THE FREEDOM AND LIMITS TO THE CHOICE OF INTERNATIONAL FORUM IN THE LIGHT OF ASYMMETRIC JURISDICTION AND ARBITRATION AGREEMENTS

S U M M A R Y O F D O C T O R ' S T H E S I S

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1. THE SUBJECT, THE METHOD AND THE OBJECTIVE OF THE THESIS

1.1. The subject of the thesis

1.1.1. Asymmetric jurisdiction and arbitration agreements

1. Asymmetric jurisdiction and arbitration clauses are well-known dispute resolution agreements in a wide range of sectors of international trade, from the financial sector to major infrastructure investment projects, real estate leases and shipping. Yet, they have recently led to numerous conflicting judicial decisions in several jurisdictions, dividing legal scholarship, as well. At one end of the imaginary scale, views condemn asymmetric choice of forum agreements, approving that some national courts do not enforce them, while at the other end of the scale, views advocate respect for party autonomy, fully supporting judicial enforcement of such clauses.

2. There are many excellent works on asymmetric jurisdiction and arbitration agreements, providing critical summaries of the national case law, court decisions, or in-depth discussions of certain issues related to these clauses in the field of substantive law, procedural law, or conflict of laws. However, the discussion of the topic in a broader context and the placing of the asymmetry of the choice of forum as a problem among the fundamental issues of international choice of forum is missing. Based on the above, in this doctoral thesis I examine asymmetric jurisdiction and arbitration agreements in the context of the freedom and limits to the choice of international forum.

1.1.2. Commercial relations

3. The thesis focuses on commercial relationships between parties engaged in commercial economic activity, in other words on so-called "B2B" relationships. For this reason, the thesis deals only with arbitration agreements in the field of international commercial arbitration, but it does not examine public arbitration and investment arbitration. Regarding jurisdiction agreements, non-civil-, and non-commercial relationships as well as "*B2C"* relationships, such as jurisdiction agreements with so-called "weaker parties" *(employee, consumer, insured)* fell outside the scope of the work.

1.1.3. Supranational legal sources, national legal systems

4. In the context of arbitration agreements, the thesis analyses in detail the provisions of the 1958 New York Convention[1] and the 1961 European Convention[2]. In addition, the work examines the UNCITRAL Model Law as international *soft law* on certain issues. In the context of jurisdiction agreements, the thesis analyses the provisions of the Brussels Ia Regulation[3] and the 2007 Lugano Convention[4] (together the "Brussels-Lugano regime"), together with the related case law of the Court of Justice of the European Union (CJEU). With regard to the fundamental rights aspects of the choice of forum, the thesis analyses the relationship of arbitration and jurisdiction agreements with the European Convention on Human Rights (ECHR)[5] and the EU Charter of

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (United Nations, Treaty Series, vol. 330, p. 3.)

[2] European Convention on International Commercial Arbitration, signed at Geneva on 21 April 1961 (United Nations, Treaty Series, vol. 484, p. 349.)

[3] 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 *OJ L 351, 20.12.2012, 1-32.*

[4] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 10 October 2007, *OJ L 339, 21.12.2007, 3-41.*

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950

Fundamental Rights[6] , and the relevant case law of the European Court of Human Rights (ECtHR) in relation to the former source of law.

5. When it comes to national legal systems, only Hungarian law is discussed comprehensively, by presenting statutory law and case law. Inspired by Holmes, who considered law as the prophecies of what the courts will do in fact, in relation with other national legal systems the paper focuses on the case law.[7] The thesis analyses the jurisprudence of the leading European jurisdictions: the United Kingdom, France and Germany in the context of asymmetric jurisdiction and arbitration agreements. The case law of two further legal systems, the United States of America and the Russian Federation is examined in relation to asymmetric arbitration agreements.

1.2. Method of the thesis

6. The thesis examines asymmetric jurisdiction and arbitration agreements primarily *from a conflict-of-law perspective*, so the analysis focuses on the qualification of the problem areas and the determination of the applicable law. The substantive and procedural issues raised by asymmetric jurisdiction and arbitration agreements are discussed only to the extent strictly necessary.

7. The initial approach of the thesis is *descriptive*, presenting the international, EU and national sources of law and the related case law. Since the body of law is constantly in flux, this method is closely linked to the *legal history method*, which describes relevant changes in legal sources and, in particular trends in the development of the case law.

8. *The comparative method is* also a fundamental approach of the analysis, which can be applied at several levels. On the one hand, the comparison between jurisdiction and arbitration agreements is used throughout the thesis. It also allows for a comparison between the judicial practice of the national legal systems under examination. Closely linked to the comparative approach is the *analytical method*, which enables the subject of the comparison to be correctly selected and the appropriate conclusions to be drawn from the results of the comparison.

9. Finally, the thesis examines the enforcement of asymmetric choice of forum clauses through the lens of state courts *(the derogation perspective)* and it does not cover the arbitrators' decision on their own jurisdiction.

1.3. The objective of the thesis

10. Two extremes can be observed in judicial practice and jurisprudence regarding the assessment of asymmetric choice of forum clauses. One extreme considers asymmetric choice of forum as a purely "private matter" of the parties which is worthy to be enforced by state courts practically in all cases. The other extreme grossly invades in the autonomy of the parties either equating or non-enforcing asymmetric clauses.

11. The hypothesis of the thesis is that neither of these two extreme positions should be accepted. On the one hand, the respect for the autonomy of the parties as an absolute value cannot be the solution to everything, since this attitude, like legal positivism, leads to the emptying out of law. On the other hand, judicial disregard for the parties' agreement to settle disputes and blatant judicial interference in their autonomy are clearly unacceptable.

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[6] Charter of Fundamental Rights of the European Union (2012/C 326/02) OJ C 326, 26.10.2012, 391-407.
[7] HOLMES, OLIVER WENDELL JR: Path of the Law. Harvard Law Review.1897/10. 457.

12. Based on the above, in the spirit of *aurea mediocritas* borrowed from Horace, the right perspective on the asymmetric choice of forum may lie somewhere between the two extreme positions.[8] The aim of this thesis is to identify the right perspective between these two extremes and place asymmetric jurisdiction and arbitration agreements in the coordinate system marked by the freedom and limits of the choice of international forum.

2. CHOICE OF FORUM AGREEMENTS

2.1. The concept and legal nature of choice of forum agreements

13. Before examining asymmetric jurisdiction and arbitration agreements, it is necessary to bring these two types of dispute settlement agreements "on a common denominator", distinguishing them from similar dispute settlement agreements, defining their basic functions and identifying their legal nature.

2.1.1. Separation of jurisdiction and arbitration agreements, functions

14. Jurisdiction and arbitration agreements form a separate group of international dispute settlement agreements, which can be distinguished from other similar agreements on the basis of (i) the *adjudicative* function of the person deciding the dispute, (ii) the binding nature and finality of the decision *(res judicata)*, and (iii) the enforceability of the decision by state coercion. In contrast to other dispute settlement agreements, the conclusion of jurisdiction and arbitration agreements constitutes a definitive modification of the jurisdiction of the courts, by means of a private law transaction. The term "choice of forum agreement" is used in this paper to refer to these two agreements together.

15. The main functions of choice of forum agreements are i) to ensure predictability of dispute resolution, ii) to reduce the risk of parallel proceedings, iii) to provide for a neutral forum independent of the parties, iv) to ensure tailored, flexible dispute resolution and expertise; v) and to facilitate enforceability of the decision.

2.1.2. The legal nature of choice of forum agreements

16. Choice of forum agreements are Janus-faced legal institutions: their dual nature is manifested, on the one hand, at the level of the legal relationship, since they are linked to substantive law (private law) and procedural law (public law). This dual relationship means that the fundamental principles of the relevant legal system cannot be applied to them automatically, without taking into account the functions of these agreements.

2.1.2.1. Link to substantive law and procedural law

17. In my view, the dual legal nature of the *arbitration agreement* is undeniable, but its *private law or substantive law nature is more dominant*. An arbitration agreement is private in nature because it is created by a private transaction between the parties. In terms of its legal effects, the arbitration agreement is primarily procedural in nature, since its main effect is the definitive removal of the jurisdiction of state courts. At the same time, the parties enjoy a degree of

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[8] *„Auream quisquis mediocritatem diligit, tutus caret obsoleti sordibus tecti, caret inuidenda sobrius aula."* QUINTUS HORATIUS FLACCUS: Odes Book 2 Poem 10. *(„Who makes the golden mean his guide, Shuns miser's cabin, foul and dark, Shuns gilded roofs, where pomp and pride Are envy's mark.")* JOHN CONINGTON (transl.): The Odes and Carmen Saeculare of Horace. Bell and Daldy. London 1872. https://archive.org/details/odesandcarmensa00conigoog/page/n92/mode/2up Last accessed on 02.02.2024.

autonomy as regards the choice of the arbitrators and the determination of the rules of procedure of the arbitration which is unprecedented in public law and procedural law.

18. In my view, the private law features of a jurisdiction agreement are exhausted by the fact that it is created by the private law transaction of the parties and the parties can choose the court that will decide the dispute. However, the parties do not have the possibility to regulate the choice of the adjudicator or the details of the procedure. In the light of the above, I consider that the *jurisdiction agreement is a* dual legal instrument, but its *procedural and public law nature is more dominant.*

2.1.2.2. Autonomy and dependence

19. The dichotomy that characterises choice of forum agreements is also manifest in the relationship with the underlying (main) contract, which is characterised by both *dependence and autonomy*. This dependency can be seen in the fact that a choice of forum agreement cannot be concluded in isolation but must always be linked to a substantive legal relationship. A choice of forum agreement therefore presupposes a substantive legal relationship between the parties, whether existing or future. At the same time, the choice of forum agreement is independent of the underlying legal relationship, since as a general rule the non-existence or invalidity of the latter does not affect the existence and validity of the choice of forum agreement. The contrary position would call into question the *raison d'être* of choice of forum agreements, and it would undermine their effectiveness.

2.1.2.3. Prorogation and derogation

20. Finally, the dual nature of choice of forum agreements also applies to the procedural effects and the rights and obligations of the parties. The prorogative effect of a choice of forum agreement is to confer jurisdiction on the forum that has been chosen and the derogatory effect is to exclude the jurisdiction of the forum that has not been chosen. From the point of view of the rights and obligations of the parties, the choice of forum agreement creates a positive obligation for the parties to litigate before the forum and, at the same time, a negative obligation to refrain from litigating before a non-chosen forum.

2.2. Types of choice of forum agreements

2.2.1. Express and implied agreements

21. Choice of forum agreements can be classified according to several criteria. From the point of view of the formation of a choice of forum agreement, a distinction can be made between express and implied choice of forum agreements. Within express choice of forum agreements, there are two further categories. On the one hand, there are choice of forum agreements which are concluded before the dispute arises, usually in the form of an arbitration clause *(clausula compromissoria)* or a jurisdiction clause *(prorogatio fori ante litem natam) in the* main contract. On the other, the parties enter into a separate choice of forum agreement in relation to an existing dispute, which may be either an arbitration agreement (*compromissum)* or a jurisdiction agreement (*prorogatio fori post litem natam).*

22. An implied choice of forum agreement is formed when a party initiates litigation or arbitration in which the other party submits a defence on the merits without contesting jurisdiction. An implied choice of forum agreement may not only constitute the conclusion of a new choice of forum agreement, but in case there was a prior express choice of forum agreement between the parties, the setting aside of the latter in respect of the given dispute. A special case of an implied

choice of forum agreement is where the parties agree only on the place of performance, which can establish jurisdiction, as well.

2.2.2. Homogeneous and heterogeneous arrangements

23. Choice of forum agreements can also be classified according to the type of dispute resolution chosen by the parties: in case of a homogeneous agreement, the parties agree on one type of dispute resolution, in case of a heterogeneous choice of forum, the parties combine state court dispute resolution with arbitration.

2.2.3. Exclusive and non-exclusive agreements

24. Choice of forum agreements can also be classified according to their procedural legal effect: in case of an exclusive agreement, the positive *(prorogative)* and the negative *(derogative)* effects are both present, while non-exclusive agreements have only partial negative effect, or no such effect at all. In the Brussels-Lugano regime, the exclusivity of jurisdiction agreements is presumed, whereas in common law there is no such presumption.

25. In case of an isolated prorogation, only the jurisdiction of the forum that shall settle the dispute is stipulated, without excluding the jurisdiction of other forums *(isolated prorogation)*. An agreement on the place of performance may also be understood as an isolated prorogation. In principle, an isolated derogation can be envisaged whereby the parties only exclude the jurisdiction of certain courts *(isolated derogation).* By concluding an arbitration agreement, the parties typically exclude the jurisdiction of the ordinary courts *(universal derogation)*, but it is debatable whether the exclusion of the ordinary courts is a conceptual element of the arbitration agreement.

2.2.4. Asymmetric choice of forum agreements

26. Asymmetric choice of forum agreements are arbitration or jurisdiction clauses that do not regulate the parties' rights to choose the dispute resolution forum equally: they give one party (the "beneficiary") more rights, while limiting the rights of the other party (the "restricted party").

2.3. Enforcing choice of forum agreements

27. Enforcing choice of forum agreements can be either the main issue or an ancillary issue in the dispute. Where enforcement arises as an ancillary issue, it may take place before the decision on the merits, in the *pre-adjudicative* phase of dispute resolution (direct enforcement), or after the decision on the merits, in the *post-adjudicative* phase of dispute resolution (indirect enforcement).

28. The enforcement of choice of forum agreements can also be the main issue in the dispute, which is the situation in proceedings for *anti-suit injunctions* or for damages by reason of the breach of choice of forum agreements. While the former proceedings are widespread in common law and have been held by the CJEU to be incompatible with the Brussels-Lugano regime, the latter can be found in continental jurisdictions, as well.

3. THE FREEDOM OF INTERNATIONAL CHOICE OF FORUM

3.1. Party autonomy in the field of international choice of forum

29. Autonomy (self-determination) is the freedom of the individual to determine his or her own life circumstances. The concept of autonomy appears in many areas of law. In private law, autonomy is most fully expressed in the principle of contractual freedom. In the field of private international law, autonomy is expressed in the choice of law. In civil procedural law, autonomy is expressed in the right of disposition. While autonomy in the above areas can be regulated by purely national legislation, the unilateral regulation in the area of choice of forum has encountered fundamental limitations. In view of this, party autonomy in the field of international choice of forum has gradually gained recognition in a multilateral framework during the 20th century, first through the general international recognition of arbitration agreements.

30. Multilateralism was first implemented after World War I under the auspices of the League of Nations and led to the conclusion of two key multilateral conventions in the field of arbitration - the 1923 Geneva Protocol[9] and the 1927 Geneva Convention[10] - which were dominated by a territorial approach to arbitration. The New York Convention of 1958 established the basic framework for today's international commercial arbitration, which already reflected an internationalist approach to arbitration on many issues, with focus on party autonomy. At the regional level, the European Convention of 1961 added to the rules, taking them even further in the internationalist direction. The evolutionary process culminated in the adoption of the UNCITRAL Model Law in 1985, which fully regulates arbitration and reflects the emerging consensus between territorialism and internationalist aspirations.[11]

31. The first milestone in the multilateralisation of the recognition of jurisdiction agreements was the 1968 Brussels Convention[12], which recognised jurisdiction clauses for the first time at the European regional level. The development within the EU culminated in the adoption of the Brussels I Regulation[13] in 2001 and its revision in 2012 with the Brussels Ia Regulation. Within the EEA, multilateralism led to the adoption of the 1988 and 2007 Lugano Conventions, thus creating the Brussels-Lugano regime. In the context of the global legal developments concerning jurisdiction agreements, the 2005 Hague Convention on Choice of Court agreements should be mentioned.[14]

3.2. The pillars of party autonomy

32. The recognition of party autonomy in the field of international choice of forum rests on several pillars. On the one hand, the existing supranational regimes governing arbitration and jurisdiction agreements directly regulate fundamental issues by the creation of substantive international law, rather than using the classical conflict-of-law method. Such fundamental issues are (i) the minimum formal requirements of the choice of forum agreement, compliance with which creates a presumption of the validity of the choice of forum, (ii) the principle of the

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[9] Protocol on Arbitration Clauses, Geneva, September 24, 1923.
[10] Convention on the Execution of Foreign Arbitral Awards, Geneva 26, September 1927.
[11] Model Law on International Commercial Arbitration (United Nations documents A/40/16, Annex I, A/61/17, Annex I). Annex) - Text adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended on 7 July 2006)
[12] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters *OJ L 299, 31.12.1972, 32-42.*
[13] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ L 12, 16.1.2001, p. 1-23.*
[14] Convention on Choice of Court Agreements, signed at The Hague on 30 June 2005.

autonomy of the choice of forum clause from the main contract, which greatly enhances the effectiveness of the choice of forum, and (iii) the uniform rules for the enforcement of choice of forum agreements before state courts.

33. On the other hand, regarding other substantive issues, not covered by direct substantive resolution, supranational regimes unify conflict-of-law rules by introducing uniform connecting factors for the substantive validity of arbitration and jurisdiction agreements.

34. Thirdly, supranational regulation is characterised by the gradual erosion of territoriality and, at the same time, the strengthening of party autonomy on several issues.

3.3. Recognition of choice of forum agreements in Hungary

35. Although the roots of arbitration in Hungary date back to the Second Decree of Saint Stephen I, adopted in 1030, the first normative recognition of arbitration agreements only took place in the second half of the 19th century. Subsequently, with the adoption of the Civil Procedure Code of 1911 (1911 CPC)[15], a more advanced legislation came into force, which fully recognised the legal effects of the arbitration agreement. In the case of jurisdiction agreements, there is only an indirect and partial recognition of the jurisdiction clause regulated by the 1911 CPC. With regard to the recognition of choice of forum agreements, after the Second World War, with the adoption of the Civil Procedure Code of 1952 (1952 CPC)[16] and the Private International Law Decree (PIL Decree)[17], the development of domestic law deviated for several decades from the path paved by leading international sources of law. However, with the adoption of the Arbitration Act of 1994,[18] which was based on the UNCITRAL Model Law, and with the revision of the PIL Decree at the turn of the millennium, leading to the reception of the Brussels-Lugano regime, the domestic legal system caught up with the dominant international trends.

36. The Arbitration Act of 2017 (HAA)[19] and the Private Internation Law Act of 2017 (PILA)[20], which entered into force in 2018, have brought the domestic law closer to the supranational sources of law, so it can be said that the freedom of choice of international forum has also become a basic principle of autonomous Hungarian law. However, certain provisions of the domestic law do not fully serve the effectiveness of choice of forum, which is discussed by the thesis to the extent justified by the topic.

4. THE LIMITS OF INTERNATIONAL CHOICE OF FORUM

37. The autonomy of the parties regarding the choice of international forum is not unlimited. In addition to the general recognition of the freedom of choice of forum, there are different limits at supranational and national level, which may lead to a refusal by the state courts to recognise the parties' choice of forum agreement. These limitations are listed and grouped below.

[15] Act I of 1911 on the Code of Civil Procedure
[16] Act III of 1952 on the Code of Civil Procedure
[17] Law Decree No. 13 of 1979 on private international law
[18] Act LXXI of 1994 on Arbitration
[19] Act LX of 2017 on Arbitration
[20] Act XXVIII of 2017 on Private International Law

4.1. Express limits

38. One group of barriers is explicitly reflected in statutory or conventional law. These limits on the choice of international forum are (i) personal and material limitations, (ii) the written form requirement, and (iii) the principle of certainty.

4.1.1. Subject-matter and personal limits

39. In the Brussels-Lugano regime, the civil or commercial nature of the legal relationship is the general subject-matter limitation of jurisdiction agreements, whereas under autonomous Hungarian law, jurisdiction agreements can be concluded in proprietary matters. The system of exclusive grounds of jurisdiction is a special subject-matter limitation in the Brussels-Lugano regime, and the same goes for the exclusive and excluded grounds of jurisdiction in autonomous Hungarian law. The personal limitation of the jurisdictional agreement is, on the one hand, state immunity and, on the other hand, the provisions protecting the so-called weaker parties.

40. The general subject-matter limitation of arbitration agreements under the New York Convention and under the HAA is the commercial relationship of the parties, under the European Convention the international commercial activity of the parties. When it comes to specific subject-matter limitations, these are the cases of objective inarbitrability. For arbitration agreements, the personal limitation are the provisions related to subjective inarbitrability. These restrict the state or public bodies from concluding arbitration agreements and they also limit the conclusion of arbitration agreements with so-called weaker parties.

4.1.2. The writing requirement

41. It is a general requirement that choice of forum agreements shall be concluded in writing, which serves a dual purpose: on the one hand it secures that attention is drawn to the choice of forum agreement, as deviation from the normal rules of jurisdiction, and it is also an ex-post evidentiary basis for the conclusion of the choice of forum agreement. The requirement of written form is a formal validity condition for both jurisdiction agreements and arbitration agreements, but in recent decades there has been a gradual relaxation of formal rules, in addition supranational sources governing arbitration agreements allow the application of more favourable national law.[21]

4.1.3. Certainty

42. The requirement of certainty must apply both to the underlying legal relationship, in relation to which the parties may choose the forum for disputes, and to the forum chosen. In the Brussels-Lugano regime, the parties may choose the courts of a Member State or of a contracting party, under the PILA the courts of "any state" can be chosen, however these sources of law are silent on the degree of certainty of the chosen forum. Jurisprudence and case-law also apply the requirement of certainty to the forum chosen. A choice of court agreement is sufficiently precise if the chosen court can establish its own jurisdiction on the basis of the objective circumstances of the case, as the CJEU has held in *Coreck Maritime*.[22] In case of an arbitration agreement, certainty is the requirement for submission to arbitration, which is fulfilled if it can be established that the parties intended to settle the dispute by arbitration and the arbitral tribunal can be set up.

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[21] New York Convention Article VII (1), European Convention Article I(2)(a)

[22] C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* (9 November 2000) ECLI:EU:C:2000:606.

4.2. Implied limits

43. Another group of limits on choice of forum agreement are implied limits, which are typically not recognised in the statutory or conventional law. Although there is no theoretical or practical consensus on their application, they appear in jurisprudence and in case law. These limits are (i) the requirement of internationality of the underlying legal relationship or dispute, (ii) the limits of contract law, and (iii) the rules of public policy.

4.2.1. Internationality

44. In the Brussels-Lugano regime the reductionist approach to the requirement of internationality, which aimed at reducing the scope of application of these sources of law to facts within the EEA, has been replaced by a more liberal approach, according to which it is sufficient if the dispute has a relevant link to a third country. However, for a long time, there had not been consensus on the question whether internationality is an objective or a subjective category, which has been recently decided by the CJEU in the *Inkreal case*.[23] According to the judgment, the parties can make the jurisdiction agreement international in a domestic case by choosing a court in another EU member state. In the context of autonomous Hungarian law, the PILA does not define the concept of internationality, however, given that the domestic legislation was adopted on the basis of the Brussels Ibis Regulation, the above case law of the CJEU should be followed.

45. The lack of a specific provision in the New York Convention has also led to a lack of consensus on the concept of internationality: those at one end of the scale argue that the Convention applies to both domestic and foreign arbitrations, while those at the other end of the scale stress that it applies only to the latter. Although the European Convention defines the concept of internationality, as an exception that strengthens the rule, this is not always followed in judicial practice. In contrast to the previous legislation, the HAA does not define the concept of internationality either.

4.2.2. Contract law limits

46. As the choice of forum agreements are contracts and the supranational sources governing them do not regulate every aspect, the application of national contract law rules on the formation and validity of contracts is inevitable.

4.2.3. Public policy

47. In judicial practice, there are numerous examples of a non-chosen forum trying to prevent harm to its own public policy by not enforcing a choice of forum agreement. The public policy test can be applied on the pretext of a hypothetical substantive decision to be taken by the non-chosen forum, but also directly in relation to the choice of forum agreement.

4.3. Fundamental rights aspects of choice of forum

48. Within public policy, it is necessary to highlight the fundamental procedural guarantees that are recognised by fundamental rights. In the light of the ECHR and the jurisprudence of the Hungarian Constitutional Court, the conclusion of an arbitration agreement *constitutes a waiver of* the right of access to the courts as a *fundamental right*, the validity of which requires certain basic conditions to be fulfilled and which is subject to limits. For the purposes of the Charter of Fundamental Rights, the case-law of the ECtHR is relevant, with the proviso that it constitutes only a minimum level, and the CJEU may lay down a higher level of protection.

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[23] C-566/22. sz. *Inkreal s.r.o. - Dúha reality s.r.o.* (8 February 2024) ECLI:EU:C:2024:123

49. Given that by concluding a jurisdiction agreement the parties do not exclude the jurisdiction of all courts, the conclusion of a jurisdiction agreement *constitutes a partial waiver of the right to access to court, as a fundamental right*. Nevertheless, as regards the conditions and limits of the waiver, it is appropriate to apply by way of analogy the system of waiver established for arbitration agreements, taking into account the identical function of the two choice of forum agreements.

5. ASYMMETRIC CHOICE OF FORUM CLAUSES IN JUDICIAL PRACTICE

50. Asymmetric arbitration and jurisdiction clauses have been brought before various national courts in recent years in large numbers and they have significantly divided contemporary jurisprudence. The thesis shows how the courts of some continental and common law jurisdictions consider the validity and enforceability of these clauses, and then identifies those limits of international choice of forum that are relevant in the light of the case law presented.

5.1. Contemporary international judicial practice

51. The evolution of English jurisprudence has been a straightforward one: after the initial prohibition of asymmetric arbitration and jurisdiction clauses, a paradigm shift occurred in the 1980s and 1990s. Today English courts use the full range of tools at their disposal, including injunctions, to enforce asymmetric choice of forum clauses.

52. French jurisprudence shows the opposite development. The initial liberal approach was reversed in 2012 with the *Rotschild* decision[24] and judicial practice is now producing conflicting decisions. The Civil Chamber of the Cour de cassation seems to take a conservative position, the Economic Chamber a more permissive one, but there is no consensus on the assessment of asymmetric jurisdiction clauses. At the same time the preliminary ruling of the CJEU in the *Societa Italiana Lastre case*[25] will presumably unify the diverging court practice.

53. In Germany, the courts generally enforce asymmetric choice of forum clauses, but subject them to differential scrutiny, which varies in depth for individually negotiated clauses and in the adhesion context. In the latter case, the scrutiny is more thorough, and German courts invalidated asymmetric arbitration clauses in the post-adjudicative phase of dispute resolution, as the clause in fact has emptied out the right of access to court of the restricted party.

54. In US jurisprudence, some courts have previously not enforced asymmetric arbitration clauses due to lack of reciprocity or consideration. Today, the jurisprudence generally recognises such clauses, but examines their unfairness in the adhesion context and, where appropriate, refuses to enforce them at the pre-adjudicative stage. After a brief liberal period, Russian practice, moved towards the denial of asymmetric choice of forum agreements by the end of the 2010s, on the basis of which such clauses are "equated" by the state courts.

5.2. Domestic case law

55. In Hungary, pre-1945 judicial practice organically developed the recognition of asymmetric choice of forum in the modern sense in relation to stock exchange court clauses. The Royal Curia, even if it hesitated to take a position on asymmetric choice of forum in principle, in practice

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[24] Cour de cassation 26 septembre 2012 - Chambre Civile 1ére 11-26.022

[25] C-537/23 *Societa Italiana Lastre SpA v. Agora* - request for preliminary ruling submitted on 23 November 2023. (C/2023/956)

tacitly recognised its enforceability.[26] However, the lack of clarification of the principles meant that asymmetric clauses required constant supervision and correction by the higher-level courts.

56. In contemporary domestic jurisprudence, there are more open issues. As far as asymmetric arbitration clauses are concerned, in one group of them, the unilateral litigation clause, a preliminary question arises: to what extent an arbitration clause should be exclusive? In relation with this problem the contemporary Hungarian jurisprudence is divided.[27] When it comes to asymmetric choice of forum clauses, the court practice is also divided. There is a contemporary judicial approach that considers asymmetric arbitration clauses generally permissible in the absence of an explicit legal prohibition.[28] However, other decisions show some aversion to asymmetric jurisdiction clauses.[29]

5.3. Asymmetric choice of forum clauses and the limits to the choice of forum

57. After reviewing the contemporary jurisprudence on asymmetric choice of forum agreements, it is necessary to identify those limits to the freedom of international choice of forum that are relevant in the context of asymmetric choice of forum agreements. These are: (i) the requirement of certainty; (ii) the limits of contract law; and (iii) public policy.

5.3.1. The requirement of certainty

58. The *requirement of certainty in* the context of asymmetric choice of forum may be relevant for two reasons. On the one hand, asymmetric jurisdiction clauses which give one party an excessively wide choice of forum may violate the requirement of certainty regarding the court. Some decisions in French case-law, which rejected the enforcement of jurisdiction agreements because of the lack of foreseeability – see for example the *ICH c. Crédit Suisse I-II.*[30] and *Saint Joseph c. Dexia Bank*[31] *cases* – referred back to the *Coreck Maritime*[32] decision of the CJEU, which lays down the principle of the certainty of jurisdiction clauses.

59. On the other hand, in case of an asymmetric arbitration clause, the question arises whether the parties have agreed to arbitration at all, if one of them may bring the dispute before the ordinary courts. In the case of asymmetric arbitration clauses, the problem of certainty is closely linked to the requirement of the exclusivity of the clause.

5.3.2. Contract law limits

60. Contract law limits may also apply to asymmetric jurisdiction and arbitration clauses, given the dual legal nature of both types of choice of forum agreement. Since the existence of a certain degree of substantive legal connection cannot be denied in the case of either arbitration or jurisdiction clauses, the application of contractual law limitations cannot be excluded in relation with asymmetric clauses. Such a contractual barrier was applied, for example, in the *Rotschild*

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[26] Royal Curia of the 53rd TÜH

[27] Legal unification decision of Curia No. 3/2013. BDT2005. 1207. (Budapest Court of Appeal 3. Pf. 20 473/2005/1.) BDT2013. 3028. (Budapest Court of Appeal 5. Pf. 20.602/2012/3.) and Judgment of Curia No. Gfv. VII. 30.187/2015/4.

[28] Decision No 9.G. 40.400/2017/12 of the Metropolitan Court of Budapest and the decision of the Curia upholding it, Gfv.30008/2018/11.

[29] BH 2019.12.325. published decision of the Curia under No. Pfv.V.21.201/2018/8. Decision of the Court of Appeal of Budapest No. 57.Pf.638.611/2017/9.

[30] ICH c. Crédit Suisse I-II. Cour de cassation, Chambre civile 1, 25 mars 2015. 13-27.264.Cour de cassation Chambre civile 1, 7 février 2018. 16-24.497.

[31] Saint Joseph c. Dexia Banque Cour de cassation, Chambre Civile 1, 3 octobre 2018 (17-21.309)

[32] Case C387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* (9 November 2000) ECLI:EU:C:2000:606.

case, where, inter alia, the French doctrine prohibiting *potestative* contractual conditions *(potestativité)* was invoked to reject the enforcement of an asymmetric jurisdiction clause.

5.3.3. Public policy

61. Finally, the *public policy* is also relevant in the context of asymmetric choice of forum agreements, since in the framework of the second type "public policy test" – i.e. when the non-chosen forum directly applies public policy in respect of the choice of forum agreement – the imperative rules of the *lex fori* apply, which may lead to the non-enforcement of asymmetric jurisdiction and arbitration agreements.

62. The *Rotschild case is* also an example of the application of public policy, given that the domestic doctrine of "*potestativité*" could be applied by French courts on the title of public policy in respect of a clause conferring exclusive jurisdiction on the Luxembourg courts. Similarly, in the *Sony Ericsson* case[33] , the application of Russian law could also be based on public policy, given that English law was the governing law for the choice of forum clause in that case.

6. ANALYSIS OF ASYMMETRIC CLAUSES

6.1. Analytical approach

63. The starting point for the examination of asymmetric choice of forum clauses is that the *analytical approach* is the correct method instead of the holistic approach, since the latter usually leads to the non-enforcement of such clauses. In contrast to the principle of partial invalidity of contracts, the content of which varies from one legal system to another, it is more appropriate to base the use of the analytical method on the principle of autonomy, which is governed by the supranational law governing jurisdiction and arbitration agreements.

6.2. Classification

64. Asymmetric choice of forum clauses can be classified in several ways.

6.2.1. Typical - atypical clauses

65. Typical asymmetric clauses regulate the parties' rights in relation to the choice of forum differently, while atypical clauses provide for additional rights for the beneficiary within the given procedure (e.g. in relation to arbitrator nomination, etc.).

6.2.2. Homogeneous - heterogeneous clauses

66. In the case of homogeneous asymmetric clauses, the defendant can choose between one dispute resolution method, while heterogeneous asymmetric clauses combine state court dispute resolution with arbitration.

6.2.3. Discretionary - dissociative clauses

67. Within homogeneous asymmetric choice of forum clauses, asymmetric jurisdiction clauses can be further subdivided into more categories. In the case of *discretionary jurisdiction clauses*, the beneficiary, either as plaintiff or defendant, has an unlimited right to choose the forum in which the parties' dispute will be settled. *Dissociative jurisdiction clauses* limit the beneficiary's right to choose to a certain extent.

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[33] In Sony Ericsson Communications v Russian Telephone Company, Russian Supreme Court Decision No 1831/12 of 19 June 2021

68. In case of a *broad dissociative clause*, the beneficiary may bring a dispute before "any court", whereas a *classic dissociative clause* allows the beneficiary to bring the dispute before a court "of any jurisdiction" or "any competent court". In case of a *narrow dissociative clause*, the courts before which the beneficiary is unilaterally entitled to bring proceedings are specifically indicated.

69. The greatest uncertainty in case law arises in relation to *broad and classic dissociative clauses*. According to certain court decisions and jurisprudential positions, these asymmetrical clauses entitle the beneficiary to sue in "any" court in the world, which may constitute *forum shopping* or give rise to exorbitant jurisdictional grounds.

6.2.4. Heterogeneous clauses

70. Heterogeneous asymmetric choice of forum clauses combine dispute resolution by ordinary courts and arbitration. In case of a *unilateral litigation clause,* each party has the right to initiate arbitration, but only the beneficiary has the right to go to the ordinary court. In case of *unilateral* arbitration clauses, both parties have the right to go to an ordinary court, but the beneficiary also has the right to initiate arbitration.

6.2.5. Static – dynamic clauses

71. Asymmetric choice of forum clauses can also be classified according to whether the identity of the beneficiary is predetermined *(static clauses)* or depends on which party initiates the dispute first *(dynamic clauses).*

6.3. Analysis of asymmetric choice of forum clauses

72. The analysis of asymmetric choice of forum clauses aims to situate them in the Hungarian domestic legal context. The starting point of the analysis is to break down the asymmetric clauses into their parts.

6.3.1. Asymmetrical clause as formative right in procedural law

73. Asymmetric choice of forum agreements can be split into a symmetric and an asymmetric component, the latter being interpreted as an "option right" or "termination right" for the beneficiary. In the Hungarian legal system, the beneficiary's right can be understood as a formative right in the field of procedural law, which shapes the first element of the parties' right to dispose: the beneficiary of the clause can unilaterally bring about a change in the procedural situation of himself and the restricted party, i.e. in the way in which he and the restricted party can exercise their procedural right to dispose.

6.3.2. The type of the formative right

74. Unilateral arbitration clauses as well as narrow dissociative jurisdiction clauses can be considered both as right-establishing or obligation-eliminating formative right. Given that there are well-founded doubts about broad and classical dissociative clauses in both case law and jurisprudence (exorbitant jurisdiction grounds, forum shopping), it is more appropriate to consider these clauses as obligation-eliminating clauses.

75. On this basis, the beneficiary may exercise its right of termination under the asymmetric component of the clause not in any court in the world, but only in courts that have jurisdiction under the applicable rules of jurisdiction. Under this interpretation, the beneficiary is able to engage in forum shopping to the extent that the rules of jurisdiction would otherwise allow it, i.e. without entering into a choice of forum agreement.

7. CERTAINTY

76. The first relevant limitation to the choice of international forum for asymmetric jurisdiction and arbitration agreements is the requirement of certainty. This requirement has different significance in the context of asymmetric jurisdiction and arbitration agreements.

7.1. Certainty – Asymmetric jurisdictional agreements

77. Since the Brussels-Lugano regime does not longer explicitly regulate asymmetrical jurisdiction agreements, the question arises whether such clauses are covered at all by the Brussels Ia Regulation or the Lugano Convention. Since the Brussels-Lugano regime regulates exclusive and non-exclusive jurisdiction agreements, and asymmetric jurisdiction clauses can be described and interpreted along this axis according to the prevailing jurisprudential view, the scope of the Regulation and the Convention covers asymmetric jurisdiction clauses.

78. In the light of the above, it is necessary to examine to what extent asymmetric jurisdiction clauses meet the requirement of certainty, which under the Brussels-Lugano regime must be fulfilled not only with regard to the underlying legal relationship but also with regard to the chosen forum. Since, in accordance with the case-law of the CJEU *in Coreck Maritime,* the requirement that the forum shall be determined with certainty is satisfied if the clause contains objective factors enabling the court seized to decide, in the light of the particular circumstances of the case, whether it has jurisdiction over the dispute in question, when it comes to the forum chosen it is sufficient if the latter can be determined objectively. The need for objective determinability arises from the principles of legal certainty and foreseeability which underpin the Brussels-Lugano regime.

7.1.1. Discretionary clauses

79. Among asymmetric jurisdiction agreements, *discretionary jurisdiction clauses* do not meet the requirement of objective determinability, as they leave it entirely up to the subjective choice of the beneficiary as to which court to bring proceedings before. This results in a high degree of unpredictability and surprise factor for the party subject to the clause, which is incompatible with the essential function of a jurisdiction clause, i.e. to reduce the jurisdictional risk.

7.1.2. Dissociative clauses

80. *Classical and broad dissociative jurisdiction clauses* shall be interpreted correctly as not conferring jurisdiction on any court in the world, but only on those courts that would otherwise have jurisdiction in the absence of a jurisdiction clause. The first interpretation would imply a universal prorogation which is incompatible with the essential function of jurisdiction clauses, namely, to reduce the jurisdictional risk.

81. However, accepting the latter interpretation, the requirement of objective determinability and foreseeability is met in case of *classic and broad dissociative clauses*, since the restricted party can get acquainted with the grounds of jurisdiction based on the law and can relate them to the facts of the case. *Narrow dissociative clauses* also fulfil the requirement of objective determinability, since the parties narrow the list of courts having jurisdiction by drafting the clause, which allows the defendant to foresee the courts in front of which he will have to litigate.

7.2. Certainty – Asymmetric Arbitration Agreements

82. The asymmetric nature of *unilateral arbitration clauses* does not raise a real problem as regards the certainty of the clause. In the context of these clauses, the certainty of the submission

to arbitration is independent of the fact that only the beneficiary is entitled to submit the dispute to arbitration.

7.2.1. Unilateral litigation clauses – international practice

83. The asymmetry may be a real problem in the definition of *unilateral litigation clauses*, where the beneficiary is unilaterally entitled to bring a dispute before the state courts, despite having submitted to arbitration. Since in the case of a *unilateral litigation clause* the beneficiary is unilaterally entitled to bring the dispute to the state courts, the real question is whether the exclusion of the ordinary court route is a conceptual element of an arbitration agreement. The majority of international jurisprudence answers the question in the negative, in view of the fact that it is left to the autonomy of the parties to determine to what extent and when they wish to exclude the ordinary judicial route by their arbitration clause.

7.2.2. Unilateral litigation clauses - Hungarian legal perspective

84. In my view, under Hungarian law, the exclusivity of arbitral submission is not a conceptual element of an arbitration agreement.

85. On the one hand, the legislation in force since 1 January 2018 has eliminated the "absolute litigation barrier" nature of the arbitration agreement and transformed it into a relative one, which cannot be raised by the judge of its own motion.[34] On the other hand, the question of the conditions and the extent to which the parties wish to submit their dispute to arbitrators depends solely on the content of the arbitration submission, which the parties are free to formulate on the basis of the autonomy they enjoy.

86. Thirdly, if the HAA allows the parties to exclude the state courts completely from the resolution of their dispute by submitting it to arbitration, based on the principle of *argumentum a maiore ad minus*, this right necessarily includes the lesser right to exclude state court litigation not completely, but only partially or subject to certain conditions. It is up to the parties to work out the rules of partial or conditional exclusion in a way that will be applicable for the judge. Fourth, the recognition of non-exclusive arbitration agreements is more compatible with the pro-arbitration spirit of the UNCITRAL Model Law.

8. LIMITS OF CONTRACT LAW

87. Among the limits to the choice of international forum, contract law limits are also relevant to asymmetric jurisdiction and arbitration agreements. Contractual limitations also apply differently to asymmetric jurisdiction and arbitration agreements.

8.1. Contract law limits – Asymmetric jurisdiction agreements

8.1.1. The Brussels Ia Regulation

88. The Brussels Ia Regulation contains exhaustive supranational rules on the formation of jurisdiction agreements, but national law may be applied to the substantive validity of jurisdiction clauses. In the context of the application of the Brussels Ia Regulation, the application of national law contract rules by way of *lex fori* can be ruled out in gap-filling role, given that the question of asymmetry is either a governed by the Regulation itself, or by the law of the chosen court *(lex fori prorogati).* On the other hand, the application of national law may also be ruled out for the

[34] See Section 9 (1) of the HAA and Section 176 (1) b) of the CPC with effect from 1st January 2018.

purpose of assessing the derogating effect, given that this would jeopardise the uniform treatment of asymmetrical clauses within the EU and among the States parties to the Lugano Convention.

89. Under the Brussels Ibis Regulation it is not decided whether the asymmetry of the jurisdiction clause should be governed by the Regulation itself of by the law of the country of the chosen court (lex fori prorogati). The CJEU will hopefully decide this question in the Societa Italiana Lastre case.

90. In my opinion, the application of national law as *lex fori prorogati* in the context of the Brussels Ia Regulation is also not justified, since the asymmetry of jurisdiction clauses is an issue directly regulated by the Regulation itself. This view is supported by (i) a historical interpretation, given that the Brussels Convention explicitly regulated asymmetrical clauses; (ii) a logical interpretation, given that asymmetrical clauses can be described as a combination of exclusive and non-exclusive jurisdiction clauses regulated by the Regulation; iii) a systemic interpretation, bearing in mind that the Regulation itself regulates the question of asymmetry in relation to the weaker parties; iv) purposive interpretation, bearing in mind that the Brussels Ia Regulation was intended to increase the effectiveness of jurisdiction clauses, which is not fulfilled in the context of the substantive characterisation of the question of asymmetry, since it opens the way to the application of the law of the chosen court, or the law designated by the conflict-of-law rule of the latter law.

91. Assuming that the asymmetrical nature of a jurisdiction clause would be a problem of substantive law, the reference under the conflict of laws rule in Article 25(1) of the Brussels Ia Regulation must, for the uniform application of the Regulation, be understood in a narrow sense, which covers only the grounds of invalidity of the law of the chosen court *(lex fori prorogati)* related to the lack of consent (e.g. error, mistake, etc.), lack of capacity of right of representation, but does not apply to other grounds of invalidity expressing the value judgment of the relevant national legal system.

92. The narrow scope of the reference is supported by (i) a logical interpretation, taking into account that Article 25(1) of the Regulation provides an exception for substantive invalidity; (ii) a purposive interpretation, since the wider the door to the influx of national law, the less the general objectives of the Brussels regime, namely unification of the rules of jurisdiction within the EU, legal certainty and predictability, will be achieved; (iii) a historical interpretation of the legislation: one of the objectives of the Brussels Ia Regulation was to increase the effectiveness of jurisdictional arrangements, and the rule referring to *lex fori prorogati* was introduced as one of the means to this end, but a broad interpretation would undermine this legislative objective.

8.1.2. Lugano Convention

93. In the context of the Lugano Convention, the above considerations mentioned in respect of the Brussels Ia Regulation apply *mutatis mutandis* to the application of national law on the title of *lex fori* and to the application of national law on the title *lex causae.* In the latter case, it must be emphasised that the substantive characterisation of the asymmetry of the jurisdiction clause could only entail the application of national contract law limits if the reference in the Brussels Ia Regulation to the law of the court seized were applied by analogy in the context of the Lugano Convention.

8.1.3. Hungarian law

94. In the context of the application of autonomous Hungarian law, the question of the asymmetry of the jurisdiction clause should also be considered as a procedural issue, taking into account that the Brussels Ia Regulation was taken as a model by the PILA.

8.2. Contract law Limits - Asymmetric Arbitration Agreements

8.2.1. New York Convention, European Convention

95. The application of national law to the formation and validity of arbitration clauses cannot be ruled out in the context of the application of the New York Convention and the European Convention, since the conventions regulate these matters only partially.

96. Article II of the New York Convention does not expressly regulate the question of the law governing the arbitration agreement in the *pre-adjudicative* phase of dispute resolution, but the prevailing view is that the conflict of laws rules under Article V(1)(a) of the Convention shall be applied as *lex causae* for the sake of uniformity. In view of this, the law of the forum as *lex fori* cannot be applied to the formation and validity of the arbitration agreement. The question of the asymmetry of the arbitration clause in case of both unilateral arbitration agreements and unilateral litigation agreements must be assessed under the national law, determined by the conflict of laws rules under Article V(1)(a) of the New York Convention, as *lex causae*. The question of the asymmetry of an arbitration agreement under the European Convention is to be determined by the national law, determined by the conflict of law rules set forth in Article VI (2) of the Convention, as *lex causae*.

8.2.2. Hungarian law

97. When it comes to the analysis of asymmetric arbitration clauses under Hungarian law, the question arises as to which source of law should be used to determine the law governing the arbitration agreement in the pre-adjudicative phase of the dispute resolution process. Since the "sui generis" conflict of law provision of the PILA[35] diverges from the relevant provision of the New York Convention[36], the application of the PILA causes a number of internal and external incongruities, leading to contradictory court decisions. In the light of the above, it is suggested to apply as *lex specialis* the conflict of laws rules set forth by the HAA in respect of the annulment of arbitral awards in the context of direct enforcement of arbitration clauses, which should help to overcome the above problems, when the seat of arbitration is in Hungary.[37] In case the seat of arbitration is abroad, it is suggested de lege ferenda that Section 52 (1)-(3) of the PILA should be fully harmonised with the conflict of law provisions of Article V (1) a) of the New York Convention, or the Hungarian legislator should adopt new choice-of-law provisions in respect of substantive validity of the arbitration agreement, which reflect the validation principle.

98. If the Hungarian court, as the forum, has to take a position on the asymmetry of an arbitration agreement, it must first qualify the problem. The asymmetry of an arbitration clause can be understood under Hungarian law as a question relating to (i) the formation and substantive validity of the clause, (ii) the submission to arbitration, and (iii) the procedural effects of the arbitration clause. The main problem with the first qualification is that it leads to the application of the PILA, which should be avoided because of the reasons explained above. With the second and third qualification, the application of the PILA can be avoided. While the second qualification leads to the application of the substantive rules of the HAA, the third qualification leads to the application of the law determined by the conflict of laws rule of the HAA, at the same time it is only applicable when the seat of arbitration is in Hungary. However, the third approach is more doctrinally sound, given that asymmetrical clauses have been defined as procedural power affecting the procedural rights and obligations of the parties, in addition it is at least partially

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[35] Section 52 (1)-(3) of the PILA on the law governing the substantive validity of the arbitration agreement
[36] Article V (1) a) of the New York Convention referring to the law governing the validity arbitration agreement
[37] Section 47 (2) aa) of the HAA

suitable for decreasing the risk of conflicting court decisions. Based on the above, in my opinion under the Hungarian autonomous law – as long as the legislator adopts the *de lege ferenda* suggestions mentioned above - it is better to evaluate the asymmetry of the arbitration agreement in the framework of the procedural effects of the clause and apply the choice-of-law rules set forth in Section 47 (2) aa) of the HAA.

99. Should Hungarian contract law apply to an asymmetric arbitration clause as a *lex causae,* a number of grounds for invalidity of the Hungarian Civil Code[38] may arise. An asymmetric arbitration clause in itself does not exhaust the grounds of invalidity of the Civil Code, but in case of special circumstances – for example a clause which impairs the rights of the restricted party within the arbitration proceedings (e.g. the appointment of arbitrator) – the asymmetric arbitration clause may be contrary to the law[39] or to good faith[40], or it might constitute an unfair general contractual term.[41]

9. PUBLIC POLICY

100. Finally, among the limits to the choice of international forum, public policy is also relevant to asymmetric jurisdiction and arbitration agreements. In judicial practice, the public policy constraints in the pre-adjudicative phase of the enforcement of choice of forum agreements take the form of a specific "public policy test" which is applied directly to the choice of forum agreement. The justification for this public policy test is different for asymmetric jurisdiction and arbitration agreements.

9.1. Public policy test – jurisdiction agreements

101. The public policy test for the enforcement of jurisdiction agreements falling within the scope of the Brussels-Lugano regime at the pre-adjudicative stage of dispute settlement can in principle be applied under the rules of two legal systems: national law on the one hand and EU law on the other.

9.1.1. Rejecting the public policy test based on national law

102. A test based on the public policy rules of national law should be definitely rejected, as it would completely undermine the *effet utile* and uniform application of EU law, and thus the fundamental objective of the Brussels-Lugano regime, namely legal certainty and the effectiveness of jurisdictional arrangements.

9.1.2. An "in concreto" public policy test based on EU law

103. The possibility of an *in abstracto* public policy test based on EU law should be rejected, but *in concreto* it is not appropriate to exclude it entirely. First, the Brussels regime's 'weaker party' rules cannot cover all situations in which one party is in a dominant position *vis-à-vis* the other. On the other hand, in the area of the law applicable to the substantive validity of the jurisdiction agreement *(lex fori prorogati)*, the thesis above adopted the view that the reference in Article 25 of the Brussels Ia Regulation must be understood as a narrow reference which allows the law of the chosen court to prevail only on grounds of invalidity relating to lack of consent, capacity and right of representation, but not on other rules of national law on the invalidity of contracts. The

[38] Act V of 2013 on the Hungarian Civil Code
[39] Section 6:95 of the Civil Code
[40] Section 6:96 of the Civil Code
[41] Section 6:102 of the Civil Codes

gap thus created may need to be filled in exceptional cases, and in the absence of an *in concreto* public policy test this is not possible.

104. Such an *in concreto* public policy test could be based on the general prohibition of abuse of rights, which is reflected in the case law of the CJEU in a number of cases. The *test for* controlling abuse of rights between parties in an adversarial relationship is the one developed *in Kratzer.*[42] Under the *Kratzer-test*, two cumulative conditions must be met for an abuse of rights to be established: (i) first the transaction must frustrate the purpose of the EU legislation and (ii) the primary purpose of the transaction must be to obtain an undue advantage. In my view, if the above objective and subjective conditions are satisfied in relation to a jurisdiction clause, the court seized must also refuse to enforce the jurisdiction agreement at the pre-adjudicative stage of the dispute resolution process. In my opinion, the *Kratzer-test* is also suitable for the public policy control of symmetrical and asymmetrical jurisdiction clauses, and therefore there is no justification for introducing any other special public policy test in relation to the latter.

105. Considering that the domestic legislation governing jurisdiction agreements has taken the Brussels Ia Regulation as a model, the above provisions apply accordingly to jurisdiction agreements falling within the scope of Hungarian autonomous law.

9.2. Public policy test – arbitration agreements

9.2.1. Rejection of the public policy test in the New York Convention

106. In the context of arbitration agreements falling within the scope of the New York Convention, any public policy test should be rejected at the pre-adjudicative stage of dispute resolution. On the one hand, based on the grammatical, systemic and logical interpretation of the Convention, it can be deduced that a public policy test is only possible in the post-adjudicative phase, in the context of a refusal to recognise or enforce an arbitral award. On the other hand, given that the Convention leaves room for the application of objective rules of arbitrability in the pre-adjudicatory phase and allows the rules of national law governing the substantive validity of the arbitration agreement to be applied in full, there is no reason why a public policy test should be used to prevent the enforcement of an arbitration agreement by means of additional national laws.

9.2.2. The rejection of the public policy test in Hungarian autonomous law

107. Considering that the New York Convention was the basis for the adoption of the UNCITRAL Model Law, which served as a model for the Hungarian CCP, a public policy test in the pre-adjudicative phase of dispute resolution cannot be justified in relation to arbitration agreements falling within the scope of autonomous Hungarian law. Consequently, the public policy test can be conceptually excluded in the context of asymmetric arbitration agreements.

[42] Judgment in *Case* C-423/15 *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG* (28 July 2016) ECLI:EU:C:2016:604

10. CONCLUSIONS

108. The hypothesis of the thesis was that the correct jurisprudential and practical approach in relation to asymmetric jurisdiction and arbitration clauses should be taken between the two extreme views described in detail in the thesis. For this reason, the thesis situated the asymmetric jurisdiction and arbitration agreements in the coordinate system marked by the freedom and limits of the choice of international forum, and examined in detail how (i) the requirement of certainty, (ii) the contract law limitations and (iii) public policy affect the enforcement of asymmetric choice of forum agreements.

109. The thesis concludes that the requirement of certainty is justified in the context of asymmetric jurisdiction clauses, since the predictability of the dispute settlement forum is a fundamental function of choice of forum agreements under the Brussels-Lugano regime. For this reason, the enforcement of *discretionary clauses* is not justified, while *broad and classic dissociative clauses* properly interpreted (i.e. obligation terminating formative right), and *narrow dissociative clauses* satisfy the requirement of certainty.

110. The requirement of certainty in respect of asymmetric arbitration agreements is a real problem in the context of unilateral litigation clauses. However, the problem goes back to the fundamental question of the exclusivity of the clause, so that the requirement of certainty is not a limitation because of the asymmetric nature of the clause. The thesis nevertheless concludes that the exclusion of the ordinary judicial route is not a necessary element of the arbitration clause, and that the resolution of this issue should be left to the autonomy of the parties.

111. As far as contract law limits are concerned, the thesis concludes that the asymmetric nature of the clause in the Brussels-Lugano regime is a procedural issue, where EU law provides exhaustive rules, and therefore the application of contractual limits under national law is not justified. This conclusion also applies appropriately in the context of autonomous Hungarian law.

112. Under the New York Convention and European Convention, the contractual limits of national law are applicable to asymmetric arbitration agreements. The same conclusion can be drawn for Hungarian autonomous law. Since the conflict-of-law rules of the PILA on the law applicable to arbitration agreements are subject to external and internal incongruities, a special solution is suggested: in case the seat of arbitration is in Hungary, the application of the conflict-of-law rules of the HAA as *lex specialis*, in case the seat of arbitration is abroad then *de lege ferenda* the modification of the rules of the PILA.

113. Finally, regarding public policy limits, the thesis concludes that in the context of asymmetric jurisdiction clauses in the Brussels-Lugano regime, an "in concreto" public policy test based on the EU law can be justified in the pre-adjudicative phase of dispute resolution. However, in the context of asymmetric arbitration clauses, a similar public policy test should be rejected.

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