THE FUTURE ENFORCEMENT OF ASYMMETRIC JURISDICTION AGREEMENTS

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Abstract Asymmetric jurisdiction clauses are clauses which contain different provisions regarding jurisdiction for each party. They are widely used in international financial markets. However, the validity of this form of agreement has been called into doubt in several European jurisdictions. Furthermore, following Brexit, there may well be an increasing focus on alternative methods of enforcement under the Hague Convention and at common law, claims for damages and anti-suit injunctions. As well as considering recent developments in the case law and the implications of Brexit, this article will emphasize that all of these questions can only be answered after the individual promises contained in any particular agreement are properly identified and construed. Once that is done, there is no reason why the asymmetric nature of a clause should be a bar to its enforcement.

Keywords: anti-suit injunction, asymmetric jurisdiction agreements, Brussels I Regulation recast, damages.

Sophisticated and well advised commercial parties regularly include increasingly complex and multi-faceted choice of court agreements in their contracts.[1] It is crucial that parties know in advance what effect will be given to those agreements. However, the validity of certain forms of agreement, particularly asymmetric agreements, has been called into doubt in several European jurisdictions, and accordingly must remain doubtful under the Brussels I Regulation recast ('BIR recast').[2] Furthermore, the uncertainty created by Brexit cannot be underestimated. This will lead to increasing

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[1] As R Fentiman, *International Commercial Litigation* (2nd edn, Oxford 2015), notes [2.05] dispute resolution clauses in commercial transactions now commonly seek to regulate all aspects of a dispute including mechanism for service of notice, waiver of right to object to the venue or enforcement, indemnities etc. This article will focus on the core aspect of such agreements, that is, the mechanism and venue for resolving disputes. The terms jurisdiction agreement (which tends to be used at common law) and choice of court agreement (which is often used in international Conventions) will be used to describe this core aspect of a dispute resolution clause.

[2] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The recast Regulation applies to proceedings commenced on or after 10 January 2015.

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focus on alternative methods of enforcement under the Hague Convention[3] and at common law, in particular, claims for damages and anti-suit injunctions.

This article focuses on asymmetric jurisdiction agreements. As well as considering recent developments in the case law and the implications of Brexit, this article will emphasize a point of more general principle, broadly speaking, the question of construction. This article will argue that insufficient attention is paid to the construction of jurisdiction agreements. In particular, it is wrong, or at least unhelpful, to approach the question by asking whether 'asymmetric jurisdiction agreements' are valid. Choice of court agreements will contain a variety of positive and negative obligations some of which are express and some of which are implied. The effect given to a choice of court clause depends on how each of those obligations is enforced. Whilst commentators and judges are increasingly recognizing that labels such as 'exclusive' and 'non-exclusive' jurisdiction agreements are not always helpful[4], insufficient attention is still being paid to separating out the individual contractual promises comprised in any particular agreement.

Part I will start by setting out the general approach. Part II will describe different forms of asymmetric agreements and how they are commonly construed. Having determined, as a matter of construction, what promises are included in a particular agreement, the court can consider what effect to give to a particular promise. The remainder of the article considers the effects given to the promises in an asymmetric agreement at common law (Part III), under the BIR recast (Part IV) and post-Brexit (Part V).

I. THE GENERAL APPROACH: CONSTRUCTION V. VALIDITY AND AGREEMENT V. EFFECT

As a matter of English common law, a choice of court agreement is an agreement between the parties capable of generating private law contractual rights and encompassing contractual promises. It is severable from the underlying contract of which it forms a part due to the doctrine of severability.[5] Accordingly, the starting point is to determine the applicable law of the choice of court agreement by applying contractual choice of law rules. That applicable law will apply to determine questions of interpretation, including the proper construction of express terms and whether there are any implied terms. It is also often said that the applicable law will determine

[3] The Hague Convention on Choice of Court Agreements 2005.

[4] See, for example, A Briggs 'The Subtle Variety of Jurisdiction Agreements' (2012) LMCLQ 364, 376. cf D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, Sweet & Maxwell 2015) [4.03]: arguing that the labels exclusive and non-exclusive jurisdiction agreements and the distinction between them are of central importance to the application of the BIR recast, Lugano II and Hague Conventions.

[5] Confirmed at common law by *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 and, under the BIR recast, by *Benincasa v Dentalkit srl* Case C-269/95 and now by art 25.5 of the recast Regulation.

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whether a clause is exclusive or non-exclusive.[6] However, whilst this might be a useful shorthand way to describe the process of construction, it is important to focus on what express or implied obligations the agreement contains. This is a question of construction rather than characterization; attempting to characterize an agreement as, for example, exclusive or non-exclusive, tends to distract or obscure the fact an agreement can contain positive and negative obligations which can be different depending on the party and circumstances.

As well as questions of interpretation, the law applicable to the choice of court agreement will also determine questions of contractual validity eg duress, misrepresentation, undue influence etc.[7]

However, contractual validity is a different issue from the legal effect given to a valid contractual agreement. How a promise, either to submit to the jurisdiction of the English court or not to sue elsewhere, takes effect on the court's jurisdiction cannot be solely a matter of agreement between the parties themselves. Questions which go to the jurisdiction of the court can only be answered by applying the law of the forum;[8] although, as will be explained below, in some cases that law may be the rules set out in an international Convention, such as the BIR recast.

The dual function of a choice of court agreement is also reflected in Article 25 BIR recast.[9] The contractual basis is confirmed by Article 25(5) 'An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.' It is also apparent from the addition in the recast regulation of the proviso that Article 25 will not operate if 'the agreement is null and void as to its substantive validity under the law of [the chosen] Member State'. The CJEU has confirmed that contractual questions, such as interpretation, are governed by the applicable national law.[10] Thus, as is the case at common law, the starting point in cases governed by the BIR recast is that the contractual applicable law will apply to determine interpretation and, to the extent provided in Article 25, the validity of the clause.

[6] See, for example, L Collins, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) [12–105] 'It is a question of interpretation, governed by the law applicable to the contract or, more accurately, the law governing the jurisdiction agreement, whether a jurisdiction clause is exclusive or non-exclusive.'

[7] Although given the doctrine of severability which says that invalidity in the underlying agreement does not invalidate a choice of court agreement those defences are likely to be limited: *Fiona Trust& Holding Corp v Privalov* [2007] UKHL 40.

[8] A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford 2008): [1.17] 'a contractual term which specifies the jurisdiction of a court … may be regarded as a part of procedural or public law, on the basis that whether a court has jurisdiction is always a matter of public law which lies beyond the control or autonomy of the parties … But from another vantage point the agreement is promissory, made between individuals who have bargained for undertakings about where each will accept service of process.'

[9] See Fentiman, *International Commercial Litigation* (n 1) [2.169]: 'jurisdiction agreements are severable from their host contracts, and have a procedural effect for jurisdictional purposes independent of their contractual effect between the parties'.

[10] *Powell Duffryn plc v Wolfgang Petereit* Case C- 214/89 and see *Roche Products Ltd v Provimi* [2003] All ER (Comm) 683.

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The difference comes at the final stage; determining the effect of those promises on jurisdiction. In cases governed by the Regulation, that will be a matter for the rules of the Regulation itself. These rules will be considered in Part IV below.

The question of whether an 'asymmetric agreement is valid' in English law encapsulates but also potentially obscures what are accordingly a series of distinct conceptual issues. In particular, first, as a matter of contract, what is the proper construction of the clause, or more specifically what express or implied obligations does it contain. Second and only when that has been determined, it is then possible to advise what effect will be given to the agreement whether at common law or under the BIR recast.

II. THE CONSTRUCTION OF ASYMMETRIC JURISDICTION AGREEMENTS

'Asymmetric jurisdiction clauses are clauses which contain different provisions regarding jurisdiction depending on whether the proceedings are initiated by one party to the agreement rather than the other. They are widely used in international financial markets.'[11] They are also referred to as 'unilateral', 'hybrid',[12] 'one-way' or 'one-sided' clauses.[13] They have become a standard provision for financial institutions, in particular, banks. The aim of such a clause is to 'ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimizing the risk that a debtor's obligations will be unenforceable.'[14] They also seek to reassure the creditor that it can only be sued in its preferred jurisdiction.

In theory, 'asymmetric clauses' could be any clause where the obligations on the parties differ. But commonly such clauses aim to combine an obligation on one party to sue only in one jurisdiction, while allowing the other party a wider choice.

Whilst it is possible to make these general points, the wording of specific clauses differs. Commonly, such clauses start of by providing for 'exclusive jurisdiction' in, say, England, but then provide that one of the parties can in fact sue elsewhere. For example, the jurisdiction clause in the Loan Market Association Single Currency Term Facility Agreement provides:

> (A) The courts of England have exclusive jurisdiction to settle any disputes ….
> (B) The Parties agree that the courts of England are the most appropriate and convenient courts … to settle Disputes and accordingly no Party will argue to the contrary.

[11] Commerzbank Aktiengesellschaft v Pauline Shipping Limited Liquimar Tankers Management Inc [2017] EWHC 161 (Comm) [1] per Cranston J.

[12] This term is used particularly when the clause incorporates an alternative arbitration/court dispute resolution mechanism.

[13] See Financial Markets Law Committee Report (FMLC Report) on Issues of Legal Uncertainty Arising in the Context of Asymmetric Jurisdiction Clauses (July 2016) [1.2].

[14] R Fentiman 'Unilateral Jurisdiction Agreements in Europe' (2013) CLJ 24, 24. See also FMLC Report ibid, [4.1] and [4.2].

> (C) This Clause is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.[15]

Other clauses, particularly hybrid clauses containing alternative dispute resolution mechanisms, are drafted in the form of an option. For example:

> The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration.[16]

Whatever the precise form used, it is important to remember that jurisdiction agreements can have a positive and negative element.[17] The agreement has a positive effect if it seeks to confer jurisdiction on a particular court or courts. However, as has been discussed in Part I above, whether an agreement between the parties results in a court having jurisdiction is a matter for the court applying English law, not a matter for the parties themselves. Accordingly, more accurately it is better to see this as an agreement in advance by a party that it will submit to the jurisdiction of a particular court or courts rather than an agreement to 'confer' jurisdiction.[18]

A jurisdiction agreement which has a negative effect[19] also contains an obligation not to sue in any other or certain other jurisdictions.[20] Again, the parties themselves cannot prohibit a court from taking jurisdiction. But the existence of a promise not to sue may well lead another court to decline to hear the case. Furthermore, if one of the parties does sue in a jurisdiction which is not permitted under the agreement that will constitute a breach of the promise not to sue elsewhere and may well lead to remedies based on breach of contract including damages or an anti-suit injunction.

[15] Clauses drafted in a similar way were at issue in *Lornamead Acquisitions Ltd v Kaupthing Bank HF* [2011] EWHC 2611 (Comm) and *Mauritius Commercial Bank v Hestia* [2013] EWHC 1328 (Comm).

[16] *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm). A similar clause was at issue in *Law Debenture Trust Corporation PLC v Elektrim Finance BV* [2005] EWHC 1412 (Ch) although the order was reversed ie the dispute was to be submitted to arbitration but with a one-sided option to litigate.

[17] See Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (n 4) [4.02] and U Magnus and P Mankowski, *European Commentaries on PIL Brussels Ibis Regulation* (Ottoschmidt 2016) art 25 [28] referring to a prorogation effect and a derogation effect. The same terminology is used in A Dickinson and E Lein, *The Brussels I Regulation Recast* (Oxford 2015) [9.06].

[18] Effectively a unilateral submission in advance to the jurisdiction of the named court: Briggs (2012) LMCLQ 364 (n 4) 378.

[19] See Lord Mance in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower JSC [2013] [2013] UKSC 35; [2013] 2 Lloyd's Rep 201 referring to the 'negative promise' in an exclusive jurisdiction agreement.

[20] A unilateral renunciation of jurisdiction which would otherwise have been found in other courts: Briggs (2012) LMCLQ 364 (n 4) 378.

The first type of agreement, which contains only a positive obligation, is often referred to as a non-exclusive (or 'permissive' or 'optional') jurisdiction agreement, whereas the latter, which contains both a negative and positive obligation, is referred to as an exclusive (or 'mandatory' or 'binding') jurisdiction agreement.[21] However, it may not be necessary or even helpful to characterize a clause in this way: the question is better conceptualized as what a particular party promises to do or not to do in a particular agreement. The crucial question is whether 'the commencement and pursuit of the foreign proceedings in question are things which a party has promised not to do'.[22] In asymmetric agreements, one party will have made different promises to the other party; in particular, one party may have made such a promise while the other has not.

As has been described, asymmetric clauses take different forms and their proper construction may depend on the exact wording. But some general points can be made assuming a typical borrower/lender situation.

The most extreme pro-bank construction would be an agreement whereby the borrower agrees to submit to the exclusive jurisdiction of the English court and any other court which the bank choses to sue in.[23] If that was the correct construction, it would be entirely one-sided and extremely wide:

(1) The borrower would be positively agreeing to submit to the courts of any possible country depending on where the bank chose to sue.
(2) The borrower would also negatively promise only to sue the bank in England and in no other jurisdiction.
(3) The bank would not be agreeing anything.

However, under English law, clauses tend not to be construed in that way.

(1) The first aspect of the clause is usually construed as meaning that the bank can sue *in any court of competent jurisdiction*.[24] The borrower submits to the jurisdiction of the chosen court: but does not agree positively to give any other court jurisdiction. Rather, this part of the clause makes it clear that from the bank's point of view the clause is non-exclusive, ie the bank can sue elsewhere, but only if that court would otherwise have jurisdiction under its relevant jurisdictional rules.
(2) Second, even if the jurisdiction is not expressly said to be exclusive as against the borrower the court will usually imply a promise not to sue elsewhere. The juxtaposition of a submission to the English court's

[21] For a detailed discussion see M Keyes and B Marshall 'Jurisdiction Agreements: Exclusive, Optional and Asymmetric' (2015) JPrivIntL 345.
[22] *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at [88] and Fentiman, *International Commercial Litigation* (n 1) [2.61].
[23] Fentiman, *International Commercial Litigation* (n 1) describes this as a 'unilateral floating jurisdiction agreement' [2.127].
[24] See *Mauritius Commercial Bank v Hestia* [2013] EWHC 1328 (Comm).

jurisdiction, plus a provision for the benefit of one party only permitting proceedings to be commenced elsewhere, will usually lead the court to construe the obligation as against the borrower as being exclusive.[25] In other words, such clauses are usually construed as including a promise by the borrower but not the lender not to sue anywhere other than in England.

(3) Thirdly, such clauses tend to be construed as also constituting a submission by the bank to the English court's jurisdiction.[26] The fact that the bank at least promises to be sued in a particular forum may be important as otherwise the clause would be entirely one-sided.[27] The bank is usually held to have promised to submit to the jurisdiction of the English court even if it would not otherwise have jurisdiction, but nothing else.

III. THE EFFECT OF ASYMMETRIC CLAUSES AT COMMON LAW

The common law jurisdiction rules are residual in that they only apply if the BIR recast rules do not engage.[28] Provided it is a civil and commercial matter (Article 1), Article 25 applies to all agreements in favour of the courts of a Member State, regardless of the domicile of the parties. The scope of Article 25 has been extended in the BIR recast; previously the rules in what was then Article 23 BIR only engaged if at least one of the parties was also domiciled in a Member State. This means that all cases concerning a jurisdiction agreement in favour of the English courts will now be governed by the BIR recast. The role for the common law rules set out below is accordingly in practice currently limited.

As described above, having determined what obligations are contained in a particular asymmetric agreement, the crucial question is then what effect will be given to those obligations.

Special rules may apply to consumers and other vulnerable parties such as employees,[29] but the focus in this article is on the general rules which apply to commercial parties which is where the use of such clauses is most common.

Because the subject of this article is asymmetric agreements, when considering validity the most important issue to address is whether there is a reason, particular to this type of agreement (that is, the fact that parties'

[25] See Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588 applied in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579.

[26] See, for example, *Mauritius Commercial Bank v Hestia* [2013] EWHC 1328 (Comm).

[27] And may fail for lack of consideration: see, for example, D Draguiev 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) JIntLArb, 19, 27.

[28] BIR recast art 6.

[29] For example, under the Consumer Rights Act 2015 or the Unfair Contract Terms Act 1977, and special rules apply under the BIR recast in relation to consumers, employees and insured parties. See also Draguiev (n 27) 19, ibid, 40: 'there is a degree of probability that unilateral clauses may be invalidated on grounds of consumer protection' and Fentiman, *International Commercial Litigation* (n 1) [2.108].

obligations differ), why the obligations identified above will not be given effect to.[30] Three arguments have been suggested:

(1) imbalance between the parties;
(2) Article 6 ECHR; and
(3) uncertainty.

A. Imbalance between the Parties

The starting point at common law is the principle of party autonomy. The fact that a contractual provision gives better rights to one party than the other does not matter: if the intention is clear it will be upheld and the courts will not rewrite the agreement.

The Supreme Court in *Cavendish Square Holding BV v Makdessi*,[31] while upholding a limited penalty clause exception, has recently reiterated the importance of party autonomy:

> Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either in law or in equity.[32]
> The penalty clause is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law.[33]
> The rule against penalties is an exception to the general approach of the common law that parties are free to contract as they please and that the courts will enforce their agreement – *pacta sunt servanda*.[34]

Unless an asymmetric jurisdiction agreement falls into a species of agreement which the common law considers to be by its very nature contrary to the policy of the law (like the penalty clause doctrine),[35] a mere imbalance between the parties will make no difference to enforcement.

English case law overwhelmingly supports the view that there is no reason why the imbalance in such clauses should make any difference to their enforcement; on the contrary party autonomy should be respected.[36] For example, in *NB Three Shipping Ltd v Harebell Shipping Ltd*,[37] which concerned a one-sided option to arbitrate, the judge held that the fact that the

[30] The arguments in relation to optional agreements more generally are discussed in detail by Keyes and Marshall (2015) JPrivIntL 345 (n 21).
[31] Joined with the appeal in *Parking Eye Limited v Beavis* [2015] UKSC 67.
[32] Per Lord Neuberger and Lord Sumption (with whom Lord Carnworth agreed) at [13].
[33] Per Lord Neuberger and Lord Sumption at [33].
[34] Per Lord Hodge at [257].
[35] Per Lord Neuberger and Lord Sumption at [9].
[36] English cases upholding asymmetric clauses include: *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm); *Law Debenture Trust Corporation PLC v Elektrim Finance BV* [2005] EWHC 1412 (Ch); *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm); *Mauritius Commercial Bank Ltd v Hestia Holdings Limited* [2013] EWHC 1328 (Comm); *Barclays Bank PLC v Ente Nazionale* [2015] EWHC 2857 (Comm).
[37] [20014] EWHC 2001 (Comm).

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clause was designed to give 'better rights' to one party was no bar to its enforcement. Any other result would 'contradict the commercial sense of the clause as a whole'. This reasoning was applied in *Law Debenture Trust Corporation PLC v Elektrim Finance BV*[38] which concerned a similar clause, although the other way round (that is, a one-sided option to bring court proceedings). The judge commented that it was not 'correct so say that the provisions are somehow less than even handed in any relevant way. They give an additional advantage to one party, but so do many contractual provisions … .'

Thus, generally imbalance between the parties will not be a reason not to enforce contractual promises.

B. Article 6 European Convention on Human Rights

An argument sometimes relied on in the context of choice of court agreements is that asymmetric clauses infringe Article 6 ECHR. However, this point was expressly dealt with in *Mauritius Commercial Bank Ltd v Hestia Holdings Limited*:[39]

> The public policy to which [the enforcement of asymmetric agreements] was said to be inimical was 'equal access to justice' as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendant's access to justice would be unequal to that of [the bank] merely because the bank had the option of choosing the forum.

An analogous argument has been relied on to explain why anti-suit injunctions do not infringe Article 6. In particular, in *OT Africa Line Ltd v Hijazy (The Kribi)(No 1)*,[40] the court explained that Article 6 of the ECHR does not deal at all with *where* the right to a 'fair and public hearing before an independent and impartial tribunal established by law' is to be exercised by a litigant. The crucial point is that civil rights must be determined *somewhere* by a hearing and before a tribunal in accordance with the provisions of Article 6.[41]

C. Uncertainty

An argument that a jurisdiction agreement is too uncertain to be enforced is not specific to asymmetric agreements; similar arguments might apply to other choice of court agreements particularly those which do not clearly identify a single forum. It is always necessary to construe agreements and if they are

[38] [2005] EWHC 1412 (Ch), [46].
[39] [2013] EWHC 1328 (Comm), [43].
[40] [2001] Lloyd's Rep 76, [42].
[41] 'The principle of equality of arms concerns the position of the parties before a court, not whether the parties have an equal choice of forum': Fentiman, *International Commercial Litigation* (n 1) [2.149].

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uncertain they cannot be enforced. But construing the agreement involves identifying specific contractual promises: if that can be done, there is no reason why the fact that the promises differ for each party should make any difference. In other words, there is nothing inherent in asymmetric agreements which mean they are likely to fail a certainty test. Furthermore, as discussed in Part II above, such clauses can usually be construed to create certain albeit one-sided obligations.

For example, in *Hestia*[42] the judge noted that there was a dispute about the proper construction of the clause. It had been contended that it conferred a power to sue in any court of the world, rather than those courts which would otherwise regard themselves under their own rules of private international law as having competent jurisdiction. The judge held that this was an erroneous reading of the clause. Second, on a further question of construction, it had been argued that the clause was entirely one-sided because it conferred no rights on the defendant to sue in any forum. That too was an erroneous reading. The lender was agreeing to be sued in England (subject to its right to bring proceedings abroad). Thus, the judge adopted the construction of asymmetric clauses set out in Part II above and held that was sufficient to dispose of the Defendant's application because it was accepted that there was no basis for challenging the clause if it was to be construed in that way.[43]

IV. THE EFFECT OF ASYMMETRIC CLAUSES UNDER THE BIR RECAST

When a case falls within Article 25 of the BIR recast, the effect of a jurisdiction agreement is governed by special rules in the Regulation itself. These rules have both a positive and negative effect in that they give the named court or courts jurisdiction which it might not otherwise have under other rules, and also, in certain circumstances, oblige other courts to decline jurisdiction.

Under Article 25(1), where the parties have agreed that the court or courts of a Member State are to have jurisdiction that court or courts shall have jurisdiction, unless the agreement is null and void according to its substantive validity under the law of that Member State. Furthermore, that jurisdiction shall be exclusive unless the parties have agreed otherwise.[44]

[42] [2013] EWHC 1328 (Comm), [37].

[43] A similar construction was adopted in *Commerzbank v Liquimar* [2017] EWHC 161 (Comm) and the same conclusion reached. Furthermore, Popplewell J in *Hestia* [47] also commented *obiter* that he would not have acceded to [the defendant's] argument that the clause was invalid even if it bore the construction for which the defendant contended. "If, improbably, the true intention of the parties expressed in the clause is that [the bank] should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect". cf Fentiman, *International Commercial Litigation* (n 1) [2.141] arguing that a wider construction would not be valid under art 25.

[44] The last sentence, that is, that jurisdiction shall be exclusive unless the parties have agreed otherwise, is better seen as an aspect of effect rather than construction of the agreement.

The negative effect of an exclusive jurisdiction agreement is now confirmed and extended by Article 31(2) which provides that 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 must 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.

Under the BIR recast, two distinct questions arise in connection with asymmetric agreements. First, is an asymmetric agreement valid under Article 25 to confer jurisdiction on the chosen court and will that jurisdiction be exclusive as against the borrower. Second, does an asymmetric agreement engage Article 31(2) BIR recast and accordingly avoid the normal first in time *lis pendens* rule.

A. Asymmetric Jurisdiction Agreements under Article 25 BIR Recast

Before changes made in the Brussels I Regulation ('BIR'),[45] there seemed to be little doubt that asymmetric clauses were valid. Article 17 of the Brussels Convention specifically referred to one-way clauses providing: 'If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention'. The CJEU in *Anterist v Crédit Lyonnais*[46] confirmed that this provision[47] of the Brussels Convention applied to expressly asymmetric clauses. Furthermore, in *Meeth v Glacetal*[48] the CJEU also confirmed that a clause which named two different courts could fall within Article 17[49] despite the fact that Article 17, as it was worded, referred to the choice by the parties to the contract of a single court or the courts of a single state. In both cases, the CJEU reasoning confirmed and emphasized respect for party autonomy.[50]

The wording of Article 25 BIR recast, and before that Article 23 BIR, differs in that the express provision dealing with clauses for the benefit of one party is omitted. On the other hand, Article 25 (and previously Article 23) expressly

Questions of construction are, as explained above, for national law. But when it comes to the effect given to a clause under art 25, that effect will be to give the named clause exclusive jurisdiction unless the parties have agreed otherwise.

[45] Regulation 44/2001 which was replaced by the BIR recast. The Regulation itself replaced the Brussels Convention 1968.

[46] Case C-22/85.

[47] Art 17(3) of the version of the Convention in force at the time.

[48] Case C-23/78.

[49] The clause was asymmetric in that the obligations on each party differed (although it was not for the benefit of one particular party) and also was not exclusive in that it named two different courts.

[50] See *Anterist* Case C-22/85 [14]: 'Since Article 17 of the convention *embodies the principle of the parties' autonomy to determine the court or courts with jurisdiction*, the third paragraph of that provision must be interpreted in such a way as to respect the parties' common intention when the contract was concluded.' *Meeth* Case C-23/78 [5]: 'This interpretation is justified on the ground that *Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the convention* … ' (emphasis added).

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envisage the possibility of non-exclusive agreements. It was widely believed that the reference to clauses for the benefit of one party was not necessary given that non-exclusive agreements were now expressly envisaged.[51]

The controversy surrounding the enforcement of asymmetric agreements under the BIR flows from a series of decisions of the French Cour de cassation, starting with *Mme X v Banque Privée Edmond de Rothschild Europe (Société)*.[52] Mme X (a Spanish national domiciled in Paris) opened a private bank account with a Luxembourg bank. Mme X blamed the bank for the poor performance of her investments and issued proceedings in Paris. The standard terms and conditions of the bank included the following jurisdiction clause:

> The relations between the bank and the client are governed by Luxembourg law. The potential disputes between the client and the bank shall fall within the exclusive jurisdiction of the Luxembourg courts. However, the bank reserves the right to sue before the courts of the domicile of the client or before any other court having jurisdiction in the absence of selection of any of the courts previously referred to.

The bank disputed the jurisdiction of the Paris court arguing that under Article 23 BIR the Luxembourg courts had exclusive jurisdiction against Mme X. The French Court of Appeal decided that it did have jurisdiction despite the wording of the clause. The bank appealed.[53] The Cour de cassation dismissed the appeal and upheld the jurisdiction of the French court: 'having found that the clause, under the terms of which the bank reserved for itself the right to sue at the domicile of Mme X … or before "any other court having jurisdiction" was only binding on Mme X … who was alone bound to sue before the Luxembourg courts, the Court of Appeal correctly deduced that it had an optional character (*caractère potestatif*) only for the bank, so that it was contrary to the object and purpose of the prorogation of jurisdiction provided for by Article 23 of the Brussels I Regulation.'[54]

The decision left at least three issues open:

(1) The extent to which it depended on the *caractère potestatif* doctrine of French law.
(2) The significance of the fact that the borrower was an individual.[55]

[51] Fentiman (2013) CLJ 24 (n 51) 26. See also FMLC Report (n 14) [1.4].

[52] French Cour de cassation (Supreme Court) (First Civil Chamber) [2013] I L Pr 12.

[53] A claim was also brought against a French financial company based on art 6: this aspect of the decision is not relevant to the issues discussed in this article.

[54] Translation from [2013] I L Pr 12 at [9]. The Cour de cassation appeared to strike the clause down in its entirety. Whether it is possible to sever the unilateral part of the clause and salvage the rest (as to which see S Garvey, 'Hybrid Jurisdiction Clauses: Time for a Rethink?' (2016) JIBFL 6, 8) should depend on the parties' intentions, in particular, whether the separate obligations contained in the agreement were intended to be conditional on one another.

[55] Keyes and Marshall (n 21) at 367, note that although Mme X was plainly a consumer according to the Regulation, because the Bank seemingly did not direct its activities towards

(3) To what extent the decision of the Cour de cassation depended on the very wide interpretation of the clause adopted by the court below, that is, that the borrower was submitting to any court the bank choose to sue in.

In the next of the series of cases, *Société Danne v Crédit Suisse*,[56] the Court de cassation considered a similar clause and came to the same conclusion again refusing to enforce the borrower's promise not to sue other than in the identified court. The lender had concluded two framework contracts for loans. The agreements included a jurisdiction clause which provided that the court of Zurich had exclusive jurisdiction but that the bank was entitled to take action before any competent court. Again the borrower brought proceedings in France arguing that its negative obligation not to sue anywhere other than Zurich should not be enforced. Again the Cour de cassation agreed, holding that the cause was unenforceable because it did not set out an objective basis for the alternative jurisdictions which the bank could choose and was, therefore, contrary to the goal of certainty inherent in Article 23 of the Lugano Convention.[57]

In this case, the borrower was not an individual (see point (2) above). Furthermore, the court did not expressly refer to *potestatif* doctrine (point (1) above), the argument was based on a lack of certainty. However, again it was unclear exactly how the clause was interpreted, in particular, whether the Cour de cassation interpreted the clause as seeking to confer jurisdiction (in favour of the bank) on any court as opposed to any court with competent jurisdiction.

The final of the trio of cases is *Société eBizcuss.com v Apple*.[58] The jurisdiction agreement in this case provided:

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

Again proceedings had been commenced in France allegedly in breach of this agreement. However, in this case the Court de cassation appeared to take a different view of the validity of the clause. The ratio of the decision is difficult to discern. An argument based on 'potestatif character' was raised but the Cour de cassation seemed to decide the case on a different basis. It held that:

Mme X's place of domicile, the Regulation's jurisdictional rules that protect consumers did not apply. See also T Petch, 'The Treatment of Asymmetric Jurisdiction Agreements in England and in France' (2016]) UCLJLandJ, 313, 319 referring to two decisions in Luxembourg relying on her status as a consumer.

[56] French Supreme Court, First Civil Chamber (5 March 2015) Case 13-27264 [2015] I L Pr 39.

[57] Which was in the same terms as art 23 of the Brussels Regulation.

[58] French Supreme Court, First Civil Chamber (7 October 2015) Case 14-16898.

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> having noted that the jurisdiction clause required the eBizcuss company to bring its action before the Irish courts whereas it reserved the possibility for the other party, as an option, to seise another jurisdiction, the Court of Appeal correctly decided that this clause, which allowed the identification of the courts potentially to be seised to deal with a dispute arising between the parties in the course of performance or interpretation of the contracts, answered the imperative of foreseeability which jurisdiction clauses must satisfy. The ground of appeal is unfounded on this point.[59]

On the facts the Cour de cassation concluded that the clause did not apply because it did cover anti-competitive practices by Apple. However, the Cour de cassation's discussion of the clause seems to suggest that this clause was sufficiently certain to fall within Article 23 because it allowed the defendant to identify the courts which Apple was entitled to sue in, ie any jurisdiction where harm to Apple was occurring.

The *Rothschild* decision has been widely discussed[60] and followed in some other jurisdictions.[61] The Loan Markets Authority issued a memo in January 2013 warning of the risks now associated with the use of one-way jurisdiction clauses in lending documentation and advising its members of alternative approaches which might be taken.[62] This trio of decisions of the French Cour de cassation raised doubts about the validity of asymmetric agreements under Article 25 BIR recast in two different respects. The first is based on the *caractère potestatif* doctrine of French contract law. The second is a more general argument that such agreements breach requirements of certainty and foreseeability inherent in Article 25 itself.[63]

1. Application of the caractère potestatif doctrine of French law

The reliance in *Rothschild* on the *caractère potestatif* doctrine in French law[64] raises two issues: first the role for national contract law in the application of

[59] Translation [2016] I L Pr 13, [6].

[60] See eg Fentiman (2013) CLJ 24 (n 51) 24: '*Rothschild* flies in the face of market practice and has caused consternation amongst practitioners. For many reasons the decision is as perplexing as it is controversial'. Popplewell J in *Hestia* (in deciding whether or not the courts of Mauritius would be likely to follow Rothschild) commented at [34]: 'The decision is controversial and has been subjected to criticism by commentators, both domestically and in the context of Article 23 which requires an autonomous interpretation. It is arguably inconsistent with previous decisions of the Cour de cassation, although consistent with decisions of the lower courts.' cf A Briggs, *Private International Law in English Courts* (Oxford 2014) [4.190] suggesting that a clause which allowed one party to sue wherever he wishes may overreach the limits of art 25.

[61] See the summary in FMLC Report (n 14) [1.3] referring to decisions of the Bulgarian Supreme Court, French courts and Polish courts. A summary of relevant European legislation is set out in an Annex to the Report. See, for further comparative analysis, Draguiev [2014] JIntLArb 19 (n 27) and Keyes and Marshall (2015) JPrivIntL 345 (n 21), fn 4.

[62] See N Beale and C Clayson 'One-Way Jurisdiction Clauses: A One-Way Ticket to Anywhere?' [2013] JIBL 463, 464.

[63] Fentiman [2013] CLJ 24 (n 51) 25.

[64] It is unclear why the court referred to French law not the law of Luxembourg, although the same doctrine is to be found in both: see T Petch (n 55) 313, 320.

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Article 25 and, second, the application of the doctrine itself. Both of these points may need re-evaluation in the light of recent developments.

One of the criticisms of the *Rothschild* decision has been that any reliance on domestic contract law[65] was misplaced because the validity of a jurisdiction clause for the purposes of Article 23 BIR was a matter for Article 23 itself. For example, in *Roche Products Ltd v Provimi*[66] the judge, commenting on the role for national law in relation to the then equivalent provision in the Lugano Convention, said: 'There is some confusion here, in my view. Article 17 of the Lugano Convention is concerned with what English lawyers would probably call the "formal" and "material" validity of a jurisdiction clause. It is clear that Article 17 defines the necessary and sufficient requirements for formal and material validity of jurisdiction clauses. Those requirements replace any requirements imposed by the various national laws.'[67]

However, regardless of the position under the Brussels Convention and Article 23 BIR which was at issue in *Rothschild*, the position is more complex under Article 25 of the recast regulation. As has been described, Article 25 of the BIR recast now provides that the courts designated in a jurisdiction agreement shall have jurisdiction 'unless the agreement is null and void as to its substantive validity under the law of the [chosen] Member State'.[68] This new proviso clearly reopens the door to reliance on national contract law in relation to questions of validity. However, the width of the proviso is yet to be established. Some commentators have argued that it should be narrowly construed and applies only to grounds which invalidate an existing agreement (such as fraud, duress or mistake) not all the requirements for a legally binding agreement eg consideration, illegality etc.[69] Even if that narrow construction is right, it is not clear on what side of the line the *caractère potestatif* doctrine would fall.

[65] cf Fentiman (2013) CLJ 24 (n 51), 25 the French court did not apply French law directly so the decision contributes nothing to the familiar controversy about the relevance of national law in determining the validity of art.23 agreements.

[66] [2003] All ER (Comm) 683, [59].

[67] See also Briggs, noting that the CJEU had 'gone out of its way to insist that the jurisdictional validity and jurisdictional effect of an agreement on jurisdiction, which falls within the domain of art.23 is to be assessed not by reference to any national law, … but only by asking whether the consent of the party who is to be held to the agreement can be demonstrated with clarity and precision': (2012) LMCLQ 364 (n 4), 378.

[68] Recital (20) further provides 'Where 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 law rules of that Member State'.

[69] Magnus and Mankowski, *European Commentaries on PIL Brussels Ibis Regulation* (n 17) art 25 [33] conclude that the reference to national law in art 25 relates only to grounds which invalidate an existing agreement not all the requirements for a legally binding agreement eg consideration etc. (See eg [81c].) See also Dickinson and Lein, *The Brussels I Regulation Recast* (n 17) [9.69]: the reference to national law is, in principle, very limited: it only includes the grounds for material invalidity based on defects of consent (fraud, misrepresentation, duress or mistake), lack of authority or lack of capacity. It does not cover issues of contractual enforceability exogenous to the consent or capacity of the parties, such as illegality or public policy.

Furthermore, there is also uncertainty about how the choice of law provision in Article 25 should work for asymmetric agreements. In an exclusive jurisdiction agreement, French contract law would be applicable if the chosen court would apply French contract law which would be most likely if the French courts were themselves the chosen court.[70] In the case of an exclusive jurisdiction agreement in favour of England, a court even in France would almost certainly apply English contract law because that is the law which would be applied by the English court.[71] However, a further complication arises in the case of an asymmetric agreement as to which is the relevant 'chosen court'. This point was discussed in *Commerzbank v Liquimar*.[72] The judge rejected the argument that in order for Article 25 to operate there had to be a single court identified:

> This argument seems to overlook that in these asymmetric jurisdiction clauses the parties have designated the English court as having exclusive jurisdiction when the defendants sue. There is nothing in Article 25 that a valid jurisdiction agreement has to exclude any courts, in particular non EU Courts. Article 17, penultimate paragraph, of the Brussels Convention recognised asymmetric jurisdiction clauses. To my mind it would need a strong indication that Brussels 1 Recast somehow renders what is a regular feature of financial documentation in the EU ineffective.[73]

This would mean that the relevant chosen court would, at least when the bank is suing, be England in an asymmetric agreement where the lender has agreed to the exclusive jurisdiction of the English court. This would suggest that French contract law is again only potentially likely to be relevant under Article 25 where France is the chosen court.

Further, and in any event, even if it is now possible, and indeed necessary, to look at national contract law under the new proviso to Article 25, there is a further development which might affect the *Rothschild* decision, namely the extensive changes made to French contract law by the new French Civil Code. Article 1170 of the version of the French Civil Code in force at the time of the cases referred to above provided: 'A potestative condition is one

[70] Recital (20) provides that the question of validity 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.

[71] Agreements on choice of law are excluded from the scope of the Rome I Regulation (art 1(2)(e)). At common law, although a choice of court agreement is a severable agreement, there is a presumption that it is governed by the same law as that which applies to the underlying agreement: *Mauritius Commercial Bank v Hestia* [2013] EWHC 1328 (Comm). If there is an exclusive jurisdiction agreement the underlying agreement is likely to be governed by English law: see, at common law, *The Kominos S* [1991] 1 Lloyd's Rep; the Giuliano Lagarde Report to the Rome Convention [1980] OJ C282/1 at 15–17 and Recital (12) to the RIR.

[72] [2017] EWHC 161 (Comm), [80] per Cranston J.

[73] See also Magnus and Mankowski (n 17) art 25 [81h]. Dickinson and Lein (n 17) [9.65], also refer to this issue but conclude that the solution depends on the court before which the material validity of the clause is contested and, in the case of asymmetric agreements, that the validity should always be tested according to the designated court's law.

which makes the execution of the agreement depend upon an event that one or the other of the contracting parties has the power to bring about or to prevent.' Article 1174 of the same Code further provided: 'Any obligation is null when it has been contracted subject to a potestative condition on the part of the party who binds himself.'

The part of the French Civil Code dealing with contract law has been completely restructured and amended. The revised section came into force on 1 October 2016, the previous version having remained largely untouched since 1804. One of the aims was to get rid of out of date language, such as *potestatif*, and the express provisions set out above no longer appear. There are also changes of substance. Freedom of contract is now explicitly recognized as the first rule in a new Article 1102. Another change is the removal of the notion of 'cause' which used to be one of the four conditions set out in Article 1008. The notion of objective cause (that is, that the contract must have an abstract goal, usually counter performance expected from the other party) was used by French courts as a ground to annul contracts which lacked any real reciprocity.[74]

It is too early to tell what effect these changes will have. Although there is no longer an express *caractère potestatif* doctrine, the courts may well be able to reach similar decisions on the basis of other provisions.[75] However, there is a strong argument that given these changes, and in particular, the greater emphasis apparently given to freedom to contract, the doubts as to the validity of asymmetric agreements raised by the Cour de cassation's reliance on the *caractère potestatif* doctrine should no longer apply.

2. *Certainty*

The other objection relied on by the Cour de cassation is that asymmetric agreements are too uncertain and accordingly do not comply with the underlying requirements of Article 25. This does not seem to be an argument based specifically on French contract law. Nor does it depend on the one-sided nature of the agreement.

As has been described above, all agreements must be construed to discover what obligations they contain. Looking at asymmetric clauses purely from the point of view of this question of construction, the agreement by both parties to submit to the jurisdiction of the chosen court cannot be uncertain or

[74] S Rowan, 'The New French Law of Contract' ICLQ online (22 August 2017) at <https://doi.org/10.1017/S0020589317000252>.

[75] For example, new clause 1169 which provides 'An onerous contract is a nullity where, at the moment of its formation, what is agreed in return for the benefit of the person undertaking an obligation is illusory or derisory.' Significant imbalance is also addressed in a consumer context: see G Pillet, 'The Reform of French Contract Law and the General Rules on Obligations: The Civil Code Faces the Challenges of the Market' (2016) IBLJ 235, 250.

unforeseeable. Nor can the promise by the lender not to sue in any other jurisdiction in itself be argued to be uncertain.

The issue seems to be with the other element of the clause; that is, the provision making it clear that in relation to the bank, the agreement is not exclusive so that the bank can still sue in other jurisdictions. One of the problems with interpreting the French decisions is that it is not always clear what construction the court placed on the clause. For example, at first instance in *Rothschild* it seems that the court had found a general agreement on the part of the borrower to be sued in any court which the bank choose.[76] However, as has already been described, English courts have not construed asymmetric clauses in this way. Rather they have tended to construe a clause submitting to the jurisdiction of 'any competent court' more narrowly. English courts have construed such agreements as simply confirming that, from the point of view of the bank, the obligation is not exclusive, so that the bank can continue to sue in any other court *which it could otherwise have sued in* in accordance with the rules. If so, the underlying jurisdiction rules allocating jurisdiction to particular courts would be effectively incorporated.[77] If that is right, the borrower is in the same position as any other defendant who can be sued in any court which has jurisdiction according to the Regulation rules. In one respect, indeed, the borrower is better off because the bank has agreed to submit to the chosen court's jurisdiction which might not otherwise have been available.

B. Asymmetric Agreements under Article 31(2) BIR Recast

In cases where there are parallel proceedings in another Member State a different question arises. The BIR recast contains rules in Articles 29 and 30 which, in cases of either parallel or related proceedings, give precedence to the court first seised. The CJEU famously held in *Erich Gasser*[78] that the previous version of these rules applied even if there was a jurisdiction agreement in favour of the second seised court. This position has been reversed by Article 31(2) BIR recast which provides: 'where a court of a Member State on which an agreement 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'. The question whether an asymmetric clause triggers Article 31(2) was considered in *Commerzbank v Liquimar*.[79]

[76] If that is right, the decision in *Apple* is distinguishable because it referred to courts where harm was suffered.

[77] For example, in China there is a general requirement that a chosen court must have a real connection with the dispute. A competent court would have to be one which includes conformity with rules on real connection: see Wenwen Liang, 'Unilateral Jurisdiction Clauses under Chinese law' (2015) JIBLR 341, 345.

[78] *Erich Gasser GmbH v MISAT Srl* Case C-116/02.

[79] [2017] EWHC 161 (Comm).

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The bank had brought proceedings in England for the repayment of loans and on an associated guarantee. Both the loan agreement and guarantee contained a law and jurisdiction agreement in the following terms:

> 16.2 For the exclusive benefit of the Lender, the Guarantor irrevocably agrees that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Guarantee and Indemnity and that any proceedings may be brought in those courts.
> 16.3 Nothing contained in this Clause shall limit the right of the Lender to commence any proceedings against the Guarantor in any other court of competent jurisdiction nor shall the commencement of any proceedings against the Guarantor in one or more jurisdiction preclude the commencement of any proceedings in any other jurisdiction, whether concurrently or not.

Proceedings had already been commenced in Greece by the defendant against the bank concerning the same and/or related issues.[80] The Greek court was first seised but the bank relied on Article 31(2) BIR recast, arguing that the Greek courts would have to stay in favour of the English court. The judge began by adopting[81] the standard construction of asymmetric agreements set out in *Mauritius Commercial Bank v Hestia* and in Part II above, that is, that the borrower was limited to English jurisdiction but the bank was able to proceed in that jurisdiction or in other courts which have competent jurisdiction. Moreover, if the borrower sued in England, the bank would not be able to challenge the court's jurisdiction since it had agreed to it.[82] He then noted that asymmetric jurisdiction agreements are a long established and practical feature of international financial documentation. However, the question in this case was a novel one; namely, the correct interpretation of Article 31(2) BIR recast which has effect where there is 'a jurisdiction agreement which confers exclusive jurisdiction'. On this question, the judge held, first, that this must be a question of autonomous interpretation under the Regulation not a matter of English law.[83] He concluded: 'the natural meaning of the words in Article 31(2) … to my mind includes asymmetric jurisdiction clauses. … *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 defendant alone does not detract from this effect' (emphasis added).[84]

The rationale for the new rule in Article 32(1) BIR recast is party autonomy. Recital (22) explains that the new rule was introduced 'in order to enhance the effectiveness of choice-of-court agreements and to avoid abusive litigation tactics'. In an asymmetric agreement, the borrower has promised not to sue anywhere other than the chosen jurisdiction. The question of whether the

[80] There were essentially four proceedings, comprising two pairs of parallel proceedings in Greece and in England. [81] At [40]–[41].
[82] In this situation, the bank may not be able to sue elsewhere: *Lornameed Acquisitions Ltd v Kaupthing Bank* [2011] EWHC 2611, [112]. [83] At [52]. [84] At [64].

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other party did or did not agree to do the same does not arise when the bank is seeking to enforce the agreement and should be irrelevant. Thus, the point is not so much that 'considered as a whole' they are agreements conferring exclusive jurisdiction, as the judge put it in *Commerzbank*. Rather, each obligation can be considered on its own; the clause includes a promise by the borrower not to sue in any other jurisdiction and that promise is capable of being protected by Article 31(2). Each different obligation necessarily falls to be considered separately and the fact that the bank is not under a similar obligation is neither here nor there.[85]

V. ENFORCEMENT OF ASYMMETRIC JURISDICTION AGREEMENTS POST-BREXIT

It is not possible to consider in any detail the implications of Brexit on the jurisdiction rules outlined above. Many aspects of the relationship of the UK to the EU remain to be determined. However, if, as seems inevitable, EU legislation ceases to become directly binding, important European private international law legislation including the BIR (recast) would cease to have effect.[86] Because the BIR recast is a reciprocal regime, it is not possible simply to implement equivalent provisions in a post-Brexit Bill.[87] Accordingly, if there is no negotiated replacement for the BIR recast this would have significant consequences for the enforcement of jurisdiction agreements. In particular:

(1) Enforcement of jurisdiction agreements by the English courts would now be under the common law rules discussed in Part III above. In at least one respect this might be advantageous as the position would be freed from any uncertainty about Article 25 caused by the French case law.
(2) The position of English jurisdictions agreements in other Member State courts would no longer be regulated by the BIR recast: rather it would become a matter for the relevant national law. In this regard, it is possible that the enforcement of English jurisdiction agreements will no longer be guaranteed in the same way, and this uncertainty has caused concern.[88]

[85] Compare Keyes and Marshall (n 21) 345 at 352 concluding that agreements will not be exclusive under the recast if it does not exclude the jurisdiction of all but the single chosen jurisdiction.

[86] The UK will also cease to be a party to the Lugano II Convention (2007) and the Hague Convention. For further discussion see: A Dickinson, 'Back to the Future: the UK's EU Exit and the Conflict of Laws' (2016) JPrivIntL 195; P Rogerson, 'Litigation Post-Brexit' (2017) NLJ 2016; J Harris, 'How Will Brexit Impact on Cross-Border Litigation?' (2016) SJ 160; 'Brexit & Cross-Border Dispute Resolution' (2016) NLJ 166; Final Report of the House of Lords European Union Justice Sub-Committee 'Implications of Brexit for the justice system' (14 March 2017).

[87] In contrast to the position in relation to the RIR which is not reciprocal and where it would be possible to implement equivalent rules into national domestic law.

[88] Committees of both Houses of Parliament continue to consider the implications of Brexit for the justice system as do many professional bodies including COMBAR and the Law Society.

This uncertainty means that parties may well look to alternative methods for enforcing jurisdiction agreements including:

(1) the Hague Convention;
(2) claims for damages; and
(3) anti-suit injunctions.

A. Enforcement under the Hague Convention

Like the BIR recast, the Hague Convention contains rules which seek to enforce both the positive and negative aspects of jurisdiction agreements. Article 5(1) provides that the court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction, unless the agreement is null and void under the law of that State. Article 6 confirms the negative effect of an exclusive jurisdiction agreement providing that a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.

The Hague Convention currently applies between the Member States of the EU, Mexico and Singapore. Once it has left the EU, the UK could accede to the Convention on its own account, and the Convention, once implemented into English law, would then provide rules for the reciprocal recognition of jurisdiction agreements in Convention States. However, whether this will help in relation to asymmetric agreements is uncertain. The Hague Convention only applies to 'exclusive choice of court agreements 'as defined in Article 3(a) as:

> an agreement concluded between two or more parties 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.

It is commonly assumed that asymmetric agreements do not fall within the Hague Convention. The Explanatory Report to the Hague Convention by Professors Hartley and Dogauchi noted that asymmetric jurisdiction clauses are often used in international loan agreements. However, they continued, the Diplomatic Session had agreed that they 'are not exclusive choice of court agreements for the purposes of the Convention'.[89]

The Report noted that such clauses may be subject to the rules of the Convention if the States in question have made declarations under Article 22 which allows for reciprocal declarations on non-exclusive agreements.

[89] At [106]. See also Keyes and Marshall (n 21) 345 at 366 noting that Switzerland proposed that unilateral agreements should be brought within the scope of the Hague Convention but that this proposal was rejected.

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However, the position is not entirely clear. An earlier report at the time of drafting of the Convention suggested that to make it clear that asymmetric jurisdiction clauses were excluded from the definition of what is now Article 3(a), it might be desirable to add the words 'such an agreement must be exclusive irrespective of the party bringing the proceedings'. That was not done.[90] In *Commerzbank*, Cranston J noted,[91] *obiter*, that 'there are good arguments in my view that the words of the definition in Article 3(a) of the Hague Convention cover asymmetric jurisdiction clauses'. However, there was no reason for him to reach a concluded view. Presumably, his argument would have been analogous to that he adopted in relation to Article 31(2) BIR recast discussed above, that is, that 'taken as a whole' an asymmetric agreement can be described as an 'exclusive jurisdiction agreement'. However, another way of putting it is that the effect of a clause can only be judged by considering the effect of a particular obligation on a particular party. There is nothing inherent in the structure or rationale of the Convention to mean that if the claim is made against a borrower who has agreed to be sued in a particular jurisdiction and only that jurisdiction that the rules should not engage.

B. Damages for Breach of Asymmetric Jurisdiction Agreements

At common law, the availability in principle of an action for damages for breach of a jurisdiction agreement has been confirmed by a number of cases.[92] In *Donohue v Armco*[93] the defendant's counsel conceded that damages were in principle available for any loss flowing from breach of a jurisdiction agreement, whether represented by the claimant's costs or any damages awarded in the foreign proceedings. More recently, the Supreme Court in *Starlight Shipping Company v Allianz Marine & Aviation (The Alexandros T)*,[94] clearly accepted the possibility of such a claim in principle. The position under the BIR recast is less clear-cut. It is not certain that the CJEU would support a claim for damages for breach of a jurisdiction agreement, at least where the courts of another Member State are involved. There may be difficulties of issue estoppel if the other Member State's court has made findings about the scope or validity of the agreement. There may also be an argument that an award of damages which in effect undoes the judgment of another Member State's court would breach the principle of mutual trust and confidence.[95] A further consequence of Brexit

[90] See *Commerzbank v Liquimar* [2017] EWHC 16, [39].
[91] [2017] EWHC 161 (Comm), [74].
[92] See Fentiman, International Commercial Litigation (n 1) [2.249].
[93] [2002] 1 Lloyds Rep 425 (HL)
[94] [2013] UKSC 70.
[95] This argument was rejected by the Court of Appeal in *The Alexandros T* [2014] EWCA Civ 2010 but has yet to be tested by the CJEU. An analogous point was raised but did not need to be answered in the context of a claim for damages for inducing breach of contract in *AMT Futures Ltd v Marzillier* [2017] UKSC 13.

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may be to remove any doubts about the availability of such a remedy in European cases.

The basis of a claim for damages is breach of contract; the defendant promised not to sue in a particular court, and in breach of that promise has done so. If the claimant can establish he has suffered loss as a result (whether wasted costs or sums he has been ordered to pay) he can claim damages for breach of that promise. The cases reflect and confirm the common law view of the private law consequences which flow from a choice of court agreement. Once an agreement, properly construed, includes a promise not to sue, if the borrower in breach of the promise does sue elsewhere there is no reason why a claim for damages should not be available. There seems to be no reason why this reasoning should not apply to a borrower in an asymmetric agreement who has similarly made such a promise. This was the view of the judge in *Barclays Bank PLC v Ente Nazionale de Previdenza dei Medici degli Odontoiatra*.[96] The judge noted that as is frequently agreed for good practical reasons in financing transactions, the clause in question stipulated that exclusivity in favour of one court did not prevent the financing institution from bringing an action in the courts of any other jurisdiction. The judge continued by noting that there had been a short debate in the skeleton arguments to whether such a clause can be regarded as 'exclusive'. While the judge would have accepted the submission that it was exclusive, he noted that:

> [T]he issue for decision in the present case is a more limited one. Regardless of how the clause is characterised in terms of exclusivity, the issue is whether ENPAM is right to say that it is not in breach of it by pursuing proceedings in the Milan courts. In the *Continental Bank*[97] case the court concluded that the clause at issue there evinced a clear intention that the defendant (though not the bank) was obliged to submit disputes in connection with the loan facility at issue to the English courts. I consider that the same construction should be placed upon the jurisdiction clause in the PCA. I do not accept ENPAM's submission that the supposed 'non-exclusivity' of the clause means that the bringing of proceedings relating to the PCA by ENPAM in the Milan court is not a breach of the jurisdiction agreement. In my view, it clearly is a breach.

Here, adopting the approach advocated in this article, the judge focusses on whether there is a breach of a specific obligation on the borrower, not

[96] [2015] EWHC 2857 (Comm) [127]–[128]. The clause at issue provided: '… each of the parties irrevocably:

> (a) agrees for [C's] benefit that the courts of England shall have jurisdiction to settle any suit, action or other proceedings relating to this Agreement ("Proceedings") and irrevocably submits to the jurisdiction of such courts (provided that this shall not prevent us from bringing an action in the courts of any other jurisdiction); and
> (b) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court and agrees not to claim that such Proceedings have been brought in an inconvenient forum or that such court does not have jurisdiction over it.'

[97] *Continental Bank v Aeakos* [1994] 1 WLR 588.

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whether the clause should be characterized as exclusive or non-exclusive. Given such a breach, *prima facie*, a claim for damages should be available.

For the same reasons, a breach of a promise not to sue by a borrower might also provide the basis for a claim in tort against the borrower's advisers for inducing breach of contract. The possibility of such a claim was raised although not decided in *AMT Futures Ltd v Marzillier*.[98] AMTF was a derivatives broker. About 70 former clients commenced proceedings in Germany. The agreements between AMTF and each client contained a clause providing for English law and that the English courts would have exclusive jurisdiction. As well as suing its former clients for damages, AMTF also alleged that Marzillier, a German firm of lawyers, had induced its former clients to breach the jurisdiction agreement by issuing proceedings in Germany. AMTF commenced proceedings in London based on the tort of inducing breach of contract and claimed damages and an injunction. The judge at first instance found that the English court had jurisdiction under Article 5.3 BIR. The Court of Appeal disagreed and held the BIR did not give jurisdiction to the English courts over AMTF's claim. It accordingly did not need to address the issue which had been raised as to whether the English claim thereby breached EU law by impermissibly interfering with the judgments of the German courts. However, if such a claim was available for breach of the agreement not to sue in an exclusive jurisdiction agreement, for the reasons discussed above, there is no reason why such a claim should not be available against the advisers of the borrower under an asymmetric agreement.

C. *Anti-Suit Injunctions*

The principle of mutual trust and confidence between the courts of Member States means that English courts cannot issue an anti-suit injunction against the courts of another Member State, even to enforce an arbitration agreement or jurisdiction agreement in favour of the English courts.[99] Once the UK has left the EU, it seems that such a remedy will become available again to enforce jurisdiction agreements.

If so, there seems to be no reason why, at common law, an asymmetric agreement could not be relied on, in appropriate cases, as a basis for an anti-suit injunction. For the same reasons as apply in the damages cases, once it is seen that an asymmetric agreement contains a promise by the borrower not to sue in any other jurisdiction, that promise can be enforced in the normal way, including the possibility of an anti-suit injunction. It should not matter that the bank has not made a similar promise. This was exactly the case in *Bank of New York Mellon v GV Films*.[100] The documentation in a trust document in

[98] [2017] UKSC 13.

[99] *Turner v Grovit* Case C-159/02 and, in the context of arbitration, *Allianz SpA v West Tankers Inc* Case C-185/07.

[100] [2009] EWHC 2338 (Comm).

respect of a bond issue included an asymmetric agreement in favour of the bank nominating the English courts. The defendant sued in India and the bank sought an anti-suit injunction. Field J[101] held that the wording of the clause, together with the express liberty conferred on the bank trustee but not the defendant to bring proceedings in any other court of competent jurisdiction, clearly showed that the intention of the parties was that the courts of England had exclusive jurisdiction so far as proceedings brought by the defendant were concerned. In the absence of strong reasons why not, the defendant's promise not to sue could be enforced by an anti-suit injunction.

VI. CONCLUSION

Asymmetric jurisdiction clauses are widely used by commercial parties. They contain a series of both positive and negative obligations which differ depending on the party. Before their effect can be considered, both at common law and under the BIR recast, the express and implied obligations must be identified and construed. Once this has been done, there should be nothing to prevent those obligations being enforced in the normal way. In particular, a promise by a borrower not to sue in any jurisdiction other than that designated will be given effect at common law, under Article 25 and 31(2) BIR recast and, although more controversially, the Hague Convention. Breach of that promise can also potentially provide the basis of a claim for damages or an anti-suit injunction, remedies which may well become of increasing practical importance.

[101] Following the reasoning in *Continental Bank v Aeakos* [1994] 1 WLR 588 discussed above.

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