

## Imbalanced Jurisdiction Clauses under the Lugano Convention

### Judgement of the French Cour de Cassation of 25 March 2015

with comments by Brooke Adele Marshall, Hamburg

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## Abstract

Asymmetrical or imbalanced jurisdiction clauses are a regular feature of standard form loan facility contracts. These clauses generally comprise two elements: an exclusive limb nominating the courts of one jurisdiction purporting to apply to both parties and an option allowing one party to seise the courts of other jurisdictions. Imbalanced clauses are considered an effective risk-management mechanism for the option holder which has both the security of defending proceedings in its place of domicile and the flexibility of initiating proceedings in the most attractive forum at the time of the dispute. In *ICH v Crédit Suisse*, the French *Cour de cassation* held that such clauses, which allow one party greater scope to choose the forum for litigation and which do not specify the objective elements on which this choice is to be based, create an imbalance between the parties and are contrary to the Lugano Convention's objectives of predictability and legal certainty. After consideration of the Lugano regime and the scarce case-law of other superior national courts in the European Union on imbalanced clauses, this article examines the reasoning of the *Cour de cassation*. It situates the court's criteria, the lack of "objective elements" and imbalance between the parties, within CJEU jurisprudence establishing autonomous requirements for jurisdiction agreements before assessing the relevance of national law, in particular its *ordre public international*, to the question of substantive validity. The article also highlights the relevance of important differences between the Lugano Convention and the reformed Brussels I Recast Regulation. The judgment of the *Cour de cassation* shows that whether asymmetrical or imbalanced optional clauses are compatible with those instruments remains unresolved and, far from being an *acte clair*, calls for a preliminary ruling of the CJEU.

515 **Imbalanced Jurisdiction Clauses under the Lugano Convention**

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**Headnote:**

*“Attendu que, pour accueillir l’exception d’incompétence soulevée par la société Crédit suisse sur le fondement de la clause attributive de juridiction, l’arrêt, après avoir rappelé que la société ICH, laquelle faisait valoir que la rédaction de cette clause, dans un contrat d’adhésion, était particulièrement favorable à la banque, relève que le déséquilibre dénoncé, consubstantiel à une clause attributive de juridiction convenue entre deux contractants de pays différents, ne suffit pas à la rendre irrégulière au regard de la Convention de Lugano;*

*Qu’en se déterminant ainsi, sans rechercher si le déséquilibre dénoncé, en ce que la clause litigieuse réservait à la banque le droit d’agir contre l’emprunteur devant « tout autre tribunal compétent » et ne précisait pas sur quels éléments objectifs cette compétence alternative était fondée, n’était pas contraire à l’objectif de prévisibilité et de sécurité juridique poursuivi par le texte susvisé, la cour d’appel a privé sa décision de base légale”.*<sup>1</sup>

**Summary of the facts and proceedings:**

The proceedings in *ICH v Crédit Suisse* concerned a dispute between Danne, a company seated in France, and Crédit Suisse, seated in Switzerland, about a finance package under which returns on Danne’s investment were to fully satisfy the repayment of its secured loan to the value of €4.5 million<sup>2</sup> to Crédit Suisse. Danne alleged that it had sought only one fifth of the loan amount to finance its agricultural operations in the French department, Maine-et-Loire. Danne, through its English agent, and Crédit Suisse concluded two loan contracts. Société Générale (SG), seated in Paris, provided an on-demand guarantee. Each loan contract contained a choice of law clause designating Swiss law and a jurisdiction clause which provided that:

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“The borrower acknowledges that the exclusive forum for all proceedings is Zurich or the place of the bank’s branch where the relationship between the parties was formed. The bank

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\* Cass. civ., 1ère, 25.3. 2015, *ICH v Crédit Suisse*, n° 13-27264.

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1 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21.12.2007, Official Journal of the European Union (O.J.) 2009 L 147, 5 (Lugano Convention) paralleling Regulation (EC) 44/2001 of 22.12.2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. 2001 L 12, 1 (Brussels Regulation).

2 *Cour d’appel, Angers, Chambre commerciale, section A*, 10.9. 2013, RG n°12/01827.

nonetheless reserves the right to commence proceedings against the borrower before any other court with jurisdiction.”<sup>3</sup>

The investments performed poorly, yielding low returns. Société civile immobilière ICH, the successor in law to Danne, brought proceedings in delict against Danne’s English agent and the banks before the *Tribunal de grande instance d’Angers* (the court of first instance). It alleged that they had proposed a financial package so structurally unviable that no investment could have yielded returns sufficient to discharge the loan, and that they had failed to fulfil their obligations to adequately advise and inform Danne. Crédit Suisse and SG objected to jurisdiction and the court declared itself incompetent, ruling that because ICH’s claims should be characterised as contractual, it lacked jurisdiction – the banks and NJRH were not domiciled within its jurisdiction, and it was not the court named in the jurisdiction agreement between Crédit Suisse and ICH.

ICH appealed to the *Cour d’appel d’Angers*.<sup>4</sup> ICH subsequently went into liquidation, and its receivers continued the proceedings. The *Cour d’appel* confirmed the tribunal’s decision, holding that ICH’s claims were indivisible and should be heard by a single tribunal so as to avoid the risk of irreconcilable judgments. It further held that the claims were properly contractual, not delictual,<sup>5</sup> such that the *Tribunal de grande instance d’Angers* lacked jurisdiction under the rules applicable to contractual matters. Although the jurisdiction clause did not apply to NJRH or SG, the court reasoned that because neither objected to the matter being heard in the courts designated by the jurisdiction clause applicable to Crédit Suisse, all parties should bring the proceedings before “the courts of Switzerland”.

The *Cour d’appel* rejected ICH’s argument that the contracts were consumer contracts within the terms of the Lugano Convention<sup>6</sup> before addressing the imbalanced nature of the clause cursorily: the “impugned imbalance, concomitant with a jurisdiction clause between two contracting parties from different countries, does not suffice to make it irregular under the Lugano Convention”.<sup>7</sup> ICH did not deny that it had knowledge of the jurisdiction clause at the time of the conclusion of the contract.<sup>8</sup>

ICH appealed to the *Cour de cassation*, arguing that the Lugano Convention requires a jurisdiction clause to designate clearly the court or courts of the chosen jurisdiction and that the *Cour d’appel* ought to have considered whether the jurisdiction clause in question had a “potestative” character such that it was contrary to the objective of certainty and predictability in prorogation of jurisdiction under article 23 of the convention.

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3 *Cass. civ., 1ère*, 25.3. 2015, *ICH v Crédit Suisse*, n° 13-27264.

4 See generally *Juliette Morel-Maroger*, De l’usage excessif d’une clause attributive de juridiction potestative; *Cour d’appel d’Angers, Chambre commerciale, section A*, 10.9. 2013, RG numéro 12/01827, *La Gazette du palais (GP)*, n° 312-313, 2013, 36.

5 ICH argued that the *Tribunal de grande instance d’Angers* was competent principally on the basis that its claims against all defendants were properly delictual and therefore the court at Angers, as the place where the harmful event occurred, was competent. Arts 5(3) of the Brussels Regulation and Lugano Convention, applicable to NJRH and Crédit Suisse, respectively, provide that a person may be sued “in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred...” Art. 46 of the *Code civil*, applicable to SG, includes a provision in similar terms.

6 Art. 15(1) defines a consumer contract as one that a person concludes “for a purpose which can be regarded as being outside his [or her] trade or profession”.

7 *Cour d’appel, Angers, Chambre commerciale, section A*, 10.9. 2013, RG n°12/01827.

8 See fn. 7.

### Extract of the decision:

On ICH's appeal, the *Cour de cassation* summarised the decision of the *Cour d'appel*, in the following terms:

“In accepting the objection to jurisdiction raised by *Crédit Suisse* on the basis of the jurisdiction clause, the decision, after having referred to the argument of ICH to the effect that the drafting of this clause, in a contract of adhesion, was particularly favorable to the bank, ruled that the impugned imbalance, concomitant with a jurisdiction clause between two contracting parties from different countries, does not suffice to make it irregular under the Lugano Convention.”<sup>9</sup>

The *Cour de cassation* quashed the decision of the *Cour d'appel*, reasoning that:

“In ruling, without exploring that imbalance, that the jurisdiction clause — which reserved to the bank the right to proceed against the borrower before any court with jurisdiction and which did not specify the objective elements on which this alternative jurisdiction was based — was not contrary to the objectives of predictability and legal certainty of the aforementioned [Lugano] convention, the decision of the *Cour d'appel* is without a legal basis.”<sup>10</sup>

The *Cour de cassation* remitted the entire matter for rehearing to the *Cour d'appel de Rennes*.

### Annotation:

#### I. Imbalanced optional jurisdiction clauses and the clause in *ICH v Crédit Suisse*

518 Imbalanced optional jurisdiction clauses<sup>11</sup> are a regular feature of standard form loan facility contracts. They are considered to be an effective risk-management mechanism for the option holder which has the security of defending proceedings in its place of domicile and the flexibility of initiating proceedings in the most attractive jurisdiction at the time of dispute.<sup>12</sup> These clauses differ substantially from simple exclusive jurisdiction agreements in which both parties agree before a dispute arises, to prorogate the jurisdiction of the courts of a single state to the express or implied exclusion of all others.

Imbalanced clauses generally comprise two elements: first, an exclusive limb nominating the courts of one jurisdiction, purporting to apply to both parties, and second, an option allowing one party to seize the courts of other jurisdictions.<sup>13</sup> The clause in *ICH v Crédit Suisse* was unusual in that the first limb of the clause applicable to both parties and expressed to be exclusive, was itself also optional: “the exclusive forum for all proceedings is Zurich or the place of the bank's branch where the relationship between the parties was formed”. The *Cour d'appel* did not refer to Zurich specifically and did not address the second part of the first limb of the jurisdiction

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9 *Cass. civ., 1ère*, 25.3. 2015, *ICH v Crédit Suisse*, n°13-27264. The original French is quoted *supra* in the headnote.

10 *Ibid.*

11 These are also called asymmetrical optional jurisdiction clauses.

12 These agreements are intended to minimise what *Richard Fentiman* calls “enforcement risk”, which includes “the risk that a judgment debtor with worldwide assets will disperse or conceal those assets”: *International Commercial Litigation*, 2nd ed., Oxford, 2015, para. 1.11.

13 See eg *Cass. civ., 1ère*, 26.9.2012, *Madame X v Banque Privée Edmond de Rothschild*, n° 11-26.022 (Rothschild) discussed *infra*.

clause, namely, where the relationship between ICH and *Crédit Suisse* was formed.<sup>14</sup> It referred instead to the clause as designating the “Swiss courts”.<sup>15</sup>

## II. Legal framework

The jurisdiction clause in *ICH v Crédit Suisse* was governed by the Lugano Convention which applies to civil and commercial matters involving the European Union (EU) and the Member States of the European Free Trade Association (EFTA).<sup>16</sup> Article 23 of that convention applies when the parties, one or more of whom is domiciled in a state bound by the convention, have agreed that the courts of a state in the EFTA (EFTA-Lugano state) shall have jurisdiction to settle disputes arising out of their particular relationship.<sup>17</sup> The provision presumes the jurisdiction of that court to be exclusive unless the parties have agreed otherwise.<sup>18</sup> Where both contracting parties are commercial, or one party is commercial and the other is an active consumer,<sup>19</sup> a jurisdiction agreement need only satisfy the requirements of article 23 to be compatible with the Lugano Convention.<sup>20</sup>

## III. Consideration of imbalanced clauses by European courts

The *Cour de cassation* in *ICH v Crédit Suisse* is the first court of last instance of an EU or EFTA state to have considered the compatibility of imbalanced optional jurisdiction clauses with the Lugano Convention. Both the French *Cour de cassation* in *Rothschild* and the Italian *Corte Suprema di Cassazione* in *Umbro International Ltd v Global Brand Management Srl*<sup>21</sup> have considered this issue under the identical provision of the Brussels Regulation which applies to jurisdiction agreements designating the courts of EU Member States.<sup>22</sup> They are the only courts of last instance<sup>23</sup> to have considered imbalanced clauses under the Brussels Regulation and Lugano Convention.<sup>24</sup>

14 Although *Crédit Suisse* had a branch in Paris, the fact that the court rejected the suggestion that the matter could be heard in Paris because of the jurisdiction agreement suggests that the relationship between the parties was formed in a canton of the Swiss Confederation.

15 « ... en définitive que seules les juridictions helvétiques, désignées par la clause attributive de juridiction [ont] compétence pour connaître dans son intégralité de la présente affaire ... » : *Cour d'appel, Angers, Chambre commerciale, section A*, 10.9. 2013, RG n°12/01827.

16 The EFTA states are Iceland, Norway, Switzerland and Liechtenstein. All except Liechtenstein are bound by the Lugano Convention.

17 Lugano Convention, arts 23(1), 64(2)(a).

18 Lugano Convention, art. 23(1).

19 ie a consumer to whose place of domicile a commercial party does not direct its activities: cf Lugano Convention arts 15(1)(c), 16. See e.g. *Cass. civ., Ière*, 26.9. 2012, *Rothschild*, n° 11-26.022. Additional requirements apply to jurisdiction agreements in other consumer contracts: Lugano Convention, arts 15(1)(a)-(c), 16.

20 Lugano Convention, art. 23(1)-(5).

21 *Cass., S.U.*, 8.3. 2012, No 3264, *Umbro International Ltd v Global Brand Management Srl*.

22 Regulation (EC) 44/2001 of 22.12. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. 2001 L 12, 1 (Brussels Regulation), art. 23(1).

23 ie, those obliged to refer a matter which is not an *acte clair* to the ECJ: Treaty on the Functioning of the European Union (TFEU), O.J. 2012 C 326, 47, art. 267; ECJ 6.10.1982 – C-283/81 para. 21 – C.I.L.F.I.T./Ministero della Sanità.

24 The English Court of Appeal in its leading decision of *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 enforced an imbalanced clause. The court was applying the Con-

The clause in *Rothschild* comprised two elements: first, a bilateral exclusive limb: “Any dispute which arises between the client and the Bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg”, and second, an option reserving the right to the bank to proceed in the courts of the client’s domicile or “any other court with jurisdiction”.<sup>25</sup> The court considered that the option gave the bank access to any court in the world. The clause in *Umbro International Ltd v Global Brand Management Srl*<sup>26</sup> similarly comprised<sup>27</sup> a bilateral limb, although not expressed to be exclusive, stating that “the parties accept the jurisdiction of the English court”, with the further

520 specification that Global Brand Management could seize only one of the chosen courts (ie, one of the English courts), while Umbro reserved the right to seize a court in Italy (where Umbro was domiciled) or another court with jurisdiction based on international conventions.

In neither case did the option holder seek to invoke the jurisdictional option. In both cases, the non-option holder brought proceedings in a court other than the court designated in the mutual limb of the clause. Both courts nonetheless construed the clause as a whole in determining its enforceability.

The *Cour de cassation* in *Rothschild* struck down the clause on the basis that the complete discretion that it accorded to the bank, which the court described as “potestative”, was contrary to the objective and purpose in prorogation of jurisdiction under the Brussels Regulation.<sup>28</sup> The *Corte Suprema di Cassazione* found the clause’s imbalanced character to be unobjectionable and upheld it on the basis that it was an arrangement, alternative to exclusive jurisdiction, allowed for by the Brussels Regulation on agreement of the parties.

#### IV. Reasoning of the *Cour de cassation*

In line with its conclusion in *Rothschild*, the *Cour de cassation* in *ICH v Crédit Suisse* found the jurisdiction clause to be contrary to the objectives of predictability and legal certainty under the Lugano regime. The court reasoned that the clause did not specify

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vention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27.9.1968, O.J. 1998 C 27/01 (1968 Brussels Convention). There are numerous first instance decisions in which English courts have construed imbalanced clauses as enforceable, and a legitimate expression of party autonomy: Mary Keyes and Brooke Adele Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, (2015) 11 *Journal of Private International Law* (JPIL) 345, 373-377 (*Journal of Private International Law*).

25 *Cass. civ.*, 1ère, 26.9.2012, *Rothschild*, n° 11-26.022.

26 *Cass. S.U.*, 8.3.2012, n° 3264, *Umbro International Ltd v Global Brand Management Srl*.

27 The judgment of the *Corte Suprema di Cassazione* does not set the clause out in full, quoting only the mutual aspect and paraphrasing the option: “*le parti accettano la giurisdizione delle Corti inglesi*”, *con l’ulteriore specificazione che la concessionaria (G.M.B.) può agire in giudizio solo dinanzi ad una di dette corti, mentre alla Umbro è riservata anche la facoltà di agire in alternativa dinanzi ad una Corte italiana o ad altro giudice fornito di giurisdizione in base alle convenzioni internazionali*”.

28 See Keyes and Marshall, JPIL 2015 (forthcoming); Robert Freitag, *Halbseitig ausschließliche Gerichtsstandsvereinbarungen unter der Brüssel I-VO*, FS Magnus, 2014, 419; Adrian Briggs, *One-sided Jurisdiction Clauses: French Folly and Russian Menace*, LMCLQ 2013, 137 (*Lloyd’s Maritime and Commercial Law Quarterly*); Richard Fentiman, *Unilateral Jurisdiction Agreements in Europe*, C.L.J. 2013, 24 (*Cambridge Law Journal*); Étienne Cornut, *Clause attributive de juridiction potestative*, JCP 2012, 41 (*La semaine juridique – édition générale* 1815); Pascal Ancel and Gilles Cuniberti, *Cour de cassation française* (1re ch. civ.), 26.9.2012, J.T.L. 2013, 25 (*Journal des tribunaux Luxembourg*).

the objective factors on which *Crédit Suisse*'s jurisdictional option was to be based, and that the disparity between the parties that the clause created was questionable. The words "objective factors" are extracted from CJEU jurisprudence<sup>29</sup> and clearly refer to the autonomous requirement of certainty 1. The justification for court's use of the word "*déséquilibre*" (imbalance) is more opaque. On the one hand, the imbalance may relate to implicit requirements of the autonomous concept of an agreement between the parties 2. On the other hand, the imbalance may relate to an imperative norm that affects the agreement's substantive validity 3.

521 The requirement of certainty and the concept of agreement are equivalent among the old 1968 Brussels Convention<sup>30</sup> and 1988 Lugano Convention,<sup>31</sup> and the Brussels Regulation and Lugano Convention which replaced them. Consequently, CJEU and EU Member State jurisprudence concerning those requirements in one of these instruments can be applied to all of them.<sup>32</sup>

### 1. Autonomous requirement of certainty

In holding the lack of "objective elements" on the face of the clause<sup>33</sup> to be contrary to the objectives of the Lugano Convention, the court in *ICH v Crédit Suisse* directly applied CJEU jurisprudence. The Lugano Convention recognises "the independent will of the parties"<sup>34</sup> to reach an agreement with a view to making it foreseeable where parties will be required to bring and defend proceedings.<sup>35</sup> A jurisdiction agreement must therefore "designate, clearly and precisely, a court in a Contracting State"<sup>36</sup> such that a "well-informed defendant" is able "reasonably to foresee" where it may be called upon to defend proceedings.<sup>37</sup> The CJEU ruled in *Coreck*<sup>38</sup> that this requirement is satisfied by an agreement that specifies with sufficient precision the objective elements that would

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- 29 *European Court of Justice (ECJ)* 9.11. 2000 – C-387/98 – *Coreck Maritime GmbH/Handelsveem BV*. See *infra*.
- 30 1968 Brussels Convention, art. 17(1).
- 31 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 16.9. 1988, O.J. 1988 L 319/9 (1988 Lugano Convention), art. 17(1).
- 32 Lugano Convention, Protocol 2, art. 1; ECJ 25.10. 2011 – C-509/09 – *eDate Advertising GmbH and Others/X* and C-161/10 – *Martinez/MGN Ltd* (joined cases) para. 39; Opinion of the Advocate General *Jääskinen* in ECJ 7.2.2013 – C-543/10 – *Refcomp SpA/Axa Corporate Solutions Assurance SA Axa France IARD, Emerson Network Power, Climaveneta SpA*, para. 28.
- 33 La clause «ne précisait pas sur quels éléments objectifs cette compétence alternative était fondée ...»: *Cass civ, Ière*, 25.3.2015, *ICH v Crédit Suisse*, n°13-27264.
- 34 ECJ 9.11.1978 – C-23/78 para. 5 – *Meeth/Glacet*; C-387/98 para. 14 – *Coreck Maritime GmbH/Handelsveem BV*.
- 35 ECJ 9.12. 2003 – C-116/02 para. 51 – *Erich Gasser GmbH/MISAT Srl*; opinion of the Advocate General *Jääskinen* in ECJ– C-543/10 – *Refcomp SpA/Axa Corporate Solutions Assurance SA*, para. 48; *Carine Brière, Note [on Rothschild]*, (2013) 140 *JDI* 175, 178; see also *Caroline Verbruggen*, La compatibilité d'une clause (unilatérale) optionnelle de juridiction avec l'article 23 du Règlement Bruxelles I, *RDC* 2013/ 5.5. 2013 443, 448.
- 36 ECJ 16.3. 1999 – C-159/97 para. 48 – *Transporti Castelletti Spedizioni Internazionali SpA/ Hugo Trumpy SpA*.
- 37 ECJ 28.9. 1999 – C-440/97 para. 24 – *GIE Groupe Concorde and Others/Master of the vessel "Suhadiwarno Panjan" and Others*; 19.2. 2002 – C-256/00 para. 26 – *Besix SA/Wasserreinigungsbau Alfred Kretschmar GmbH & Co. KG (WABAG), Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretschmar GmbH & KG (Plafog)*. The requirement of foreseeability is necessitated by virtue of art. 23 being a rule which departs from the general rule in art. 2(1) of the Lugano Convention: ECJ 1.3. 2005 – C-281/02 para. 40 – *Andrew Owusu/N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*.
- 38 ECJ– C-387/98 – *Coreck Maritime GmbH/Handelsveem BV*.

enable a court seised to ascertain whether it has jurisdiction.<sup>39</sup> *Coreck* concerned a clause which allowed for the chosen court to be identified by reference to the objective element of “the principal place of business of the carrier”. Unlike “the principal place of business of the carrier”, the court in *ICH v Crédit Suisse* considered “any court with jurisdiction” not to be a sufficiently precise “objective element” on which the jurisdiction alternative to the courts in Zurich or in the place of the bank’s branch where the relationship between the parties was formed could be based.<sup>40</sup>

## 522 2. Autonomous concept of “agreement”

The court’s objection to the imbalance in the clause in *ICH v Crédit Suisse* may arise out of requirements implicit in the autonomous concept of an agreement between the parties. It is clear that an agreement on jurisdiction is an autonomous concept<sup>41</sup> which requires consensus between the parties.<sup>42</sup> Consensus is not an express requirement of article 23 of the Lugano Convention but rather an implicit requirement pronounced by the CJEU. Further implicit requirements may be that an agreement fulfils a certain function *a)* and that it not be incompatible with the *ordre public international* of the forum *b)*.<sup>43</sup>

### a) Implicit requirement that an agreement fulfil a certain function

The imbalance referred to by the court may relate to an implicit requirement that a jurisdiction agreement must fulfil a particular function for both parties. The function of a jurisdiction agreement is, as described by one commentator, to serve as a “statement” between the parties as to the court before which they intend to bring proceedings and that is competent to resolve their disputes.<sup>44</sup> The language of agreement and “consensus between the parties”<sup>45</sup> used by the CJEU demonstrates that this statement must be mutual – if only one party is making a “statement” as to where it will bring proceedings (ie, if only one party is undertaking to perform), then the agreement is effectively unilateral.<sup>46</sup> The CJEU has not been called upon to rule whether a clause in

39 ECJ– C-387/98 para. 1 – *Coreck Maritime GmbH/Handelsveem BV*.

40 *Cass. civ.*, *Ière*, 25.3. 2015, *ICH v Crédit Suisse*, n° 13-27264.

41 ECJ 10.3. 1992 – C-214/89 paras 13-14 – *Powell Duffryn plc/Wolfgang Petereit*.

42 ECJ – C-159/97 para. 19 – *Trasporti Castelletti Spedizioni Internazionali SpA/Hugo Trumpy SpA*; C-543/10 para. 26 – *Refcomp SpA/Axa Corporate Solutions Assurance SA*.

43 As *Fentiman* observes, the autonomous nature of what is now article 23, espoused by the court in ECJ – C-159/97 para. 49 – *Trasporti Castelletti Spedizioni Internazionali SpA/Hugo Trumpy SpA*), is not infringed to the extent that the provision “must implicitly embrace” certain rules: *Fentiman* (fn. 12) para 2.109.

44 *Adrian Briggs*, *What Should be Done about Jurisdiction Agreements?*, (2010) 12 *Yrbk Priv Int Law* 311, 324 (Yearbook of Private International Law).

45 ECJ – C-159/97 para. 48 – *Trasporti Castelletti Spedizioni Internazionali SpA/Hugo Trumpy SpA*; C-543/10 para. 26 – *Refcomp SpA/Axa Corporate Solutions Assurance SA*.

46 See *Adrian Briggs*, *The Brussels I bis Regulation Appears on the Horizon*, [2011] *LMCLQ* 157, 161 who argues that a unilateral statement as to jurisdiction is sufficient. *Bucher* suggests that prorogation agreements having a “unilateral character” are admissible: *Andreas Bucher* in *Commentaire Romand*, 1st ed. 2011 updated as 18.8.2015, *Loi sur le droit international privé/Convention de Lugano*, accessible via <[www.andreasbucher-law.ch](http://www.andreasbucher-law.ch)>, art. 23 *Convention de Lugano* (CL) para. 39.

which effectively only one party is making a statement as to where it will bring proceedings is admissible as an agreement between the parties.<sup>47</sup>

523 Considering the jurisdiction clause in issue in *ICH v Crédit Suisse* in light of this function, only ICH is making a statement under the clause. A statement by *Crédit Suisse* to the effect that it intends to bring proceedings in Zurich or the place of the bank's branch where the relationship between the parties was formed or "any other court with jurisdiction" is too uncertain to properly be a statement. The lack of any real statement on the part of *Crédit Suisse* as to the court in which it intends to bring proceedings, when compared to a clear statement by ICH nominating the courts of Zurich, is the imbalance which the *Cour de cassation* considered that the *Cour d'appel* had neglected to explore.<sup>48</sup>

**b) Implicit requirement that an agreement not be incompatible with the *ordre public international***

The imbalance may also refer to an implicit requirement of article 23 of the Lugano Convention that a jurisdiction agreement *itself* – as distinct from its effects – not infringe the *ordre public international* of the forum. There is a growing body of literature suggesting that article 23 of the Brussels Regulation contains an implicit autonomous requirement that a jurisdiction agreement is one which is not incompatible with imperative norms (ie the *ordre public international* of the forum<sup>49</sup> or overriding mandatory provisions of the forum, especially when derived from an EU directive);<sup>50</sup> unreasonable;<sup>51</sup> or a misuse of the autonomy that article 23 confers on the parties.<sup>52</sup> Several commentators suggest that it is an implicit requirement of the admissibility<sup>53</sup> (*licéité*) of the agreement rather than a requirement of its formal validity<sup>54</sup> or substantive validity.<sup>55</sup>

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47 In ECJ 14.12. 1976 – C-24/76 para. 9 – *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c./Rüwa Polstereimaschinen GmbH*, the court ruled that a clause conferring jurisdiction contained in the general conditions of the supplier, printed on the reverse side of a contract drawn up by the supplier, is not an agreement for the purposes of what is now article 23, because there is "no guarantee" that the buyer has "really consented" to the clause. The clause designated the courts of Cologne for claims brought by either party with a limited option for the supplier who was "at all times entitled to commence proceedings at the buyer's place of establishment". The ECJ did not comment upon the imbalanced or optional character of the clause.

48 «*Qu'en se déterminant ainsi, sans rechercher si le déséquilibre dénoncé n'était pas contraire à l'objectif de prévisibilité et de sécurité juridique poursuivi par le texte susvisé, la cour d'appel a privé sa décision de base légale*»: *Cass. civ., 1ère, 25.3. 2015, ICH v Crédit Suisse*, n°13-27264.

49 *Ulrich Magnus* in *Ulrich Magnus and Peter Mankowski*, *Brussels I Regulation*, 2nd ed. 2012, art. 23 para. 73 refers to "ordre public" and "public policy" but his subsequent discussion at para. 74 suggests that he is also referring to overriding mandatory rules, at least those arising out of European directives.

50 *Fentiman* (fn. 12) para. 2.109-2.110.

51 *Magnus* in *Magnus/Mankowski*, 2nd ed. 2012, art. 23 para. 73.

52 *Ibid.*, art. 23 para. 73 and fn. 197 citing the German commentators who support or refute this view; see also *Bucher* in *Commentaire Romand*, 1st ed. 2011, art. 23 CL para. 34 (tentatively).

53 *Magnus* in *Magnus/Mankowski*, 2nd ed. 2012, art. 23 para. 65.

54 *Bucher* in *Commentaire Romand*, 1st ed. 2011, art 23 CL para 34; ECJ 24.06. 1981 – C-150/80 para 29 – *Elefanten Schuh GmbH/Pierre Jacqmain; Provimi Limited v Aventis Animal Nutrition SA and Others* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683 [80].

55 For criticism, see *Jürgen Basedow*, *Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms*, in *Essays in Honour of Michael Bogdan*, Lund 2013, 15, 20. See also discussion *infra*.

524 Insofar as the implicit requirement concerns imperative norms, a distinction needs to be drawn between jurisdiction clauses which, if enforced, are likely to derogate from the imperative norms of the forum, on the one hand,<sup>56</sup> and clauses which themselves are contrary to the imperative norms of the forum on the other. Relevant CJEU jurisprudence to date relates to the first type (imperative norms relating to the *results* of the agreement);<sup>57</sup> not to the second type (imperative norms relating to the jurisdiction agreement *itself*).<sup>58</sup> The clause in *ICH v Crédit Suisse* was of the second type. The *Cour de cassation* in *ICH v Crédit Suisse* may therefore have seen the relevance of imperative norms affecting the jurisdiction agreement itself to be an open question. This is especially so in light of a line of CJEU case law establishing that a non-negotiated jurisdiction agreement in a standard form contract, albeit involving a consumer, in a case internal to a Member State, will be invalid if it creates a significant imbalance between the parties contrary to the EU Unfair Contract Terms Directive.<sup>59</sup>

EU law does not apply in the EFTA. Consequently, if the Lugano Convention implicitly refers to the *ordre public international*, this is not an EU *ordre public international* but is rather the *ordre public international* of the forum. For the same reason, any independent control test on the existence or operation of the clause (ie one that is neither an implicit requirement of article 23 of the Lugano Convention itself nor a requirement of the law governing the clause's substantive validity discussed in c) below) is therefore also excluded.<sup>60</sup> The *Cour de cassation* would have therefore applied the *ordre public international* of French law. French law seems to be opposed in various ways to clauses creating a significant imbalance (“*déséquilibre significatif*”) between commercial parties.<sup>61</sup> The concept of “*déséquilibre significatif*” is set to be further entrenched into French law via the *Projet de réforme du droit des contrats*.<sup>62</sup> This may reflect a more fundamental principle of French *ordre public* which forms part of the *ordre public international*.

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56 eg *Cass. civ., 1ère*, 22.10.2008, *Monster Cable Products inc v Audio Marketing Services*, n° 07-15.823, *Revue critique de droit international privé* (Rev. crit. DIP) 98 (2009) 69-70 (*Revue critique de droit international privé*) discussed in *Dominique Bureau* and *Horatia Muir Watt*, *L'impérativité désactivée?*, Rev. crit. DIP 98 (2009) 1-27. In that case, the court held that a jurisdiction clause cannot be impugned by reference to *lois de police* relevant to the litigation; not *lois de police* relevant to the jurisdiction clause.

57 In ECJ 13.11. 1979 – C-25/79 – *Sanicentral GmbH/Collin*, which concerned the 1968 Brussels Convention, the ECJ ruled that an imperative provision of French law which ensured that French courts, despite any jurisdiction clause, would have jurisdiction over employment litigation did not apply where the agreement satisfied the requirements of the now article 23 of the Lugano Convention; see *Adrian Briggs*, *Civil Jurisdiction and Judgments*, 6th ed., Oxon, 2015, paras. 2.145. In a choice of law context, see ECJ 9.11. 2000 – C-381/98 – *Ingmar GB Ltd/Eaton Leonard Technologies, Inc*. For the application of this case to jurisdiction agreements, see *Basedow* (fn. 49) 15, 16.

58 See generally, *Peter Nygh*, *Autonomy in International Contracts*, Oxford 1999, 67 who alludes to this distinction at common law.

59 ECJ 27.6. 2000 – C-240/98 to C-244/98 paras 21-24 – *Océano Grupo Editorial SA/Rocio Murciano Quintero*; 9.11. 2010 – C-137/08 paras 53-56 – *VB Penzugyi Lizing Zrt/Schneider*.

60 For a discussion of an independent control test arising out of the law of the European Union, for jurisdiction clauses which, if enforced, are likely to derogate from the imperative norms of the European Union, see *Basedow* (fn. 55) 15, 22-23.

61 See *Code de commerce*, L. 442-6 I. 2, discussed in *Emilie Gicquidaud*, *Le contrat à l'épreuve du déséquilibre significatif*, *Revue trimestrielle de droit commercial* (RTD Com.) 2014, 267, and *Cass. com.*, 22.10. 1998, *La société Bancheureau v La société Chronopost*, n° 93-18632.

62 *Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations*, art. 1169 (*Projet de réforme du droit des contrats*).

525 **3. Imperative norms affecting the agreement's substantive validity**

A final possibility is that the clause's imbalance is inconsistent with the *ordre public* of the law governing the substantive validity of the jurisdiction agreement. The Lugano Convention is silent on the extent to which national law plays a residual role in determining whether the parties' agreement is substantively valid and on which national law that should be. The literature suggests that national law should govern narrow issues of substantive validity,<sup>63</sup> relating to defective party consent to the jurisdiction agreement.<sup>64</sup> Whether the compatibility of a clause with imperative norms is similarly an issue of substantive validity to which national law may apply is unresolved.<sup>65</sup> Again, a distinction must be drawn between jurisdiction clauses which, if enforced, are likely to result in imperative norms of the law applicable to the agreement's substantive validity being ignored, on the one hand, and clauses which themselves are contrary to the imperative norms of the law governing the clause's substantive validity on the other. A strong case has been made that the incompatibility of a jurisdiction clause of the first type with the imperative norms of the law governing its substantive validity should be a matter which affects its substantive validity;<sup>66</sup> whether the incompatibility of a clause of the second type, with the imperative norms of the law governing its substantive validity should be a matter which affects its substantive validity is an open question.

Given that the clause in *ICH v Crédit Suisse* was of the second type, the *Cour de cassation* may therefore have found the “*déséquilibre*” to be incompatible with the *ordre public* of the national law governing the substantive validity of the jurisdiction clause. Which national law the court may have been applying is unclear. National choice of law rules on the law governing a jurisdiction agreement are unsettled within a number of Member States, including France.<sup>67</sup> In the case of *ICH v Crédit Suisse*, it is likely that the governing law of the jurisdiction clause, from the perspective of

526 the court seised (French law) or the law governing the credit contracts (Swiss law).

If the law applicable to the substantive validity of the jurisdiction clause were French law, then the “*déséquilibre*” would refer to the possible fundamental principle of French law, noted above, concerning clauses creating a significant imbalance be-

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63 The French version of the Recast refers to “*validité ... au fond*” suggesting that substantive validity under Recast is broader than what a common lawyer would strictly see as material validity.

64 *Magnus* in *Magnus/Mankowski*, 2nd ed. 2012, art. 23 para. 83; *Hélène Gaudemet-Tallon*, *Compétence et exécution des jugements en Europe*, 4th ed., Paris, 2010, 165; *Tena Ratković and Dora Zgrabljíćrotar*, *Choice of Court Agreements under the Brussels I Regulation (Recast)*, JPIL 2013, 245, 253 f. See also *Stéphanie Francq*, *Les clauses d'élection de for dans le nouveau règlement Bruxelles Ibis*, in Emmanuel Guinchard (ed), *Le nouveau règlement Bruxelles Ibis Règlement*, 2014, 107, 128-130.

65 *Fentiman* cautiously suggests that the relevance of imperative norms going to the substantive validity of the clause itself is open under the Recast but that the Brussels Regulation foreclosed this possibility: *Fentiman* (fn. 12) paras 2.11, 2.154. The Recast has replaced the Brussels Regulation in the EU and expressly provides for national law to apply to issues of substantive validity (see discussion *infra*).

66 *Basedow* argues that since the incompatibility of a choice of law clause with an imperative norm is a matter which affects its substantive validity under Regulation (EC) 593/2008 of the *European Parliament and of the Council of 4.7. 2008 on the Law Applicable to Contractual Obligations*, O.J. 2008 L 177 (Rome I Regulation), the incompatibility of a jurisdiction agreement with an imperative norm should similarly be a matter which affects its substantive validity under the Recast: *Basedow* (fn. 55) 15, 20.

67 *Hélène Gaudemet-Tallon*, *Compétence et exécution des jugements en Europe*, 5th ed., Paris, 2015, 165f.

tween the parties. If the law applicable to the substantive validity of the clause were Swiss law, and Swiss law does not recognise the concept of significant imbalance, then the French principle of significant imbalance could apply only if it were part of the *ordre public international* of the forum.

## V. Impact and outlook

Whether imbalanced optional clauses are jurisdiction agreements of the type contemplated by the Lugano Convention remains unresolved. The compatibility of those clauses with this instrument and the identical Brussels Regulation is not an *acte clair*; a preliminary ruling from the CJEU is needed.<sup>68</sup> The decision of the *Cour de cassation* in *ICH v Crédit Suisse* is nonetheless of particular interest as it emanates from the highest court of an EU or EFTA state to rule consistently on this issue.

An appeal currently lies before the *Cour de cassation* in a dispute concerning an imbalanced optional clause between Apple and an authorised reseller of Apple products (*eBizcuss*). The clause is governed by the identical provision of the Brussels Regulation but is drafted in different terms to the clause in *ICH v Crédit Suisse*.<sup>69</sup> It will be interesting to see how the *Cour de cassation* approaches the clause in *eBizcuss* and whether the court will refer the issue to the CJEU, requesting a preliminary ruling.

The Brussels Regulation was replaced in January 2015 in the EU by the Recast.<sup>70</sup> The Recast has important similarities to, as well differences from, the provisions of the Brussels Regulation relevant to jurisdiction agreements.<sup>71</sup> Of particular note is the introduction of an express rule subjecting the substantive validity of the agreement to the law of the court on which the clause confers jurisdiction, or if its choice of law rules so provide, the law of another Member State.<sup>72</sup> This provision underscores the residual role of national law and may

527 suggest that *ordre public international* has a proper place in the fray. To date, the Lugano Convention has not been amended to reflect the changes made by the Recast, and there are currently no plans to amend it.<sup>73</sup> How courts applying the Lugano Convention to jurisdiction agreements will be influenced by the provisions that the Recast introduces is an open question.

*Reste à savoir ...*

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68 Treaty on the Functioning of the European Union, O.J. 2012 C 326, 49, art. 267(1)(b) and (3); Lugano Convention, Protocol 2, Preamble 3.

69 *Cour d'appel*, Paris, 8.4. 2014, RG n°13/21121. For an analysis, see *Keyes and Marshall*, 2015 JPIL (forthcoming).

70 Following the entry into force on 1.10. 2015 of the Hague Convention of 30.6. 2005 on Choice of Court Agreements, the Recast has a limited application to exclusive choice of court agreements designating EU Member States.

71 *Keyes and Marshall*, JPIL 2015 (forthcoming).

72 The choice of law rules of the designated court are its national choice of law rules – there is no uniform choice of law rule in the EU for the law governing a jurisdiction agreement, this matter having been carved out of the Rome I Regulation in art. 1(2)(e).

73 *Fausto Pocar*, Has the Lugano Convention been Forgotten?, in Fausto Pocar et al, *Recasting Brussels I*, Milano, 2012, 117, 118.

## VI. Postscript:

After the journal accepted this case note for publication, the French *Cour de cassation* delivered its decision in *eBizcuss*.<sup>74</sup> It ruled that the *Cour d'appel* correctly decided that the clause, which gave Apple the option to sue eBizcuss at eBizcuss' "...seat or in any jurisdiction where harm to Apple is occurring",<sup>75</sup> allowed for the identification of the jurisdictions before which litigation would be brought. Accordingly, the clause was consistent with the objective of predictability in the use of jurisdiction agreements.

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74 *Cass. civ., 1ère*, 7.10.2015, *MJA (mandataire judiciaire de la société Ebizcuss.com) v Apple Sales international*, n°14-16898.

75 *Cour d'appel*, Paris, 8.4.2014, RG n°13/21121.