ASYMMETRIC JURISDICTION CLAUSES AND THE ANOMALY CREATED BY ARTICLE 31(2) OF THE BRUSSELS I RECAST REGULATION

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Abstract The English Court of Appeal and German *Bundesgerichtshof* recently decided that Article 31(2) of the Brussels I Recast Regulation applies to asymmetric jurisdiction clauses. This article contends that while this conclusion is sound, separating the 'clause' into two 'agreements' to reach it is not. This disaggregation prevents a solution to the anomaly that Article 31(2) creates for asymmetric clauses, where a lender sues under its option and the borrower subsequently sues in the anchor court. This article proposes a solution, based on a uniform characterisation of the clause as a whole, which protects the lender's option and mitigates the risk of parallel proceedings.

Keywords: asymmetric jurisdiction clauses, Rothschild clauses, *Etihad Airways PJSC v Flöther*, *Bundesgerichtshof*, exclusive jurisdiction, Brussels I Recast Regulation, Hague Choice of Courts Convention, 2007 Lugano Convention.

I. INTRODUCTION

Where commercial parties sue each other concurrently in multiple courts, in light of or in spite of a jurisdiction clause, a threshold question arises. Which court should assess the clause? For cases internal to the European Union (EU), the Brussels I Recast Regulation (Recast) provides a deceptively simple answer.[1] Article 31(2) of the Recast grants priority to the EU Member State court on which the clause 'confers exclusive jurisdiction'.

Doubt has existed for some time about whether Article 31(2) of the Recast applies to asymmetric jurisdiction clauses that confer exclusive jurisdiction

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[1] 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 [2012] OJ L351/1.

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only in respect of one party's proceedings.[2] English and German appellate courts recently decided it is an *acte clair* that it does. The English Court of Appeal and *Bundesgerichtshof*, in the same case involving Etihad and Air Berlin, declined to refer this question to the Court of Justice of the European Union (CJEU).[3] Those national courts also expressed opinions, in obiter, about the relevance of their conclusions to the Hague Choice of Courts Convention.[4] They opined that the convention, which unlike the Recast defines 'exclusive choice of court agreements',[5] does not apply to asymmetric ones.[6] For proceedings initiated since 1 January 2021, the Hague Choice of Courts Convention is the only multilateral instrument governing jurisdiction in force between the United Kingdom (UK) and the EU. The EU had, at the time of writing, rejected the UK's request to accede to the Lugano Convention, which governs jurisdictional questions arising among EU Member States, and Switzerland, Norway and Iceland. [7]

As is well known, the Recast regulates jurisdictional issues in civil and commercial matters between EU Member State courts. Despite the UK's withdrawal from the EU, the Recast also continues to regulate jurisdictional issues as between EU Member State and English courts in several

[2] I Bergson, 'The Death of the Torpedo Action? The Practical Operation of the Recast's Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union' (2015) 11 JPIL 1, 22–3; G Cuniberti, 'La clause attributive de juridiction' in *Le banquier luxembourgeois et le droit international privé* (LGDJ 2017) 82–4; L Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements' (2018) 67 ICLQ 37, 54–6; R Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) paras 2.145, 2.204–2.205; H Wais, 'Einseitige Gerichtsstandsvereinbarungen und die Schranken der Parteiautonomie' (2017) 81 Rabels Zeitschrift für ausländisches und internationales Privatrecht 815, 850–5. See also PR Wood, *Conflict of Laws and International Finance* (3rd edn, Sweet & Maxwell 2019) para 17-005 (describing this doubt as '[p]erhaps' the rule's 'most significant defect').

[3] *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707 (*Etihad* [2020]) paras 92–94; BGH, 15 June 2021, II ZB 35/20, paras 48, 71. For simplicity, references in this article to the 'CJEU' also relate to the European Court of Justice.

[4] Convention on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) 44 ILM 1294 (Hague Choice of Courts Convention); *Etihad* [2020] (n 3) paras 85–87 (obiter); BGH, 15 June 2021 (n 3) para 69. The Convention entered into force for the UK, in its own right, on 1 January 2021: Private International Law (Implementation of Agreements) Act 2020, section 1; Civil Jurisdiction and Judgments Act 1982, section 3D.

[5] Hague Choice of Courts Convention (n 4) art 3(a). This article uses 'choice of court agreement' or 'clause' and 'jurisdiction agreement' or 'clause' interchangeably.

[6] See BGH, 15 June 2021 (n 3) para 69; *Etihad* [2020] (n 3) para 85 (obiter).

[7] Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2007] OJ L339/3, arts 70(1)(c), 72(3); Commission, 'Communication from the European Commission Representing the European Union to the Swiss Federal Council as the Depositary of the 2007 Lugano Convention (Concerning the Application of the United Kingdom of Great Britain and Northern Ireland to Accede to the 2007 Lugano Convention)' (Note verbale) Ref Ares(2021)4053632 (22 June 2021). The 2007 Lugano Convention ceased to have effect so far as it concerned the UK at the end of the implementation period on 31 December 2020: see A Dickinson, 'Realignment of the Planets – Brexit and European Private International Law' (2021) 41 Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 213, 220.

circumstances. One is in respect of appeals from decisions in proceedings originally initiated in an EU Member State or English court before the end of the transition period on 31 December 2020.[8] The other is in respect of proceedings, initiated after that date, if proceedings in the same matter, initiated prior to that date, are already pending in an English or EU Member State court.[9]

Though other types of asymmetric jurisdiction clause exist, this article focuses on the most common type of asymmetric jurisdiction clause, which it calls a 'Rothschild clause', after the widely discussed French *Cour de cassation Rothschild* case.[10] An example of a standard variant of a Rothschild clause, like that in issue in the *Etihad* litigation, is as follows:

> 39.1 Jurisdiction
>
> (a) The courts of (Frankfurt am Main), Germany have exclusive jurisdiction to settle any dispute … in connection with this Agreement …
>
> (b) The Parties agree that the courts of (Frankfurt am Main), Germany are the most appropriate and convenient courts … and accordingly no Party will argue to the contrary.
>
> (c) This Clause 39.1 is for the benefit of the [lenders] only. As a result, no [lender] shall be prevented from taking proceedings … in any other courts with jurisdiction. To the extent allowed by law, the [lenders] may take concurrent proceedings in any number of jurisdictions.[11]

This clause, in subsection (a), designates the jurisdiction of Frankfurt, the '"anchor" court'.[12] The anchor court has jurisdiction over proceedings brought by the borrower (sometimes called 'the non-option holder') and the lenders (sometimes called 'the option holder(s)').[13] In subsection (c), it gives the lenders an option to seise another court or other courts with jurisdiction. There is also a waiver in subsection (b), by both the borrower and lenders, of

[8] A Briggs, *Civil Jurisdiction and Judgments* (7th edn, Informa Law 2021) paras 2.03, 2.05.

[9] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 50(3); Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/1, arts 7, 67(1)(a), 126–127; European Union (Withdrawal) Act 2018, section 1, as amended by European Union (Withdrawal Agreement) Act 2020, Pt 1; Civil Jurisdiction and Judgments (Amendment) EU Exit Regulations 2019 SI 2019/479, Pt 5, as amended by The Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 SI 2020/1493, reg 5. A clear course through these provisions is very helpfully charted by Dickinson: 'Realignment of the Planets' (n 7) 214–17, 219–21.

[10] *Madame X v Banque Privée Edmond de Rothschild*, Cour de cassation, First Civil Chamber, 26 September 2012, No 11-26.022. See eg M Keyes and BA Marshall, 'Jurisdiction Agreements: Exclusive, Optional and Asymmetrical' (2015) 11 JPIL 345, 366–70.

[11] The *LMA Multicurrency Term and Revolving Facilities Agreement* (LMA.MTR.GER.08, 14 June 2016) cl 39.1 (footnotes omitted) (reprinted with permission).

[12] Fentiman (n 2) para 2.127. 'Designate' is synonymous with 'confer jurisdiction' or 'prorogate': see *Etihad* [2020] (n 3) para 34 (Henderson LJ with whom Hickinbottom and Newey LJJ agreed) (explaining 'prorogation' by reference to Scots law).

[13] The terms 'borrower' and 'lender' are used here for simplicity. Rothschild clauses are used in a range of cross-border contracts, beyond loan agreements.

their rights to challenge the jurisdiction of the anchor court. Not all standard variants of this type of clause contain such a waiver, and some contain a waiver that applies only to the borrower.[14]

German and English courts have generally considered this variant of clause under Article 25 of the Recast[15] to mean that the *anchor court* has *exclusive jurisdiction* over *proceedings commenced by the borrower* and non-exclusive jurisdiction over proceedings commenced by the lenders.[16] As further explained below, Article 31(2) of the Recast engages when an EU Member State court, on which an agreement that is governed by Article 25 confers *exclusive* jurisdiction, is seised in addition to another Member State court.[17] It might, therefore, be thought that an anchor court should only assess a Rothschild clause when seised by the borrower over whom it has exclusive jurisdiction, and not when seised by the lenders over whom it has *non-exclusive* jurisdiction. This might be thought to be the case given that the anchor court has only non-exclusive jurisdiction over the lender. This is not, however, how German and English courts have applied Article 31(2). Instead, they have applied Article 31(2) in the scenario where the borrower has first brought proceedings contrary to the clause in a court which would, but for the clause, have general or special jurisdiction under the Recast,[18] and the lenders have subsequently seised the anchor court, in an effort to have the borrower bring its proceedings there.

The recent litigation involving Etihad Airways and Air Berlin is illustrative. Those parties had concluded a loan agreement containing a Rothschild jurisdiction clause, designating English courts as the anchor. After Air Berlin ceased operations, its insolvency administrator, Flöther, brought proceedings against Etihad in Berlin, alleging that Etihad owed approximately €2 billion. Six months later, Etihad sought declaratory relief in England. It argued that the claims in the Berlin proceedings were subject to the exclusive jurisdiction of the English court (then an EU Member State court), pursuant to the Rothschild clause in the loan agreement. The German courts and English courts, at first instance and on appeal, held that Flöther should bring his claims in England: the Berlin court was right to stay its proceedings under Article 31(2) of the Recast, once the English court had been seised.[19]

[14] eg *UBS v HSH Nordbank* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272, para 22.

[15] '(1): If the parties … have agreed that … the courts of a Member State are to have jurisdiction … those courts shall have jurisdiction … Such jurisdiction shall be exclusive unless the parties have agreed otherwise.'

[16] eg *In re NN2 Newco Ltd* [2019] EWHC 1917 (Ch) para 41 (Norris J); LG Mainz, 13 September 2005, 10 HK O 112/04: cf *In the Matter of Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch) paras 29–31 (obiter); *In re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), [2015] Bus LR 1046, para 49; *KfW v Singal* [2020] EWHC 2214 (Comm) paras 29–33, fn 1.

[17] Part II.

[18] Arts 4 or 7.

[19] LG Berlin, 13 May 2020, 95 O 60/18; KG, 3 December 2020, 2 W 1009/20, BeckRS 2020, 33470; *Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm), [2020] 2 WLR 333 (*Etihad* [2019]); *Etihad* [2020] (n 3); BGH, 15 June 2021 (n 3). See also *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm), [2017] 1 WLR 3497.

For Rothschild clauses, 'ubiquitous' in lending and capital markets,[20] this conclusion appears to make commercial sense. If Article 31(2) does not apply when a borrower/issuer has first commenced proceedings in a non-designated court, the lender/dealer may be incentivised to commence proceedings in the anchor court precipitously to prevent an action by the borrower/issuer in a non-designated court.[21] That may, in turn, trigger a chain of events of default and cross-default.[22] Article 31(2) does not mitigate the need for a lender/dealer to commence proceedings in the anchor court, for the provision will not operate unless that court is seised; it does, however, mitigate the need (if there is one) for a lender/dealer to commence proceedings pre-emptively.[23]

This article explores various lines of analysis which support the conclusion that Article 31(2) applies to the variant of Rothschild clause set out above. It considers the implications of that conclusion, beyond the scenario treated in the case law to date. It argues that while this conclusion is sound, the reasoning in the case law leading to it is reductive. Deciding that Article 31(2) applies to Rothschild clauses by reference to this isolated scenario, and disaggregating them into separate agreements for each party as the English Court of Appeal did, fails to account for the anomaly to which application of Article 31(2) to Rothschild clauses gives rise. Importantly, it ignores how Article 31(2) is to operate in the entirely conceivable scenario where a lender has, pursuant to its option, brought proceedings in a court with jurisdiction under the Recast, first, and the borrower subsequently brings proceedings in the anchor court. For instance, assume in the litigation described above, *Etihad*, pursuant to its option, had first sued Air Berlin *in Berlin* and *Air Berlin* subsequently brought proceedings *in England* under the anchor part of the clause. Article 31(2) in that scenario either defeats the lender's option entirely or it results in parallel proceedings. A characterisation of a Rothschild clause which treats the clause as one Article 25 agreement is needed for Article 31(2) to apply coherently to it in all likely scenarios.

The analysis proceeds as follows. It examines, first, the function, purpose and scope of Article 31(2) of the Recast, and how it relates to Article 25 and the EU law principle of *res judicata* (Part II). Part III examines four paths to the conclusion that Article 31(2) applies to Rothschild clauses, drawing on case

[20] S Garvey, 'Hybrid Jurisdiction Clauses: Time for a Rethink' (2016) 31 BJIBFL 6, 6.

[21] Wood (n 2) paras 15-038, 17-005.

[22] ibid.

[23] *Pre-emptive* proceedings commenced by the lender/dealer is not, however, a scenario borne out in the cases involving Rothschild clauses governed by the Recast's predecessor instruments, which contained no equivalent to Article 31(2): see eg *Barclays Bank v Ente Nazionale di Previdenza* [2015] EWHC 2857 (Comm), [2015] Lloyd's Rep 527; *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm). (*Primacom* has been widely misreported as a case involving a (symmetric) exclusive jurisdiction agreement, presumably because the English High Court did not quote the whole of the clause in its judgment: cf *Primacom* para 3 with LG Mainz, 13 September 2005 (n 16) paras 10–16, a judgment in the same case, which sets the clause out in its entirety.)

law and literature that have considered the question. The anomaly created by the application of Article 31(2) to Rothschild clauses, regardless of which path one follows, is investigated in Part IV. A solution, based on an autonomous characterisation of this variant of clause under Article 25, is proposed in Part V. Since this article's objective is to examine the *in limine* issue of which court is competent *to decide on* the effects and enforceability[24] of a Rothschild clause under the Recast, it does not concern itself with the question of whether Rothschild clauses are enforceable under that instrument.[25]

II. RECAST, ARTICLES 25 AND 31(2), AND RES JUDICATA

The Recast's core provision on jurisdiction agreements is Article 25. It provides that an agreement between the parties confers jurisdiction on the court or courts of an EU Member State to decide 'any disputes … in connection with a particular legal relationship'. The concept of a jurisdiction 'agreement' is autonomous under EU law,[26] as is the requirement that it be the subject of consensus in fact between the parties.[27] Though the requirement of 'a particular legal relationship' is also autonomous, it is intimately linked with the issue of scope (ie whether the agreement applies to the dispute in question),[28] however conceptually distinct the two issues may be.[29] The issue of scope is a question of interpretation for national courts, to be undertaken, at least according to the majority view, by reference to national law.[30] Article 25 further provides for a presumption that the '*jurisdiction*' of the designated court shall be exclusive unless the parties have agreed otherwise.'[31]

Though the Recast does not define exclusive jurisdiction, it does appear to be a concept with a 'consistent, autonomous meaning'.[32] An agreement that confers exclusive jurisdiction will, by virtue of Article 25 of the Recast,

[24] 'Effects' denotes the impact a jurisdiction clause will have on a court's decision to assume and/or exercise jurisdiction. 'Enforceability' refers to the question whether a clause is invalid, void, vitiated or otherwise liable to be constrained or set aside.

[25] See eg Merrett (n 2) 47–54; Fentiman (n 2) paras 2.123–2.150; B Marshall, *Asymmetric Jurisdiction Clauses* (Oxford University Press 2022 forthcoming) Ch 6 (on file with the author).

[26] See eg Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA* EU:C:2013:62, para 21.

[27] See eg Case C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* EU:C:2018:173, para 25.

[28] eg Case C-595/17 *Apple Sales International* EU:C:2018:854, paras 21–22; *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, [2020] 1 All ER 762, paras 69–83; KG, 3 December 2020 (n 19) paras 67–77.

[29] cf M Winkler, 'Understanding Claim Proximity in the EU Regime of Jurisdiction Agreements' (2020) 69 ICLQ 431, 434, 437, 448.

[30] See Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-1769, para 37, ruling para 4; Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* EU:C:2015:335, para 67; *Apple Sales* (n 28) para 21. Though in none of these cases did the CJEU specify whether a national court should apply its own national law to the question of scope (that is, the law of the forum), the national law designated by the forum's private international law rules, or neither.

[31] Recast, art 25(1).

[32] *Commerzbank* (n 19) para 53 (Cranston J).

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'exclude both jurisdiction as determined by the general principle of the defendant's courts laid down in Article 4 thereof and the special jurisdictions provided for in Articles 7 to 9 thereof'.[33] This means that the exclusively designated court will have no discretion to decline that jurisdiction,[34] and Member State courts which would otherwise have general or special jurisdiction have, by virtue of the agreement, no jurisdiction to exercise.[35]

The concept of 'non-exclusive jurisdiction' is more obscure; those words do not appear anywhere in the Recast or in the jurisprudence of the CJEU. By reference to the concept of exclusivity just considered, however, non-exclusive (or not exclusive) jurisdiction must mean jurisdiction which does not affect the competence of other fora with general or special jurisdiction.[36] If that is right, a designated court with non-exclusive jurisdiction, first seised, must exercise that jurisdiction.[37] A designated court with non-exclusive jurisdiction, second seised, must decline jurisdiction in favour of a court first seised that has general or special jurisdiction, provided the proceedings involve the same parties, the same cause of action and have 'the same end in view'[38].[39]

Article 31(2) of the Recast provides for the court on which an Article 25 jurisdiction agreement confers exclusive jurisdiction, if it is seised,[40] to decide on the effects and enforceability of the agreement designating it.[41] The Recast allows the exclusively chosen court to do so, even if another Member State court has already been seised.[42] Once the exclusively chosen court has established jurisdiction in accordance with the agreement, any other Member State court must decline jurisdiction.[43] Recital 22 of the Recast describes the

[33] *Saey Home* (n 27) para 24.

[34] *Generali Italia SpA v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm), [2020] 1 WLR 4211, para 117. See also T Kruger, 'Brussels Calling: The Extra-EU Effect of European Private International Law' in G Van Calster and J Falconis (eds), *European Private International Law at 50* (Intersentia 2018) para 24.

[35] Recast, art 28.

[36] See A Mills and U Grušić, 'Jurisdiction under the Brussels/Lugano System' in P Torremans and JJ Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 230; F Pocar, 'Explanatory Report to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' [2009] OJ C319/1, para 106(1).

[37] Recast, art 29(3). See *Nordea Bank Norge ASA v Unicredit Corporate Banking SpA* [2011] EWHC 30 (Comm) paras 7, 72.

[38] P Rogerson, M Lehmann and F Garcimartin, 'Lis Pendens and Related Actions' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) para 11.16. See Case C-406/92 *The Tatry* [1994] ECR I-5439, para 41.

[39] See Recast, art 29(1); *Secret Hotels 2 Ltd v EA Traveller Ltd* [2010] EWHC 1023 (Ch) paras 15–16, 48–49, 68; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, Sweet & Maxwell 2015) para 4.06. But see *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981, para 61 (obiter).

[40] Seisin carries its own meaning under EU law: Recast, art 32.

[41] Technically, it is the *apparently* designated court, with *apparently* exclusive jurisdiction: A Briggs, 'What Should Be Done about Jurisdiction Agreements?' (2010) 12 Yearbook of Private International Law 311, 316–22. See further text to (nn 54–68).

[42] *Commerzbank* (n 19) paras 77–78.

[43] Recast, art 31(3).

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provision as 'an exception to the general *lis pendens* rule'.[44] This implies that both sets of proceedings must involve the same parties and 'cause of action', and have 'the same end in view'.[45] The exception, therefore, appears not to apply to related proceedings, where at least one of those aspects in the two sets of proceedings is not the same but where the proceedings are 'so closely connected that it is expedient to hear and determine them together'.[46]

By introducing Article 31(2), the Recast differs from the Brussels Convention[47] and Regulation 44/2001[48] which preceded it. Those instruments subjected all jurisdiction agreements to the *lis pendens* rule. According to the CJEU's ruling in *Gasser*, they required the court first seised to examine its own jurisdiction, considering the jurisdiction agreement designating another Member State's courts, and the designated court to stay its proceedings until the first seised court had concluded that examination.[49] The court first seised would eventually be required to decline jurisdiction, if it decided that the agreement conferred exclusive jurisdiction and was enforceable. Although the effect of an enforceable agreement conferring exclusive jurisdiction was that the court first seised *had no jurisdiction*,[50] some Member State courts took a long time to reach that decision.[51] This 'torpedo' problem, to which Article 31(2) of the Recast responds, is well-known and need not be revisited here.[52] Suffice it to say that article was introduced to dissuade a party from initiating proceedings in a court which—on the assumption that there was an enforceable exclusive jurisdiction clause

[44] ibid, Recital 22(1). But see *Etihad* [2019] (n 19) paras 49–52, 87 (Henderson LJ with whom Hickinbottom and Newey LJJ agreed) (describing it as a 'modification'); *Commerzbank* (n 19) paras 62–63.

[45] Recast, Recital 22(1), art 29(1). But see Q Forner-Delaygua, 'Changes to Jurisdiction Based on Exclusive Jurisdiction Agreements under the Brussels I Regulation Recast' (2015) 11 JPIL 379, 386–7.

[46] See Recast, art 30(3); A Dickinson, 'Exclusively Yours' (2020) LQR 215, 218; P Gottwald, 'Artikel 30' in W Kruger and T Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (5th edn, CH Beck 2017) vol 3, art 30 EuGVVO, para 10; LG Düsseldorf, 11 July 2018, 4c O 81/17, openJur, para 64: cf Forner-Delaygua (n 45) 386–7; D Kenny and R Hennigan, 'Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation' (2015) 64 ICLQ 197, 206–9.

[47] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, consolidated version at [1998] OJ C27/1.

[48] Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1.

[49] Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-4207, paras 46–49: cf *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 596. See also Case C-438/12 *Irmengard Weber v Mechthilde Weber* EU:C:2014:212, para 52.

[50] Regulation 44/2001, arts 25–26.

[51] See A Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 134.

[52] See generally J Mance, 'Exclusive Jurisdiction Agreements and European Ideals' (2004) 120 LQR 357; S Fulli-Lemaire, 'La protection de la compétence du juge élu et ses limites' in M Laazouzi (ed), *Les clauses attributives de compétence internationale : de la prévisibilité au désordre* (Éditions Panthéon-Assas 2021) 148–9.

designating the courts of another Member State—had no jurisdiction. The strategy behind such a manoeuvre was to delay the resolution of the dispute.

The Recast is said to change the identity of the court that should decide on the effects and enforceability of an agreement, where multiple Member State courts are seised.[53] There is continuing uncertainty, however, about the extent to which the court first seised must be satisfied that an applicable clause conferring exclusive jurisdiction exists for the obligation to stay its proceedings to engage.[54]

On one view, Article 31(2) means that the court first seised makes no *decisions* that have binding effect on the clause's effects and enforceability, including whether it confers *exclusive* jurisdiction.[55] The court first seised need only be satisfied that there apparently, probably, prima facie or manifestly is a clause that confers exclusive jurisdiction on another Member State court, in order to stay its proceedings when that other court is subsequently seised.[56] This approach has the advantage of one court—and *the* court which appears to have been chosen—deciding with binding effect on all elements of the agreement, including the question of whether it is exclusive.

An opposing view, advanced by Professor Dickinson, considers that the court first seised should decide with binding effect on all aspects of the agreement that are governed by autonomous requirements, of which he considers the question of whether a clause confers exclusive jurisdiction to be one.[57] Provided those are satisfied, the court first seised should stay proceedings to allow the chosen court to decide on those requirements that the Recast subjects to national law. This view derives support from Recital 22, which does not expressly refer to exclusivity as an issue for the chosen court to decide. Since no Member State court is better placed than another to decide a matter which is subject to autonomous EU law,[58] it is also more efficient for the court first seised to resolve the exclusivity question and be done with it.

Which view is preferable? Is it enough that the court first seised considers there to be a clause that apparently/probably/prima facie confers *exclusive* jurisdiction for the obligation to stay its proceedings to engage?[59] (Clearly, a

[53] See *Ablynx NV v VHsquared Ltd* [2019] EWCA Civ 2192, para 72 (Lewison LJ with whom Newey and Asplin LJJ agreed); Bergson (n 2) 8–9. But see Dickinson, 'Exclusively Yours' (n 46) 217 (arguing that only those aspects which the Recast refers to national law should be determined by the chosen court).

[54] KG, 3 December 2020 (n 19) paras 63–64 (not needing to decide the point). This uncertainty is longstanding: see eg Bergson (n 2) 6–14; A Nuyts, 'La refonte du règlement Bruxelles I' (2013) 102 Revue critique de droit international privé 1, 52; A Briggs, *Private International Law in English Courts* (Oxford University Press 2014) para 4.350; A Dickinson, 'Surveying the Proposed Brussels I Bis Regulation – Solid Foundations but Renovation Needed' (2010) 12 Yearbook of Private International Law 247, 297.

[55] *Generali Italia* (n 34) paras 68–69.

[56] See eg KG, 3 December 2020 (n 19) para 62 (summarising the ample German commentary in support of this view); Cuniberti (n 2) 80–1.

[57] See Dickinson, 'Exclusively Yours' (n 46) 217.

[58] ibid.

[59] See *Ablynx* (n 53) paras 53–55, 73, where the 'prima facie' approach was common ground between counsel: Dickinson, 'Exclusively Yours' n (46) 217.

prima facie case that there is an agreement conferring *non-exclusive* jurisdiction will not be enough.[60]) Or should the court first seised make a decision, with binding effect, that the clause confers exclusive jurisdiction, such that the chosen court must recognise it? The latter view is enticing because exclusivity is the hook on which Article 31(2) of the Recast turns, but the former is likely to be preferred by the CJEU. That is because it is more consistent with what Article 31(2) requires the court first seised to do, namely, to stay its proceedings rather than to decline jurisdiction. A decision of the court first seised to characterise the jurisdiction of the chosen court as exclusive and stay its proceedings does not bind the chosen court:[61] interlocutory decisions are only recognisable judgments if they regulate or determine the parties' legal relationship.[62] That decision does regulate the parties' legal relationship, but only provisionally.[63]

This characterisation is not decisive of the jurisdiction of the court first seised (it has only *stayed* its proceedings; it has not (yet) declined jurisdiction).[64] Nor is it determinative of the designated court's jurisdiction: to the extent that the designated court's jurisdiction depends on an enforceable agreement conferring exclusive jurisdiction, the purpose of Article 31(2) in requiring the court first seised to stay its proceedings is to allow the designated court to decide, in all respects, whether there is one.[65] This makes sense. If the *designated* court were ultimately to decide that the clause confers on it *non-exclusive* jurisdiction, it would be odd if the court first seised were then bound to decline its jurisdiction on account of its own initial ruling that another Member State court had *exclusive* jurisdiction, in circumstances where that other court does not agree.

Granted, the logic of this approach generates an obvious inefficiency: arguments as to whether the clause confers exclusive jurisdiction will, in effect, be ventilated on at least two occasions. The facts of the litigation in

[60] *Ablynx* (n 53) para 73 (Lewison LJ with whom Newey and Asplin LJJ agreed).

[61] M Weller, 'Die "verbesserte Wirksamkeit" der europäischen Gerichtsstandsvereinbarung nach der Reform der Brüssel I-VO' (2014) 19 Zeitschrift für Zivilprozeß International 251, 275.

[62] P Schlosser, 'Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' [1979] OJEC C59/71, para 184 (Schlosser Report).

[63] Weller interprets the Schlosser Report to mean that interlocutory decisions that only provisionally regulate the parties' relationship are not recognisable judgments: Weller, 'Die "verbesserte Wirksamkeit"' (n 61) 275. The Schlosser Report is vague on this point: see Schlosser (n 62) para 184. But see Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9686, para 46.

[64] Recast, art 31(2): cf art 31(3); Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, paras 15, 27, 32, 36 (*Gothaer* Judgment) (which concerned the recognition of a decision by one Member State court of a decision by another a Member State court to *decline* jurisdiction on account of an exclusive jurisdiction clause). cf Bergson (n 2) 19, fn 70 (arguing by reference to Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:554, Opinion of AG Bot, para 59 that it is a judgment, whenever a Member State court 'rules on its international jurisdiction, whether it accepts or declines jurisdiction'. That may be so, but a court first seised in *staying* its proceedings is doing none of those three things).

[65] See eg *Generali Italia* (n 34) paras 68–70: cf *Gothaer* Judgment (n 64) paras 37–43.

Perella Weinberg Partners UK LLP v Codere SA are illustrative.[66] The scope for argument is, however, reduced if interpreting or characterising a jurisdiction clause is to be done wholly autonomously. That is to say, there will be less room for argument if the question of whether a given clause confers exclusive jurisdiction—a concept which, as has been seen, has an autonomous meaning—is answered without reference to national law.

Needless to say, if the court first seised has (in error)[67] *declined* jurisdiction on account of what it considers to be a clause conferring exclusive jurisdiction on another Member State court, that decision will nonetheless bind the designated court.[68]

III. INTERPRETING AND CHARACTERISING ASYMMETRIC CLAUSES AS EXCLUSIVE

Whether a jurisdiction agreement confers exclusive or non-exclusive jurisdiction under Article 25 is said to be a question of 'interpretation' or 'construction' going to its effects;[69] whether a jurisdiction agreement on which Article 25 confers exclusive jurisdiction falls within Article 31(2) is said to be a question of 'characterisation'.[70] But where construction stops and characterisation begins is murky, in light of the autonomous meaning of exclusivity, articulated above, and the rebuttable presumption of exclusivity contained in Article 25. Determining whether the presumption that a clause confers exclusive jurisdiction has been rebutted is either a question for national courts applying national law; or it is a question for national courts but is to be determined autonomously by examining the wording of the clause neutrally for clear indications that the parties intended to rebut the presumption.[71] If it is the latter, then the question is

[66] [2016] EWHC 1182 (Comm).

[67] That course would be in error, because the Recast does not permit the court first seised to decline jurisdiction until the designated court establishes jurisdiction under the agreement: art 31 (2)–(3).

[68] *Gothaer* Judgment (n 64) paras 15, 27, 32, 36.

[69] *Perella* (n 66) para 23. (Private international law, for whatever reason, has been less concerned with the distinction between interpretation and construction than the law of contract.)

[70] *Commerzbank* (n 19) para 52.

[71] Consensus is missing: *GDE LLC (formerly Anglia Autoflow North America LLC) v Anglia Autoflow Ltd* [2020] EWHC 105 (Comm) paras 124–131; U Magnus, 'Introduction' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law* (Otto Schmidt 2016) vol 1, Brussels I*bis* Regulation, art 25, paras 81a, 143; Fentiman (n 2) para 2.71; M Lehmann and A Grimm, 'Zulässigkeit asymmetrischer Gerichtsstandsvereinbarungen nach Artikel 23 Brüssel I-VO' [2013] Zeitschrift für Europäisches Privatrecht 890, 892, 893; Case C-222/15 *Hőszig Kft v Alstom Power Thermal Services* EU:C:2016:525, para 28; Mills (n 51) 110; P Mankowski, 'Artikel 25 – Zulässigkeit und Form von Gerichtsstandsvereinbarungen' in T Rauscher (ed), *EuZPR/EuIPR, Band I : Europäisches Zivilprozess- und Kollisionsrecht* (5th edn, Otto Schmidt 2021) art 25 Brüssel Ia-VO, para 341. See also *Etihad* [2020] (n 3) para 4 (Henderson LJ with whom Hickinbottom and Newey LJJ agreed) (not referring to any governing law in pronouncing on the effects of the clause).

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properly one of characterisation rather than construction.[72] Which of those it is, is uncertain.

In practical terms, this is a problem which affects asymmetric rather than symmetric clauses. By reference to the concepts of exclusive and non-exclusive jurisdiction canvassed above,[73] and the Recast's rebuttable presumption of exclusivity, characterising symmetric agreements for the purposes of Article 31(2) is simple. Article 25 presumes the jurisdiction of a Member State court designated in an agreement to be 'exclusive unless the parties have agreed otherwise'.[74] Accordingly, an agreement that a court presumes to confer exclusive jurisdiction under Article 25 will be characterised as falling within Article 31(2); an agreement that a court characterises as having rebutted the presumption (or as conferring non-exclusive jurisdiction) will not.

The difficulty that Rothschild clauses present is that they are generally considered, for the purposes of Article 25 of the Recast, as conferring both exclusive and non-exclusive jurisdiction, so the rebuttable presumption of exclusivity arguably does little to aid their construction (or, properly put, their characterisation).[75] As already noted, German and English courts have generally determined a Rothschild clause to mean that the jurisdiction of the anchor court is exclusive under Article 25 when the borrower brings proceedings, and non-exclusive when the lender does. This means that, under the Rothschild clause set out in Part I above, only the courts of Frankfurt will have jurisdiction when the borrower sues, whereas the courts of Frankfurt as well as other courts competent under the Recast will have jurisdiction when the lender sues.[76] The question, then, is how a clause that confers both exclusive and non-exclusive jurisdiction under Article 25 should be characterised as exclusive for the purposes of Article 31(2). Four possibilities are examined.

A. Considered as a Whole?

One path to Article 31(2) is that, considered as a whole, Rothschild clauses confer exclusive jurisdiction. That was Cranston J's approach in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc*, a case concerning a Rothschild clause in a loan agreement and related guarantee. The lender warned the borrower that it would bring English proceedings against the borrower for non-payment, unless it received a settlement offer by 16 June 2015. The borrower commenced proceedings

[72] See generally J Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' in S Degeling and The Hon Justice J Edelman (eds), *Contract in Commercial Law* (Thomson Reuters 2016) 105. [73] Text to (nn 32–36). [74] Recast, art 25(1).

[75] See also Mankowski (n 71) para 349.

[76] Non-EU courts, competent under their own private international law rules, will also have jurisdiction when the lender sues.

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against the bank in Greece on that very date, contrary to the clause. The following year, the lender brought proceedings in England. The English High Court held that Article 31(2) applied to Rothschild clauses, characterised autonomously. Cranston J reasoned that:

> Considered as a whole, they are agreements conferring *exclusive* jurisdiction on the courts of an EU member state … That this applies in respect of a claim by the [*borrower*] alone does not detract from this effect.[77]

This logic solves the problem which arose in the factual scenario of the *Commerzbank* case, because it requires the court first seised by the borrower to stay proceedings in favour of the anchor court.

The problem with it is that it leads to the anomaly, foreshadowed above, where a lender has, pursuant to its option, brought proceedings in a court with jurisdiction under the Recast first, and the borrower brings proceedings in the anchor court second. In that scenario, it is unclear how a court first seised by the lender pursuant to its option (and thus consistently with the agreement) would not need to stay its proceedings under Article 31(2) to allow for the anchor court second seised by the borrower to rule on it, given that 'considered as a whole', the clause is an agreement conferring exclusive jurisdiction under Article 25.[78]

It might be thought that this problem falls away if Cranston J's logic is inverted:

> Considered as a whole, they are agreements conferring *non-exclusive* jurisdiction on the courts of an EU member state. That this applies in respect of a claim by the *lender* alone does not detract from this effect.

Because, according to this logic, Rothschild clauses as a whole are non-exclusive, Article 31(2) would not engage when either party brings proceedings pursuant to a Rothschild clause, meaning that the *lis pendens* rule would apply.[79]

This logic means that in the factual scenario which arose in the *Commerzbank* case, the English anchor court, second seised by the lender under the Rothschild clause, would have needed to stay its proceedings until the Greek court first seised by the borrower, contrary to the agreement, has decided that it had no jurisdiction. That result would weaken the policy aims of Article 31(2), set out in Recital 22.[80]

Characterising Rothschild clauses as non-exclusive creates a further difficulty.[81] The Greek court first seised must have characterised the agreement as non-exclusive under Article 25, in order to conclude that it need not stay its proceedings under Article 31(2). Having done so, it is

[77] *Commerzbank* (n 19) para 64 (emphasis added).
[78] See further Part IV(A).
[79] Recast, art 29(1).
[80] *Commerzbank* (n 19) para 69. See also *Etihad* [2019] (n 19) para 190.
[81] cf Keyes and Marshall (n 10) 352.

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unclear how the Greek court could then decline its general or special jurisdiction on the basis that another Member State court has exclusive jurisdiction under Article 25.

This difficulty may explain Professor Fentiman's remark that '[t]here is nothing incoherent about concluding that such agreements are non-exclusive for the purposes of Article 31(2)' [of the Recast], but intractable problems arise in the context of Article 25'.[82] One way out of those problems is for the Member State court first seised to characterise the agreement as a whole as non-exclusive for the purposes of Article 31(2) but exclusive for the purposes of Article 25. Evidently, one court characterising an agreement as non-exclusive for the purposes of one provision of the Recast and, in the next breath, exclusive for the purposes of another has little to be said for it. Nor does it appear to be an approach that the Recast facilitates.

B. Because of the Borrower's Promise

Professor Merrett argues that the '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'.[83] Accordingly, another way of arriving at the conclusion that Article 31(2) will apply is because the borrower has, from the perspective of English law, 'promised *not to sue* anywhere other than the chosen jurisdiction'.[84] From the perspective of German law, one could say that Article 31(2) will apply because the borrower has promised *to sue only* in the chosen court.[85] A German or English perspective is, however, only relevant to the extent that the Recast says it is.[86] As noted above, the CJEU has consistently ruled that an agreement on jurisdiction is an independent concept under the Recast and 2007 Lugano Convention.[87] It is not a reference to national concepts of jurisdiction by agreement.[88]

The CJEU has not explained whether an agreement conferring jurisdiction is a promissory contract creating rights and obligations among the parties, or rather whether it is a dispositional agreement (a *Verfügung*) which directly affects the parties' rights to bring and have proceedings brought before courts with competence under the Recast, but which does not produce obligations

[82] See Fentiman (n 2) para 2.145.

[83] Merrett (n 2) 56 (emphasis added).

[84] ibid 56 (emphasis added), approved in *Etihad* [2019] (n 19) paras 183–184. See also *Etihad* [2020] (n 3) para 67 (Henderson LJ with whom Hickinbottom and Newey LJJ agreed).

[85] The positive obligation to sue in the designated court rather than the negative obligation not to sue elsewhere may be relevant: cf BGH, 17 October 2019, III ZR 42/19, paras 24, 33 with *Starlight Shipping Co v Allianz Marine Aviation Versicherungs AG* [2014] EWCA Civ 1010, para 20 (holding, respectively, that breach of the former and breach of the latter sounded in damages under German and English law).

[86] TC Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford University Press 2017) para 13.07.

[87] Case C-519/19 *Ryanair DAC v DelayFix* EU:C:2020:933, para 38. Text to (n 26).

[88] *Refcomp* (n 26) para 21.

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between the parties inter se.[89] As an autonomous EU concept, it is plausible that the juridical nature of an Article 25 jurisdiction agreement is neither. It follows that although the English High Court and Court of Appeal both approved of Merrett's approach in *Etihad*,[90] as a matter of EU law, it may not be right to conceptualise a jurisdiction agreement in terms of promise or obligation, as a common lawyer would.[91]

C. Because the Clause Comprises Two Agreements or Two Unilateral Acceptances, and One is Exclusive

A further path to Article 31(2)'s application to a Rothschild clause is to characterise the clause as comprising two jurisdiction agreements or two unilateral acceptances of the anchor court's jurisdiction, one of which is exclusive, with respect to a single dispute within a particular relationship. Disaggregating a Rothschild clause into 'separate' jurisdiction agreements was the English Court of Appeal's approach in *Etihad Airways PJSC v Flöther*. Henderson LJ reasoned:

> I can see no difficulty in regarding a composite jurisdiction agreement such as that contained in clause 33 of the Facility Agreement as comprising (a) an exclusive agreement in relation to claims brought by Air Berlin, and (b) *a separate* non-exclusive agreement in relation to claims brought by Etihad.[92]

Professor Briggs has made a similar suggestion, albeit in a response to a different problem.[93] He suggests that:

> it may be prudent for contracts which were intended to contain such asymmetric provisions to be recast so that they contain two jurisdiction agreements, separately numbered and clearly distinct from each other … Clause X … provide[s] that all proceedings in which A sues B shall be brought only before a particular court; and Clause Y that proceedings brought by B against A may be brought before any of a number of named courts.[94]

Elsewhere, he has argued that one should conceive of jurisdiction agreements generally under the Recast as unilateral waivers,[95] by which parties unilaterally

[89] See generally M Weller, 'Optional Choice of Court Agreements' in M Schmidt-Kessel (ed), *German National Reports on the 20th International Congress of Comparative Law* (Mohr Siebeck 2018) 209, 212.

[90] *Etihad* [2019] (n 19) para 184; *Etihad* [2020] (n 3) para 67.

[91] See A Briggs, 'The Subtle Variety of Jurisdiction Agreements' [2012] LMCLQ 364, 378–9; A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) para 7.35; J Harris, 'The Brussels I Regulation, the ECJ and the Rulebook' (2008) 124 LQR 523.

[92] *Etihad* [2020] (n 3) para 68 (Henderson LJ with whom Hickinbottom and Newey LJJ agreed) (emphasis added).

[93] (Briggs was not addressing Article 31(2) of the Recast, but rather the possibility that a French court applying the 2007 Lugano Convention might invalidate an asymmetric clause, considered as a whole, on the basis that it is potestative.)

[94] Briggs, *Civil Jurisdiction and Judgments* (n 8) para 12.16.

[95] A Briggs, 'The Brussels Ibis Regulation Appears on the Horizon' [2011] LMCLQ 157, 161.

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renounce their privileges of being sued in courts with general or special jurisdiction[96] and unilaterally accept the jurisdiction of courts that would not otherwise have it.[97] Persuaded by that analysis, the English Court of Appeal observed in *Joint Stock Co Aeroflot – Russian Airlines v Berezovsky*, in relation to Article 23 of Regulation 44/2001 that 'the agreement of a party is not bilateral … but unilateral'.[98] Subsequent English authority, albeit at first instance, has cast some doubt on whether this approach can be reconciled with the Recast's autonomous requirement that a jurisdiction agreement be the subject of consensus in fact between the parties.[99]

Applying Briggs' conception to a Rothschild clause means that the *lender* (B in Briggs' example, quoted above) waives its privileges of being sued in courts with general or special jurisdiction and accepts the jurisdiction of the anchor court. The *borrower* (A in his example) merely accepts the jurisdiction of the anchor court.

Framing a Rothschild clause in these terms misrepresents the relative jurisdictional advantages and disadvantages for each party under the clause. It suggests that it is advantageous to leave open the possibility of *having to defend* proceedings in one of any number of courts with special jurisdiction in addition to one's domicile. It suggests that it is disadvantageous to know in advance that proceedings will only have to be defended in one nominated court, that court often being the place of the lender's domicile, branch or registered office.

It is true that the CJEU has used the language of waiver in connection with jurisdiction agreements. In several early cases, the Court framed the question of whether a party (which was the defendant to the proceedings) had agreed to a jurisdiction agreement as one of waiving the advantage of the rules of jurisdiction under the Brussels Convention.[100] But there is nothing in the Court's decisions to support the conclusion that the Court was concerned with a waiver of those rules by a party only in its position as defendant. Indeed, in subsequent cases, the Court asked essentially the same question in determining whether a party (which was the claimant to the proceedings) had agreed to a jurisdiction agreement. It asked whether that party had agreed to derogate from the default rules, giving it the advantage of *initiating* proceedings against the counterparty in a court with jurisdiction under

[96] See Briggs, *Agreements on Jurisdiction and Choice of Law* (n 91) paras 7.34–7.36; Briggs, 'The Subtle Variety of Jurisdiction Agreements' (n 91) 378.

[97] Briggs, *Agreements on Jurisdiction and Choice of Law* (n 91) para 7.66; Briggs, 'The Brussels Ibis Regulation' (n 95) 161.

[98] [2013] EWCA Civ 784, para 64 (Aikens LJ with whom Mann J and Laws LJ agreed).

[99] See *IMS SA v Capital Oil and Gas Industries Ltd* [2016] EWHC 1956 (Comm) paras 46–52.

[100] Case 24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH* [1976] ECR 1832, para 9; Case 25/76 *Galeries Segoura SPRL v Société Rahim Bonakdarian* [1976] ECR 1851, para 8.

Regulation 44/2001.[101] It would be more cogent to describe an agreement as a waiver of a party's jurisdictional privilege to initiate proceedings in a court with general or special jurisdiction,[102] rather than a waiver of its jurisdictional privilege to defend proceedings in one of those jurisdictions.

In all events, so far as Article 31(2) of the Recast is concerned, it is unhelpful to construe a Rothschild clause as an exclusive jurisdiction agreement or acceptance for one party, and a distinct non-exclusive jurisdiction agreement or waiver for the other. For the reasons elaborated later, segregation of one clause into two separate agreements prevents the only apparent solution to the problems which Article 31(2), applied to Rothschild clauses, generates.[103] That solution depends on the interrelationship between the various aspects of the parties' *agreement*.

D. Because it has Exclusive Effect Whenever the Borrower Brings Proceedings

A final path to the conclusion that Article 31(2) applies to Rothschild clauses is to interpret the words of that provision by reference to the exclusive effects that Rothschild clauses have under Article 25 when the borrower brings proceedings.[104] Article 31(2) 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 shall stay [its] proceedings'.[105] As Walker J observed in *Perella Weinberg v Codere*, the inquiry for which Article 31(2) calls is whether 'the party seeking to bring proceedings in a court of "another member state" has agreed that the dispute in question is to be subject to the exclusive jurisdiction of a court or the courts of another member state'.[106] The simple answer to that question, in the case of a Rothschild clause, is that the borrower has so agreed, because the clause has exclusive effect under Article 25 whenever the borrower brings proceedings.[107]

If the borrower brings proceedings first in a Member State court, which is not the anchor court, Article 31(2) will apply when the anchor court is second seised, because the parties have agreed that the designated court should have exclusive jurisdiction over the borrower's proceedings. Once the court first seised has established, to the requisite standard, that the borrower has agreed

[101] See *Cartel Damage Claims* (n 30) para 70 (in this case, whether that party had agreed to derogate from the normal rules in respect of a non-contractual relationship); Case 71/83 *The Tilly Russ* [1984] ECR 2417, para 14.

[102] See also M Lehmann *et al.*, 'Special Jurisdiction' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) para 4.17.

[103] See Part V.

[104] See generally U Magnus in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law (ECPIL)* (Otto Schmidt 2016) vol 1, Brussels I*bis* Regulation, Introduction, para 103.

[105] (Emphasis added).

[106] *Perella* (n 66) para 18 (obiter) (a case, as already noted, concerning a different type of asymmetric jurisdiction clause from the one examined in this article).

[107] *Commerzbank* (n 19) para 80.

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that disputes brought by it should be subject to the exclusive jurisdiction of another Member State court,[108] the only remaining question is whether that other court 'is seised … on the basis of the agreement'.[109] Again, the only answer to that question is 'yes'.[110] The passive 'is' in Article 31(2) means that the designated court can be seised by either party on the basis of the agreement. It does not matter that it is seised by the party over whom the court has non-exclusive jurisdiction under that agreement,[111] as long as both sets of proceedings involve the same cause of action or have the same end in view.[112]

E. Evaluation of Existing Approaches

Of the approaches so far considered, the most compelling is that in Section D: to characterise a Rothschild clause as one agreement with different effects for proceedings initiated by each party. It might be thought that the characterisation in Section D is so similar to the 'separate agreement' characterisation, criticised in Section C, and ultimately adopted by the English Court of Appeal in *Etihad*, that drawing any distinction between them is splitting hairs. The argument made here is that this is a distinction without a difference if only one party commences proceedings, such that only Article 25 of the Recast is engaged. But as soon as both parties initiate proceedings before Member State courts, the distinction becomes material.

Disaggregating the clause into two agreements, as the Court of Appeal did, prevents a solution to the anomaly that the application of Article 31(2) to Rothschild clauses creates.

IV. PROBLEMS WITH APPLYING ARTICLE 31(2) TO ASYMMETRIC CLAUSES

Regardless of which path one takes, Article 31(2) applied to Rothschild clauses creates an anomaly.[113] This anomalous scenario was foreshadowed in the literature when the Recast first took effect[114] and was raised by David Joseph QC of counsel in *Etihad Airways PJSC v Flöther*.[115] It occurs when the lender first commences proceedings in an EU Member State court with general or special jurisdiction, pursuant to the optional limb of the parties' agreement. And the borrower subsequently seises the Member State court designated in the anchor limb of the parties' agreement.

The anomaly is that application of Article 31(2) either defeats the lender's option entirely or it results in parallel proceedings. Either, (A) the Member State court first seised by the lender must stay its proceedings until the

[108] As to which, see text to (nn 54–68).
[109] Recast, art 31(2).
[110] Provided Article 32 is satisfied.
[111] See *Etihad* [2019] (n 19) paras 206–207; BGH, 15 June 2021 (n 3) para 64.
[112] Text to (nn 44–46).
[113] cf *Etihad* [2019] (n 19) para 219.
[114] Keyes and Marshall (n 10) 365–6, fns 111–12.
[115] *Etihad* [2019] (n 19) para 180.

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anchor court 'declares that it has no jurisdiction under the agreement',[116] which the anchor court cannot do, since it has exclusive jurisdiction under Article 25 of the Recast. Once the anchor court establishes its jurisdiction, the court first seised must decline jurisdiction,[117] thus defeating the lender's option. Alternatively, (B) the Member State court first seised need not stay its proceedings, on account of the clause conferring only non-exclusive jurisdiction in respect of the lender's proceedings of which it is seised. But the anchor court second seised cannot stay its proceedings, because the clause confers exclusive jurisdiction in respect of the borrower's proceedings of which it is seised, such that there are parallel proceedings.

A. Article 31(2) Defeats the Option

The optional court first seised by the lender may take the view that Article 31(2) requires it to stay its proceedings because a Member State court 'on which an agreement … confers exclusive jurisdiction is seised'. The parties have agreed that the anchor court should have exclusive jurisdiction when the borrower brings proceedings and the borrower has seised the anchor court. Because the borrower *must* bring proceedings before the anchor court, the anchor court 'seised on the basis of the agreement' cannot declare 'that it has no jurisdiction under the agreement'.[118] In other words, the anchor court will have no discretion to decline jurisdiction; such is the effect of exclusive jurisdiction.[119]

The optional court first seised must decline jurisdiction in favour of that court under Article 31(3), once the anchor court 'has established jurisdiction in accordance with the agreement'. If that is right, the lender's option is worthless if and when the borrower brings proceedings before the anchor court. That will be so regardless of whether the borrower's claims are for positive or negative declaratory relief.[120]

In Section D of the previous Part, it was established by reference to the *Etihad* litigation that if the *borrower* has brought proceedings outside the anchor court under a Rothschild clause, and the lender seises the anchor court, then Article 31(2) will apply. That is because the parties have agreed that the anchor court should have exclusive jurisdiction when the borrower sues. Because of the lender having seised the anchor court, that court now 'is seised'. The fact that the anchor court has been seised by the lender over whom the anchor court has non-exclusive jurisdiction is, according to *Etihad*, immaterial.

By reverse analogy of reasoning, it might be thought that in the scenario where the *lender* brings proceedings in a court pursuant to its option and the

[116] Recast, art 31(2). [117] Art 31(3). [118] cf Recast, art 31(2). [119] Text to (n 34).
[120] A mirror image claim for negative declaratory relief is, as a matter of EU law, procedurally indistinguishable from a claim for positive relief: eg Case C–406/92 *Tatry v Maciej Rataj* [1994] ECR I–5439, para 39.

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borrower later brings proceedings in the anchor court that Article 31(2) will not apply, because the parties have agreed that the anchor court should have *non-exclusive* jurisdiction when the lender sues.

The problem with that line of thinking is it ignores the original reasoning on which the analogy is based. If the original reasoning in *Etihad* is right, where the *lender* has brought its claims in the optional court, and the borrower seises the anchor court, Article 31(2) will apply because the parties have agreed that the anchor court should have exclusive jurisdiction when the borrower sues. Because of the borrower having seised the anchor court, that court now 'is seised' and the optional court first seised by the lender must stay its proceedings. The fact that the anchor court has been seised by the party over whom the court has exclusive jurisdiction must be immaterial.

B. Article 31(2) Results in Parallel Proceedings

Alternatively, the optional court first seised by the lender may take the view that Article 31(2) does not require it to stay its proceedings when the borrower subsequently sues in the anchor court. The optional court may consider that because the jurisdiction of the anchor court is, for proceedings brought by the lender, only non-exclusive, then Article 31(2) will not apply.

There is no obligation for the optional court first seised to stay where there is an agreement conferring non-exclusive jurisdiction on another Member State court,[121] which is the effect of the agreement for proceedings brought by the lender.[122] But equally, there is no possibility for the anchor court second seised to stay its proceedings or decline jurisdiction where there is an agreement conferring exclusive jurisdiction on it, which is what the agreement does for proceedings brought by the borrower. That is a problem.

It might be thought that the likelihood in practice of this being a problem is reduced by the possibility that the proceedings in the optional court may proceed quicker and that any interlocutory decision that court makes as to jurisdiction will bind the anchor court. For a court, seised of jurisdiction pursuant to the option, *not to stay* its proceedings under Article 31(2), it must first *decide* that the jurisdiction of the anchor court is non-exclusive so far as proceedings brought by the lender are concerned. That interlocutory decision by the court first seised is arguably a judgment under the Recast.[123] It is an interlocutory decision that is decisive, rather than merely provisional, of that court's own jurisdiction. Its decision and the reasons leading to it would have *res judicata* effect for the anchor court.[124]

Even if that is so, that decision of the optional court will only have *res judicata* effect in the anchor court in respect of claims brought by the lender.

[121] Text to (n 60).
[122] Text to (n 16).
[123] See *Gothaer* Judgment (n 64) para 27; Schlosser (n 62) para 184: cf text to (nn 61–66).
[124] *Gothaer* Judgment (n 64) paras 40–1.

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The decision of a court seised under the option can only be an interlocutory decision that it has jurisdiction over claims brought by the lender and over set-off, if that were raised by the borrower before the optional court as a defence.[125]

If the borrower chooses not to counterclaim in the proceedings before the court in the Member State where the lender has sued, it is hard to see how the borrower could be prevented from bringing its claims in the anchor court. And it is hard to see how the anchor court would rule that it has no jurisdiction to adjudicate those claims, which is the only way it could deseise of those proceedings.[126] If, instead, the borrower wanted to counterclaim in the optional court, it is probable, though not certain, that the lender would submit to those claims there.[127] But if the lender does not submit to the counterclaims, the borrower would be obliged to bring them in the anchor court, assuming the lender is domiciled in a Member State. That is because Article 8(3) of the Recast, which allows a person domiciled in a Member State to be sued 'on a counterclaim … in the court in which the original claim is pending', cannot be relied upon by the borrower. That ground of jurisdiction is not available, because proceedings brought by the borrower are subject to the exclusive jurisdiction of the anchor court and exclusive jurisdiction excludes special jurisdiction, including Article 8.[128] The result either way would be concurrent proceedings that risk culminating in irreconcilable judgments, contrary to one of the Recast's principal objectives.[129]

If the anchor court were to render judgment first in time in respect of the borrower's claims, there would be no basis under the Recast on which the optional court could refuse to recognise that judgment: taking jurisdiction contrary to a jurisdiction agreement is not a basis on which a judgment can be refused.[130] Misapplication of the rules under the Recast will not provide a basis for refusing to recognise a judgment either.[131] Accordingly, if the court with optional jurisdiction continues to hear the lender's proceedings and its judgment is rendered first,[132] the anchor court must recognise it.

V. A SOLUTION

Put shortly, while application of Article 31(2) to Rothschild clauses may solve one problem, it risks creating others. That is not to say that Article 31(2) should not be applied to Rothschild clauses. Indeed, a lender losing the benefit of its

[125] See generally H Muir Watt in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law* (Otto Schmidt 2016) vol 1, Brussels I*bis* Regulation, art 8, para 60; Case 23/78 *Meeth v Glacetal Sarl* [1978] ECR 2133, para 8.
[126] Recast, art 31(2).
[127] ibid art 26.
[128] See *Saey Home* (n 27) para 24, quoted at text to (n 33).
[129] See Recast, Recitals 1, 21; Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* EU:C:2010:243, para 49.
[130] cf Recast, art 45(3).
[131] See Case C-386/17 *Liberato v Grigorescu* EU:C:2019:24, para 54.
[132] Recast, art 45(1)(c).

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option is arguably less pernicious than the torpedo problem Article 31(2) was introduced to solve.[133] But it does suggest that a solution which preserves the lender's option and mitigates the risk of parallel proceedings is needed, while also dissuading torpedo claims by the borrower.

One solution that suggests itself lies in a different approach to the interpretation or characterisation of Rothschild clauses. It seems that the only way the anchor court second seised could declare that 'it has no jurisdiction under the agreement'[134] is if it considers the clause to mean that once the lender exercises its option and brings proceedings first in a court with general or special jurisdiction under the Recast, the effect of that choice is that the anchor court no longer has jurisdiction over proceedings brought by either party. For this solution to be effective, it would require Member State courts to adopt a uniform construction or an autonomous approach to the characterisation of Rothschild clauses of the type under discussion here. This is not a radical proposition: the courts of most Member States, with the notable exception of France, generally already characterise asymmetric clauses of this type that are subject to the Recast or 2007 Lugano Convention in the same fashion under national law, as has been seen.[135]

That autonomous approach would require a Rothschild clause to be characterised as an agreement between the parties conferring exclusive jurisdiction, which one party may unilaterally renounce in its entirety. This approach is similar, in one respect, to the approach French courts take under their national rules of private international law.[136]

Framed differently, but to a similar effect, it would require a Rothschild clause to be characterised as an agreement conferring exclusive jurisdiction that is dependent on a condition subsequent, over which the lender has sole power: the parties have agreed on the jurisdiction of the anchor court to the exclusion of courts with general or special jurisdiction, unless or until the lender exercises its power to sue elsewhere.[137]

However it is framed, exclusivity under this construction is contingent or conditional. It is dependent on the condition subsequent not being fulfilled or the lender not unilaterally renouncing the jurisdiction clause.

[133] *Commerzbank* (n 19) para 76; *Etihad* [2019] (n 19) para 219.

[134] Recast, art 31(2).

[135] See eg cases cited in (n 16).

[136] In another important respect, it is different: under French national private international law rules and when applying art 17(4) of the Brussels Convention (see text to (nn 140–141)), French courts have interpreted what looks like a fully symmetrical exclusive jurisdiction clause, as though it is drafted for one party's benefit and thus as *impliedly* asymmetric. That approach was sagely rejected by the CJEU in the context of art 17(4) and should not be revived: Case 22/85 *Anterist v Credit Lyonnais* [1986] ECR 1957, para 16. See generally F Mailhé, 'France' in M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020) 199–200, 209, 211 (criticising the stark difference between the approach taken by French courts under their national private international law rules as compared with the approach they have taken under EU law to asymmetric clauses).

[137] The author is grateful to Professor Andrew Dickinson and Associate Professor Jessica Hudson for suggesting this to her.

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Once the lender has renounced the clause conferring exclusive jurisdiction and brought proceedings in a court with general or special jurisdiction, the borrower may bring any counterclaims it has before that court.[138] Any other Member State court, seised by the borrower, would be required to decline jurisdiction in accordance with the general *lis pendens* rule.[139]

The characterisation of Rothschild clauses proposed here would lead to a result consistent with that which Article 17(4) of the Brussels Convention produced. Unlike the Recast, which contains a rebuttable presumption of exclusivity, the Convention had deemed the jurisdiction of a court designated in any agreement to be exclusive, but it also made provision for an exclusive agreement to be concluded for the benefit of one party.

The effect of Article 17(4) of the Convention was that the benefitting party had a contingent right to bring proceedings in a court with general or special jurisdiction under the instrument. The right was contingent because if the non-benefitting party first seised the exclusively designated court, the party for whose benefit the agreement was drafted lost its right to bring proceedings in a court with general or special jurisdiction under the instrument.[140] Equally, 'if the party for whose benefit the agreement was drafted seised a court with general or special jurisdiction first in time, the exclusive jurisdiction of the nominated court seised second in time by the non-benefiting party [appears to have] had no effect'.[141] That is because the benefitting party had, in seising another court, renounced the entire exclusive jurisdiction agreement (that is to say, for proceedings brought by either party).[142] Such was the result of the agreement being for its benefit.

To be clear, it was the Convention, not the jurisdiction clause that produced that result. What is being proposed here is a characterisation of the *jurisdiction clause* that leads to an equivalent result to the Brussels Convention; not an interpretation of the *Recast* that leads to an equivalent result to the Brussels Convention.[143] The latter is not possible, because the Recast does not contain a provision equivalent to Article 17(4).[144]

Characterising Rothschild clauses, as currently drafted, in the manner proposed here is not a perfect solution, especially if *both* parties have expressly agreed to waive their right to object to the jurisdiction of the anchor court.[145] A submission by the lender that the jurisdiction of the anchor court has, on the proper characterisation of the jurisdiction clause,

[138] Recast, art 8(3).
[139] Recast, art 29.
[140] See *Lornamead Acquisitions Ltd v Kaupthing Bank HF* [2011] EWHC 2611 (Comm), [2013] BCLC 73, paras 111–112.
[141] Keyes and Marshall (n 10) 365–6, fn 112.
[142] H Gaudemet-Tallon and M-É Ancel, *Compétence et exécution des jugements en Europe* (6th edn, Librairie générale de droit et de jurisprudence 2018) 220, para 166. cf *Lornamead* (n 140) paras 111–112.
[143] cf the approach of Fentiman (n 2) paras 2.141, 2.144, 2.151.
[144] The principle of continuity, therefore, does not apply: cf Recast, Recital 34; Case C-417/15 *Schmidt* EU:C:2016:881, para 26.
[145] See eg the clause cited in text to (n 11).

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been lost looks very challenging indeed when the lender has expressly agreed not to contest that jurisdiction.

A preferable solution lies with drafters:[146] a clause should provide that the anchor court has no jurisdiction over proceedings brought by the borrower, if the lender has already seised the optional court. It should also provide that any express waiver of the parties' right to object to the jurisdiction of the anchor court only applies if the option has not been exercised. Further, the clause should make clear that in these circumstances, where the lender has brought proceedings before an optional court, the borrower may bring its counterclaims there. But for the many Rothschild agreements still in circulation, characterisation by Member State courts seems to be the only sensible solution to the problem that applying Article 31(2) of the Recast to Rothschild clauses creates when the lender sues in the optional court first, and the borrower sues in the anchor court, second.

These solutions are unavailable if the approach to characterisation taken by the English Court of Appeal in *Etihad Airways PJSC v Flöther* finds favour with Member State courts. As explained above,[147] the Court held that Article 31(2) applied on the basis of an 'exclusive agreement' in relation to the borrower's claims, which was *separate* from the 'non-exclusive agreement' that would apply to the lender's claims. The court's separation of a Rothschild clause into *two agreements* under Article 25 necessarily precludes a solution to Article 31(2) that is based on the interaction between the various components of the parties' *agreement.*

VI. CONCLUSION: LONG LIVE LUGANO, OR ALL EYES ON THE HAGUE?

It is unsurprising that appellate courts in England and Germany have concluded that Article 31(2) of the Recast applies to asymmetric jurisdiction clauses, as a means of curbing torpedo claims by borrowers outside the anchor court. But one should not arrive at that conclusion by conceptually separating the clause into two agreements, as the English Court of Appeal did, or encouraging parties to draft their Rothschild clause as two agreements.

Disaggregating the clause, whether conceptually or physically, prevents a solution to the anomaly Article 31(2) creates when a lender sues in the optional court first and the borrower sues in the anchor court second. Application of Article 31(2) means either parallel proceedings between the anchor court and optional court, or that the optional court must stay its proceedings thus defeating the lender's option. The solution proposed by this article, which rests on a uniform characterisation of the clause viewed as a whole, both preserves the lender's option and mitigates the risk of parallel proceedings.

The conclusion that Article 31(2) applies to Rothschild clauses is good news for financiers on the Continent whose clauses designate courts in Luxembourg

[146] For suggested drafting of such a clause, see Marshall, *Asymmetric Jurisdiction Clauses* (n 25) Ch 9.

[147] Part III(C).

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or Frankfurt as the anchor. But it is little comfort for those financiers whose clauses designate English courts in the anchor. Those agreements now fall squarely outside the Recast.

Moreover, although no court of a Contracting State to the Hague Choice of Courts Convention appears to have conclusively decided the question, at least in the opinion of appellate courts in England and Germany, asymmetric jurisdiction clauses fall outside the jurisdictional provisions of that convention too.[148]

Unless or until the EU changes its mind and allows the UK to accede to the Lugano Convention as it wishes, the result is that the effects in the EU of all Rothschild clauses designating English anchor courts are now governed by the national private international law rules of each Member State. The English High Court, in its former role as an EU Member State court, decided that the CJEU's decision in *Gasser* continued to apply in respect of a jurisdiction agreement governed by the Lugano Convention. As such, the solution that Article 31(2) of the Recast introduced should not be adopted. Jurisdiction agreements governed by the Lugano Convention, it held, continued to be subject to the *lis pendens* rule, given that the Convention has not been amended to reflect the Recast's exception,[149] and instead mirrors the provisions of Regulation 44/2001 which preceded it. As the court first seised, the English court considered that it should examine its own jurisdiction in light of the jurisdiction clause conferring jurisdiction on a Swiss court and should not stay its proceedings until the Swiss court had assessed the clause. The Zurich *Handelsgericht*, perhaps unsurprisingly, took the opposite view in the same case.[150] The Swiss view is consistent with some academic commentary that argues that the courts of European Free Trade Association Member States are free to depart from the ruling in *Gasser*. The basis of that argument is that the requisite equivalence between the 2007 Lugano Convention and Recast, on which the obligation to have due regard to CJEU jurisprudence is founded, is lacking.[151] If the EU does eventually allow the UK to accede to the 2007 Lugano Convention, it will be interesting to see whether English courts maintain their position on *Gasser*, once the boot is on the other foot.

[148] For an analysis of this question by reference to the drafting history of the Convention, see B Marshall, 'The 2005 Hague Convention: A Panacea for Non-exclusive and Asymmetric Jurisdiction Agreements Too?' in M Douglas *et al.* (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing 2019) 100–13; Marshall, *Asymmetric Jurisdiction Clauses* (n 25) Ch 4.

[149] See *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (Comm) paras 19–30, 32 (a case about a (symmetric) exclusive jurisdiction agreement).

[150] Handelsgericht des Kantons Zürich, Verfahren HG 190119-O, 4 February 2020, referred to in Bundesgericht, 4A_82/2020, 16 June 2020.

[151] Lugano Convention, Protocol 2, Art 1(1); T Hartley, 'Choice-of-Court Agreements and the New Brussels I Regulation' (2013) 129 LQR 309, 314; N Meier, 'Droit international privé et Convention de Lugano : Rupture, après la rupture, un nouvel élan' in Ordre des avocats de Genève (ed), *Regards de marathoniens sur le droit suisse : Mélanges publiés à l'occasion du 20e « Marathon du droit »* (Slatkine 2015) 297–8.