

CJEU's first ruling on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention

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In a nutshell: reinforced legal certainty but questions remain

In its decision of yesterday (27 February 2025) in the *Lastre* case (Case C-537/23), the Court of Justice of the European Union (CJEU) handed down its long-awaited first judgment on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention.

The Court ruled that the validity of asymmetric jurisdiction clauses is assessed in the light of the autonomous rules of Article 25 of the regulation (rather than Member States' national laws) and confirmed their validity where the clause can be interpreted as designating courts of EU or Lugano States.



This decision dispels some of the previous uncertainties, particularly arising from the shifting case law of the French Supreme Court. The details of the decision and any possible impact, in particular the requirement for the clause to be interpreted as designating courts of EU or Lugano States, will need to be analysed more closely, but on the whole the CJEU strengthened foreseeability and consistency regarding unilateral jurisdiction clauses under the Brussels I regulation and the

Lugano convention.

Besides other sectors, this decision is of particular relevance in international financing transactions, including syndicated loans and capital markets, where asymmetric jurisdiction clauses in favour of the finance parties have been a long-standing practice.

Background

A so-called asymmetric or unilateral jurisdiction clause allows one party to choose any competent court to bring proceedings, while the other party is restricted to a specific jurisdiction. Such clauses are common in financial agreements, like international syndicated loan transactions, where lenders, bearing most of the financial risk, reserve the right to enforce claims wherever the borrower may have assets.

Article 25 of the Brussels I recast regulation provides autonomous conditions for the formal validity of jurisdiction clauses designating EU courts. By contrast, for the jurisdiction clause's substantive validity, Article 25 refers to the law of the Member State designated by the jurisdiction clause. While one of the Brussels I recast regulation's predecessors, the 1968 Brussels Convention, referred to jurisdiction clauses "*concluded for the benefit of only one of the parties*", the regulation is silent on the validity of asymmetrical jurisdiction clauses. Their precise working under Article 25, particularly in relation to the substantive validity rule, awaited authoritative consideration by the CJEU.

In the absence of relevant national case law in many Member States and diverging approaches in jurisdictions where decisions had been rendered, today's judgment brings welcomed clarity and legal certainty. For instance, in *Commerzbank AG v Liquimar Tankers Management Inc*, the English Commercial Court considered (pre-Brexit, when EU jurisdiction law still applied in the UK) that asymmetric jurisdiction clauses are valid under Article 25, whereas the evolving jurisprudence of the French Supreme Court (discussed below) has led to many debates.

Arbitration is excluded from the scope of application of the Brussels I recast regulation, meaning that the validity of asymmetric *arbitration* clauses generally depends on the law applicable to the arbitration clause (*lex arbitri*). Under some

laws, they are accepted if no consent issues, such as duress, arise (see e.g. under English law the *NB Three Shipping* case).

Discussions in France spur crucial CJEU review

In the case at hand, an Italian and a French company entered into a supply agreement including an asymmetric jurisdiction clause, similar to clauses often seen in financial documentation favouring the lenders:

“The jurisdiction of the court of Brescia (Italy) shall apply to any dispute arising from this contract or related to it, [the Italian supplier] reserving the right to proceed against the buyer before another competent court in Italy or abroad.”

When a dispute arose, the French company brought proceedings before the French courts. The supplier challenged the competence of French courts on the basis of the unilateral jurisdiction clause. The French courts dismissed this objection, declaring the clause unlawful due to its lack of foreseeability and one-sided nature.

The case was brought before the French Supreme Court (*Cour de cassation*). In the past, its First Civil Chamber had ruled, in its 2012 *Rothschild* decision, that jurisdiction clauses giving one party the right to sue the other before “*any other competent court*” are invalid both under the French civil code and the Brussels I regulation, on the ground that this would be “*potestative*” (i.e. that the execution of the clause would depend on an event that solely one contracting party has the power to control or to prevent).

Although the First Chamber later abandoned any reference to the “*potestativité*” criteria, there now appear to be diverging positions among the chambers of the French Supreme Court regarding the validity of asymmetric jurisdiction clauses. On the one hand, further to several decisions, the latest being in 2018, the First Civil Chamber of the *Cour de Cassation* appears to hold that asymmetric jurisdiction clauses are invalid if the competent courts are not identifiable through objective criteria or jurisdiction rules within a Member State. On the other hand, the Commercial Chamber of the French Supreme Court ruled in 2017 that such clauses are valid if the parties have agreed to them, regardless of predictability.

In this case, the *Cour de cassation* sought guidance from the CJEU through a preliminary ruling reference. The *Cour de cassation* requested the CJEU's position on:

- whether the lawfulness of asymmetric jurisdiction clauses should be evaluated under (i) the autonomous principles of the Brussels I recast regulation or (ii) the applicable national law;
- if the Brussels I recast regulation applies, whether this regulation permits such asymmetric clauses;
- if national law is applicable, how to determine which Member State's law should take precedence.

After the hearing, the Court deemed a prior opinion from the Advocate General not necessary.

CJEU upholds asymmetric clauses... under conditions

On the first question, the CJEU ruled that, in the context of the assessment of the validity of a jurisdiction clause, complaints alleging the imprecision or asymmetry of that agreement must be examined in the light of autonomous criteria which are derived from Article 25 of the Brussels I recast regulation. Matters of substantive validity, for which the law of the relevant Member States shall apply, only concern causes which vitiate consent, such as error, deceit, fraud or violence, and incapacity to contract.

Turning to the interpretation of these autonomous criteria under Article 25, the Court confirmed the validity of asymmetric jurisdiction clauses designating courts of EU Member States or States that are parties to the Lugano Convention.

The Court first confirmed that parties are free to designate several courts in their jurisdiction clauses, and that a clause referring to "any other competent court" meets the requirements of foreseeability, transparency and legal certainty of the Brussels I recast regulation and the Lugano Convention since it refers to the general rules of jurisdiction provided for by these instruments.

However, the Court importantly held that these requirements are met only insofar as the jurisdiction clause can be interpreted as conferring jurisdiction to the court designated in the clause (in the case at hand, Brescia) and the competent courts of the EU/Lugano States to hear disputes between the parties. EU law alone

would not make it possible to confer jurisdiction to a court of third countries, as this designation would depend on the application of their own private international law rules. The exact implications of this requirement will require careful assessment, in particular where non-EU/Lugano parties are involved.

With respect to the alleged “unbalanced” nature of such clause, the Court stressed that the Brussels I recast regulation and the Lugano Convention are based on the principle of contractual autonomy and thus allow asymmetric clauses, as long as they respect the exceptions foreseen by these instruments, in particular with respect to exclusive jurisdiction (Art. 24 Brussels I recast regulation) as well as the protective rules in insurance, consumer and employment contracts (Arts. 15, 19 and 23 Brussels I recast regulation).