Asymmetric jurisdiction clauses under the Brussels-Lugano and Hague regimes

Le clausole di scelta asimmetriche nell'ambito dei regimi di Bruxelles-Lugano e dell'Aja

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Abstract: Asymmetric jurisdiction clauses are choice of court agreements which bind one party to bring proceedings exclusively before the designated court and give the other party a right to choose, in addition to that court, other competent courts. The most common type of asymmetric clauses are the so-called Rothschild clauses. The article considers the enforceability requirements which asymmetric clauses must satisfy in order to be covered by the Brussels-Lugano regime, their effects under Regulation 1215/2012 and the Lugano Convention of 2007 and the issue of whether asymmetric clauses are covered by Art. 31(2) of Regulation 1215/2012, as well as the applicability of the Hague regime. To this end, reference is made to the relevant jurisprudence of the ECJ and national courts, with particular reference to the recent *Lastre* judgment in which the ECJ imposed for the first time limits on the validity of asymmetric clauses, while leaving open some important questions.

Keywords: Asymmetric jurisdiction clauses, Brussels-Lugano regime, enforceability requirements, effects, applicability of the Hague regime.

Riassunto: Le clausole di scelta asimmetriche costituiscono accordi di scelta del foro che vincolano una parte ad instaurare un procedimento esclusivamente dinanzi al tribunale designato e conferiscono all'altra parte il diritto di scegliere, oltre a tale tribunale, altri fori competenti. La tipologia più comune di clausole asimmetriche sono le cosiddette clausole Rothschild. L'articolo esamina le condizioni di applicabilità che le clausole asimmetriche devono soddisfare per essere riconducibili al regime di Bruxelles-Lugano, i loro effetti ai sensi del Regolamento 1215/2012 e della Convenzione di Lugano del 2007, la questione se le clausole asimmetriche siano riconducibili all'Art. 31(2) del Regolamento 1215/2012, nonché l'applicabilità del regime dell'Aja. A tal fine, verrà presa in considerazione la pertinente giurisprudenza della CGUE e dei tribunali nazionali, con particolare riferimento alla recente sentenza *Lastre* in cui la CGUE ha per la prima volta assoggettato la validità delle clausole asimmetriche ad alcuni limiti, pur lasciando aperte alcune questioni importanti.

Parole chiave: Clausole di scelta asimmetriche, regime di Bruxelles e Lugano, criteri di applicabilità, effetti, applicabilità del regime dell'Aja.

I. Introduction

1. Asymmetric jurisdiction clauses – also known as unilateral, imbalanced, one-sided, one-way, hybrid or lopsided jurisdiction clauses – are choice of court agreements[1] which are more favourable to one party to the contract than to the other[2], in that they give one party more rights, *i.e*. a much wider choice of competent courts[3]. Asymmetric clauses contain different provisions on jurisdiction depending on which party to the agreement initiates litigation proceedings[4]: they bind one party to bring proceedings exclusively before the designated/named court and give the other party a right to choose, in addition to that court, other competent court(s)[5]. Such agreements are exclusive for one party but non-exclusive for the other[6]. They differ from exclusive jurisdiction agreements, where all parties are restricted to initiate proceedings in a single nominated court with exclusive jurisdiction. Asymmetric choice of court agreements are most frequently used in transnational finance contracts, particularly in loan agreements, where the borrower may sue the lender in the courts of only one State but the lender may sue the borrower elsewhere.

2. There are different types of asymmetric clauses[7]. Most common is the so-called Rothschild clause named after the landmark French case *Madame X v Banque Privée Edmond de Rothschild* of 2012[8]. The clause was framed in the following terms: «[p]otential disputes between the Client and the Bank will be submitted to the exclusive jurisdiction of the Courts of Luxembourg. The Bank nonetheless reserves the right to bring an action before the Courts of the client's domicile or before any other competent court in default of an election of the preceding jurisdiction»[9]. Rothschild clauses thus provide for one party (the non-option holder) to sue exclusively in one jurisdiction and allow the counterparty

[1] The expressions "jurisdiction clauses" or "jurisdiction agreements", "choice of court agreements", "choice of forum agreements" and "forum selection clauses" or "forum selection agreements" are used interchangeably in this paper.

[2] T.C. Hartley, *International Commercial Litigation. Text, Cases and Materials on Private International Law*, II ed., Cambridge University Press, Cambridge, 2015, p. 180.

[3] T.C. Hartley, *Civil Jurisdiction and Judgements in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, II ed., Oxford University Press, Oxford-New York, 2023, p. 248; European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre SpA v Agora SARL*, C-537/23, ECLI:EU:C:2025:120, para 63, commented by G. Croisant, C. Cavicchioli, N. Rölike, A. Kaztaridou, J. Esquenazi, *CJEU's first ruling on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention*, in *Conflictoflaws.net*, 28 February 2025; P.A. De Miguel Asensio, *Los acuerdos de jurisdicción asimétricos tras la sentencia Società Italiana Lastre*, in *La Ley Unión Europea*, 135, 2025; L. Eckhoff, A. Lietmeyer, *Wirksamkeitsvoraussetzungen von einseitigen bzw. asymmetrischen Gerichtsstandsvereinbarungen*, in *Zeitschrift für Vertriebsrecht*, 2025, p. 179 ff.; J.G. Horrach Armo, *Los acuerdos atributivos de competencia asimétricos*, in *La Ley Unión Europea*, 135, 2025; L. Idot, *Règlement Bruxelles I bis - Clause attributive de juridiction asymétrique*, in *Europe*, 4, 2025, p. 133.

[4] High Court of Justice, judgment of 3 February 2017, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm), para 1.

[5] B. Marshall, *Asymmetric jurisdiction clauses*, Oxford University Press, Oxford, 2023, p. 22; European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 54 and 67.

[6] F. Garcimartín, G. Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, para 217.

[7] B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 17-22 distinguishes between three broad types of asymmetric clauses: Rothschild clauses (and their standard, broad and narrow variants), unilateral non-exclusive clauses and unilateral indeterminate jurisdiction clauses. This article is only concerned with Rothschild-type clauses.

[8] Cour de cassation, First Civil Chamber, 26 September 2012, No. 11-26.022, *Madame X v Banque Privé Edmond de Rothschild*, commented by D. Bureau, *Clause attributive de juridiction potestative et pluralité de défendeurs dans des actions fondées sur des loi différentes*, in *Revue critique de droit international privé*, 1, 2013, p. 256 ff.; A. Henke, *La Corte di cassazione francese e le clausole di proroga asimmetrica*, in *Int'l Lis*, 2, 2013, p. 75 ff.; M. Lehmann, A. Grimm, *Zulässigkeit asymmetrischer Gerichtsstandsvereinbarungen nach Artikel 23 Brüssel I-VO*, in *Zeitschrift für Europäisches Privatrecht*, 2013, p. 890 ff.; M. Scherer, S. Lange, *The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?*, in *Kluwer Arbitration Blog*, 18 July 2013. All decisions of the *Cour de Cassation* cited in this paper are avaiable at https://www.legifrance.gouv.fr.

[9] Author's translation. See Cour de cassation, First Civil Chamber, 26 September 2012, No. 11-26.022, *Rothschild*, cit.: «[l]es litiges éventuels entre le Client et la Banque seront soumis à la juridiction exclusive des tribunaux de Luxembourg. La Banque se réserve toutefois le droit d'agir au domicile du client ou devant tout autre tribunal compétent à défaut de l'élection de juridiction qui précède» (French original).

(the option holder) to sue in further courts and not only in the courts named in the first part of the clause. Rothschild clauses consist of two limbs: the (restrictive) anchor limb which applies to proceedings brought by both the non-option holder and the option holder before the so-called "anchor court(s)" and the (liberal) optional limb allowing only the option holder to bring proceedings before the so-called "optional court(s)"[10].

3. *Asymmetrische Gerichtsstandsklauseln* for disputes in cross-border civil and commercial matters are regulated by different European Union ("EU") and international law instruments. In particular, asymmetric jurisdiction agreements are governed by Art. 25 of Regulation 1215/2012 ("Brussels Ibis Regulation")[11] if they designate the court(s) of EU Member States regardless of the parties' domicile[12] or by Art. 23 of the Lugano Convention of 2007[13] if they confer jurisdiction on the court(s) of European Free Trade Association ("EFTA")-Lugano States (*i.e*. Iceland, Norway and Switzerland)[14] and at least one of the parties is domiciled in a EU Member State or EFTA-Lugano State[15]. The Hague Choice of Court Agreements Convention of 2005 ("Hague Convention of 2005")[16], which prevails over the Brussels Ibis Regulation if one or more of the parties is resident in a Contracting State that is not a EU Member State[17], only applies to exclusive choice of court agreements which designate the courts of a Contracting State[18]. By contrast, non-exclusive jurisdiction clauses fall within the scope of the Hague Judgments Convention of 2019 ("Hague Convention of 2019")[19]. The Hague regime has gained particular importance in the relationship between the EU and the United Kingdom after the latter's withdrawal from the EU.

4. One-sided choice of forum agreements have raised several issues, which this paper analyses in turn by considering the relevant EU and international legal instruments as well as European and national jurisprudence.

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[10] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 17.

[11] Regulation (EU) No 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), in *Official Journal of the European Union*, L 351 of 20 December 2012. Regulation 1215/2012 has repealed Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *Official Journal of the European Communities*, L 12 of 16 January 2001 ("Brussels I Regulation"). On the prorogation of jurisdiction under the Brussels regime see, among others, P. Bertoli, *Nozioni di diritto internazionale privato e processuale*, Giappichelli, Torino, 2023, p. 56 ff.; M. Brosch, L.M. Kahl, *Article 25*, in M. Requejo Isidro (ed.), *Brussels I bis. A commentary on Regulation (EU) No 1215/2012*, Edward Elgar Publishing, Cheltenham-Northampton, 2022, p. 344 ff.; T.C. Hartley, *Choice-of-court Agreements under the European and International Instruments*, Oxford University Press, Oxford, 2013; T. Ratkovic, D. Zgrabljic Rotar, *Choice-of-court agreements under the Brussels I regulation (recast)*, in *Journal of Private International Law*, 2, 2013, p. 245 ff.; F.C. Villata, *L'attuazione degli accordi di scelta del foro nel Regolamento Bruxelles I*, Cedam, Assago, 2012.

[12] Art. 25(1) of Regulation 1215/2012.

[13] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *Official Journal of the European Union*, L 339 of 21 December 2007.

[14] "EFTA-Lugano States" are, in the words of Art. 64(2)(a) of the Lugano Convention of 2007, States where the Lugano Convention of 2007 but not the "Brussels regime" (*i.e*. Regulation 44/2001 and Regulation 1215/2012) applies. Liechtenstein is an EFTA State but not an EFTA-Lugano State since it is not bound by the Lugano Convention of 2007.

[15] Art. 23(1) and 64(2)(a) of the Lugano Convention of 2007. See also B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 5-6.

[16] Hague Convention of 30 June 2005 on Choice of Court Agreements, https://www.hcch.net. The Hague Convention of 2005 is currently in force between the EU (including Denmark) and Albania, Bahrain, Mexico, Montenegro, North Macedonia, Moldova, Singapore, Switzerland, Ukraine and the United Kingdom. It entered into force in EU Member States and in the United Kingdom in its capacity as a EU Member State on 1 October 2015. It entered into force for the United Kingdom in its own right on 1 January 2021 but the United Kingdom considers that it has been a Contracting State without interruption since 1 October 2015, despite Brexit.

[17] Art. 26(6)(a) of the Hague Convention of 2005; F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale. Parte generale e obbligazioni*, IX ed., Utet, Torino, 2020, p. 134.

[18] Art. 3(a) and (b) of the Hague Convention of 2005.

[19] Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, https://www.hcch.net. The Hague Convention of 2019 is currently in force between the EU (Denmark excluded) and Albania, Andorra, Montenegro, Ukraine, the United Kingdom and Uruguay. It entered into force in EU Member States as a result of the EU's accession on 1 September 2023 and in the United Kingdom on 1 July 2025.

5. The first issue concerns the enforceability of asymmetric clauses (paragraph II), *i.e.* whether they satisfy the enforceability requirements provided by Regulation 1215/2012 and the Lugano Convention of 2007[20] in order to be valid (and thus allowed) under the Brussels-Lugano regime[21].

6. Asymmetric clauses were undoubtedly valid under the former Brussels Convention of 1968[22] and Lugano Convention of 1988. Art. 17(5) of the Brussels Convention of 1968, as well as Art. 17(4) of the Lugano Convention of 1988, implicitly accepted the imbalance and validity of one-sided clauses[23] by stating that «[i]f the 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»[24], so that the clause was exclusive only for the other party[25]. With reference to Art. 17(5), the European Court of Justice ("ECJ") held that the common intention to confer an advantage to one of the parties must be clear from the terms of the jurisdiction clause and that «[c]lauses which […], whilst specifying the courts in which either party may sue the other, give one of them a wider choice of courts [*i.e.* asymmetric clauses] must be regarded as clauses whose wording shows that they were agreed for the exclusive benefit of one of the parties»[26]. In this regard, the designation of the court(s) of the Contracting State in which one of the parties is domiciled was not deemed sufficient by the ECJ[27].

7. The explicit reference to asymmetric clauses contained in Arts. 17(5) of the Brussels Convention of 1968 and 17(4) of the Lugano Convention of 1988 has however been deleted in Arts. 23 of both the Brussels I Regulation and Lugano Convention of 2007 and Art. 25 of the Brussels Ibis Regulation. Among the reasons which seem to have led to the deletion are, on the one hand, the fact that the former provisions were «obviously to the advantage of the stronger party in the negotiation of a contract, without producing any significant gain for international commerce»[28] and, on the other hand, the uncertainties which the formulation «for the benefit of only one of the parties» had created[29]. Arguably, the introduction of a rebuttable presumption of exclusivity in Arts. 25 of the Brussels Ibis Regulation and 23 of the Lugano Convention of 2007 («jurisdiction shall be exclusive unless the parties have agreed otherwise») might have been the main reason, since asymmetric Rothschild clauses undoubtedly fall within the terms «unless […] agreed otherwise» by the parties[30].

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[20] B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 195-196.

[21] On this topic see, in addition to the authors cited below, M. Ahmed, *The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union*, in *European Business Law Review*, 3, 2017, p. 403 ff.; L. Merrett, *The Future Enforcement of Asymmetric Jurisdiction Agreements*, in *International and Comparative Law Quarterly*, 1, 2018, p. 37 ff.; H. Wais, *Einseitige Gerichtsstandsvereinbarungen und die Schranken der Parteiautonomie*, in *Rabels Zeitschrift* für *ausländisches und internationales Privatrecht*, 4, 2017, p. 815 ff.

[22] L. Merrett, J. Carruthers, *United Kingdom: Giving Effect to Optional Choice of Court Agreements — Interpretation, Operation and Enforcement*, in M. Keyes (ed.), *Optional Choice of Court Agreements in Private International Law*, Springer, Cham, 2020, p. 485; A. Mills, *Party Autonomy in Private International Law*, Cambridge University Press, Cambridge, 2018, p. 159; E.-A. Oprea, *Romania: Interpretation and Effects of Optional Jurisdiction Agreements in International Disputes*, in M. Keyes (ed.), *Optional Choice of Court Agreements*, cit., p. 315: «[g]iven [the] text [of Art. 17(5) of the Brussels Convention of 1968], the admissibility of asymmetrical jurisdiction agreements was not seriously disputed».

[23] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 52.

[24] Art. 17(5) of the consolidated version of the Brussels Convention of 1968.

[25] F. Pocar, *Explanatory Report to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, in *Official Journal of the European Union*, C 319 of 23 December 2009, para 106.

[26] European Court of Justice, judgment of 24 June 1986, *Rudolf Anterist v* Crédit Lyonnais, C-22/85, ECLI:EU:C:1986:255, paras 14-15.

[27] European Court of Justice, judgment of 24 June 1986, *Rudolf Anterist*, cit., para 16.

[28] F. Pocar, *Explanatory Report*, cit., para 106 (with reference to the Lugano regime).

[29] U. Magnus, *Article 25*, in U. Magnus, P. Mankowski (eds.), *European Commentaries on Private International Law. Brussels Ibis Regulation*, Otto Schmidt, Köln, 2023, p. 603. Similarly, G. Droz, H. Gaudemet-Tallon, *La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Revue critique de droit international privé*, 4, 2001, p. 601 ff., para 51: «la suppression de cette disposition […] supprime ainsi une source de contentieux: il n'était pas toujours aisé de déterminer si la clause avait ou non été stipulée uniquement en faveur de l'une des parties».

[30] R. Fentiman, *International Commercial Litigation*, Oxford University Press, Oxford, 2015, p. 81.

8. In the absence of an equivalent rule to Arts. 17(5) of the Brussels Convention of 1968 and 17(4) of the Lugano Convention of 1988 contained in the Brussels I and Ibis Regulations and in the Lugano Convention of 2007, the issue of enforceability and effectiveness of asymmetric clauses under the Brussels-Lugano regime has been widely debated among scholars[31] and national courts[32]. Indeed, while Italian[33], German and, before Brexit, English[34] courts ruled on the applicability of the Brussels regime to asymmetric clauses, the chambers of the French *Cour de Cassation* have over the years rendered opposed decisions on whether asymmetric choice of court agreements are allowed under the Brussels-Lugano regime. In doing so, they relied on different standards ranging from potestativity to foreseeability[35].

9. In its already mentioned *Rothschild* decision, the First Civil Chamber considered that due to its potestative nature («*caractère potestatif*», a French contract law conception which refers to the power of one party to unilaterally affect the legal position of its counterparty), the asymmetric Rothschild clause at issue was contrary to the object and purpose of the prorogation of jurisdiction under Art. 23 of Regulation 44/2001 ("Brussels I Regulation")[36]. In the *ICH* case the *Court de Cassation* held that the Court of Appeal should have verified whether the asymmetric clause at issue was contrary to the objectives of foreseeability and legal certainty pursued by the Lugano Convention[37]. The French highest court subsequently upheld an asymmetric clause under Art. 23 of the Brussels I Regulation on the ground that it met the requirement of predictability («cette clause […] répondait à l'impératif de prévisibilité») in *eBizcuss*[38]. In *Diemme* the *Court de Cassation* overturned a decision of the Paris Court of Appeal which, in light of the *Rothschild* decision, had declared an asymmetric clause null due to its potestative character[39]. Asymmetric clauses were set aside for lack of objective elements in order to identify the optional courts in *ICH II*[40] and for lack of predictability in *Dexia banque*[41]. In *Tabbert* the asymmetric clause in question was upheld (again) because it met the standard of predictability[42].

10. Recently, upon request for a preliminary ruling from the same French *Cour the Cassation*, the ECJ had the opportunity to rule for the first time in the *Lastre* judgment on the admissibility/validi-

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[31] According to U. Magnus, *Article 25*, cit., p. 603: «"asymmetric clauses" are principally valid under the [Brussels Ibis] Regulation». See also D. Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, in *Journal of International Arbitration*, 1, 2014, p. 38: «[c]onstruing the Brussels I Regulation in light of the Brussels Convention, there is no indication that this type of clause [*i.e.* the Rothschild clause] is not covered by the Regulation. In fact, such clauses have been previously covered by the Brussels Convention»; R. Fentiman, *International Commercial Litigation*, cit., p. 81: «asymmetric agreements of the standard type employed in Rothschild are compatible with Article 25».

[32] E.-A. Oprea, *Romania: Interpretation and Effects of Optional Jurisdiction Agreements*, cit., pp. 315-317.

[33] Cassazione civile, Sezioni Unite, decision of 8 March 2012, n. 3624, *Umbro International Limited v Global Brand Management*, in *One Legale*. On the validity of an asymmetric clause under Art. 4 of the Italian Statute on Private International Law (Law 218/1995), the national provision corresponding to Art. 25 of Regulation 1215/2012, see Cassazione civile, Sezioni Unite, decision of 11 April 2012, n. 5705, *Grinka S.r.l. in liquidazione v Intesa San Paolo S.p.A*., *Simest S.p.A., HSBC Bank Plc*, in *De Jure*.

[34] *E.g*. Court of Appeal, judgment of 18 December 2020, *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707.

[35] F. Mailhé, *French Supreme Court Refers Validity of Asymmetrical Clauses to CJEU*, in *EAPIL Blog*, 4 May 2023.

[36] Cour de cassation, First Civil Chamber, 26 September 2012, No. 11-26.022, *Rothschild*, cit.: «[…] la cour d'appel en a exactement déduit qu'elle revêtait un caractère potestatif à l'égard de la banque, de sorte qu'elle était contraire à l'objet et à la finalité de la prorogation de compétence ouverte par l'article 23 du Règlement Bruxelles I». See also Bulgarian Supreme Court of Cassation, 2 September 2011, No. 71, which held a one-way arbitration/choice of court clause contained in a loan agreement without an international element to be void under Bulgarian law. On the latter judgment see D. Sarbinova, *Bulgarian Court Strikes Down One Way Jurisdiction Clause*, in *Conflictoflaws.net*, 13 November 2012.

[37] Cour de cassation, First Civil Chamber, 25 March 2015, No. 13-27.264, *ICH v Crédit Suisse*.

[38] Cour de cassation, First Civil Chamber, 7 October 2015, No. 14-16.898, *MJA (mandataire judiciaire de la société eBizcuss) v Apple Sales international.*

[39] Cour de cassation, Commercial Chamber, 11 May 2017, No. 15- 18.758, *Diemme v Chambon.*

[40] Cour de cassation, First Civil Chamber, 7 February 2018, No. 16-24.497, *Crédit Suisse v ICH II* (concerning Art. 23 of the Lugano Convention of 2007)

[41] Cour de cassation, First Civil Chamber, 3 October 2018, No. 17-21.309, *Société Saint Joseph v Dexia banque internationale* (Art. 23 of Regulation 44/2001).

[42] Cour de cassation, First Civil Chamber, 11 July 2019, No. 18-11.456, *Aquitaine caravanes v Knaus Tabbert GmbH* (Art. 25 of Regulation 1215/2012).

ty of asymmetric jurisdiction clauses under the Brussels-Lugano regime. The asymmetric jurisdiction clause at issue, which was included in a supply contract between Società Italiana Lastre SpA, an Italian company, and Agora SARL, a French company, stated that «the court of Brescia [(Italy)] will have jurisdiction over any dispute arising from or related to this contract. [Società Italiana Lastre] reserves the right to bring proceedings against the purchaser before another competent court in Italy or elsewhere»[43]. The clause clearly favoured the Italian supplier company, since only the French buyer was required to comply with the exclusive jurisdiction conferred on the Italian court of Brescia[44].

11. The ECJ held that in the assessment of the validity of a forum selection agreement the alleged imprecision and asymmetry of choice of court agreements is to be determined in light of the autonomous criteria to be derived from Art. 25(1) of Regulation 1215/2012 itself[45]. It also clarified that an asymmetric forum selection clause is valid under Regulation 1215/2012 and the Lugano Convention of 2007 if three cumulative conditions are satisfied. The clause must (*i*) designate courts of one or several EU Member States or States parties to the Lugano Convention of 2007, (*ii*) identify objective factors which are sufficiently precise to enable the court seised to ascertain whether it has jurisdiction and (*iii*) not be contrary to Arts. 15, 19 and 23 of Regulation 1215/2012 on jurisdiction relating to insurance, consumer and individual employment contracts and neither derogate to Art. 24 on exclusive jurisdiction[46]. As will be seen, the ECJ relied on some of the enforceability requirements set forth in Art. 25(1) of the Brussels Ibis Regulation and in Art. 25(4), read together with Arts. 15, 19, 23 on protective jurisdiction and Art. 24 on exclusive jurisdiction.

12. The second issue is about the effects of asymmetric jurisdiction clauses under the Brussels-Lugano regime and whether the exception to the *lis pendens* rule in Art. 31(2) of Regulation 1215/2012 is applicable to these clauses (paragraph III).

13. The third issue concerns the exclusion of asymmetric choice of court clauses from the scope of application of the Hague Convention of 2005 which is expressly limited by Art. 1(1) to «exclusive choice of court agreements». Despite the clear wording of the provision and of the accompanying Explanatory Report, some national courts ruled in favour of the application of the Hague Convention of 2005 to asymmetric agreements. At the same time, the exclusion from the Hague Convention of 2005 of asymmetric clauses is counterbalanced by the specific inclusion of these clauses within the scope of the Hague Convention of 2019 (paragraph IV).

II. The enforceability requirements of asymmetric jurisdiction clauses under the Brussels-Lugano regime

14. Art. 25(1) of Regulation 1215/2012 provides that the parties may agree that «a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship». Parties may include their choice of court (*electio fori*) in a standalone agreement or, more frequently, within a contractual clause.

15. This paragraph considers the enforceability requirements of one-way jurisdiction clauses which can be derived from (now) Art. 25 and other provisions on jurisdiction of the Brussels Ibis Regulation, as interpreted by the ECJ and national jurisprudence. Identical and different formulations of the corresponding provisions contained in the Brussels Convention of 1968, the Brussels I Regulation and the Lugano Convention of 2007 will be taken into account, if relevant.

[43] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 17.
[44] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 66.
[45] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 47, 51, 53.
[46] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 67 and dispositive.

1. The precision of content

16. The first sentence of Arts. 17(1) of the Brussels Convention of 1968 and 23(1) of Regulation 44/2001 opened with the wording «[i]f the parties […] have agreed that a court or the courts of a [Contracting State or, respectively, of a] Member State are to have jurisdiction […]». In its earlier *Coreck* and *Hőszig* jurisprudence, the ECJ held that the terms «have agreed» «cannot be interpreted as meaning that it is necessary for such a clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient [in order to be valid] that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case»[47]. Hence, the jurisdiction of a court must be determinable[48]. Jurisdiction clauses designating the courts «in the country where the carrier has his principal place of business»[49] or «the Paris Courts»[50] meet the precision of content requirement.

17. In the most recent *Lastre* decision the ECJ reiterated the just mentioned case law being equally applicable to the corresponding Art. 25(1) of Regulation 1215/2012 which also contains the words «have agreed»[51]. The ECJ added that the condition that the parties «have agreed» on a court or courts of a EU Member State in the first sentence of Art. 25(1) of Regulation 1215/2012 implicitly includes a requirement of precision which a choice of court agreement must satisfy in order to be valid[52]. This precision requirement contributes to the achievement of the objectives of foreseeability, transparency and legal certainty set forth in Recitals 15 and 16 of Regulation 1215/2012[53] and is met if an asymmetric agreement designates with sufficient precision a particular court and other courts of EU Member States or States parties to the Lugano Convention of 2007 having jurisdiction under the general and special rules on jurisdiction of the Regulation (Arts. 4-9) or of the Convention (Arts. 2-7)[54].

18. The specific reference to the objectives of foreseeability and legal certainty in *Lastre* seems to suggest that the precision requirement is to be assessed not only from the perspective of the court but also from the perspective of both parties[55]. In *Inkreal* the ECJ stated that an agreement conferring jurisdiction meets the aim of legal certainty because it «helps the applicant to ascertain the court before which he or she may bring proceedings and the defendant to foresee the court before which he or she may be sued, and enables the national court seised to be able readily to decide whether it has jurisdiction»[56]. There is however no reference to this part of the *Inkreal* judgment in *Lastre*.

19. In sum, it seems that under current EU jurisprudence a jurisdiction clause providing that both parties could sue before a particular court and that the option holder could sue before another «*competent* court» is consistent with the precision of content requirement[57] provided that the clause identifies

[47] European Court of Justice, judgments of 9 November 2000, *Coreck*, C-387/98, ECLI:EU:C:2000:606, para 15 and 7 July 2016, *Hőszig*, C-222/15, ECLI:EU:C:2000:606, para 43.

[48] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 198.

[49] This was the jurisdiction clause at issue in the *Coreck* case: European Court of Justice, judgment of 9 November 2000, *Coreck*, cit., para 5.

[50] European Court of Justice, judgment of July 2016, *Hőszig*, cit, paras 45, 49.

[51] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 42, 45.

[52] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 43-44.

[53] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 46.

[54] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 59.

[55] See in this regard B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 201-205; B. Marshall, *CJEU on substantive validity and on asymmetric clauses: what we now know, and what we (still) don't*, in *GAVC Law Blog*, 7 March 2025.

[56] European Court of Justice, judgment of 8 February 2024, *Inkreal v Dúha reality*, C-566/22, ECLI:EU:C:2024:123, paras 28-29.

[57] G. Cuniberti, *CJEU Rules on Validity of Asymmetric Jurisdiction Clauses*, in *EAPIL Blog*, 27 February 2025: a key lesson of the *Lastre* judgment «seems to be that a clause granting jurisdiction to 'competent' courts is sufficiently precise».

the «*competent* courts» in the EU or in a State bound by the Lugano Convention of 2007[58] (and not outside the EU) having jurisdiction under the Brussels-Lugano regime (*e.g.* the courts of the defendant's domicile or where the services were performed)[59]. This enforceability requirement will be addressed in more detail in the next paragraph.

2. The designation of a court or the courts of a EU Member State or a State bound by the Lugano Convention of 2007

20. Pursuant to Art. 25(1), first sentence, of Regulation 1215/2012 the parties may agree to confer jurisdiction only to «a court or the courts of a [EU] Member State». Similarly, Art. 23(1), first sentence, of the Lugano Convention of 2007 refers to «a court or the courts of a State bound by this Convention». The reference to singular and plural enables the parties to determine local jurisdiction (*e.g.* «the court of Brescia») or international jurisdiction (*e.g.* «the courts in Italy»). In the latter case national procedural law determines the local competent court.

21. With specific regard to the optional limb of the asymmetric jurisdiction clause at issue in the *Lastre* case allowing the option holder to bring proceedings «before another competent court in Italy or elsewhere», the ECJ clarified that despite the wording of Art. 25(1) («courts of a [EU] Member State»), the provision can not be interpreted as meaning that the parties must necessarily designate the courts of a single and the same EU Member State (or State party to the Lugano Convention of 2007). The imposition of such a limit would otherwise be contrary to the need to respect the party autonomy principle enshrined in Recital 19 of the Brussels Ibis Regulation[60]. An asymmetric clause is therefore valid if it designates the courts of one or several EU Member States or States parties to the Lugano Convention of 2007[61].

22. The ECJ specified that the former Art. 17 of the Brussels Convention of 1968 does not apply to clauses designating a court in a third country[62]. In line with this jurisprudence, the ECJ held that if the optional limb of an asymmetric clause referring to «another competent court […] elsewhere» must be interpreted as meaning that it also designates one or several courts of one or more third States (*i.e.* non-EU Member States or non-States parties to the Lugano Convention of 2007), the clause would be contrary to the Brussels-Lugano regime due to the risks of unforeseeability, legal uncertainty and conflicts of jurisdiction[63]. Indeed, in order to determine the «competent court» in a third State (*e.g.* the United Kingdom) which has jurisdiction, it would be necessary to apply the rules on jurisdiction of that State instead of EU law[64], an eventuality which seems inadequate to the ECJ[65].

23. Pursuant to this line of reasoning of the ECJ, the optional limb of the asymmetric clause in the French *Rothschild* case designating «the Courts of the client's domicile or […] any other *competent* court»[66] would satisfy the precision requirement discussed in the previous paragraph. The same seems to apply to the optional limb of a clause which refers to the «courts of Italy or another court *having jurisdiction* by virtue of international conventions»[67], the «competent court at the place of the [reseller]'s

[58] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 62.
[59] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 59.
[60] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 55-56.
[61] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 58 and 67.
[62] European Court of Justice, judgment of 9 November 2000, *Coreck*, cit., para 19.
[63] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 60-61.
[64] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 60.
[65] G. Cuniberti, *CJEU Rules on Validity of Asymmetric Jurisdiction Clauses*, cit.
[66] Emphasis added.
[67] Emphasis added. The clause is taken from the case decided by the Cassazione civile, Sezioni Unite, decision of 8 March 2012, n. 3624, cit.

registered office»[68] or «any other court with jurisdiction»[69]. Doubts arise as regards the second part of the clause in the *Lastre* case («another competent court in Italy *or elsewhere*»)[70].

3. Formal validity

24. Art. 25(1) of Regulation 1215/2012 expressly sets out an exhaustive list[71] of alternative formal validity requirements of choice of court agreements and provides that their substantive validity is governed by the law of the EU Member State of the chosen court(s)[72]. The Brussels Ibis Regulation fails to define the expressions "formal validity" and "substantive validity", which are different, although intertwined, concepts[73].

25. "Formal validity" refers to the formal requirements necessary for a person's will/consent to be externalized and, thus, to be legally effective[74]. The purpose of the requirements as to form is to ensure that consensus between the parties is in fact established[75].

26. The formal validity requirements are listed in Arts. 25(1)(a) to (c) of the Brussels Ibis Regulation and 23(1)(a) to (c) of the Lugano Convention of 2007. To be formally valid, an asymmetric choice of court agreement must be concluded (*a*) in writing or orally with a written confirmation, (*b*) by a practice established between the parties or (*c*) based on a usage of international trade or commerce. The requirement «in writing» is satisfied in the case of «[a]ny communication by electronic means which provides a durable record of the agreement»[76]. Electronic asymmetric clauses or one-sided clauses contained in an online contract are therefore enforceable under the Brussels Ibis Regulation and the Lugano Convention of 2007. The formal validity requirement *sub* (*a*) does not give rise to particular problems, as asymmetric clauses are always concluded in writing[77].

4. Substantive validity

26. The concept of "substantive validity" refers to the existence of vitiating factors affecting the way in which the parties' consent was formed[78]. According to the ECJ, the expression «null and void as

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[68] The clause is taken from the case decided by the Cour de cassation, First Civil Chamber, 11 July 2019, No. 18-11.456, *Aquitaine caravanes v Knaus Tabbert GmbH*.

[69] The clause is taken from the case decided by Cour de cassation, First Civil Chamber, 25 March 2015, No. 13-27.264, *ICH v Crédit Suisse*. See B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 200: «[i]t is difficult to see why the criterion 'any court with jurisdiction' is not an objective factor or why it is insufficiently precise, assessed only from the perspective of a court seised: any court which would otherwise regard itself as competent has jurisdiction»; B. Marshall, *CJEU on substantive validity and on asymmetric clauses*, cit.

[70] Emphasis added. As stated by G. Cuniberti, *CJEU Rules on Validity of Asymmetric Jurisdiction Clauses*, cit. «[t]his clause is found to violate the precision requirement […] the clause would have complied with the requirement of EU law if it had granted jurisdiction to "any competent court of an EU member State or a State applying the Lugano Convention"».

[71] European Court of Justice, judgments of 24 June 1981, *Elefanten Schuh GmbH v Pierre Jacqmain*, C-150/80, ECLI:EU:C:1981:148, para 26: «Contracting States are not free to lay down formal requirements other than those contained in [Art. 17 of] the [Brussels] Convention [of 1968]»; 16 March 1999, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, C-159/97, ECLI:EU:C:1999:142, para 37.

[72] Cf. Arts. 3(c) and 5(1) of the Hague Convention of 2005.

[73] P. Franzina, *The Substantive Validity of Forum Selection Agreements under the Brussels Ibis Regulation*, in P. Mankowski (ed.), *Research Handbook on the Brussels Ibis Regulation*, Edward Elgar Publishing, Cheltenham, 2020, p. 115: «[t]he two sides of validity – the formal and the substantive – remain […] closely related to each other». On the substantive validity of asymmetric clauses see para 27 ff. below.

[74] M. Giuliano, P. Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, in *Official Journal,* C 282/1, p. 29; P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., p. 114.

[75] European Court of Justice, judgments of 11 November 1986, *Iveco Fiat*, C-313/85, ECLI:EU:C:1986:423, para 5; 9 November 2000, Coreck, cit., para 13 and case law cited therein (Art. 17 of the Brussels Convention of 1968).

[76] Arts. 25(2) of Regulation 1215/2012 and 23(2) of the Lugano Convention of 2007.

[77] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 206.

[78] P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., pp. 114-115.

to […] substantive validity» – which must be given an autonomous, uniform[79] and restrictive interpretation – covers the general causes of nullity of a contract, namely the consent-vitiating factors such as error, deceit, violence or fraud and incapacity to contract[80]. These causes are governed by the law of the EU Member State whose courts are designated (*lex fori prorogati*) and not by the Brussels Ibis Regulation itself[81]. The concept «null and void as to […] substantive validity» does not cover conditions of validity pertaining to jurisdiction clauses[82]. It follows that the alleged imprecision and/or asymmetry is an autonomous (rather than a substantive validity) question to be determined by applying autonomous factors and criteria to be derived from Art. 25 of the Brussels Ibis Regulation as interpreted by the ECJ[83].

27. Unlike Arts. 17 of the Brussels Convention of 1968 and 23 of both Regulation 44/2001 and the Lugano Convention of 2007, Art. 25(1), first sentence, of Regulation 1215/2012 provides that the court(s) of a Member State designated in a forum selection agreement «shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State» (*lex fori prorogati*). Art. 25(1) lays down a conflict-of-laws rule that indicates which national law applies as regards grounds of substantive (in)validity of a jurisdiction clause[84] and which is in line with the principle of severability/separability enshrined in Art. 25(5) of the Brussels Ibis Regulation.

28. Pursuant to Recital 20 of the Brussels Ibis Regulation, for the purposes of Art. 25(1) the term «law» refers to both the substantive rules and the conflict-of-laws rules of the EU Member State whose courts have been chosen[85]. Recital 20 – which has only interpretative value – thus specifies that the doctrine of *renvoi* applies[86]. In the absence, at EU[87] and international level, of uniform conflict-of-laws rules to determine the law applicable to the substantive validity of choice of court agreements, the *domestic* conflict-of-laws rules of the chosen court must be taken into account[88]. This may lead to the application of the substantive law of another EU Member State – or, even, of a third State[89] – under the national conflict-of-laws rules of the chosen court. In the *Lastre* case the referring French *Cour de Cassation* requested the ECJ to clarify whether, in light of Recital 20, the conflict-of-laws rule in Art. 25(1) of the Brussels Ibis Regulation includes *renvoi*[90]. Regrettably, this has not yet been clarified by

[79] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 30.

[80] On the issues being covered by "substantive validity" see the detailed analysis of B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 211 ff.

[81] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 36.

[82] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 36.

[83] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 47, 51 and 53. See also P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., p. 112: «the admissible 'format' of a forum selection agreement – that is, its general layout, including whether the agreement should necessarily provide the parties with equal jurisdictional opportunities – seems to rank among the matters that the Regulation itself takes care to address».

[84] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 32. As highlighted by A. Mills, *Party Autonomy in Private International Law*, cit., p. 107, Art. 25(1) is a «complex choice of law rule, somewhat curiously buried in the Brussels I[bis] Regulation (which is otherwise exclusively focused on jurisdiction and the recognition and enforcement of judgments)».

[85] See Recital 20 of Regulation 1215/2012: «[w]here a question arises as to whether a choice-of-court agreement in favour 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-laws rules of that Member State».

[86] See T.C. Hartley, *Civil Jurisdiction and Judgements in Europe*, cit., p. 271 ff.; A. Mills, *Party Autonomy in Private International Law*, cit., p. 107.

[87] Art. 1(2)(e) of the Rome I Regulation excludes «agreements on the choice of court» from its scope of application.

[88] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 219. Some EU Member States have unilaterally extended the provisions of the Rome I Regulation through their national legislation (*e.g.* Art. 57 of the Italian Statute on Private International Law, Law 218/1995), while others have enacted specific national conflict-of-laws rules: see in detail P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., pp. 107-109.

[89] In this case the safeguards of the overriding mandatory provisions in force in the EU Member State of the chosen court and its public policy would still apply: P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., p. 105.

[90] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 27(3), third indent: «lastly, in view of recital 20 of the Brussels Ia Regulation, should reference to the law of the Member State designated be understood to mean the material rules of the State or its conflict-of-law rules?».

the ECJ[91]. It should also be noted that in paragraph 9 of its *Lastre* judgment the ECJ quoted Recital 20 in its entirety, while in paragraph 33 it omitted to cite the relevant final part («including the conflict-of-laws rules of that Member State»)[92]. Alignment with Art. 5(1) of the Hague Convention of 2005 would however suggest that *renvoi* is included[93].

29. The *lex fori prorogati* approach now enshrined in Art. 25(1) of Regulation 1215/2012 has already been anticipated by Advocate General Slynn in 1981[94] and has been later codified in Art. 5(1) of the Hague Convention of 2005. The latter provision states that «[t]he court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State»[95]. As highlighted in the Hartley/Dogauchi Explanatory Report, the term «law» in Art. 5(1) includes the choice-of-law rules of the State of the chosen court as well[96]. Despite the slightly different formulation (Art. 25(1) of Regulation 1215/2012 adds that the clause may be null and void «as to its substantive validity»), Art. 25(1) of Regulation 1215/2012 mirrors the choice-of-law rule under Art. 5(1) of the Hague Convention of 2005, thus ensuring perfect coherence between the Brussels and Hague regimes[97]. In paragraph 3 of the *Lastre* judgment the ECJ specifically refers to Art. 5(1) of the Hague Convention of 2005, maybe to underline the alignment of the Brussels Ibis Regulation with the Convention on this point[98]. This seems to be confirmed by the ECJ's reference to a Proposal for the Brussels Ibis Regulation which specified that «a harmonised conflict of law rule on the substantive validity of choice of court agreements […] reflect[s] the solutions established in the 2005 Hague Convention on the Choice of Court Agreements»[99].

30. The *lex fori prorogati* approach can also be found in other provisions of the Hague Convention of 2005, namely Art. 6(a) excluding the obligation of a court of a Contracting State other than that of the chosen court to suspend or dismiss proceedings to which an exclusive choice of court agreement applies if «the agreement is null and void under the law of the State of the chosen court»[100] and Art. 9(a) on the refusal of recognition or enforcement of a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement if «the agreement was null and void under the law of the State of the chosen court»[101].

31. It should be noted that in order to ascertain the substantive validity of the choice of court agreement, Art. 25(1) of Regulation 1215/2012 makes reference to the «law of that Member State», *i.e*. to the

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[91] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 68.

[92] G. van Calster, *Società Italiana Lastre. The CJEU (once again ignoring renvoi nb) in strong support for party autonomy, holds the validity of asymmetric choice of court IS covered by Brussels Ia and, in principle, valid provided it be limited to EU or Lugano States courts*, in *GAVC Law Blog*, 28 February 2025.

[93] In this sense see also B. Marshall, *CJEU on substantive validity and on asymmetric clauses*, cit., observing that «[w]hat one should make of the Court's misleading truncation of recital 20 is, therefore, anyone's guess».

[94] Opinion of Advocate General Slynn of 20 May 1981, *Elefanten Schuh*, C-150/80, p. 1698: «having regard to the objects and purposes of the [Brussels] Convention [of 1968], Article 17 is to be read as implicitly laying down the rule that where a particular forum is referred to in writing, in what is alleged to be, or to be evidence of, a valid agreement, the law of that forum must decide whether the agreement is valid. Only in this way can any principle of uniformity be satisfied».

[95] Art. 5(1) of the Hague Convention of 2005.

[96] T.C. Hartley, M. Dogauchi, *Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements*, para 125.

[97] M. Weller, *Choice of Court Agreements under Brussels Ia and under the Hague Convention: Coherences and Clashes*, in *Journal of Private International Law*, 1, 2017, p. 101.

[98] However, according to G. Cuniberti, *CJEU Rules on Validity of Asymmetric Jurisdiction Clauses*, cit., the ECJ's reference to the Hague Convention of 2005 «is unclear, but somewhat worrying, as it may signal that it considers that the issues should be addressed in the same way under the two instruments [but] [t]he Hague Convention […] only applies to exclusive choice of court agreements». The same concern has been shared by G. van Calster, *Società Italiana Lastre*, cit.

[99] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 40 quoting European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14 December 2010, COM(2010) 748 final, p. 9.

[100] Art. 6(a) of the Hague Convention of 2005.

[101] Art. 9(a) of the Hague Convention of 2005.

lex fori prorogati of the only EU Member State whose court(s) have been chosen[102]. In other words, the conflict-of-laws rule in Art 25(1) presupposes that the parties designate the court(s) of one EU Member State in their forum selection clause[103]. How does the conflict-of-laws rule in Art. 25(1) work in the case of Rothschild clauses? Which court(s) are designated/prorogated in such clauses? Is it only the anchor court or also the optional courts[104] which are usually located in different (EU or EFTA-Lugano) States?

32. The referring court in the *Lastre* case asked the ECJ whether reference should be made to «the sole court to be expressly designated, even if proceedings could equally be brought before other courts» or, if multiple courts have been designated, to the «court before which proceedings have actually been brought»[105]. Unfortunately, the ECJ did not answer this key question[106] which still has to be solved. It has been argued that Rothschild clauses designate/prorogate only the anchor court for both parties[107] and merely preserve (but not prorogate) the jurisdiction of the optional court(s) for one of the parties (the option holder). Under this solution, if proceedings are brought before the anchor court, that court will apply to the substantive validity of the Rothschild clause the law designated by its conflict-of-laws rules (assuming *renvoi* is included). If proceedings are brought before another court (including one of the optional courts), that court will apply the law designated by the conflict-of-laws rules of the anchor court[108].

5. The compliance with the provisions on protective and exclusive jurisdiction

33. Art. 25(4) of Regulation 1215/2012 provides that «[a]greements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24».

34. It follows from Art. 25(4), read in conjunction with Arts. 15(2), 19(2), 23(2) and 24 of Regulation 1215/2012, that in order to be valid a unilateral clause must not contravene the provisions of the Brussels Ibis Regulation on protective jurisdiction, nor derogate from an exclusive jurisdiction[109]. Under Arts. 15(2), 19(2), 23(2) a choice of court agreement is valid in matters relating to insurance, consumer and individual employment contracts only if it allows the weaker party to bring proceedings in courts other than those indicated in Sections 3 to 5 of Chapter II of Regulation 1215/2012. These provisions explicitly deal with asymmetry of choice of court agreements in favour of the weaker party and govern the situation in which an asymmetric jurisdiction agreement is valid or not[110].

III. The effects of asymmetric jurisdiction clauses under the Brussels-Lugano regime and the issue of whether asymmetric clauses fall within Art. 31(2) of Regulation 1215/2012

35. Since asymmetric clauses are exclusive for one party but non-exclusive for the other, it may be argued that they have, on the one hand, a prorogation effect for both parties (*i.e*. the non-option and the option holder), in that they confer jurisdiction on the nominated/anchor court(s), as well as, on the other hand, a derogation effect for the non-option holder, in that they exclude the jurisdiction of any other court[111].

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[102] P. Franzina, *The Substantive Validity of Forum Selection Agreements*, cit., p. 109: «[t]he reference to the *lex fori prorogati* is in fact spelled […] in the singular».

[103] B. Marshall, *CJEU on substantive validity and on asymmetric clauses*, cit.

[104] See B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 142-153.

[105] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 27(3), first and second indent.

[106] For a critique on this point see also B. Marshall, *CJEU on substantive validity and on asymmetric clauses*, cit.: «[i]t is a shame that [the ECJ] did not grasp the nettle».

[107] See para 36 below.

[108] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 223.

[109] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 48-50, 64-65.

[110] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., paras 50, 64.

[111] A. Mills, *Party Autonomy in Private International Law*, cit., p. 164.

36. Arts. 23(1), second sentence, of the Brussels I Regulation and the Lugano Convention of 2007 and 25(1), second sentence, of Regulation 1215/2012 state that the jurisdiction of the designated court(s) «shall be exclusive unless the parties have agreed otherwise». These provisions introduce a presumption of exclusivity of choice of court agreements, unless the parties have expressly provided otherwise. This amendment – which is in line with the principle of party autonomy[112] – may be linked to the deletion of the provision which was initially contained in Arts. 17(5) of the Brussels Convention of 1968 and 17(4) of the Lugano Convention of 1988[113].

37. Legal scholars[114] and national courts have relied on the expression «unless the parties have agreed otherwise» to conclude on the validity of asymmetric choice of court agreements, which are a form of non-exclusive jurisdiction clauses. For example, the Italian Supreme Court (*Corte di Cassazione*) ruled on the applicability of Art. 23 of Regulation 44/2001 to an asymmetric clause providing that one party (in the case at hand, Global Brand Management) may only bring proceedings before the courts of England, while the other party (Umbro International Limited) also reserved the right to bring proceedings alternatively before the courts of Italy or another court having jurisdiction by virtue of international conventions. According to the Court, the phrase «unless the parties have agreed otherwise» of Art. 23 of the Brussels I Regulation allows the parties of an asymmetric clause to mitigate the exclusive jurisdiction of the anchor courts. However, in this case, Global Brand Management brought proceedings before the Tribunal of Rome. The *Corte di Cassazione* held that Art. 23 of Regulation 44/2001 precludes the non-option holder from derogating to the jurisdiction of the anchor courts and, consequently, denied the jurisdiction of the Tribunal of Rome in favour of the English jurisdiction[115].

38. In its *Lastre* judgment, the ECJ expressly underlined that the fact that under the anchor limb of an asymmetric clause only the non-option holder is required to comply with the exclusive jurisdiction conferred on the anchor court «does not appear, in itself, to be contrary to [the second sentence of] Article 25» of the Brussels Ibis Regulation[116].

39. Exclusivity constitutes a crucial requirement for the application of Art. 31(2) of Regulation 1215/2012[117]. According to Art. 31(2), «where a court of a Member State on which an agreement as referred to in Article 25 confers *exclusive* jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement»[118]. The latter provision, which can not be found in the Lugano Convention of 2007, constitutes a «reverse *lis pendens* rule»[119] in that it gives priority to determine the effect of the agreement to the exclusively chosen court, even if it is second seised[120]. The

[112] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 52.

[113] See para I above.

[114] R. Fentiman, *International Commercial Litigation*, cit., p. 81: «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, the agreement in Rothschild being but a form of non-exclusive jurisdiction agreement»; F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione). Evoluzione e continuità del "sistema Bruxelles-I" nel quadro della cooperazione giudiziaria europea in materia civile*, IV ed., Wolters Kluwer-Cedam, Padova, 2015, pp. 203-204.

[115] See Cassazione civile, Sezioni Unite, decision of 8 March 2012, n. 3624, cit.: «la circostanza che, rispetto alla giurisdizione, la posizione delle parti del contratto sia asimmetrica, essendo [l']una vincolata alla giurisdizione delle Corti inglesi e l'altra avendo invece la facoltà di optare eventualmente anche per fori differenti, rientra nell'ambito dei possibili diversi accordi mediante i quali il citato art. 23 consente di contemperare l'esclusività del criterio di competenza convenzionale, ma non legittima certo la deroga a tale criterio anche in favore della parte cui quella facoltà non sia stata invece riconosciuta nel contratto; pertanto il Tribunale di Roma non ha titolo per conoscere della presente causa, che ricade nella giurisdizione inglese».

[116] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 66.

[117] M. Brosch, L.M. Kahl, *Article 25*, cit., p. 361.

[118] Art. 31(2) of Regulation 1215/2012, emphasis added.

[119] See M. Ahmed, *The Nature and Enforcement of Choice of Court Agreements. A Comparative Study*, Hart Publishing, Portland, 2017, pp. 213 and 245 and authors cited therein.

[120] Recital 22 of Regulation 1215/2012.

rationale behind the introduction of Art. 31(2) in Regulation 1215/2012 was to avoid the risk of "Italian torpedoes"[121].

40. The issue is whether Art. 31(2) applies to asymmetric clauses[122]. English[123] and German[124] courts have ruled that it is an *acte clair* that it does, with consequently no need to refer a preliminary question to the ECJ under Art. 267 of the TFEU. Art. 31(2) of the Brussels Ibis Regulation explicitly covers only jurisdiction clauses which confer *exclusive* jurisdiction on a court of a EU Member State. The heart of the problem lies in the already mentioned hybrid nature of asymmetric clauses which are exclusive for the non-option holder, but non-exclusive for the option holder. Should Art. 31(2) apply only if the non-option holder initiates proceedings before a court other than the anchor court in breach of the anchor limb of a Rothschild clause?[125] Again, a reference to the ECJ on whether *mutually exclusive* jurisdiction agreements are covered by Art. 31(2) is advisable. In the case of an affirmative answer, the general *lis pendens* rule under Art. 29 of Regulation 1215/2012 will apply to asymmetric clauses instead of Art. 31(2).

IV. The exclusion of asymmetric choice of court agreements from the scope of the Hague Convention of 2005 and their inclusion within the scope of the Hague Convention of 2019

41. As regards the Hague Convention of 2005, there is no requirement that the parties should have equal rights[126]. However, Art. 1(1) of the Convention expressly limits the scope of application of the Convention to only «*exclusive* choice of court agreements concluded in civil or commercial matters»[127]. Such a delimitation is missing in Arts. 25 of the Brussels Ibis Regulation and 23 of the Lugano Convention of 2007.

42. Art. 3(a) defines «exclusive choice of court agreement» as «an agreement concluded by two or more parties [or documented] [in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference[128]] […] [that] designates, for the 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*»[129]. The Hague Convention of 2005 also contains a deeming rule: Art.

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[121] R. Monico, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, Giappichelli, Torino, 2022, pp. 74-75.

[122] On this issue see the detailed discussion of G. Cuniberti, *Lis Pendens and Jurisdiction Clauses: Open Issues*, in B. Hess, M. Bergström, E. Storskrubb (eds.), *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, Oxford, 2015, p. 30 ff.; B. Marshall, *Asymmetric Jurisdiction Clauses and the Anomaly Created by Article 31(2) of the Brussels I Recast Regulation*, in *International and Comparative Law Quarterly*, 2, 2022, p. 297 ff.; B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 174 ff.

[123] Court of Appeal, judgment of 18 December 2020, *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707, paras 93-94. See also High Court of Justice, judgment of 3 February 2017, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm), para 64: «[t]he natural meaning of the words in Article 31(2) - "an agreement [which] confers exclusive jurisdiction"- to my mind includes asymmetric jurisdiction clauses such as those in the various agreements in this case between the Bank and the defendants. Considered as a whole, they are agreements conferring exclusive jurisdiction on the courts of an EU member state, namely, England. That this applies in respect of a claim by the defendants alone does not detract from this effect».

[124] Bundesgerichtshof, 15 June 2021, II ZB 35/ 20, para 71.

[125] M. Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, cit., p. 230; R. Fentiman, *International Commercial Litigation*, cit., p. 101.

[126] M. Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, cit., p. 241; T.C. Hartley, *Civil Jurisdiction and Judgements in Europe*, cit., p. 249.

[127] Art. 1(1) of the Hague Convention of 2005, emphasis added.

[128] See Arts. 3(a) and 3(c) of the Hague Convention of 2005.

[129] Art. 3(a) of the Hague Convention of 2005, emphasis added. The Bundesgerichtshof, 15 June 2021, II ZB 35/ 20, para 69 underlined that the concept of exclusivity under the Hague Convention of 2005 is narrower than in Art. 25 of Regulation 1215/2012.

3(b) provides that «a choice of court agreement […] shall be deemed to be exclusive unless the parties have expressly provided otherwise». It follows that if the parties have expressly provided otherwise, the agreement is not exclusive and, therefore, outside the Convention's scope of application[130].

43. The Diplomatic Session agreed that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings[131]. As a consequence, asymmetric choice of court agreements, such as those in the *Rothschild* and *Lastre* cases, although being exclusive for one party and non-exclusive for the other, «count as non-exclusive agreements for the purpose of the Convention[132] because they exclude the possibility of initiating proceedings in other courts for only one of the parties»[133]. They are thus not covered by the Hague Convention of 2005[134]. The English High Court of Justice has nonetheless ruled – although in *obiter dictum* – that the Convention applies to asymmetric clauses[135]. This national jurisprudence is not supported by neither the above-mentioned clear wording of the Hague Convention of 2005, nor by the *travail préparatoire*, *i.e*. the Hartley/Dogauchi Explanatory Report[136].

44. Nonetheless, asymmetric jurisdiction clauses which are exclusive for both parties and designate alternative courts in the same Contracting State would instead be covered by the Hague Convention of 2005[137]. This would be in line with Art. 3(a) of the Convention which explicitly allows the designation of «one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts»[138]. A clause framed as follows «X may sue Y only in the court of Brescia but Y may sue X in the court of Brescia or the court of Rome» would therefore be valid under the Hague Convention of 2005.

45. Art. 8(1) of the Hague Convention of 2005 limits the application of Chapter III on recognition and enforcement to «[a] judgment given by a court of a Contracting State designated in an *exclusive* choice of court agreement»[139]. Whereas asymmetric jurisdiction clauses are not exclusive for the purpose of the Hague Convention of 2005, the recognition and enforcement procedure set out in the Convention does not apply to judgments given under asymmetric agreements. However, Art. 22 of the Convention provides that Contracting States may extend the recognition and enforcement provisions in Chapter III of the Convention[140] to non-exclusive choice of court agreements[141]. Under Art. 22, Contracting States may make reciprocal declarations that their courts will recognise and enforce judgments given by Con-

[130] B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 124.

[131] T.C. Hartley, M. Dogauchi, *Explanatory Report*, cit., para 106.

[132] High Court of Justice, judgment of 20 May 2024, *Borrelli v Otaibi*, [2024] EWHC 1148 (Comm), para 40; Court of Appeal, judgment of 18 December 2020, *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707, para 85; G. Cuniberti, *CJEU Rules on Validity of Asymmetric Jurisdiction Clauses*, cit.: «it is most doubtful that clauses granting options to one of the parties such as the one in [the *Lastre*] case can be characterised as exclusive [under the Hague Convention of 2005]»; R. Fentiman, *International Commercial Litigation*, cit., p. 64; M. Keyes, B. A. Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, in *Journal of Private International Law*, 3, 2015, p. 366; B. Marshall, *Asymmetric jurisdiction clauses*, cit., pp. 124-136 and 138 concludes in the sense that Rothschild clauses can not be characterized as exclusive jurisdiction agreements for the purposes of the Hague Convention of 2005; A. Mills, *Party Autonomy in Private International Law*, cit., pp. 159, 163-164.

[133] T.C. Hartley, M. Dogauchi, *Explanatory Report*, cit., paras 106, 249; Rechtbank Amsterdam, decision of 15 November 2022, *X v Juno Holdings*, ECLI:NL:RBAMS:2022:7521, para 4.9.

[134] M. Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, cit., p. 241; T.C. Hartley, *Civil Jurisdiction and Judgements in Europe*, cit., p. 249.

[135] See High Court of Justice, judgments of 18 November 2019, *Etihad Airways PJSC v Flöther*, [2019] EWHC 3107 (Comm), para 217: «there are good arguments that the rules in the Hague Convention [of 2005] are engaged by an asymmetric clause»; 3 February 2017, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm), para 74: «[t]here are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention [of 2005] cover asymmetric jurisdiction clauses».

[136] See fn 133.

[137] T.C. Hartley, *Civil Jurisdiction and Judgements in Europe*, cit., p. 249.

[138] Art. 3(a) of the Hague Convention of 2005.

[139] Art. 8(1) of the Hague Convention of 2005, emphasis added.

[140] Arts. 8-15 of the Hague Convention of 2005.

[141] T.C. Hartley, M. Dogauchi, *Explanatory Report*, cit., paras 28, 106 (asymmetric agreements «may be subject to the rules of the Convention on recognition and enforcement if the States in question have made declarations under Article 22»), 240.

tracting States courts designated in a non-exclusive choice of court agreement[142]. The rationale behind Art. 22 seems to be to allow option holders who have been awarded a judgment based on a Rothschild clause to benefit from enforcement under the Hague Convention of 2005[143]. As mentioned, Art. 22 is based on a system of reciprocal declarations[144]. Since, at the time of writing, only Switzerland has yet made a declaration pursuant to Art. 22 of the Hague Convention of 2005[145], the provision is devoid of any practical effect.

46. Asymmetric clauses are included in the scope of the Hague Convention of 2019. Indeed, Art. 5(1)(m) of the Convention provides that a judgment is eligible for recognition and enforcement if it «was given by a court designated in an agreement […] *other than* an exclusive choice of court agreement»[146]. Art. 5(1)(m) substantially reproduces the same definition of «exclusive choice of court agreement» contained in Art. 3(a) of the Hague Convention of 2005. As explained in the Garcimartín/Saumier Explanatory Report, the Hague Convention of 2019 only deals with non-exclusive choice of court agreements in order to avoid any overlap with the Hague Convention of 2005[147]. Since asymmetric clauses are not regarded to be exclusive under the Hague Convention of 2005[148], they fall within the scope of the Hague Convention of 2019[149].

V. Conclusion

47. The enforceability of asymmetric jurisdiction clauses, *i.e*. whether they satisfy the enforceability requirements set forth by Regulation 1215/2012 and the Lugano Convention of 2007, is one of the most debated issues concerning these clauses. While Italian, German and (pre-Brexit) English courts have ruled on the applicability of the Brussels-Lugano regime to asymmetric clauses, the French *Cour de Cassation* has, since its landmark *Rotschild* case of 2012, rendered opposed decisions based on different standards.

48. The issue has been recently addressed by the ECJ. In *Lastre* the ECJ imposed for the first time some limits on the validity of asymmetric jurisdiction clauses under the Brussels-Lugano regime. Asymmetric clauses are valid if they (*i*) designate courts of one or several EU Member States or States parties to the Lugano Convention of 2007, (*ii*) identify objective factors which are sufficiently precise to enable the court seised to ascertain whether it has jurisdiction and (*iii*) comply with Arts. 15(2), 19(2) and 23(2) on protective jurisdiction and Art. 24 on exclusive jurisdiction[150]. It remains to be seen how national courts (particularly the French *Cour de Cassation*) will from now on assess the validity of asymmetric clauses under the Brussels-Lugano regime in applying the ECJ *Lastre* judgment.

49. The analysis of the ECJ jurisprudence concerning the enforceability requirements of asymmetric jurisdiction clauses shows that the precision of content requirement is satisfied if the optional limb of a Rotschild-type clause allows the option holder to sue before another «competent court», pro-

[142] According to A. Mills, *Party Autonomy in Private International Law*, cit., p. 164 «[i]t is something of an oddity that an asymmetrical jurisdiction agreement may therefore potentially benefit from the rules on recognition and enforcement of judgments under the Hague Convention, even if the party who is the beneficiary of the exclusive jurisdiction clause is unable to rely on the Convention to give effect to that clause».

[143] B. Marshall, *The 2005 Hague Convention. A Panacea for Non-Exclusive and Asymmetric Jurisdiction Agreements Too?*, in M. Douglas, V. Bath, M. Keyes, A. Dickinson (eds.), *Commercial Issues in Private International Law. A Common Law Perspective*, Hart Publishing, Oxford, 2019, p. 116.

[144] T.C. Hartley, M. Dogauchi, *Explanatory Report*, cit., para 28.

[145] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1537&disp=resdn.

[146] Art. 5(1)(m) of the Hague Convention of 2005, emphasis added.

[147] F. Garcimartín, G. Saumier, *Explanatory Report*, cit., para 215.

[148] T.C. Hartley, M. Dogauchi, *Explanatory Report*, cit., para 32.

[149] F. Garcimartín, G. Saumier, *Explanatory Report*, cit., para 217.

[150] European Court of Justice, judgment of 27 February 2025, *Società Italiana Lastre*, cit., para 67 and dispositive.

vided that the clause identifies the «competent court» in a EU Member State or in a State bound by the Lugano Convention of 2007 (and not in a third State) having jurisdiction under the Brussels-Lugano regime. Doubts arise as regards asymmetric clauses which give the option holder a right to generally sue «elsewhere».

50. Still open issues which the ECJ has unfortunately not addressed in *Lastre* are whether, in light of Recital 20, the conflict-of-laws rule in Art. 25(1), first sentence, of the Brussels Ibis Regulation includes *renvoi* and how this conflict-of-laws rule works in the case of Rothschild clauses. Art. 25(1) provides that the court(s) of a EU Member State designated in a forum selection agreement «shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State» (*lex fori prorogati*). The problem is to determine which, among the multiple courts referred to in Rotschild clauses, is the designated/prorogated court in order to identify the «law» of which EU Member State applies to ascertain the substantive validity of the choice of court agreement. In this regard, it has been argued that the anchor court should be considered as the designated court. A reference to the ECJ for a preliminary ruling under Art. 267 of the TFEU on this issue is extremely desirable.

51. The article has also considered the effects of asymmetric jurisdiction clauses under the Brussels-Lugano regime. Such clauses have an exclusive effect for the non-option holder and a non-exclusive effect for the option holder. It is exactly this hybrid nature of Rotschild-type clauses which raises the further issue of whether the reverse *lis pendens* rule contained in Art. 32(1) of the Brussels Ibis Regulation covers these clauses. A clarification by the ECJ on this point as well would be more than welcome.

52. With regard to the Hague regime, asymmetric clauses fall outside the scope of the Hague Convention of 2005, which applies to forum selection agreements being exclusive irrespective of the party bringing the proceedings. Despite the clear wording of the Convention and of the accompanying Explanatory Report, the English High Court of Justice ruled (although in *obiter dictum*) in favour of the application of the Hague Convention of 2005 to asymmetric agreements. Given that the Hague Convention of 2005 is an international treaty and has the *status* of EU law within the EU (Denmark excluded)[151], it is also advisable for the courts of EU Member States to seek confirmation from the ECJ – again through the preliminary reference procedure – as to whether asymmetric jurisdiction clauses are non-exclusive for the purpose of the Convention, thus falling outside its scope of application. Still, Art. 22 of the Hague Convention of 2005 enables Contracting States to extend the recognition and enforcement provisions in Chapter III of the Convention to non-exclusive choice of court agreements through reciprocal declarations. However, at the time of writing Switzerland is the only Contracting State to have made a declaration. It should be noted that asymmetric clauses are by contrast included in the scope of the Hague Convention of 2019 due to its Art. 5(1)(m). Post-Brexit, the recognition and enforcement in the EU of English court judgments granted under asymmetric clauses (and *vice versa*) is therefore only possible under the Hague Convention of 2019.

[151] M. Ahmed, *The Nature and Enforcement of Choice of Court Agreements*, cit., p. 246; T.C. Hartley, *Choice-of-court Agreements under the European and International Instruments*, cit., pp. 23-24; B. Marshall, *Asymmetric jurisdiction clauses*, cit., p. 137.