EXPORTING JURISDICTION: HOW THE CJEU IS TURNING THE EU INTO A QUASI-ARBITRAL SPACE

Alessandra Angel Venzy Ferrari
(LL.M 26' Cornell)

Introduction

The European Union's evolving approach to jurisdiction under the Brussels Recast reveals a growing tension between deeper judicial integration and the ambition to position the Union as an attractive global forum for dispute resolution. Given the widespread use of forum-selection clauses in commercial practice, the Court of Justice of the European Union (CJEU) has transformed Article 25 into a powerful instrument of negative integration. The landmark *Inkreal* judgment marked a decisive step in this trajectory. Contrary to the Opinion of Advocate General Jean Richard de la Tour, the Court extended Article 25 to disputes lacking an objective cross-border element, effectively relaxing the traditional transnational requirement of EU judicial cooperation. In doing so, it endorsed what may be described as a "fifth freedom" within the internal market, the *free movement of lawsuits*, treating Member State courts as functionally interchangeable within an integrated judicial space. This development was further reinforced in *Cabris Investment*, where Article 25 was held applicable even when both parties were domiciled in the same third State. Together, these judgments raise pressing questions about the constitutional coherence of the Union's increasingly arbitration-like jurisdictional framework.

I. The structural evolution of EU jurisdiction under the Brussels Recast Regulation

A. The absence of a defined "international element" under Article 25 of Brussels Recast

Before delving into the analysis of the *Inkreal* judgment, which represents for some a jurisprudential *revolution*[154], it is essential to recall the context in which the caselaw emerged, that being the absence of a defined "international element" for the purposes of Article 25 of the Brussels Recast. This cross-border element is required insofar as the Brussels System can only apply "in the international order"[155], as required

[154] DRAGUIEV D., *Choice of court agreements in light of CJEU Decision in case C-566/22 Inkreal*, in "Journal of International Dispute Settlement", Volume 16, Issue 2, June 2025, p. 13.
[155] ENARD P., *Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* (OJ C, C/59, 05.03.1979), pp. 37-38.

by the 1968 Brussels Convention Preamble and the Jenard Report. However, the European Union has never provided a positive definition of such element for the purposes of the application of the Brussels Recast, nor a list of potential cross-border elements which could justify its application[156].

In this context, one could even wonder why a cross-border element needs to exist for the Recast to apply. If we consider the Brussels System as one of the European Union's means to allocate jurisdiction *between* the various Member States, one could argue that the Union is also free to define what it considers a "cross-border" case or not, as a form of expression of its power within such competence. More precisely, the answer to this question can be found in Article 81 TFEU, which is used as the legal basis for the adoption of the regulation of the Brussels System, as the provision which grants the Union the mandate to develop judicial cooperation in civil matters with cross-border implications[157]. In fact, its second paragraph states that, when necessary for the proper functioning of the internal market, measures shall be adopted to ensure the compatibility of the rules applied by Member States in matters of Conflict of Laws and jurisdiction[158]. Therefore, without a cross-border implication, the European Union is statutorily not entitled to exercise its competence.

Yet, over the years, the European Union has failed to positively define what constitutes a cross-border dispute for the purposes of the application of Article 25 of the Brussels System. Because of such a European definitional gap on "cross-border" disputes, the door was opened for the CJEU to intervene and exercise some of its interpretative power over the preliminary scope of application of the Brussels Recast in various caselaw. First, it explicitly stated the need of an "international element" for the rules of the Brussels System to be applied to a dispute. In particular, it stated so in the *Hypotečni banka*[159] and *Refcomp*[160] cases. Subsequently, the CJEU eventually provided a partially positive definition of what constitutes a cross-border dispute in a landmark case, still applicable nowadays: *Owusu*[161]. In *Owusu*, the CJEU recognized that the cross-border nature of a dispute can be both *internal* to the Union and *external*, so long as it involves at least a Member State and a non-EU Member State. Though such ruling does not expressly give a complete solution to the lack of definition of what constitutes a cross-border dispute, it still implies that the existence of two different states, as long as one of them is a Member State, is enough for the Recast to apply.

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[156] QUÉGUINER J.-S., AVOUT L., HUBER S., KINSCH P., RASS-MASSON L., SÁNCHEZ-LORENZO S., WILDERSPIN M., *Droit international privé de l'Union européenne (2022)*, in "Journal du Droit international Clunet", Number 4, Chronicle 8, October-November-December 2023

[157] BALLESTEROS M., *Questions to Debate around Choice of Court Agreements. Challenges for a Limited Reform of Article 25 of Brussels I Regulation (Recast)*, in "Cuadernos de Derecho Transnacional", Number 2, October 2023, pp. 602-628.

[158] Article 81, Treaty on the Functioning of the European Union (TFEU) (Consolidated version 2016), OJ C 202, 7.6.2016, pp. 78-79.

[159] CJEU, Judgment of November 17th, 2011, case C-327/10, *Hypoteční banka* a.s. v. *Udo Mike Lindner*.

[160] CJEU, Judgment of February 7th, 2013, case C-543/10, *Refcomp SpA* v. *Axa Corporate Solutions Assurance SA and Others*.

[161] CJEU, Judgment of March 1st, 2005, case C-281/02, *Andrew Owusu* v. *NB Jackson*.

The CJEU's evolutive caselaw has undoubtedly provided a more detailed definition on what constitutes a cross-border dispute compared to the first years of life of the Brussels Convention. Still, the definition was highly flexible under the Recast, whereas the same Court proved to be more restrictive when involving other European legal instruments such as with the 2006 Regulation creating a European order for payment procedure for uncontested claims[162].

Indeed, in the *PARKING and Interplastics* joint caselaw, the CJEU has underlined the existence of a definition of a cross-border dispute for the purposes of the 2006 Regulation. More specifically, the Court highlights that whilst the Brussels Recast does not provide such a definition, according to Article 3(1) of the 2006 Regulation[163], a cross-border dispute consists of "*a case in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised.*"[164]. The 2006 Regulation refers to the Brussels System in Article 3(2) for the purposes of defining what constitutes a "*domicile*"[165], revealing a first attempt to coordinate various European legal instruments of different areas. However, the CJEU then did not mention any coordination between the instruments regarding the definition of what is a cross-border dispute for the purposes of all European regulations but limited its judgment to simply recommending the Union to "harmonize" the matter[166]. Indeed, scholars generally referred to the need to clarify the concept of cross-border elements, not specifically in the choice-of-court agreement context, but regarding all subject-matters[167]. This led to uncertainty in the field of application of the Brussels Recast and the role of forum-selection agreements as potential "international elements". Indeed, the Brussels System remained completely silent on the case of purely domestic contracts and their artificial internationalization via party autonomy in concluding a forum-selection agreement.

The CJEU further underlined that the assessment of the cross-border element does not depend on the case's connection with the jurisdictions of two different Member States, whether through the domicile of the parties or the subject-matter of the dispute, but with the implication of various states, including non-EU Member States, as long as one Member State is involved in the dispute. A few years after the pivotal shift of the *Owusu* caselaw, the CJEU provided the European Union and its Recast with a new interpretation

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162 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L 399, pp. 1–32.

163 Article 3(1), 2006 Regulation on payment procedure, stating: "For the purposes of this Regulation, a cross-border case is *one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised*.".

164 CJEU, Judgment of May 7th, 2020, case C-267/19 (joint case C-323/19), *PARKING d.o.o. and Interplastics s.r.o.* v. *SAWAL d.o.o. and Letifico d.o.o.*, para. 33.

165 Article 3(2), 2006 Regulation on payment procedure, stating: *"Domicile shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.".*

166 Case C-267/19, *PARKING and Interplastics*, op. cit., para. 35.

167 See in general HESS B., *Reforming the Brussels Ibis Regulation: Perspectives and Prospects*, in MPILux Research Paper Series, Number 4, 2021, pp.1-16.

of what constitutes a cross-border dispute. After the 2022 *EPIC Financial Consulting* case[168], the CJEU further confirmed the cases constituting a cross-border dispute under the Brussels Recast along the lines of the *Owusu* jurisprudence. Therefore, a cross-border dispute could result from a case including either various Member States or including one Member State only, under the condition that an international element results from the implication of a third State[169].

Though the *EPIC Financial Consulting* case does reconfirm and precise the *Owusu* holding, still, it does not offer legal support for the hypothesis of the *Inkreal* ruling given that the only cross-border element of *Inkreal* consists in a forum-selection agreement in favor of Member State, included in a purely domestic contract located in another Member State. Because a forum-selection agreement results from the autonomy of parties, and is therefore *subjective*, it does not fully correspond to the *Owusu* holding which dealt with an *objective* international element located in a third state and corresponding to a tort committed in its territory.

Retrospectively, in 2024, Horatia Muir Watt referred to Louis d'Avout's 2017 article on the *Vinyls ItaliaSpA* caselaw[170], and its criticism over the Court's overreaching decision in the field of internationality of contracts for the purposes of the application of the Recast. Louis d'Avout indeed questioned back then: "*Will it be said tomorrow, following the liberal spirit of the Court of Justice, that a jurisdiction clause included in a domestically internal contract that has been artificially internationalized indeed falls under private international law and the effective regime, such as that of the Brussels I Regulation?*"[171].

Fortunately for some and less for others, the prophecy did occur and the CJEU eventually decided to rule on such question. It expressed its decision in a far-reaching judgment of February 8th, 2024, under the daunting name of *Inkreal* v. *Dúha reality* (C-566/22).

B. Inkreal (C-566/22): Jurisdiction without an objective cross-border element

Understanding the EU's failure to provide a positive definition of what constitutes an international element for purposes of its application allowed us to set the background for a case such as *Inkreal* to emerge. Taking place before the Czech jurisdictions, the lawsuit involving Inkreal and Dúha reality, two litigants located in Slovakia, refers to a

168 CJEU, Judgment of July 14th, 2022, case C-274/21, *EPIC Financial Consulting Ges.m.b.H.* v. *Republik Österreich and Bundesbeschaffung GmbH*, para. 57.

169 Similar caselaw is CJEU, Judgment of May 7th, 2020, case C-641/18, *LG* v. *Rina SpA and Ente Registro Italiano Navale*, para. 25.

170 CJEU, Judgment of June 8th, 2017, case C-54/16, *Vinyls Italia SpA* v. *Mediterranea di Navigazione SpA*.

171 BUREAU D., MUIR WATT H., *La désignation d'une juridiction étrangère dans un contrat entre parties établies dans un même État membre relève de l'article 25 du règlement Bruxelles I bis*, in "Revue critique de droit international privé", 2024, p. 348, quoting Louis d'Avout's note on the C-54/16 *Vynils Italia SpA* v. *Mediterranea di Navigazione SpA* caselaw (translated in English).

forum-selection clause inserted in their contract which conferred jurisdiction upon the Czech courts. Surprised by such clause, and notably by the fact that the dispute in cause was purely domestic to Slovakia, the Czech judge referred the following preliminary question to the Luxembourg judge: "*From the perspective of the existence of an international element, which is required for [Regulation No 1215/2012] to apply, [can] the application of [that regulation] be based solely on the fact that two parties with their seat in the same Member State agree on the jurisdiction of courts of another EU Member State?"*[172].

At first glance, the Czech courts are seeking confirmation of their jurisdictional power in this particular dispute. In fact, the Czech courts reasonably doubted the enforceability of a forum-selection agreement in favor of their courts provided that they did not hold any link with the dispute. However, the CJEU, in the previous *Zelger* ruling, relative to the 1968 Brussels Convention, had confirmed that no objective connection is required between the legal relationship and the chosen court for the purposes of then Article 17[173]. Therefore, the question dwelled not upon the fact that parties were designating a jurisdiction *external* to their dispute, but rather the fact that the only international element present in the matter at stake is the forum-selection agreement.

Despite depicting a clear framework for the question referred by the Czech Supreme Court, the Advocate General Jean Richard de la Tour's Advisory Opinion was rejected outright by the CJEU in its *Inkreal* judgment. Scholars have noted that this preliminary reference represents the first opportunity for the CJEU to rule on the provisions related to the internationality of forum-selection agreements[174]. Whilst the Court here ruled in the opposite direction recommended by the Advocate General, it nonetheless clarified the concept of what constitutes a "cross-border" situation when the elements of the relationship are located in the same Member State and the parties have agreed that a court, or the courts of other Member States, have jurisdiction via a forum-selection agreement.

The First Chamber of the CJEU answered the preliminary reference brought by the Czech Supreme Court and responded to the preliminary reference as follows: "Article 25(1) of 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 must be interpreted as meaning that *an agreement conferring jurisdiction by which the parties to a contract who are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle*

[172] C-566/22, *Inkreal s.r.o.* v. *Dúha reality s.r.o.*, para. 13. Note that a similar preliminary reference had been introduced a few years earlier in a Portuguese lawsuit. See CJEU, case C-136/16, *Sociedade Metropolitana de Deselvolvimento, S.A.* v. *Banco Santander Totta, S.A.*, (preliminary reference withdrawn).

[173] CJEU, Judgment of January 17th, 1980, case C-56/79, *Siegfried Zelger* v. *Sebastiano Salinitri*, para. 4.

[174] See generally LESCURE K., *L'existence d'une clause attributive de juridiction constitue en soi un élément d'extranéité suffisant pour entraîner l'application de Bruxelles I bis*, in "La Semaine Juridique Notariale et Immobilière", Number 10, Act. 381, March 8th, 2024.

disputes arising out of that contract is covered under that provision, even if that contract has no other connection with that other Member State."[175].

In other words, the Court plainly affirmed that, in the context of the application of Article 25 of the Brussels Recast, parties exclusively located in the same Member State can extend jurisdiction via a forum-selection agreement to another Member State, without any connection to the designated Member State, or any other international element. Such ruling was particularly unexpected for it included the extension of the Brussels Recast's jurisdictional rules to purely domestic disputes. Indeed, Olivia Lopes Pegna underlined in 2018 that we could "*imagine resistance from Member States to an extension of the Union's competences inward (that is, in relation to domestic matters)"* but that such resistance would probably not apply *"to extending the notion of cross border dispute beyond the Union's borders"*[176].

Concretely, the judges in the *Inkreal* ruling justify their reasoning in light of the objectives of upholding party autonomy and promoting legal certainty, recognizing the internationalizing function of the forum-selection agreement in favor of the jurisdiction of the Czech courts in the case of a purely Slovakian domestic case. Where an objective international element was previously required, now a subjective international element is deemed sufficient. Undoubtedly, the lack of a clear definition of what constitutes an "international element" under the Recast has enabled the Court to interpret the presence of a forum-selection clause, even in a purely domestic contract, as sufficient to trigger the Regulation. From an *epistemological* perspective, Horatia Muir Watt argued that the silence of Article 25 almost compels such an interpretation. Therefore, the CJEU was given the discretion to recognize a mere forum-selection agreement as enough of an international element to apply the Brussels Recast[177]. However, it did find some legal basis for its justification under party autonomy, along with the need to strengthen the enforcement of forum-selection agreements, as recalled by the Recitals of the Recast.

C. Cabris Investment (C-540/24): Consolidating the exportation of EU jurisdiction

Before turning to the broader effects of *Inkreal*, it is important to observe that the Court has since reinforced and extended its logic[178]. In *Cabris Investment*, decided on October 9th, 2025, the CJEU confirmed that Article 25 of the Brussels Recast also applies

[175] C-566/22, *Inkreal s.r.o.* v. *Dúha reality s.r.o.*, para. 40 (emphasis added).
[176] LOPES PEGNA, *La nozione di controversia "transfrontaliera" nel processo di armonizzazione delle norme di procedura civile degli Stati Membri dell'Unione europea*, in "Rivista di diritto internazionale privato e processuale", Number 4, 2018, p. 922 (translated in English from Italian).
[177] LESCURE K., *L'existence d'une clause attributive de juridiction constitue en soi un élément d'extranéité suffisant pour entraîner l'application de Bruxelles I bis*, op. cit.
[178] OKUR S., *CJEU, Case C-540/24, Cabris Investments Ltd v. Revetas Capital Advisors LLP: Jurisdiction Clause in Favour of an EU Court is Subject to Art. 25 Brussels Ibis Regulation even if Both Parties are Domiciled in the Same Third State*, Conflict of Laws.net, October 13th, 2025, https://conflictoflaws.net/2025/cjeu-case-c-540-24-cabris-investment-jurisdiction-clause-in-favour-of-eu-court-is-subject-to-art-25-brussels-ia-even-if-both-parties-are-domiciled-in-the-same-third-state/, February 2026.

where the parties to a contract are both domiciled in the same third State, in that case the United Kingdom, and designate the courts of a Member State as competent to hear their disputes. The Court held that such an agreement "*falls within the scope of [Article 25], even if the underlying contract has no further connection with the Member State chosen as the place of jurisdiction*."[179].

As in *Inkreal*, both parties were domiciled in a single State. However, the decisive distinction was that this State was the United Kingdom, now a third State, and the sole link with the European Union derived from the parties' designation of the Vienna commercial court[180]. The internationality of the dispute thus rested entirely on the subjective will of the parties, not on any objective territorial or factual connection to the chosen Member State, alike in *Inkreal*. By adopting this reasoning, the Court effectively read *Cabris* through the combined lens of *Owusu* and *Inkreal*: *Owusu* had already established that the Brussels System may apply where a Member State is involved alongside a third State, while *Inkreal* clarified that party autonomy can itself generate the relevant cross-border element. *Cabris* merges these strands and confirms that Article 25 may be triggered even where the underlying contractual relationship is entirely *external* to the Union, provided that a Member State court is chosen.

Cabris therefore does not qualify or limit *Inkreal* but rather consolidates and externalizes it, which contributes to this article's theory. If *Inkreal* internalized jurisdictional mobility within the Union by allowing purely domestic disputes to be "*Europeanized*" through party autonomy, *Cabris* confirms that the same logic permits the exportation of EU jurisdiction beyond its territorial boundaries, implying a possible arbitration-like feature of the EU jurisdictional forum. Article 25 thus emerges not merely as a rule of allocation among Member States, but as a gateway through which EU jurisdiction can be projected outward, further entrenching the Union's evolution toward a quasi-arbitral judicial space.

II. Inkreal and Cabris as instruments of jurisdictional integration

A. Jurisdiction as a "fifth freedom": The integrationist potential of Article 25

Through *Inkreal* and its consolidations in *Cabris Investment*, the CJEU has explicitly recognized the internationalizing role of forum-selection agreements designating the courts of another Member State, even where the underlying dispute is purely domestic or entirely external to the Union. By accepting party autonomy as sufficient to generate the relevant cross-border element, the Court has transformed Article

[179] CJEU, Judgment of October 9th, 2025, case C-540/24, *Cabris Investments Ltd* v *Revetas Capital Advisors LLP*, operative part of the judgment.

[180] This trend mirrors the increasing selection of specialized European commercial courts by foreign litigants (see footnote 33).

25 into a mechanism through which disputes may circulate freely *within*, and now even *toward*, the European judicial space.

While this shift undoubtedly affects the substantive outcome of individual disputes, its deeper significance lies at the constitutional level. The Founding Treaties established the internal market upon four classical freedoms, which include the free movement of goods, persons, services, and capital, designed to dismantle regulatory barriers and promote economic integration. *Inkreal* and *Cabris* together suggest the emergence of a parallel dynamic: *the free movement of lawsuits*[181]. Jurisdiction itself becomes mobile, litigants are no longer confined to the forum naturally linked to their dispute; instead, they may reallocate adjudicative authority within the Union through contractual choice. In this sense, Article 25 of the Brussels Recast operates as a vector of integration, enabling the circulation not of economic factors but rather of adjudicative power.

At first glance, such a "fifth freedom" may appear as a logical extension of the internal market's integrationist ambition. If economic actors are free to move, contract, invest and provide services across borders, why should they not also be free to select the judicial forum best suited to their needs? Yet this development simultaneously reveals the assertive role of the CJEU in advancing what is commonly described as negative integration. Unlike positive integration, which requires legislative harmonization through political processes, negative integration proceeds through judicial interpretation, dismantling national constraints without necessarily replacing them with a uniform regulatory framework[182].

By expansively interpreting Article 25, the Court has effectively removed the territorial limits that once confined the Brussels regime to objectively cross-border situations. In doing so, it has extended the functional reach of EU jurisdiction without corresponding legislative intervention clarifying the scope of Article 81 TFEU. This dynamic recalls earlier moments in the Union's constitutional evolution, such as the recognition of *implied external competences*, where the Court expanded the Union's authority through interpretative reasoning rather than express Treaty amendment[183]. The integration achieved through *Inkreal* and *Cabris* is therefore not merely procedural. It redistributes adjudicative authority within the Union and projects it outward, reinforcing the idea that Member State courts form an *interchangeable* and *integrated* judicial area[184]. Whether this judicial mobility strengthens the internal market or unsettles the

[181] See generally KIRÁLY M., *Forum à la carte: Free movement of lawsuits in the EU after Inkreal?*, in "Common Market Law Review", 2025, pp. 187-.
[182] SCHÜTZE R., *Free Movement of Goods I: Negative Integration*. European Union Law, 2013-2025, https://european-union-law.schutze.eu/chapter/free-movement-of-goods-i-negative-integration/content/, January 2026.
[183] See generally CJEU, Judgment of March 31st, 1971, case C-22/70, *Commission* v. *Council (ERTA)*.
[184] See generally BUREAU D., MUIR WATT H., *Inkreal: Jurisdictional Barrier-crossing in Domestic Cases: A Threefold Critique*, EAPIL, March 1st, 2024, https://eapil.org/2024/03/01/inkreal-jurisdictional-barrier crossing-in-domestic-cases-a-threefold-critique/, February 2026.

constitutional balance between Union competence and Member State sovereignty remains one of the central questions raised by this emergent "fifth freedom".

B. The costs of jurisdictional expansion: legitimacy, predictability, and constitutional balance

If *Inkreal* and *Cabris* may be read as consolidating a form of "jurisdictional integration" within the Union, the constitutional implications of such expansion cannot be ignored. The recognition of party autonomy as sufficient to internationalize an otherwise purely domestic dispute strengthens the integrative logic identified above. Yet the same movement simultaneously raises concerns regarding legitimacy, predictability, and the equilibrium between Union integration and Member State sovereignty. From a functional perspective, the broadened interpretation of Article 25 of the Brussels Recast offers tangible advantages. The ability to designate the courts of another Member State may reflect legitimate commercial considerations such as alignment with the nationality of shareholders or directors, as illustrated in the facts of *Inkreal*[185], recourse to specialized commercial courts[186], procedural efficiency, linguistic convenience, or even desire to avoid a domestic system perceived as lacking quality of independence[187]. In this sense, party autonomy operates as an instrument of rational economic organization within an integrated judicial area.

Moreover, while critics warn that such an approach may intensify forum shopping in the short term[188], a longer-term perspective suggests a more nuanced dynamic. Persistent diversion of cases away from certain jurisdictions could operate as a signal of structural deficiencies, encouraging institutional reform and regulatory convergence. Judicial mobility might thus function as a subtle mechanism of market self-correction, fostering higher standards of transparency, efficiency and judicial independence across the Union[189]. The *interchangeability* of European forums marks a significant doctrinal shift. Unlike international arbitration, where the seat remains characterized by *distinctive* procedural frameworks, supervisory courts, and legal traditions, the logic emerging from Article 25 presupposes a functional *equivalence* among Member State courts, grounded in the fundamental European principles of mutual trust and automatic recognition[190]. The choice of forum within the Union is thereby neutralized in constitutional terms as it is no

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[185] WELLER M., *Choice of Court Agreements – Old Issues and Recent Developments: Delineating EU Law from Member State Law – The Latest from the CJEU on Choice of Court Agreements (Inkreal, Lastre, Maersk)*, in "Yearbook of Private International Law", Vol. 26 (2024/2025), p. 113.
[186] DRAGUIEV D., op. cit., p. 14, underlining how many jurisdictions have now created special courts for international disputes such as the *Netherlands Commercial Court for international business disputes* based in Amsterdam, the *German commercial courts* based in Stuttgart and Manheim, and the *Brussels International Business Court*, which all operate in English language to ensure attractiveness of foreign litigants.
[187] WELLER M., op. cit., p. 114.
[188] DRAGUIEV D., op. cit., p. 1, arguing that *Inkreal* "opens a door for forum selection within the EU".
[189] WELLER M., op. cit., p. 114 and KIRÁLY M., op. cit., p. 193.
[190] See generally BOHÁČEK L., *Mutual trust in EU law : trust 'in what' and 'between whom'?*, in "European journal of legal studies", 2022, Vol. 14, No. 1, pp. 103-140.

longer an exception justified by objective cross-border elements, but an exercise of mobility within a supposedly homogeneous judicial space.

Such reasoning, however, sits uneasily with the broader architecture of private international law. The contrast with the 2005 Hague Convention on Choice-of-Court Agreements illustrates this tension. While the Hague regime adopts a more restrained approach to internationality in a multilateral context of sovereign equality, the Union's interpretation under *Inkreal* appears more expansive. For some commentators, this incoherence weakens the systematic consistency of the EU's external and internal judicial cooperation. Others, including Weller, argue that had the EU legislature intended to exclude purely subjective internationalization, it would have done so expressly, as the Hague Conference did[191]. Yet the comparison is not as straightforward insofar as the Hague Conference operates in a horizontal multilateral framework, whereas the European Union constitutes a vertically integrated legal order. Member States may therefore accept broader jurisdictional mobility within the Union, precisely because they participate in a shared constitutional structure. Nonetheless, the reliance on mutual trust cannot entirely eclipse the sovereignty dimension of adjudicative authority of each Member State. Jurisdiction should remain, to some extent, a pure expression of public power.

Therefore, *Inkreal* and *Cabris* thus do more than expand Article 25; they subtly reshape the nature of judicial cooperation within the Union. When jurisdiction may now be freely designated without objective territorial links, adjudicative authority begins to resemble a matter of contractual allocation rather than sovereign attachment. This development invites a reconsideration of Article 25 through a different lens, one that draws a functional analogy with the field of arbitration.

III. <u>From judicial cooperation to quasi-arbitration: Re-reading Article 25</u>

A. Why arbitration is the right analogy for the EU's jurisdictional turn

If *Inkreal* and *Cabris* reveal a shift from territorially anchored jurisdiction toward party-driven allocation of adjudicative authority, the arbitration analogy becomes more than illustrative but rather structurally revealing. Similarly to arbitration, forum-selection under Article 25 operates as a private enforcement mechanism, generally embedded in a contractual clause and designed to satisfy the parties' strategic interests in dispute resolution. The context in which this evolution occurs is not neutral. In recent years, certain Member States have witnessed a decline in public trust in their judicial institutions following political and constitutional tensions, notably Poland and Hungary, both of which have experienced significant decreases in their rule of law scores (respectively -2.4% and -1.4%) according to the *World Justice Project Rule of Law Index*[192]. In such circumstances, the ability to designate a foreign forum may be perceived as a safeguard

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[191] WELLER M., op. cit., p. 103.

[192] WORLD JUSTICE PROJECT, *European Union's Top Court Rules Against Hungary and Poland in Rule of Law Showdown*, World Justice Project (16 Feb. 2022).

of judicial independence. The choice of jurisdiction, much like that of arbitration, becomes a mechanism for securing neutrality, predictability and institutional reliability within an integrated judicial space.

From the perspective of the parties, the functional objectives of arbitration and forum-selection often converge. Both mechanisms aim to secure a neutral decision-maker, procedural efficiency, and a favorable normative environment. It may even be argued that where parties choose jurisdiction rather than arbitration, they may be constrained by subject-matter limitations preventing recourse to arbitration, since arbitration depends on the sovereign's decision to delegate certain disputes to private adjudication. In many national systems, moreover, the qualification of arbitration as "international" presupposes the existence of a cross-border element[193]. By contrast, following *Inkreal*, Article 25 permits the internationalization of a purely domestic dispute through the sole will of the parties. The threshold of objective internationality, previously central to the Brussels regime and to Article 81 TFEU, is thereby attenuated.

At the same time, similarly to arbitration, this development raises concerns of access and equality. While sophisticated commercial actors may strategically allocate jurisdiction across the Union, more economically vulnerable litigants may lack the resources to pursue litigation abroad and remain bound to domestic systems of lower perceived quality. Arbitration has long been criticized for privileging well-resourced parties capable of bearing the costs of international proceedings; the expanded use of Article 25 risks producing comparable asymmetries within the judicial sphere. Although the Brussels Recast provides protective mechanisms for consumers, insured parties and employees (at Section 3, 4 and 5 of the instrument), not all litigants benefit from such safeguards. The expansion of party autonomy thus risks reinforcing structural asymmetries within the judicial marketplace that *Inkreal* has helped consolidate.

The growing proximity between arbitration and jurisdiction is increasingly acknowledged in private international law scholarship. Arbitration remains formally excluded from the scope of the Brussels Recast[194] and continues to be governed primarily by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[195]. Nevertheless, *Inkreal* significantly broadens party autonomy in jurisdictional matters in a manner reminiscent of arbitral practice. By selecting a forum, parties indirectly influence the applicable law, procedural framework, and relevant public policy standards. The choice-of-forum becomes a strategic tool capable of shaping the substantive outcome of the dispute. Traditionally, the Brussels System, as reflected in Article 81 TFEU, the Recitals of the Recast, and earlier interpretative materials such as

[193] For example, the French Code of Civil Procedure states at Article 1504 that "*An arbitration is international when it involves the interests of international commerce*" (translated in English from French), yet this article is subject to reform to include in its definition broader "international economic interests".
[194] Article 1(2)(d), Brussels Recast, which states: "*This Regulation shall not apply to: [...] arbitration; [...]*".
[195] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June, 1958, 330 U.N.T.S. 3 (New York Convention).

the Jenard and Schlosser Reports, presupposed the existence of a cross-border dispute. In *Inkreal*, however, the Court accepted a mere forum-selection clause in favor of another Member State as sufficient to generate the international element required for the application of the Regulation. The parties were thus permitted to construct internationality subjectively, bypassing the objective threshold that had previously structured the System. In doing so, the Court reinforced the logic of *interchangeability* already identified above: Member State courts are treated as functionally equivalent adjudicative fora within a common judicial area sustained by mutual trust.

Philippine Blajan accordingly compares the designation of a neutral judge, such as in *Inkreal*, to the appointment of a "public arbitrator"[196]. Arbitration's core function lies in enabling parties to remove their dispute from the ordinary jurisdiction of state courts and entrust it to privately appointed adjudicators. Forum-selection agreements under Article 25 do not privatize dispute resolution, yet they partially replicate this emancipatory dynamic by allowing parties to evade the "natural" judge and to designate a different sovereign court. The judge selected pursuant to Article 25 thus occupies a hybrid position: at once an organ of state sovereignty and an authority contractually designated by private actors. Blajan further observes that arbitration is becoming more jurisdictional, while jurisdiction is becoming increasingly contractual, if not quasi-arbitral. *Inkreal* exemplifies this convergence. The decision contributes to transforming Article 25 from a coordinating device within judicial cooperation into a mechanism of contractual allocation of adjudicative authority. The choice of a Czech court in a purely domestic dispute, as in *Inkreal*, illustrates how jurisdiction may now function analogously to the designation of an arbitral seat.

The comparison may be illuminated by reference to the UNCITRAL Model Law on International Commercial Arbitration. Article 1(3)(b)(i) of the 2006 Model Law provides that arbitration is "international" where "*one of the following places is situated outside the State in which the parties have their places of business: the place of arbitration if determined in, or pursuant to, the arbitration agreement.*". The will of the parties may therefore suffice to internationalize proceedings even where the substantive relationship is entirely domestic. Formally, this resembles the subjective internationalization endorsed in *Inkreal*[197]. Yet the structural foundations differ profoundly. Arbitration exists only insofar as States consent to surrender certain disputes to an extrajudicial mechanism; its authority ultimately derives from national law and remains subject to judicial supervision at the seat. Jurisdiction, by contrast, constitutes a direct emanation of sovereign power. Within the European Union, however, this sovereign allocation is no longer exclusively national. Through the Brussels regime, a supranational legal order effectively authorizes the extraction of a dispute from one Member State's adjudicative sphere and its attribution to another, even absent objective

[196] BLAJAN P., *La combinaison des autonomies en droit international privé des contrats. Étude des intéractions entre la clause de choix de juridiction et la clause de choix de loi*, Vareilles-Sommières Pascal (dir.), Thèse de doctorat, Université Paris 1 Panthéon-Sorbonne, 2021, p.357.
[197] DRAGUIEV D., op. cit., p. 11.

territorial links. What in arbitration results from sovereign delegation to private actors, in the Union results from supranational redistribution of public authority.

The arbitration analogy therefore exposes the deeper constitutional transformation initiated by *Inkreal*. Article 25 no longer merely coordinates jurisdiction in cross-border situations; it enables the contractual reallocation of sovereign adjudicative power within an integrated judicial space. While sustained by mutual trust and internal market logic, this evolution pushes judicial cooperation toward a quasi-arbitral model, one that challenges traditional understandings of territoriality, competence, and the limits imposed by Article 81 TFEU.

B. Procedural safeguards missing from the EU's quasi-arbitral design

If *Inkreal* contributes to the emergence of a quasi-arbitral allocation of jurisdiction within the Union, it does so without the procedural safeguards that typically accompany comparable mechanisms elsewhere. The Brussels System was never designed to promote judicial competition; yet the combined effect of *Inkreal* and *Cabris* undeniably encourages it. Crucially, the Regulation does not contain a reasonableness or connection requirement capable of tempering party autonomy. A useful comparison may be drawn with United States jurisprudence. In *The Bremen* v. *Zapata Off-Shore Company* caselaw[198], the Supreme Court rejected the traditional "ouster" rationale and held that forum-selection clauses in international commercial agreements concluded between sophisticated parties are *presumptively enforceable*, provided they are reasonable and not contrary to public policy[199]. The selected forum itself need not possess an objective connection to the dispute; rather, the agreement must not be unconscionable in the contractual sense. Enforcement may be refused where the clause results from fraud, overreaching, or where litigation in the chosen forum would be gravely difficult or unfair[200]. Although the burden placed on the challenging party remains heavy, the *reasonableness* test nevertheless operates as a corrective mechanism.

Notably, *The Bremen* suggested that resolving "essentially local disputes in a remote alien forum" might be unreasonable[201]. In practice, U.S. courts do not systematically require a substantial connection between the forum and the dispute, in a manner that partially resembles *Inkreal*. However, the doctrine still allows consideration of factors such as denial of an effective remedy, serious inconvenience amounting to a loss of one's day in court, abuse of economic power, or incompatibility with due process or public policy. Even if its contours remain uncertain[202], the American framework

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[198] *The Bremen* v. *Zapata Off-Shore Co*., 407 U.S. 1 (1972).
[199] COYLE J., *"Contractually Valid" Forum Selection Clauses*, in "Iowa Law Review", 2022, p. 165.
[200] LAGERMAN L., *Choice of Forum Clauses in International Contracts: What is Unjust and Unreasonable*, in "International Lawyer", Number 4, 1978, p. 790.
[201] BUXBAUM, H., *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, in "Willamette Journal of International Law & Dispute Resolution", Number 12, 2004, p. 195.
[202] FERNANDEZ N., *Enforcement of Forum Selection Clauses in Transnational Contracts,* op. cit., p. 289.

provides a discretionary safety valve which is instead absent from the Brussels regime. Indeed, such a *reasonableness* standard would sit uneasily within the EU system. It would require Member State courts to exercise discretionary powers that conflict with the objective of uniformity and predictability underlying the Brussels Recast. The CJEU has consistently resisted discretionary doctrines. In particular, it has excluded the application of *forum non conveniens*[203]. The *Owusu* judgment is illustrative: the Court prohibited an English court from declining jurisdiction under Article 2 of the Convention (now Article 4 of the Recast), despite the dispute's stronger connection to Jamaica, for it was deemed incompatible with the principles of predictability and mutual trust underpinning the Brussels System[204].

Owusu therefore prepared the structural terrain upon which *Inkreal* could later emerge. If a court of the defendant's domicile cannot decline jurisdiction even in favor of a third State, a court designated under Article 25 likewise lacks discretion to refuse jurisdiction on grounds of weak connection. The absence of both a *reasonableness* test and a *forum non conveniens* doctrine reinforces the automaticity of party-designated jurisdiction. In this sense, the EU's quasi-arbitral turn is more rigid than arbitration itself. This raises a broader question: if Member State courts are increasingly treated as *interchangeable* adjudicative fora, will the Union ultimately move toward further harmonization of procedural rules in order to sustain this interchangeability? *Inkreal* strengthens mobility, but it leaves untouched the structural diversity of national procedural systems, creating therefore a tension within the framework that may intensify over time[205].

C. Codification or containment? Rethinking the future of EU jurisdiction

The transformative implications of *Inkreal* have not gone unnoticed. At a Round Table held on July 8th, 2025, it was suggested that the evolution of the Brussels Recast does not herald a revolution, but rather a "kosher development" whose consequences must now be carefully assessed[206]. The European Commission has announced the preparation of a Report on the application of the Brussels Recast, expected by the end of 2027. This evaluation will likely consider not only procedural effects but also the broader socio-economic impact of Article 25 as interpreted by the Court, with a possible reform horizon extending toward 2030.

Yet technical adjustment may not suffice. *Inkreal* raises a constitutional issue concerning the scope of Article 81 TFEU, which conditions judicial cooperation on cross-border implications. By accepting a purely subjective element, the parties' will, as

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[203] According to LII, *Forum non conveniens*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/forum_non_conveniens, February 2026.
[204] CJEU, Judgment of March 1st, 2005, case C-281/02, *Andrew Owusu* v. *NB Jackson*, para. 46.
[205] See generally KIRÁLY M., op. cit.
[206] Virtual Roundtable on the Commission's Report on the Brussels Ia Regulation, hosted by ConflictofLaws.net, 8 July 2025, with Andrew Dickinson (University of Oxford), Stefano Dominelli (University of Genoa), Pietro Franzina (Catholic University of the Sacred Heart, Milan), Thalia Kruger (University of Antwerp), and Tobias Lutzi (University of Augsburg) (author in attendance).

sufficient to establish internationality, the Court has expanded the functional reach of Union competence. Any future reform must therefore clarify the contours of this competence and determine whether subjective internationalization is to be codified, limited, or recalibrated. Legislative intervention could take several forms. One possibility would be the introduction of a narrowly tailored procedural safeguard, analogous though not identical to a *reasonableness* mechanism, ensuring that jurisdiction is not allocated to a forum entirely unrelated to the dispute. Such a safeguard would need to balance party autonomy with respect for Member State sovereignty and avoid undermining predictability. The objective would not be to replicate arbitration, but to prevent the Brussels System from evolving into an unqualified quasi-arbitral regime.

Ultimately, while the protection of party autonomy and the promotion of legal certainty in an integrated market are legitimate aims, they cannot justify the construction of a framework that risks constitutional incoherence. The challenge ahead is therefore not whether to preserve Article 25's integrative potential, but how to contain it within a coherent institutional and constitutional architecture.