

VALIDITY OF CHOICE OF COURT AGREEMENTS, ABUSIVE TERMS IN AIR CARRIAGE CONTRACTS, ASSIGNMENTS AND COMPENSATION, IS THERE ROOM FOR ANYONE ELSE? (COMMENTS ON CJEU JUDGMENT DELAYFIX, C-519/19)

VALIDEZ DE CLÁUSULAS DE ELECCIÓN DE FORO, CLÁUSULAS ABUSIVAS EN CONTRATOS DE TRANSPORTE DE PASAJEROS AÉREOS Y CESIÓN DE CRÉDITOS: ¿DÓNDE CABEN DOS, CABEN TRES? (COMENTARIOS A LA STJUE DELAYFIX, C-519/19)

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**Abstract:** In *Delayfix* case, the Court of Justice of the European Union (CJEU) has interpreted the formal and substantive validity of a “choice of court agreement” included in an air carriage of passenger’s contract. But, for the first time, the CJEU has openly declared the unfair nature of these choice of court agreements, not only for the passengers, but also for third parties assigned by them. In opposition with former case law on the effects of a choice of court agreement for assignees. In carriage of passengers’ contracts, third parties are usually agencies devoted to the defense of air passenger rights and collection of credits who claim for the compensation rights in accordance with the rights conferred by Regulation 261/2004. From the EU Private International Law approach, the preliminary ruling is of interest, being the Brussels I *bis* regulation the instrument for clarifying whether this choice of court agreement should be deemed as enforceable or not, regarding the requirements of Article 25 Brussels I *bis* due to these contracts are not considered as consumer contracts. To the analysis of the merits and substantive law, contrarily than under EU Private International law rules these contracts are considered as *Business to consumer* (B2C) contracts, and Directive 93/13/CEE and other EU Consumer rules must be applied so as to determine the unfair nature of these clauses in these contracts.

**Key words:** B2C contracts, passenger, consumer, professional, assignment, passengers’ rights, choice of court agreements, consent, substantial validity, *lex fori prorogatio*, renvoi, air carriage contracts, weaker party, abusive terms, assignee, assignment, Brussels I *bis* regulation, Regulation 261/2004, Directive 93/13, asymmetric clauses.

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**Resumen:** En el asunto *Delayfix*, se traen a colación ante el Tribunal de Justicia de la Unión Europea (TJUE) aspectos relevantes sobre la validez formal y material de las cláusulas de elección de foro, establecidas en contratos celebrados entre pasajeros y compañías áreas. En este supuesto, los derechos de compensación del pasajero otorgados por el Reglamento 261/2004, se ceden a una tercera empresa encargada de gestionar el cobro. Estos terceros, son agencias especializadas que representan los intereses de los pasajeros (“consumidores”). Lo que se analiza es si la cláusula de elección de foro es válida o no, de conformidad con los requisitos del artículo 25 del Reglamento Bruselas I *bis*. No sólo para el pasajero sino también para estas agencias que se subrogan en el crédito. A pesar de que estos contratos están excluidos de la protección que las normas de Derecho internacional privado europeo otorgan a los contratos de consumidores. En lo que se refiere a los aspectos de Derecho sustantivo, el carácter abusivo de la cláusula y por ser considerados contratos de consumo desde este acervo de normas, a pesar de no serlo en las normas de DIPr europeo, se atiende a lo dispuesto en la Directiva 93/13/CEE y a otras normas del Derecho europeo de consumo sustantivo.

**Palabras clave:** contratos *B2C*, pasajeros, consumidor, profesional, cesión de créditos, cláusulas de elección de foro, validez material, *lex fori prorrogatio*, reenvío, contratos de transporte aéreo, *B2C*, consumidores, pasajeros, cláusulas abusivas, cesionario, Bruselas I *bis*, Reglamento 261/2004, Directiva 13/93, cláusulas asimétricas.

**Summary:** I. The Preliminary ruling C-591/19, *Delayfix vs. Ryanair*: A) Overview of the merits: B) Facts; II. Aspects of Jurisdiction under Brussels I *bis* Regulation: 1. Choice of Court Agreements and air carriage of passenger’s contracts: *Minding the Gap* between passengers and consumers: A) Features of carriage of passengers’ contracts under EU PIL rules; B) Inclusion of choice of court agreements as a “common practice”: 2. Scope of the Choice of courts agreements: 2.1. An european concept of the Brussels I *bis* Regulation linked with the party autonomy of the parties; 2.2. Third parties at stake: 3. Validity assessment of the Choice of Court Agreements under Article 25 Brussels I *bis* Regulation; 3.1. Formal validity: the “consent” of the parties: 3.2. Substantive validity: *lex fori prorrogatio*?; III. EU Consumer protection law and its Interplay with the Brussels I *bis* Regulation: 1. Passengers as consumers-weaker parties and the UCTD implementation for carriage of passenger’s contracts: 2. Other considerations on the substantive law to the assignment of credits; IV. Final Remarks.

## I. Preliminary remarks and ruling C-591/19, *Delayfix vs. Ryanair*

### 1. Overview of the merits

1. *Delayfix vs Ryanair* case is one of these preliminary rulings that should not go unnoticed for many reasons, namely for the influence that will have in the passenger’s protection and for the effects of the choice of court agreements for third parties in certain assignments<sup>1</sup>. Likewise, it must be said that on the validity and unfairness of this choice of court agreements included in carriage of passengers’ contracts, there was no former CJEU case law or precedent hitherto.

Still, there are domestic precedents of some Member States courts, such as of Spain, Belgium and of Poland, which coincide partially on the merits, being the air company in the spotlight the same to all these cases: *Ryanair*. This case-law is worthy to be analysed in comparison to *Delayfix* with some caveats regarding the features of the whole case, and to figure out what is actually beneath its wording.

2. Concerning the effects of the choice of court agreement on third parties assigned by the passenger-creditor, only the Belgian case matches with the CJEU *Delayfix* reasoning, insofar the case

<sup>1</sup> Case C-591/19 (First Chamber), *Delayfix v Ryanair*, of 18 November 2020 (text rectified by order of 13 January 2021) (ECLI:EU:C:2020:933); V. CUARTERO RUBIO, “Cuando el consumidor-pasajero” es una empresa de gestión de cobros y la cláusula atributiva de Competencia judicial internacional es abusiva (Asunto *DelayFix*, C-519/19)”, *Centro de Estudios de Consumo, Publicaciones jurídicas*, pp. 1-6.

was related to an assignment performed among a passenger and a Belgian collection agency in defense of consumers rights<sup>2</sup>. The Spanish case is not related to the validity for third parties or assignees of the creditors-passengers<sup>3</sup>, as it will be analyzed again. However, all these National courts resolutions upheld that these “choice of court agreements” are null and void as well as unfair for the passengers-consumers, in spite of the exclusion of the “B2C” carriage contracts under EU Private International Law (hereinafter, EU PIL). And all these judgements, in the same vein, declared the unfair nature of these clauses according to the EU consumer substantive law.

3. By far, this judgment has been criticized by some Scholars specialized in EU PIL, considering some of its flaws in the interpretation of the requirements of Article 25 of Brussels *bis* Regulation<sup>4</sup>, insofar the particularities of the case. For instance, critics have been launched to the CJEU interpretation, for being vague in the analysis of the type of contract, the nullity and the unfairness of the choice of court agreement as an alleged “exclusive choice of court clause” for the passenger from the EU PIL rules. Also, relating to the problem of the *renvoi* in connection with the *lex fori prorogatio* for the assessment of the substantive validity of the jurisdictional clause<sup>5</sup>. Even, in the unclear interpretation of the law to perform the assignment between the passenger and the collection agency and so on. Therefore, *Delayfix* goes through many topics of great interest.

## 2. Facts

4. *Delayfix (former Passenger Rights)* is a Polish agency specialized in the protection of air passengers’ rights and the collection of their credits. It is based in Warsaw (Poland). In the same city, *Delayfix* (the assignee) brought cross-border actions before the Courts, against *Ryanair* (the debtor), an Irish air company based in Ireland. *Delayfix* sought for compensation as the successor of the passenger (creditor) who assigned his credit of 250 euros, -due to a cancellation of the flight operated by *Ryanair*-, under the provisions of Regulation 261/2004<sup>6</sup>.

5. The legal representative of *Ryanair* filed a plea considering the Polish Court (District Court of Warsaw) was not internationally competent to hear the case due to the “choice of court agreement” included in the Standard terms of its contract with the passenger. *Ryanair* argued that *Delayfix* was not entitled of the same rights attributed to the passengers, under EU Consumer law, being the “contested” jurisdictional

<sup>2</sup> Belgian Supreme Court, *Happy Flights vs. Ryanair*, case c. 18.0354. 30 May 2018 (ECLI:BE:CASS:2019:ARR.20190208.5), available only in Dutch at: <https://juportal.be/content/ECLI:BE:CASS:2019:ARR.20190208.5>; G. V. CALSTER, “*Happy Flights v. Ryanair. Belgian Supreme Court* (only) confirms proper *lex causae* of choice of court under Article 25 Brussels Ia”, *GAVC LA-GEERT VAN CALSTER Blog*, 11 March 2019, available at: <https://gavclaw.com/2019/03/11/happy-flights-v-ryanair-belgian-supreme-court-only-confirms-proper-lex-causae-for-validity-of-choice-of-court-under-article-25-brussels-ia/>

<sup>3</sup> See, C. ORÓ MARTÍNEZ, “Unfair Terms in Low Cost Airline Contracts: A Spanish Court Takes a Bold Step”, *Conflict of Laws*, November 2017, available at: <http://conflictoflaws.net/2013/unfair-terms-in-low-cost-airline-contracts-a-spanish-court-takes-a-bold-step/>; Judgment of Commercial Court of Madrid n°5, 30 September 2013, SJM M 380/2013 (ECLI:ES:2013:380); C.I. CORDERO ALVÁREZ, “Contratos internacionales de consumo: eficacia de las cláusulas de jurisdicción y ley aplicable incorporadas en condiciones generales”, *REDI*, vol. LXVI, n°1, 2014, pp. 281-284; *id.* “Cuestiones de competencia. judicial internacional en el ejercicio del derecho de compensación de los pasajeros en el transporte aéreo en la Unión Europea”, *La Ley Mercantil*, n°49, 2018, pp.1-20.

<sup>4</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJL* 351 (recast).

<sup>5</sup> G. V. CALSTER, “*Ryanair v. DelayFix*. The CJEU dots some is on choice of court and unfair term in unfair consumer contracts: defers to national law on the assignment issue; and keeps schtum on *renvoi* in Article 25 Brussels Ia”, *GAVC LA-GEERT VAN CALSTER Blog*, 19 November 2020, available at: <https://gavclaw.com/?s=delayfix> ; on the negative effects for choice of court agreements as stated under Brussels I *bis* Regulation, M. LEHMANN, “CJEU Significantly Weakens Jurisdiction Clauses in Case of Assignment”, *EAPIL*, 30 November 2020, available at: <https://eapil.org/2020/11/30/cjeu-significantly-weakens-jurisdiction-clauses-in-case-of-assignment/>

<sup>6</sup> Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (ECC) No 295/91, *OJ*, L46/1.

clause enforceable to the assignee (according to the *lex fori prorogati*). The District Court rejected the plea stating the unfair nature of this choice of court agreement in accordance with the provisions of Directive 93/13/EEC (hereafter, the UCTD<sup>7</sup>) and following former Polish case law of the Supreme Court<sup>8</sup>.

In addition, the Polish court estimated the assignment duly performed under the Polish law of credits (Polish Civil Code)<sup>9</sup>. After this resolution of the District Court, Ryanair appealed before the Regional Court of Warsaw (Commercial Appeals Division N 23) that decided to stay the proceedings to submit in accordance with the Article 267 of the TFEU a preliminary ruling with a single question:

“Should Articles 2(b), 3(1) and (2) and 6(1) of Directive 93/13....and Article 25 of Regulation (No 1215/2012), as regards examination of the validity of an agreement conferring jurisdiction, be interpreted as meaning that the final purchaser of a claim acquired by way of assignment from a consumer, which final purchaser is not a consumer himself, may rely on the absence of individual negotiation of contractual terms and on unfair contractual terms arising from a jurisdiction clause”.

## II. Aspects of Jurisdiction under Brussels I bis Regulation

### 1. Choice of court agreements and air carriage of passenger’s contracts: *Minding the Gap between passengers and consumers*

#### A) Features of carriage of passengers ‘contracts under EU PIL rules

6. To understand the particularities of this case (furthermore: to understand the critics the CJEU *Delayfix* interpretation has received), one should depart from succinctly recalling that a *Business to consumer contract* (B2C) entered into a passenger and a transporter is excluded of the jurisdiction rules on consumers protection of the Brussels I bis Regulation (Chapter II, Section 4).

As laid down in Article 17 (3) Brussels I bis Regulation: “*This Section shall not apply to a contract of transport other than a contract which, for inclusive price, provides for a combination of travel and accommodation*”<sup>10</sup>. This legal treatment is at odds with the treatment these contracts receive under the EU substantive consumer law as it will be further explained under Section III<sup>11</sup>.

<sup>7</sup> Council Directive 93/13/EEC, of 5 April 1993 on unfair terms in consumer contracts, *OJ L 95*, amended through Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC, and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L 304*, 2011 (*Omnibus Directive*).

<sup>8</sup> Case C-519/19 par 18 (operative part); “(...) *the unfairness of a term of a contract could be established in the context of the assessment of a claim for damages brought against a liable person by a professional party who has acquired the claim of a consumer*”.

<sup>9</sup> Polish Civil Code, para 509: “(1) *A creditor may, without the consent of the debtor, assign a claim to a third party (transfer), save where this could be contrary to the law, a contractual stipulation or a characteristic of the obligation: (2) All rights associated with the claim, in particular any claim to arrears of interest, are transferred together with the claim*”.

<sup>10</sup> Z. S. TANG, “Aviation jurisdiction and protection of passengers”, 2010, available at: [https://www.researchgate.net/publication/255725642\\_Aviation\\_Jurisdiction\\_and\\_Protection\\_of\\_Passengers/references](https://www.researchgate.net/publication/255725642_Aviation_Jurisdiction_and_Protection_of_Passengers/references); A. HERNÁNDEZ RODRÍGUEZ, “El contrato de transporte aéreo de pasajeros: algunas consideraciones de Competencia judicial internacional y Derecho aplicable”, *CDT*, Vol. 3, nº1, 2011, pp.179-194; A.-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, Vol. II, 16<sup>a</sup> ed., 2016, p. 1108 *et seq.*; F.J. GARCIMARTÍN ALFÉREZ, *Derecho Internacional Privado*, 5<sup>a</sup>ed., Thomson Reuters, 2019, p. 129; CECU, “La protección del consumidor en el transporte aéreo”, *CECU (Confederación estatal de Consumidores y Usuarios)*, 2009, available at: [https://cecu.es/publicaciones/INC09\\_transaereo.pdf](https://cecu.es/publicaciones/INC09_transaereo.pdf); P. MAESTRE CASAS, “El pasajero aéreo desprotegido: Obstáculos a la tutela judicial en litigios transfronterizos por incumplimientos de las compañías aéreas (A propósito de la STJUE de 9 de julio 2009, *Rehder*, As. C-204/08)”, *CDT*, vol. 3, nº2, 2011, pp. 282-303; E. ALVÁREZ ARMAS & M. DECHAMPS, “Le droit international privé et la protection des passagers : l’articulation des sources européennes et internationales », *REDC*, 2012, pp. 749-777; C. TWIGG-FLESNER, *A Cross-Border Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law*, Springer Brief, 2012, pp. 1-77.

<sup>11</sup> J. VALANT, “Consumer protection in the EU”, *European Parliamentary Research Service (EPRS)*, 2015, disponible en: [ei.pitt.edu/96092/1/consumer.1.pdf](http://ei.pitt.edu/96092/1/consumer.1.pdf), esp. p. 6; J. HILL, *Cross Border Consumer Contracts*, Oxford University Press, 2008, p. 126 *et seq.*; X. MARINÉZ DE OLIVEIRA, “El contrato de transporte de personas como contrato de adhesión”, *Direito e Democracia*, Vol. 12, Nº1, 2011, pp. 153-158.

7. Hence, under the EU PIL civil and commercial rules on Jurisdiction and applicable law<sup>12</sup>, these contracts shall be regarded as a “kind” of services provision contracts. As a consequence, -as established for the jurisdiction hierarchy disposed by the Brussels I *bis* Regulation-, general (Article 4) and special jurisdiction fora (Article 7.1 (b)) will apply to solve any claim that can arise out among the passengers and the carriers, in the absence of any choice of court agreement in the contract. Besides, as these contracts are not considered as B2C contracts under these rules, companies have been allowed to include such as choice of court agreements, and choice of law agreements.

## B) Inclusion of “choice of court agreements” as a “common” practice

8. Choice of court agreements in air carriage of passengers’ contracts are frequently included in the Standard terms by the carriers or transporters. *A priori*, as was explained under Section 1.1, this practice is regarded as a correct practice permitted to the air companies<sup>13</sup>. Moreover, as TANG distinguishes<sup>14</sup>, air companies have been including *non-exclusive* choice of court agreements, in line with the solution of other international instruments which also covers passengers’ contracts and jurisdiction rules, *viz.*, Montreal Convention<sup>15</sup>.

9. It seems that *non-exclusive* agreements are more respectful with the party in an asymmetric position to bargain (i.e.: passengers). These jurisdictional clauses do not impede to litigate in other different Courts from the previously seized by the air companies, unlike the exclusive’s ones. Therefore, air companies, at least the European ones, decided not to include *exclusive* choice of court agreements but *non-exclusive*<sup>16</sup>, (the “friendly” choice of court” clauses for passengers)<sup>17</sup>.

Equally, according to the rules of applicable law, choice of law clauses in these contracts are not considered null under the Rome I Regulation (Article 5). Nevertheless, is still being a debatable issue that these choice of court agreements might be considered as an asymmetrical clause for the weaker party who bears the brunt of the effects of it, when produced a confirmed significant imbalance in the parties’ rights and obligations arising under the contract, according to the Article 3 (1) UCTD<sup>18</sup>, and since they are excluded from this EU PIL Consumer protection rules.

<sup>12</sup> 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), *OJL* 177, 4 July 2008; Z. S. TANG, *Electronic Consumer Contracts in the Conflict of Law*, 2<sup>nd</sup>ed., Bloomsbury, 2015, p. 222 *et seq.*; C.I. CORDERO ALVÁREZ, “Cuestiones de competencia. judicial internacional en el ejercicio del derecho de compensación de los pasajeros en el transporte aéreo en la Unión Europea”, *La Ley Mercantil*, n°49, 2018, pp.1-20.

<sup>13</sup> A-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional...*, vol. I, *op.cit.*, esp. at p. 256; C.I. CORDERO ALVÁREZ, “Cuestiones de competencia. judicial internacional en el ejercicio del derecho...”, *loc.cit.* at pp. 11-12.

<sup>14</sup> Z. S. TANG, “Aviation jurisdiction and protection of...”, *loc.cit.*, pp. 12-14; a contrario sensu, C.I.CORDERO ALVÁREZ, “Cuestiones de competencia...”, *loc.cit.*, which states the habitual and common practice of the air companies to include choice of court and applicable law agreements unilaterally in these Standard contracts.

<sup>15</sup> *Ibidem*.

<sup>16</sup> *General Terms and Conditions of Ryanair Ireland*, 2.3 Governing law and jurisdiction: 2.2.3: “You are entitled to bring an action against us in your local court, except that Irish Courts shall have exclusive jurisdiction in relation to claims under EU Regulation 261/2004 where you have not complied with Articles 15.2.1 to 15.2.7 of these Terms and in relation to non-consumer (i.e., business to business) claims; 15.2.1. This Article applies to claims for compensation under EU Regulation 261/2004; 15.2.7. Passengers are not prohibited by this clause from consulting legal and other third party advisers before submitting their claim directly to Ryanair”, available at: [https://www.ryanair.com/ie/en/useful-info/help-centre/terms-and-conditions/termsandconditionsar\\_197583062](https://www.ryanair.com/ie/en/useful-info/help-centre/terms-and-conditions/termsandconditionsar_197583062)

<sup>17</sup> *Ibid*, at 13, *viz.* Montreal Convention, Convention for the unification of certain rules for international carriage by air contracts, *OJL* 194, 18 July 2001.

<sup>18</sup> H. MUIR WATT, “Party Autonomy” in international contracts: from the makings of the Myth to the requirements of global governance”, Vol. 6, n°3, 2010, available at: [https://www.degruyter.com/document/doi/10.1515/ercl.2010.250/pdf?\\_ll-ca=transfer%3A827afc2a2d679019602f452a70d925c5&\\_llch=9f462e88a6f48c826ce49f1c9eb4ce5a86972dbf1d4c850e-da396182acc96960](https://www.degruyter.com/document/doi/10.1515/ercl.2010.250/pdf?_ll-ca=transfer%3A827afc2a2d679019602f452a70d925c5&_llch=9f462e88a6f48c826ce49f1c9eb4ce5a86972dbf1d4c850e-da396182acc96960) M. KEYES & B.A. MARSHALL, “Jurisdiction agreements: exclusive, optional and asymmetrical”, *JPIL*, vol. 11, n°3, 2015, pp. 345-378; A. MILLS, “Choice of Court Agreements: Effects and Effectiveness”, in *Party Autonomy in Private International Law*, Cambridge University Press, pp. 91-174.

10. As the law does not prohibit air companies to include it (regardless its *non-exclusive* or *exclusive* nature), the scope of these choice of court agreements must be assessed in accordance with the requirements of the Article 25 Brussels I *bis* Regulation, being the forum invoked by the appellant *Ryanair* to contest the jurisdiction of the Polish Court.

## 2. Scope of the Choice of Court Agreements

### A) An “european concept” of the Brussels I *bis* Regulation linked with the party autonomy

11. To commence, the CJEU recalled that the concept of “choice of court agreement” is an european concept, aka autonomous concept<sup>19</sup>. As an european concept must be interpreted by the National Courts of the Member States such as provided by the Regulation. Likewise, these european concepts must be interpreted with respect to former CJEU case law on these european concepts in the event, Member States courts have any concern on them. For the merits of *Delayfix* case, what is relevant of this, is the specific connection with the “party autonomy” (which enshrined the “principle of freedom of choice”) and the concept of choice of court agreement<sup>20</sup>. The forum was intended to protect the party autonomy between contracting parties with the same leverage and bargaining power, usually in the so called, *Business to Business contracts (B2B)*<sup>21</sup>.

12. It was earlier mentioned that some EU PIL Scholars have criticized this judgment<sup>22</sup>. Precisely, these Scholars identify this reasoning of the CJEU on the protection of party autonomy aim and consent of the parties, as one of the most contested, inasmuch the CJEU had, up to a certain degree, disregarded it. At least, between the agency (assignee) and the air company, which in theory are at the same level of leverage as professionals (companies). However, -as the CJEU considers-, this mutual consent (source of the party autonomy) in this contract between the passenger and the assignee, and between the assignee and the air company subsequently the assignment, was not agreed or subject to an individual negotiation. Being this aspect of relevance for the analysis of the formal and substantive validity (Section II).

### B) Third parties at stake

13. Article 25 does not overtly state anything on the effects of a choice of court agreement for third parties who entered the contract as an assignee of the original creditor, by means of an assignment or other legal business<sup>23</sup>. In theory, the choice of court agreement only produces effects between the original parties in the contract. As a matter of fact, in para 42 of *Delayfix*, the CJEU argued these effects: “*it follows that, in principle, a jurisdiction clause incorporated in a contract may produce*

<sup>19</sup> See, G. V. CALSTER, *European Private International Law*, 2nd. ed., Hart, 2016, at 114 *et seq.*; V. CUARTERO RUBIO, “Cuando el consumidor-pasajero” es una empresa de gestión de cobros y la cláusula atributiva de ...”, *loc.cit.*, This european concept of “choice of court agreement” is respectful of the party autonomy of the parties as part of the bases of the pillars of Contract law doctrine; F.J. GARCIMARTÍN ALFÉREZ, “Article 25. Prorogation of Jurisdiction”, In E. LEIN & A. DICKINSON (EDS.), *The Brussels I Regulation Recast*, Oxford University Press, 2015, at 280-298, at 286.

<sup>20</sup> This case law, as well known, is binding for the National Courts of the Member States. In the absence of further explanation of the european concepts provided by the EU Law. Relevant CJEU case law to this concept of choice of court agreement as european under Brussels I *bis* Regulation since Brussels Convention 1969 as follows: C-214/89, *Powell Duffryn*, 10 March 1992 (ECLI:EU: 1992:115), C-116/02, *Gasser*, 9 December 2003 (ECLI:EU:C:2003:657), C-543/10, *Refcomp*, 7 February 2010 (ECLI:EU:C:2013/62).

<sup>21</sup> C.I. CORDERO ALVÁREZ, “Cuestiones de competencia...”, *loc.cit.*

<sup>22</sup> See *supra* Section I.

<sup>23</sup> *Ibid*; A-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional...*, vol. I, *op.cit.*, esp. at pp. 268-270; A. RODRÍGUEZ BENOT, “Sección 7ª. Prórroga de la competencia”, In P. BLANCO-MORALES LIMONES, F.F. GARAU SOBRINO *ET AL.*, (COORD.), *Comentario al Reglamento (UE) N°1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil (Reglamento Bruselas I refundido)*, Aranzadi, 2016, pp. 545-580.

*effects only in the relations between the parties who have given their agreement to the conclusion of this contract”.*

However, it is not the first time that the CJEU deals with the interpretation of the Article 25 Brussels I *bis* Regulation, on the effects of a choice of court agreement for third parties. It is usual, in the international business arena, to assign the contract to third parties (*mobilidad de contrato*, “mobility of the contract”), namely in assignments<sup>24</sup>. This “mobility” affects mainly to the parties rather than to the content of the contract, thus, the consent of third parties matters to determine the formal validity. In doing so, to know if the parties really agreed to submit the controversies to a seized court chosen by mutual agreement. An assessment that has to be carried out by the National court in the main proceedings always (Section 3).

In such a context, seminal CJEU case law related to the effects on third parties’ assignees in contracts was quoted in *Delayfix, i.e.: Refcomp* (C-543/10) and *CDC Hydrogen Peroxide* (C-352/13). In this case law, the CJEU already clarified the issue of the effects to third parties of a choice of court agreement, even when these third parties did not agree to the choice of court agreement in an individual negotiation with the counterparty of the creditor (original party)<sup>25</sup>.

**14.** In those cases, as the CJEU and the EU PIL Scholars have already understood, the key issue relies in knowing if third parties were rightly assigned in the whole contract (*i.e.*: when subrogating in all the rights and obligations of the original contracting party in this contract). As the performance of the assignment is a different issue from the analysis of the validity of the choice of court agreements, it needs to be assessed under other requirements. Usually, in conformity with the law of the country under the assignment was performed (*lex causae*)<sup>26</sup>. Besides, it is important that National Courts analyze the validity of the assignment too, so as to estimate the third-party effects on specific claims. Only if the assignment was duly performed and the successor enters in the contract assuming all their rights and obligations, it might be argued that this choice of court agreement is valid, binding and enforceable to the successors or assignees<sup>27</sup>.

**15.** Nevertheless, -unlike *Delayfix* case-, in all these cases, original parties (professionals) assigned to other professionals in B2B contracts the whole contract or part of it. That is a significant difference to make. The CJEU held that neither *Delayfix* nor *Ryanair* submitted the choice of court agreement to an individual negotiation after the performance of the assignment. Consequently, the choice of court agreement could not be enforceable to any of the parties in this contract (creditor, debtor, and assignee)<sup>28</sup>.

<sup>24</sup> A-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional...*, vol. I, *op.cit.*, esp. at 268. Nonetheless, the CJEU case law differentiates among kinds of contracts and situations; J. STEINLE & E. VASILIADES, “The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy”, *JPIL*, vol. 6, n°3, 2010, pp. 569-573; A. RODRÍGUEZ BENOT, “Sección 7ª. Prórroga de la...”, *loc.cit.*, In P. BLANCO-MORALES LIMONES, F.F. GARAU SOBRINO *ET AL.*, (COORD.), *Comentario al Reglamento (UE) N°1215/2012 relativo a la competencia judicial, el reconocimiento...* *op.cit.*, pp.576-578.

<sup>25</sup> *V.gr.*, Case C-543/10, *Refcomp*, of 7 February 2013 (ECLI:EU:C:2013:62) para 29 and, Case C-436/16, *Leventis and Vafeias*, of 28 June 2017 (ECLI:C:EU:2017:497), para 35 and case law cited; M. LEHMANN, “CJEU Significantly Weakens Jurisdictions Clauses in Case of Assignment”, *EAPIL*, 30 November 2020, available at: <https://eapil.org/2020/11/30/cjeu-significantly-weakens-jurisdiction-clauses-in-case-of-assignment/>

<sup>26</sup> Begin a very controversial issue (apart from different of the analysis in *Delayfix* by the CJEU) due to the substantive differences between the law of the Member States, and taking into account Article 14 of the Rome I Regulation does not encompass all the aspects concerning the third party effects of assignments. Furthermore, if this assignment between and agency and a consumer can be considered as a B2C assignment, then, Roma I Regulation won’t be of application to determine the applicable law; C-548/18, *Paribas v. Teambank*, of 9 October 2019 (ECLI:EU:C:2019:848); T.C. HARTLEY, “Choice of Law Regarding the Voluntary Assignment of Contractual Obligations Under the Roma I Regulation”, *ICLQ*, vol. 60, 2011, pp. 29-56.

<sup>27</sup> *Ibid.*, vol. I., p. 258; M. LEHMANN, “CJEU Significantly Weakens Jurisdictions Clauses in Case of Assignment”, *EAPIL*, 30 November 2020, available at: <https://eapil.org/2020/11/30/cjeu-significantly-weakens-jurisdiction-clauses-in-case-of-assignment/>; O. SCHIMDT, “Section 7: Prorogation of jurisdiction”. In U. MAGNUS Y P. MANKOWSKI (EDS.), *Brussels Ibis Regulation: Commentary*, vol. 1, Verlag, 2016, pp. 583-681.

<sup>28</sup> *Delayfix*, C-519/19, para 44: “however, while neither *Passenger Rights* nor *Delayfix*, successor to *Passenger Rights*, consented to be bound to *Ryanair* by a jurisdiction clause, neither has that airline consented to be bound to that collection agency by such a clause.”

In doing so, the CJEU is recognizing that the formal validity of this choice of court agreement is not valid, because none of the parties (passenger and agency) have granted their consent (*infra* section 3.1.).

### 3. Validity assessment of the Choice of Courts Agreements under Article 25 Brussels I *bis* Regulation

16. The validity of a choice of a court agreement according to the reading of the Article 25 Brussels I *bis* Regulation has two dimensions: formal and substantive validity. As a different clause with independence from the other clauses of the contract, -a contract 'within' the contract-, requires to be assessed separately (*severability principle*)<sup>29</sup>. Indeed, this aspect is of interest to comprehend why the EU lawmaker established certain mandatory requirements to assess the validity of these clauses from these two dimensions.

#### A) Formal validity: the “consent” of the parties

17. CALVO CARAVACA & CARRASCOSA GONZÁLEZ expound that procedural or formal validity must be assessed in conformity with the following requirements<sup>30</sup>: there must be a “real” choice of court agreement between the parties, in which these parties have agreed in attributing the jurisdiction to certain Courts of a Member State. Apart from that, the controversy must be transnational, to trigger the Brussels I *bis* Regulation jurisdiction rules<sup>31</sup>. On the other hand, VAN CASTLER considers as JENARD REPORT clearly expressed<sup>32</sup>, “consent” is the basis to proof the formal validity of these clauses ensuring that parties have truly agreed in an individual negotiation of this clause<sup>33</sup>.

18. The “consent” of a carriage of passengers’ contracts is accepted by the passengers once they click on the terms and conditions, when online contracts, as was the present case and most of them<sup>34</sup>. *Online* consent does not invalidate the choice of court itself, what invalidates the consent is the lack of individual negotiation among the parties. In this regard, the CJEU establishes that, is up to the National court in the main proceedings, -*in limine litis*-, to analyze whether this consent/consensus was subject of an individual negotiation, to ultimately resolve if the choice of court agreement complies with the formal validity requirement of the “consent” (“mutual agreement” according to Article 25 Brussels I *bis* Regulation wording)<sup>35</sup>.

<sup>29</sup> It can be noted that the CJEU, in this preliminary ruling, is implicitly recognizing this independence of the choice of agreement in the contract, considering that neither *Delayfix* nor *Ryanair* submitted it to an individual negotiation when the assignment was performed between the creditor and the assignee; A.-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional...*, vol. I, *op.cit.*, esp. at pp. 268-270; M. AHMED, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Bloomsbury, 2017, pp. 38-41.

<sup>30</sup> A.-L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, vol. 1, ed. 16<sup>a</sup>, 2016, at p. 246.

<sup>31</sup> *Delayfix*, C-519/19, *in fine*.

<sup>32</sup> G. V. CALSTER, *European Private International...*, *op.cit.*, at 120; Report by Mr P Jenard on the Convention of 27 September 1968 on jurisdiction and recognition and enforcement, *OJ*, C 59, 5 March 1979, Vol. 22 at C 59/37: “Since there must be a true agreement between the parties to confer jurisdiction, the court cannot necessarily deduce from a document in writing adduced by the party seeking to rely on it that there was an oral agreement”.

<sup>33</sup> *Delayfix*, C-519/19 para 41: “(...) the court (...) has the duty of examining, *in limine litis*, whether the jurisdiction clause is in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated”; Case C-64/17, *Saey Home & Garden* (EU:C:2018:173) para 25 and related case law.

<sup>34</sup> C-519/19, *Delayfix*, par 39, quoting C-322/14, *El Majdoub*, 21 May 2015 (ECLI:EU:C:2015:334). The european concept includes online consent too.

<sup>35</sup> See C-352/13, 21 May 2013, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA vs Azko Nobel NV* (ECLI:EU:C:2015:335); Z. S. TANG, “Aviation jurisdiction and protection of...”, *loc.cit.* pp. 14-15, for TANG, is not very clear passengers can argue they did not negotiate these clauses. According to her analysis, these clauses are not included for hindering the consumers to exercise their rights to access to justice, but to protect trader from commercial risk of being sued under unexpected circumstances and fora; G. V. CALSTER, “*Ryanair v. DelayFix*. The CJEU dots some is on choice of court and unfair



19. From this analysis, on the one hand, the issue to be examined for the court is whether the passengers are truly aware of the choice of court agreement and of the choice of law clauses in the contracts when they click on the term and conditions. It has been argued that is a common and allowed practice on behalf of the air companies to include it in their contracts with passengers. It has been also argued that usually these clauses are non-exclusive, and can be considered as asymmetrical under the *lex fori prorrogatio*. On the other hand, one may ask if the Article 25 Brussels I *bis* Regulation is properly embracing the manifold problems of these clauses which entail private international law issues but are invalidated under the EU substantive law due to its unfair nature for the weaker parties.

### B) Substantive validity: *lex fori prorrogatio*?

20. Substantive validity of these choice of courts agreements needs to be evaluated by National courts, according to the law of the national court-s seized by the parties. This requirement is set forth under Article 25 as a kind of *renvoi* to the *lex fori prorrogatio*, which also entails the application of the conflict of law rules of the *lex fori prorrogatio* (Recital 20)<sup>36</sup>. This has been, essentially, the moot point of this preliminary ruling. The CJEU seems to not estimate the *lex fori prorrogatio* (nor the *renvoi*), to the assessment of the substantive validity of the choice of court agreement, but this concern is related to the justification of the application of the UCTD, being the substantive law, as part of the *lex fori prorrogatio*.

21. As was cited, there are some domestic precedents of some National courts which have rendered the unfair nature, and nullity of these choice of courts agreements in carriage of passengers' contracts. All of them have been as well as CJEU *Delayfix* criticized on the same basis. All of them have seemingly infringed the *lex fori prorrogatio*. A misapplication of one of the mandatory requirements of the Article 25 Brussels I *bis* Regulation for the validity assessment. As VAN CASTLER pointed in his comment on *Happy Flights*<sup>37</sup>.

22. In the Spanish case, the Spanish Commercial Court of Madrid (2013) assessed the validity of the choice of court agreement under the Spanish transposition of the UCTD, but not according to the UCTD Irish transposition<sup>38</sup>. However, this resolution was appealed by *Ryanair* before the Provincial Court of Madrid, which amended this contentious Commercial Court of Madrid resolution in some of its merits. This Provincial Court of Madrid handled down that the choice of court agreement included by *Ryanair* in the Standard terms and conditions was null and void, but under the Montreal Convention

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term in unfair consumer contracts: defers to national law on the assignment issue; and keeps schtum on renvoi...”, *loc.cit.*; F.J. GARCIMARTÍN ALFÉREZ, “Article 25. Prorogation ...”, *loc.cit.*, In E. LEIN & A. DICKINSON (EDS.), *The Brussels I...*, *op.cit.*, p. 294.

<sup>36</sup> Recital 20 Brussels I *bis* Regulation: “Where a question arises as to whether a choice of court agreement in favor of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict of law rules of that Member State”; A-L., CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, *Derecho Internacional...*, vol. I, *op.cit.*, p.258; A solution considered as controversial too, in the absence of harmonization of the conflict of law rules on the validity of choice of court agreements, as FRANZINA has already analyzed. P. FRANZINA, “Chapter 4. The substantive validity of forum selection agreements under the Brussels Ibis Regulation”, in P. MANSKOWSKY, *Research Handbook in European law series*, Elgardonline, 2020, pp. 95-117; On the riddle of the law applicable to choice of court agreements, K. M. CLERMONT, “Governing Law on Forum Selection Agreements”, *Cornell Law Faculty Publications*, available on line at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2544&context=facpub>; A. RODRÍGUEZ BENOT, “Sección 7ª. Prórroga de la...”, *loc.cit.*, In P. BLANCO-MORALES LIMONES, F.F. GARAU SOBRINO *ET AL.*, (COORD.), *Comentario al Reglamento (UE) N°1215/2012 relativo a la competencia judicial, el reconocimiento...op.cit.*, pp.560-563; F.J. GARCIMARTÍN ALFÉREZ, “Article 25. Prorogation of Jurisdiction”. In E. LEIN & A. DICKINSON (EDS.), *The Brussels I ...*, *op.cit.*, 2015, at 300.

<sup>37</sup> G. V. CALSTER “*Happy Flights v. Ryanair*. Belgian Supreme Court (only) confirms proper *lex causae* of choice of court under Article 25 Brussels Ia”, *GAVC LA-GEERT VAN CALSTER Blog*, 11 March 2019, available at: <https://gavclaw.com/2019/03/11/happy-flights-v-ryanair-belgian-supreme-court-only-confirms-proper-lex-causae-for-validity-of-choice-of-court-under-article-25-brussels-ia/>; *id.*, *European Private International...*, *op.cit.*, at Heading 2.2.9, and 2.2.9.4.

<sup>38</sup> See *infra* Section III.

due to its mandatory application within the instruments of jurisdiction rules in passengers' contracts (not under Article 25 Brussels I *bis* Regulation). Likewise, declared the clause at a substantive level as unfair as did not comply with the requirements of transparency given by the Article 5 UCTD but applying the Irish transposition of the UCTD, *a contrario sensu* than the Commercial Court of Madrid<sup>39</sup>. Having regard of the *lex fori prorrogatio*.

**23.** With regard to the Belgium case, the Belgian Supreme Court also assessed the validity of its choice of court agreement and its effects to the agency *Happy Flights* as an assignee of a Belgian passenger, after the Brussels Commercial Court resolution. Brussels Commercial court infringed the Article 25 Brussels I *bis* requirement of the *lex fori prorrogatio* application when determined the substantial validity of the clause applying the Belgian UCTD transposition as the Spanish Commercial Court did in the Spanish case<sup>40</sup>. After this ruling the Belgian Supreme court tried to amend it. Rather, they rectified the absence of analysis in the consideration of the agency as a consumer, and not on the wrong application of the *lex fori prorrogatio* to the substantive validity of the case. Belgian Supreme Court, at the end, still applied the *lex fori* as the Brussels Commercial court (i.e.: Belgian law)<sup>41</sup>. Without having regard of the *lex fori prorrogatio*.

**24. “The Hive”.-** As a conclusion, some of these previous judgments to *Delayfix*, did not properly applied the *lex fori prorrogatio*, and it calls the attention that having been ruled by Courts of different Member States, they applied the *lex fori* instead of the *lex fori prorrogatio*. In *Delayfix*, even if the CJEU seems to be brief, explains why the UCTD is directly applied to assess at the substantive level the unfair nature of the clause.<sup>42</sup> This is an implicit recognition of the *lex fori prorrogatio* on behalf of the CJEU, though not explained in detail<sup>43</sup> The logic of it is that UCTD was transposed to all the Member States being the substantive law to assess the unfair nature (and validity) of certain clauses in B2C contracts, as carriage of passengers' contracts are considered under this law.

### III. EU Consumer protection law and its Interplay with the Brussels I *bis* Regulation

#### 1. Passengers as consumers-weaker parties and the UCTD implementation for carriage of passenger's contracts

**25.** With all the above in mind, it can be assumed from the wording of this preliminary ruling that the case is also important for the case-law development on the scope of the UCTD and its interplay with EU PIL rules on consumer protection. In this case, the interplay with the Brussels I *bis* Regulation. Previously, the CJEU analysed the interplay between the Rome I Regulation on the

<sup>39</sup> SAP Madrid, n° 392/2017, 26 July 2017 (ECLI: ES:APM:2017:10881), FD I, p. 21.9: “Adicionalmente, como ya se anticipó, dicha apreciación ha de comportar que la abusividad de las demás cláusulas deba evaluarse a la luz del derecho irlandés, conforme a las pautas por el TJ al interpretar las disposiciones de la Directiva 93/13, apreciadas en función de las circunstancias del caso (*vid. apartado 16 supra*)”.

<sup>40</sup> G. V. CALSTER, “*Happy Flights v. Ryanair. Belgian Supreme Court* (only) confirms proper *lex causae* of choice of court under Article 25 Brussels Ia”, *GAVC LA-GEERT VAN CALSTER Blog*, 11 March 2019, available at: <https://gavclaw.com/2019/03/11/happy-flights-v-ryanair-belgian-supreme-court-only-confirms-proper-lex-causae-for-validity-of-choice-of-court-under-article-25-brussels-ia/>

<sup>41</sup> *Ibid.*

<sup>42</sup> *Delayfix*, C-519/19, para 51: “Furthermore, it is for the court seized of a dispute, such as that in the main proceedings, to apply the legislation of the Member State whose courts are designated in that clause, interpreting that legislation in accordance with EU law, in particular Directive 93/13 (see, to that effect) judgments of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 79, and of 17 May 2018, *Karel de Grote-Hogeschool Katholieke Hogeschool Atwerpen*, C-147/16, EU:C:2018:320, paragraph 41).

<sup>43</sup> See, G. V. CALSTER “*WecoProjects: on Yachts Lost at sea, anchor jurisdiction (that’s right), lis alibi pendens, carriage, “transport” and choice of court*”, 27 August 2020, a commentary of the author on *Weco Projects APS v. Piana & Ors* [2002] EWHC 2150 (Comm).

law applicable to contractual obligations and the UCTD, but for well recognized B2C contracts under these EU PIL rules<sup>44</sup>.

**26.** The UCTD is a *minimum harmonization* Directive which covers all kind of B2C contracts concluded between a seller or supplier and a consumer (article 1 para 1 UCTD). Its scope is quite broad encompassing carriage of passengers' contracts too. Moreover, the CJEU evoked the role of other rules related to the protection of passengers and the UCTD to endorse its application to these contracts. In para 52, “ (...) is important to point out that, as regards the relationship between Directive 93/13 and the rights of air passengers such as those stemming from Regulation No 261/2004, the Court has held that Directive 93/13 is a general regulation for consumer protection in all sectors of economic activity, including the air transport sector”<sup>45</sup>.

**27.** In accordance with the findings of the CJEU in previous seminal case law and to the “Guidance on the interpretation and application of the UCTD”<sup>46</sup>, the UCTD scope depends on the *capacity* of the parties, not on the *identity* of them, *i.e.*, the capacity related to the consent to bargain all the clauses of a contract with the professional<sup>47</sup>. Whether the parties had the opportunity to negotiate terms and conditions among them<sup>48</sup>.

In declaring so, the CJEU confirms the underpinning between the UCTD and the EU PIL rules even for contracts excluded on the consumer protection jurisdiction rules. Once the court in the main proceedings assesses the unfairness of a clause in a B2C contract as laid down in Articles 3 and 4 considering the nature of the services (Article 6 UCTD)<sup>49</sup>.

**28.** To sum up: From a substantive level, these clauses produce a significant imbalance of the rights of passengers without leverage and bargaining power to negotiate with the professionals (*i.e.*: there is no party autonomy for all the parties)<sup>50</sup>. From a litigation or procedural approach-strategy, these clauses deter passengers to bring cross border actions against professionals before their courts in case of controversy, hindering the exercise of their consumer's rights bestowed to them by the EU legislator<sup>51</sup>. Parties can still litigate seeking for redress as former CJEU case law on cross border passengers claims under Article 7.1 (b) Brussels I *bis* Regulation, being both the place of departure and of arrival proper for a to bring the actions (pursuing Regulation 261/2004)<sup>52</sup>.

<sup>44</sup> *V.gr.*, Case C-191/15, *Verein für Konsumenteninformation*, 28 July 2016 (ECLI:EU:C:2016:612).

<sup>45</sup> Case C-290/16, *Air Berlin*, 6 July 2017, ECLI:EU:C:2017:523.

<sup>46</sup> European Commission, “Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts”, C (2019) 5313 final, 22 July 2019, at 7 *et seq.*

<sup>47</sup> On the controversial concept of consumer under EU Consumer rules, *inter alia*, J. LAZIKOVA & L. RUMANOVSKA, “The Notion of Consumer in the EU Law”, *Agrárne právo EU*, n°2, 2016, pp.1-12; S. CÁMARA LAPUENTE, “El concepto legal de “consumidor”, en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos”, *CDT*, Vol., 3 , n°, 1, 2011, pp. 84-117.

<sup>48</sup> M. LEHMANN, “CJEU Significantly Weakens...”, *loc.cit.*; G. V. CALSTER, “*Ryanair v. DelayFix*. The CJEU dots some is on choice of court and unfair term in unfair consumer contracts...”, *loc.cit.*

<sup>49</sup> Nevertheless, TANG diverges widely from this point. The author considers that for a passenger as the weaker party is very hard to prove there was no consent and the unfair nature of these clauses when allowed to be included by the air companies, “Aviation Jurisdiction...”, *loc.cit.* pp. 13-15: “(...) However, it is hard to argue that an exclusive jurisdiction is certainly contrary to the requirement of good faith, or causes a significant imbalance in the parties' rights and obligations. (...) It is arguable that an exclusive jurisdiction clause choosing a foreign court has the actual effect to hinder consumers' access to justice, as many consumers would simply give up legal redress for the burden of foreign action” (unlike arbitration clauses which are expressly listed as an example of unfair terms under the Annex I of the UCTD).

<sup>50</sup> European Commission, “Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts”, C (2019) 5313 final, 22 July 2019, at 15-16; *Delayfix* C-519/19, para 59 and 60; C-240/98, *Océano Grupo Editorial and Salvat Editores*, 27 June 2000 (ECLI:EU:C:2000:346); C-243/08, *Pannon GSM*, 4 June 2009 (ECLI:EU:C:2009:350), and, C-137/08, *VB Pénzügyi Lízing*, 9 November 2010 (ECLI:EU:C:2010:659).

<sup>51</sup> *Delayfix* C-519/19, para 59.

<sup>52</sup> Cases C-274/16; C-447/16; C-448/16, *Flightright et al.*, 7 March 2018, (ECLI:EU:C:2018:160); Case C-215/18, *Primeira Air Scandinavia*, 26 March 2020 (ECLI:EU:C:2020:235), *inter alia*.

## 2. Other considerations on the substantive law to the assignment of credits

29. Is the position of the assignee at the same level than consumers under EU Consumer substantive law? If yes, why? Should assignees then be considered as if they were consumers in these B2C assignments? Is the CJEU distinguishing between a B2B assignment from a B2C assignment? These are questions which may arise in the analysis of the EU substantive law of the preliminary ruling (even for other similar cases). The answer to the last question is affirmative on the next grounds. It is implied to the wording of *Delayfix* case that the collection agency is not acting as a professional itself, despite being a company (*capacity* not “identity”), as was above mentioned under Section III.1. Therefore, the assignee is subrogating in all the rights and obligations of a consumer according to their capacity allowed by the law to represent consumers interests, but not as professionals seeking for redress against other professional of its own interests.

30. Directive 2008/48/EC on credit agreements for consumers was also transposed to the law of all the Member States<sup>53</sup>. *Mutatis mutandis* than the UCTD, it considers a consumer or a professional on the basis of *capacity* and not of identity. It is true that the CJEU only mentions former case law on Directive 2008/48/EC to emphasize the idea that “capacity” is the key issue to know if a person (regardless a legal or physical person) must be regarded as a consumer or professional to trigger the EU Consumer protection rules<sup>54</sup>. There is no further explanation on what is the law that should be applied to the assignment and why. Being, -as was mentioned in the Introduction-, a different assessment from the choice of court agreement validity assessment. Nonetheless, the CJEU has been quite clear. The agencies in its role-capacity of representative of the consumers interests, they cannot be regarded as professionals<sup>55</sup>.

31. The logic of the above, indeed, should not be overlooked. These kinds of agencies help the passengers to claim for their compensation with less costs and expenses since these claims basically are very costly for the weaker parties<sup>56</sup>. This capacity has been bestowed by the EU consumer law to them with a particular aim. And lately it has been reinforced with the new Directive on collective redress (RAD), which main goal is facilitating the access to justice for the consumers through legitimate representatives<sup>57</sup>.

## IV. Final remarks

32. **First. On the incidence of the preliminary ruling for the choice of court agreements scope and effects to third parties.** - *Delayfix*, with all its warts, being “blurry” in some points, may be considered as a relevant precedent for prospective cases on the same merits. From our view, is a “little” step further, an achievement for the protection of passengers in cross border litigation and, for the agencies which represent their interests. The CJEU paves the way to estimate, -despite of their exclusion as B2C contracts under Brussels I *bis* regulation-, these choice of court agreements as asymmetrical clauses, such as are considered under EU substantive law. Even if the solution does not seem consistent with the wording of the Article 25 Brussels I *bis* Regulation.

33. For sure, the goal of the article 25 Brussels I *bis* Regulation is to protect the party autonomy in choice of court agreements. Nonetheless, when these choice of court agreements have been submitted

<sup>53</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJL 133.

<sup>54</sup> Case C-383/18, *Lexitor*; 11 September 2019 (ECLI:EU:C:2019:702).

<sup>55</sup> Case C-167/00, *Henkel*, 1 October 2002 (ECLI:EU:C:2002:555); A. PATO, *Jurisdiction and Cross border Collective Redress: A European Private International Law Perspective*, Hart, 2019, pp. 152 *et seq.*

<sup>56</sup> V. CUARTERO RUBIO, “Cuando el consumidor-pasajero...”, *loc.cit.*, p. 6.

<sup>57</sup> *Ibid*; Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 1009/22/EC, of 4 December 2020, OJ 409/1.

to individual negotiations. Something to be assessed by the National courts of the Member States. Otherwise, same parties will be the ones who are infringing the spirit of the formal validity. What is true is that passengers, as the CJEU implicitly is recognizing, do not have the same bargain and leverage power that air companies. Neither the assignee in these types of contracts, making this differentiation.

34. As a consequence, under Article 25 Brussels I *bis* Regulation requirements, a choice of court agreement in a passenger' contract is not enforceable to passengers nor to their assignees when after a validity assessment is done and the Court finds the lack of formal and substantive requirements in contracts of this nature. Hence, parties can still litigate under general and special jurisdiction fora as the standard solution for the carriage of passengers' contracts.

35. Albeit, the CJEU has not be very "thoughtful" with the *lex fori prorrogati* as part of the substantive validity assessment and the renvoi desired by the EU legislator. Something paramount to the whole assessment on the validity of these choice of court agreements. It would have been good if the CJEU would have been more exhaustive, shedding light on it, as the *vexata quaestio* of this claim. Having regard of a respectful solution with the current wording of the Article 25 and Recital 20 of Brussels I *bis* Regulation.

**36. Second.- On the Interplay between the EU Consumer Substantive law and the EU PIL rules.-** Is this reasoning of the CJEU trying to be respectful with all the protection that the EU legislator seeks for consumers in the internal market? We dare say, yes. The ultimate goal of the EU Consumer acquis as a whole is to protect the interest of the consumers as the weaker parties as well as to their representatives, increasingly in the latest EU Fitness check on consumer protection.

37. Scope and objectives of the UCTD are wide and according to the CJEU remarks its implementation depends on the "capacity" of the parties rather than the "identity" to determine whether they will be deemed as "consumers" or as "professionals" (consumer, seller or supplier are also European concepts). Still, not only the UCTD, but the Directive 2008/48 of application in B2C assignments (and all the EU Directives on Consumer protection), considers a consumer or a professional according to their *capacity* in the contract. Therefore, third parties which represent the interests of passengers-consumers, as the CJEU is confirming once again, as since *Henkel* case (C-167/00), that consumer protection agencies are not acting as professionals, and cannot be considered as professionals. Let alone, if they have not submitted the clauses of the contract to individual negotiations with the other professionals after the assignment is done.

From the reasoning, one may appreciate that the CJEU is making a distinction between the effects of a choice of court agreements as independent clauses of the whole contract, according to the kind of assignment performed. That is, whether a B2B or a B2C assignment has been performed, National courts must consider the capacity of the parties to negotiate to know if they act as consumers or professionals. Under EU substantive law as part of the Member States law considering the high degree of EU harmonization on Consumer protection. In connection with that, is true that the CJEU has left "on tenterhooks" a comprehensive argument on it, but the Polish court did not ask for it, *en passant*. What the Polish court basically asked to the CJEU was if the substantive validity of the choice of court agreement could rely on the EU substantive law. And the answer of the CJEU was affirmative.

38. As in other cases, we can conclude that the CJEU has shown once again the relevance of minding the interplay with other regulation of EU PIL (i.e.: Rome I Regulation) and the UCTD, to pursue the coherence required of all the EU Secondary law, respecting the *principle of effectiveness*.

**39. Last but not least.-** All in all, *Delayfix* is an attempt of weaving *de facto* bridges of connection between the EU PIL rules and the EU substantive law of consumer protection where the passengers are clearly recognized as consumers.

**40.** An attempt to *de facto* amend the absence of clarification on different choice of court agreements under Brussels I *bis* Regulation and even on different kind of assignments depending on the contracts between the parties. Accordingly, the problem is still relying on this absence of a proper regulation of asymmetrical clauses or a recognition of its existence under the provisions of this Regulation. Especially, because the legislator is aware of certain B2C and / or B2B contracts, in which the parties do not have the same bargaining power nor leverage. Furthermore, where the party autonomy requirement disguised as a true consent is not clear at all. “Click” here and accept the jurisdiction is a “take it or leave it”, far away from a real negotiation which respects the party autonomy, and which represents a true and informed consent. It can be debatable, but the CJEU is shielding, precisely, the party autonomy once it was analysed there was any informed consent given.

**41.** Perhaps, one legislative solution for the prospective amendment of the Brussels I *ter* Regulation, will be adding the differences of these choice of court agreements in the wording of the Article 25 Brussels I *bis* Regulation or by means of a Recital as have been already proposed by some Scholars. To enhance and avoid the legal uncertainty originated with the current wording in most of the cases. For carriage of passengers’ contracts, if this solution was finally accepted, passengers under the EU PIL rules on civil and commercial matters will be still understood as “no consumers” (if no changes on Article 17 Brussels I *bis* Regulation “ahoy”). Although, they could find a better redress when choice of court agreements having been inserted by the carriers in the cross-border carriage of passengers contract.