations of form, certainty and fairness. Insofar as substantive validity is subject to national law, their validity is a matter for that law, exposing such agreements to the risk of invalidity depending on the content of that law. Such agreements would be valid, therefore, in an English court, in a contract governed by English law.

### **Effectiveness of Asymmetric Jurisdiction Agreements Subject to National Law**

Under Article 23 of the Brussels I Regulation, national law governs the prorogative effect of agreements to the jurisdiction of EU Member State courts, neither party to which is EU domiciled.<sup>72</sup> However, Article 23 precludes any Member State court but the designated court from exercising jurisdiction unless the designated court has itself declined jurisdiction.<sup>73</sup> The effect is that an English court will apply the doctrine of the 'proper law' of the contract to determine the validity and effect of an asymmetric jurisdiction agreement where England is the primary forum and both parties are non EU domicillaries.<sup>74</sup> Such an agreement would be valid if it is valid according to the proper law of the choice of court

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<sup>67</sup> B Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* 91-92 (München, Verlag CH Beck 2008). ('Heidelberg Report')

<sup>68</sup> *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [65].

<sup>69</sup> U Magnus, *Article 23* in U Magnus and P Mankowski (eds.), *Brussels I Regulation*, 477 (2<sup>nd</sup> Edition, Sellier 2012), citing a number of German authorities.

<sup>70</sup> Heidelberg Report, *supra*, 92.

<sup>71</sup> *Ibid.*

<sup>72</sup> Article 23(1) of the Brussels I Regulation.

<sup>73</sup> Article 23(3) of the Brussels I Regulation; The derogative effect of a jurisdiction agreement selecting the courts of a Member State concluded by non EU domiciliaries is regulated by the Brussels I Regulation.

<sup>74</sup> Choice of court agreements are excluded from the scope of the Rome I Regulation; See Article 1(2)(e) of Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L/2008/177/6.

agreement, which is quite often the applicable law of the substantive contract.<sup>75</sup> As a result, the asymmetric jurisdiction agreement should be valid if the *lex causae* of the substantive contract is English law.

### **Asymmetric Jurisdiction Agreements, Article 31(2) of the Recast Regulation and the Damages Remedy for Breach of Choice of Court Agreements**

The Brussels I Regulation (Recast) aims to augment jurisdictional party autonomy in the EU by means of an overriding 'reverse *lis pendens* rule'<sup>76</sup> which accords priority to proceedings in the court chosen in an exclusive choice of court agreement and requires any other Member State court seised to stay proceedings and ultimately decline jurisdiction.<sup>77</sup> However, Article 31(2) of the Recast Regulation applies only to exclusive jurisdiction agreements and does not apply where the parties seek to confer non-exclusive jurisdiction on the courts of a Member State.<sup>78</sup> Significantly in practice, this may have the effect that an asymmetric jurisdiction agreement, of the type frequently encountered in cross border finance transactions, is not caught by Article 31(2). If such agreements are not protected by Article 31(2), there remains the potential for a party to an asymmetric jurisdiction agreement to disable the agreement by launching a pre-emptive strike in its preferred court. Suppose that A and B agree to the jurisdiction of the English courts. A alone has the right to sue in any other court of competent jurisdiction. B must sue exclusively in England. B launches a pre-emptive strike in France and A replies by suing in England. The question is whether Article 31(2) is engaged or does *Gasser* and the court first seised rule still prevent A from relying on the agreement.<sup>79</sup>

In principle, such hybrid agreements are exclusive against a counterparty, but non-exclusive for the benefit of the beneficiary under the clause. This suggests that Article 31(2) should engage if the counterparty brings proceedings other than in the designated court in breach of its promise to sue only in that court,<sup>80</sup> but whether such hybrid agreements are subject to

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<sup>75</sup> See Collins, *Dicey, Morris and Collins on the Conflict of Laws*, *supra*, Chapter 12, 603-604; Joseph, *supra*, 182; A Briggs, *The Conflict of Laws*, 231 (3<sup>rd</sup> Edition, OUP 2013); See *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638, [2012] 1 All ER (Comm) 795.

<sup>76</sup> Hartley, *Choice-of-Court Agreements under the European and International Instruments*, *supra*, 228, [11.17]; TC Hartley, *Choice-of-court agreements and the new Brussels I Regulation*, 129 *Law Quarterly Review* 309, 312 (2013).

<sup>77</sup> Articles 31(2)-(3) and Recital 22 of the Recast Regulation.

<sup>78</sup> See T Ratkovic' and D Zgrabljic' Rotar, *Choice-of-Court Agreements under the Brussels I Regulation (Recast)*, 9 *Journal of Private International Law* 245, 261-263 (2013); Hartley, *Choice-of-Court Agreements and the New Brussels I Regulation*, *supra*, 312; Hartley, *Choice of Court Agreements under the European and International Instruments*, *supra*, 228; Crawford and Carruthers, *supra*, 181.

<sup>79</sup> See Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693; cf Article 31(2) of the Recast Regulation has effectively reversed the CJEU ruling in *Gasser* but the exclusion of non-exclusive jurisdiction agreements from the scope of Article 31(2) may render such agreements susceptible to the very same torpedo tactics that had acquired notoriety under Article 27 of the Brussels I Regulation.

<sup>80</sup> An asymmetric jurisdiction agreement has been held to be exclusive for the borrower in an international loan agreement by the English Court of Appeal in a leading case governed by the Brussels Convention: *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA) (Steyn LJ); *Mauritius*

Article 31(2) is problematic.<sup>81</sup> An elementary difficulty, going beyond the effect of Article 31(2), is that such hybrid clauses may be ineffective and invalid under the Regulation.<sup>82</sup> If such agreements are in principle compatible with the Regulation, their status under Article 31(2) depends on how the matter is characterized. Arguably, the nature of the agreement is a matter concerning the interpretation of the clause, and therefore a matter for the national law of the forum.<sup>83</sup> Therefore, the effect of such a clause would vary and depend on which law the forum applies to that question.<sup>84</sup> An asymmetric jurisdiction agreement might not be regarded as exclusive against a counterparty in some legal systems, perhaps because under the law governing the agreement only mutually exclusive agreements are regarded as exclusive. However, such an agreement would be regarded as exclusive against a counterparty where the law governing the contract is English law.<sup>85</sup> Therefore, Article 31(2) would apply as the agreement would be treated as an exclusive jurisdiction agreement and the provision would prevent a counterparty from suing in a forum other than the designated court.

Notwithstanding any arguments premised on preserving the practice of the English courts in relation to asymmetric jurisdiction agreements, it has been argued that the language of Article 31(2) (construed in association with Recital 22) limits its application to those agreements which confer exclusive jurisdiction *simpliciter*.<sup>86</sup> The definition of an exclusive choice of court agreement in Article 3(a) of the Hague Convention on Choice of Court Agreements may serve as a guide considering the fact that the Convention is in force in all the Member States of the EU (except Denmark):<sup>87</sup>

“exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the

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*Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm) (Poplewell J).

<sup>81</sup> Fentiman, *International Commercial Litigation*, *supra*, 101; F Garcimartin, *Chapter 11 – Article 31(2)-(4)* in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast*, 341 (OUP 2015); Bergson, *The Death of the Torpedo Action?*, *supra*, 22.

<sup>82</sup> Two significant French Supreme Court decisions have invalidated asymmetric jurisdiction agreements under Article 23 of the Brussels I Regulation and Article 23 of the Lugano Convention respectively: See *Ms X v Banque Privee Edmond de Rothschild Europe (Societe)* Cass civ, 1ere, 26.9.2012, No 11-26.022, [2013] ILPr 12; *ICH (Societe) v Credit Suisse (Societe)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39; cf In *Apple Sales International v eBizcuss* Cass. 1ere Civ, 7.10.2015, No. 14-16.898, the French Supreme Court has validated an asymmetric jurisdiction agreement under Article 23 of the Brussels I Regulation because the courts possessing jurisdiction were objectively identifiable; The CJEU’s position on this matter is unclear and the Recast Regulation has not endeavoured to clarify the status of these clauses in the EU law of international civil procedure.

<sup>83</sup> Case C-214/89 *Powell Duffryn plc v Wolfgang Peterit* [1992] ECR I-1745 [35]-[36]; Layton and Mercer, *supra*, 706.

<sup>84</sup> See R Fentiman, *Article 31* in U Magnus and P Mankowski (eds.), *Brussels Ibis Regulation*, 753 (Köln, Verlag Dr Otto Schmidt 2016).

<sup>85</sup> An English court would determine the effect of the agreement by reference to the ‘proper law’ of the choice of court agreement which is usually the applicable law of the host (substantive) contract. See FN 75 above.

<sup>86</sup> See Magnus, *Gerichtsstandsvereinbarungen unter der reformierten EuGVO*, *supra*, 799; Neilson, *supra*, 521.

<sup>87</sup> Emphasis added.

purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, *the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts*

Therefore, under an autonomous interpretation of exclusive jurisdiction agreements only mutually exclusive jurisdiction agreements would benefit from the exception to the general rule on *lis pendens*.<sup>88</sup>

If it is determined that asymmetric jurisdiction agreements fall outside the protective cover of Article 31(2) and pre-emptive proceedings are commenced by the borrower in breach of his obligation to sue exclusively in the English courts, an action in damages for breach of contract may both act as an effective deterrent and respond to the actual breach by compensating the aggrieved financial institution in relation to the costs and expenses of litigating in the foreign forum.<sup>89</sup> On the other hand, even if asymmetric jurisdiction agreements are deemed to be exclusive jurisdiction agreements for the purposes of Article 31(2), the aggrieved party may nevertheless elect not to commence protective proceedings in the contractual forum and instead rely on the damages remedy to compensate for the breach of the choice of court agreement.<sup>90</sup> However, it should be noted that the availability of damages in the latter case is speculative and might not be permitted by the CJEU because the party relying on the jurisdiction agreement has failed to take advantage of the systemic solution provided by the Recast Regulation of seising the chosen court before the court first seised has adjudicated on the applicability and validity of the jurisdiction agreement.

## Conclusions

The decisions of the French Cour de Cassation in the *Rothschild* and *ICH v Crédit Suisse* cases have effectively increased both the venue and enforcement risk arising from asymmetric jurisdiction agreements in the EU.<sup>91</sup> However, the ruling in *Apple Sales International v Ebyzuss* indicates a possible change in the attitude of the French Supreme Court towards such clauses as the judicial reasoning in this latter decision was focused on the requirement of predictability rather than the *potestative* nature of the clause requiring a strict mutuality of terms. Nonetheless, the certainty and predictability fostered by a dispute resolution agreement frequently encountered in international finance agreements has been undermined. Moreover, the incidence of torpedo actions challenging the validity and effectiveness of asymmetric jurisdiction agreements may have been implicitly encouraged.

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<sup>88</sup> Garcimartin, *Chapter 11 – Article 31(2)-(4)*, *supra*, 341.

<sup>89</sup> See *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010, [15]-[17] (Longmore LJ).

<sup>90</sup> Fentiman, *International Commercial Litigation*, *supra*, 98, suggests that the option of invoking the protective cover of Article 31(2) may be substituted by the secondary enforcement of choice of court agreements via the damages remedy. However, he notes that the availability of damages in such cases is ‘problematic’.

<sup>91</sup> *Ibid* 6-7: ‘Venue risk’ is a species of ‘litigation risk’ which arises when a party is required to initiate or defend proceedings in an unfavourable forum; See FN 23 above for a definition of ‘enforcement risk’.

The potential for challenges to the validity of such agreements are made even more enticing by a literal reading of Article 31(2) of the Recast Regulation which excludes from its scope non-exclusive jurisdiction agreements including presumably the obligation that binds one party to the asymmetric agreement to sue exclusively in England. These observations suggest that agreements which differ from the standard model of an exclusive jurisdiction agreement should be used with caution in practice.<sup>92</sup> From the perspective of the ready availability of cost effective finance, any decision which undermines a creditor's ability to enforce its rights threatens to increase the price of finance, so prejudicing those debtors whose interests the Cour de cassation apparently sought to protect.<sup>93</sup>

However, it has been argued that asymmetric jurisdiction agreements are in principle effective under Article 25 of the Recast Regulation from the perspectives of validity, certainty, form and fairness. The referral of issues of substantive validity to the law of the chosen forum including its private international law rules will mean that an impugned English choice of court agreement before the English courts will be valid as such agreements are held to be valid under English law. The incorporation of a choice of law rule governing material validity in Article 25 will mean that the substantive validity of an English asymmetric choice of court agreement before the courts of another EU Member State will also be subject to English law. As a result, the negative repercussions of the French Cour de Cassation's rulings in the *Rothschild* and *ICH v Crédit Suisse* cases should hopefully be ameliorated by Article 25 of the Recast Regulation. The argument that the compatibility of asymmetric jurisdiction agreements with Article 25 is an issue of the scope of an 'agreement' governed by an autonomous interpretation of the choice of court agreement provision also leads to the conclusion that such clauses are reconcilable with Article 25.

The interpretative extension of the protective cover of Article 31(2) of the Recast Regulation to asymmetric jurisdiction agreements may mean that proceedings in the English courts will trigger a stay of proceedings in a court seised in another EU Member State. However, in the more likely event that Article 31(2) is limited to mutually exclusive jurisdiction agreements and torpedo proceedings have been commenced in the courts of another EU Member State to impugn the validity of the English asymmetric jurisdiction agreement, it is still possible to claim damages for breach of the English choice of court agreement and recover the costs and expenses of litigating in the foreign forum. Notwithstanding the inapplicability of Article 31(2) of the Recast Regulation, the new choice of law rule referring issues of material validity to the *lex fori prorogatum* should also help reduce venue risk by obliging the Member State court seised to channel the determination of the substantive validity of the

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<sup>92</sup> The Loan Market Association issued a memo in January 2013 warning of the risks now associated with the use of one-way jurisdiction clauses in lending documentation, and advised its members of alternative approaches which might be taken. See 'Decision of the Cour de cassation in Mme X v Rothschild and jurisdiction clauses in LMA facility documentation' (January 24, 2013).

<sup>93</sup> Fentiman, *Unilateral Jurisdiction Agreements in Europe*, *supra*, 27.

English asymmetric choice of court agreement to English law which clearly recognizes such agreements.

In the course of this article, the pragmatic approach of the English courts focused on the enforcement of the obligations undertaken by the contracting parties in an asymmetric jurisdiction agreement has been preferred to the French methodology which has favoured a strict mutuality of terms in a contract. Ultimately, we are dealing with a clash of underlying legal ideologies where an emphasis on the facilitation of the creditor and business efficacy has to be balanced with questions over the legitimacy of consent and concerns about unequal bargaining power.<sup>94</sup> The line drawn by a legal system on this ideological scale will vary but the English legal system's underlying emphasis on the freedom and sanctity of contract has confirmed its position as an enforcer of the rights and obligations of the parties to the asymmetric jurisdiction agreement. The decision in *Apple Sales International v Ebizcuss* demonstrates that the French Cour de cassation may be changing course by jettisoning the requirement of strict mutuality of terms (*potestative*) and replacing it with an objective assessment of the criteria identifying the courts possessing jurisdiction.

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<sup>94</sup> JN Adams and R Brownsword, *The Ideologies of Contract*, 7 *Legal Studies* 205 (1987), seek to provide an interpretative framework where the ideologies of 'Market Individualism' and 'Consumer Welfarism' inform contract law. A strict requirement of mutuality in contractual terms and the invalidity of *potestative* clauses may be considered to be examples of a stronger consumer welfarist strand in French contract law. On the other hand, the pragmatic and pro-enforcement approach of the English courts may be best reconciled by reference to the ideology of market individualism.