

COEXISTING AND CONFLICTING JURISDICTION AND ARBITRATION CLAUSES

RICHARD GARNETT*

A. INTRODUCTION

In most international contracts, parties and their legal advisers strive to keep the process of dispute resolution as clear and straightforward as possible by choosing either one exclusive method of dispute resolution (normally arbitration or litigation) or creating a multi-stage or multi-tiered procedure (eg negotiation, followed by mediation and then arbitration or litigation) with each method following the other in a clearly defined sequence.

While issues can often arise as to the interpretation and enforceability of such dispute resolution agreements, the scope for complexity and confusion is much greater where parties have included potentially *conflicting* dispute resolution clauses in a contract. The focus of this article will be on the situation where jurisdiction and arbitration clauses or rights to litigate and arbitrate are both included in a single contract and how common law courts have responded to this issue.

While the weight of scholarly and judicial authority appears to support the view that in the case of a true conflict between the clauses, arbitration should prevail over litigation,¹ the rationale for such an approach is not always clear. While at times courts and writers have emphasised the need to give effect to the

* Professor of Law, the University of Melbourne and Consultant, Herbert Smith Freehills. The author wishes to acknowledge the assistance of Kathryn Howard in the preparation of this article.

¹ See eg D Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2nd edn, 2010), [4.81], who describes the outcome as “a commonsense solution”; G Born, *International Commercial Arbitration* (Kluwer, 2009), 683–87; N Pengelley, “Conflicting Dispute Resolution Clauses: The Rule in *Paul Smith* Revisited” in R Kalyani (ed), *Arbitration Awards: Demystifying the Myth* (Amicus Books, 2009), 96; M Molfa, “Pathological Arbitration Clauses and the Conflict of Laws” (2007) 37 *Hong Kong Law Journal* 161, 176–78. But, for contrary views, see S Brekoulakis, “The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements” (2007) 24 *Journal of International Arbitration* 341 and P Tan, “Between Competing Jurisdiction Clauses: A Pro-Arbitration Bias” [2011] *Lloyd’s Maritime and Commercial Law Quarterly* 15. L Craig, W Park and J Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 3rd edn, 2000), 128 and Fouchard, Gaillard and Goldman, *International Commercial Arbitration* (Kluwer Law International, 1999), 270 appear to take a middle view in the debate, while recognising that where there is a flagrant contradiction between jurisdiction and arbitration clauses in a contract, the arbitration clause will be void.

intentions of the parties, on occasions an implicit or explicit policy in favour of arbitration appears to have been adopted. While there is an undoubted international trend, both legislatively and judicially, in support of arbitration, such a policy should, in principle, remain subordinate to the ultimate will of the parties, even if at times this will is slightly awkwardly expressed. Hence in principle, where parties include a jurisdiction clause in a contract (at least where it is exclusive or mandatory in effect) as well as an arbitration clause, the process for determining which of the clauses is to be given priority must be neutral and even handed, relying on the parties' wording as far as possible. Simply upholding the arbitration clause based on some vague notion of superiority of the arbitral process is unacceptable.²

International instruments such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 UNCTRAL Model Law on International Commercial Arbitration have certainly reinforced the legal status and position of arbitration by, for example, providing for compulsory stay/dismissal of court proceedings brought in breach of an arbitration agreement³ and limited grounds for review or non-enforcement of arbitral awards.⁴ Yet neither of these texts (nor associated national arbitration statutes) specifically addresses the situation where parties choose both jurisdiction and arbitration; such a conundrum must be resolved by courts using principles of contractual interpretation rather than contemporary notions of amiability towards arbitration.

Moreover, it is also often forgotten that exclusive jurisdiction clauses themselves are today almost always enforced in common law countries – arguments of convenience to avoid such a clause are now given little weight.⁵ This trend will only be enhanced once the 2005 Hague Convention on Choice of Court Agreements comes into force – with its very limited grounds for non-recognition of exclusive jurisdiction clauses.⁶ The Convention will hopefully create “a coherent international framework securing the enforcement of jurisdiction agreements”,⁷ in the same manner as the New York Convention has done for arbitration agreements. The result will therefore be to place exclusive jurisdiction clauses on the same level as arbitration clauses.

So, when both jurisdiction and arbitration clauses are inserted in an agreement it is arguably unjustified to favour arbitration simply based on some

² Brekoulakis, *ibid.*, 354.

³ See New York Convention Art II; Model Law Art 8.

⁴ See New York Convention Art V; Model Law Arts 34, 35–36.

⁵ See eg, in the Australian context, *Global Partners Fund v Babcock & Brown* [2010] NSWCA 196; 79 ACSR 383 and in England, *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 (HL), and generally, R Garnett, “Jurisdiction Clauses since *Aka*” (2013) 87 *Australian Law Journal* 134.

⁶ See especially Arts 5 and 6.

⁷ Brekoulakis, *supra* n 1, 354.

notion of abstract superiority or to describe (as some commentators do⁸) the choice of both such clauses as “pathological” which can only be “cured” by ignoring the jurisdiction clause and requiring the parties to resort to arbitration.

This article examines the decisions which have considered the interrelationship between jurisdiction and arbitration clauses and aims to provide workable and balanced solutions to possible conflicts, by giving priority to parties’ intentions where possible.

B. CONTRACTUALLY EXPRESSED PRIORITY

1. Expressed Priority of Arbitration over Litigation/Litigation over Arbitration

The first category of case is where parties have included both jurisdiction and arbitration clauses in their agreement but have expressed clear words of priority in favour of arbitration. In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*⁹ the English Court of Appeal had to consider a contract which contained clauses providing for arbitration in London and exclusive jurisdiction in the courts of the City of Lima, Peru.

The trial judge sought to read the clauses together to produce the result that the parties had agreed to arbitrate in Peru but subject to English arbitral procedural law. While the Court of Appeal acknowledged that it would be theoretically possible to have an arbitration in country X subject to the procedural law of country Y, a court should hesitate to reach such a construction because of its inherent complexity and impracticality.

Fortunately for the court, the conflict between the arbitration and jurisdiction clause in this case was easily resolved because the parties had provided, in Article 1 of their contract, that the typed endorsement (which included the arbitration clause) prevailed over the printed conditions (which included the jurisdiction clause) in the event of conflict. The parties had therefore themselves established a priority of arbitration over litigation.

A similar situation arose in a recent Canadian decision *Oppenheim v Midnight Marine*¹⁰ where the Newfoundland Court of Appeal had to consider clauses in an insurance contract which respectively referred any disputes to resolution by London arbitration and provided for “service of suit” in any action against the underwriters to be made on their lawyers in Canada. Once again, however, the court did not have to resolve any “conflict” between the clauses because the London arbitration clause contained the words “Notwithstanding anything

⁸ See Molfa, *supra* n 1.

⁹ *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116.

¹⁰ *Oppenheim v Midnight Marine* 2010 NLCA 64.

else to the contrary” and “in the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail”. The parties had again expressly provided that the arbitration clause had primacy and the matter was easily resolved.

Similar results have been reached in other Canadian¹¹ and Australian¹² cases. Interestingly, in one English decision, *The Law Debenture Trust Corp PLC v Elektrim Finance BV*,¹³ the parties gave primacy to litigation over arbitration in their agreement. Again, consistent with and implementing the parties’ intention, the jurisdiction clause was properly relied upon by the court to restrain a party’s pursuit of arbitration.

A more subtle form of primacy is where the parties have included an optional or non-exclusive jurisdiction clause and a mandatory arbitration clause or the reverse situation: an optional arbitration clause with an exclusive jurisdiction provision. There is Commonwealth authority to the effect that where such clauses are included in the same contract, priority should normally be given to the mandatory provision, on the basis that the obligatory overrides the optional. A non-exclusive jurisdiction clause typically allows a party to sue in the stipulated forum but does not preclude it proceeding in another tribunal, whereas an exclusive jurisdiction clause requires, as a matter of contractual obligation, that any proceedings take place only in the nominated courts.

This approach is demonstrated in a series of Hong Kong¹⁴ and Indian¹⁵ cases and also explains the decision of the English Commercial Court in *Ace Capital Ltd v CMS Energy Corp*,¹⁶ discussed more fully in Section E.2 below. There, the court had to consider an application for an anti-suit injunction to restrain the pursuit of proceedings in a US state court where the parties had included a US service of suit or non-exclusive jurisdiction clause and a mandatory London arbitration clause in their contract. The court granted the injunction, in part for the reason that the service of suit clause made US jurisdiction only optional.¹⁷

¹¹ *Momentous.ca Corporation v Canadian American Association of Professional Baseball Ltd* (2010) 103 OR (3d) 467; 2010 ONCA 722 (aff’d 2012 SCC 9); *Dancap Productions Inc v Key Brand Entertainment Inc* (2009) 55 BLR (4th) 1 (ONCA).

¹² *Nicola v Ideal Image Development Corp* [2009] FCA 1177.

¹³ *The Law Debenture Trust Corp PLC v Elektrim Finance BV* [2005] EWHC 1412.

¹⁴ *Beyond the Network Ltd v Vectone Ltd* [2005] HKCFI 1187 (Hong Kong exclusive jurisdiction clause prevails over optional New York arbitration clause); *Lee Cheong Construction and Building Materials Ltd v The Incorporated Owners of the Arcadia* [2012] HKCFI 473 (Hong Kong mandatory arbitration clause trumps Hong Kong non-exclusive jurisdiction clause).

¹⁵ *M/S Linde Heavy Truck Division Ltd v Container Corporation of India Ltd* [2010] INDLHC 6323 (High Court of Delhi) (New Delhi exclusive jurisdiction clause trumps New Delhi optional arbitration clause).

¹⁶ *Ace Capital Ltd v CMS Energy Corp* [2008] 2 CLC 318.

¹⁷ On the question of interpretation of the service of suit and arbitration clauses, this case may be compared with *HIH Casualty and General Insurance Ltd (in liq) v Wallace* [2006] NSWSC 1150 where an Australian court held that the effect of almost identical clauses was to make both

2. Express Allocation of Subject Matter to Arbitration or Litigation

Another category of case in which common law courts are in broad agreement is where the parties provide for both litigation and arbitration in their agreement but specifically define the matters which may be referred to litigation or arbitration. For example, a common approach in some Australian contracts is to provide for arbitration in a specified place but to allow parties to resort to any court for “urgent interlocutory or equitable relief”.

In some Australian cases courts have allowed applicants to bring claims for such relief in court, where the requirement of “urgency” is established, on the basis that such an application “is not inconsistent with the parties’ agreeing to refer the subject matter of their dispute to arbitration after the claim for urgent ... relief has been determined”.¹⁸ Not only is such an approach defensible as a matter of construction of the parties’ agreement, it also does not offend arbitration law which has consistently allowed applications to court for interim measures of protection despite the existence of an arbitration agreement.¹⁹ In addition to applications for interim measures, court orders are often sought to compel the attendance of third persons to attend as witnesses or produce documents in an arbitration.²⁰ Applications for interim relief (eg for freezing orders) are increasingly made outside the seat of arbitration, a procedure that is also recognised by leading arbitration instruments such as the UNCITRAL Model Law.²¹

A more controversial Australian case was *Seeley International Pty Ltd v Electra Air Conditioning BV*.²² There, parties to a distribution agreement had provided in clause 20.1 that “any question or difference of opinion shall be referred to arbitration in Melbourne [Australia]” but also (in clause 20.3) that “nothing in this clause 20 prevents a party from seeking injunctive or declaratory relief in the case of material breach or threatened breach of this agreement”. The plaintiff sought a declaration from the Federal Court of Australia that the defendant was in breach of the agreement and had engaged in conduct in violation of Australian consumer protection legislation.²³ The defendant requested a stay of court proceedings in favour of arbitration. The court allowed the

litigation *and* arbitration optional. With respect, this analysis ignores the obligatory wording of the arbitration clause.

¹⁸ *ETT v IPSTAR Australia* [2008] NSWSC 644 [45]; cf *AED Oil v Puffin* [2010] VSCA 37 (requirement of urgency not established on the facts).

¹⁹ See eg Model Law Art 9; Arbitration Act 1996 (UK) s 44.

²⁰ M Holmes, “Drafting an Effective International Arbitration Clause” (2009) 83 *Australian Law Journal* 305, 315.

²¹ See Art 17J.

²² *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29 (aff’d [2008] FCAFC 169).

²³ Trade Practices Act 1974 (Cth) s 52 (see now Competition and Consumer Act 2010 Sch 2 s 18).

action to proceed, finding that clause 20.3 amounted to a complete litigation “carve out” of the dispute from the scope of the arbitration clause.

While some commentators have been critical of the decision,²⁴ the approach taken by the court in *Seeley* can be defended on the ground that the parties had chosen to vest the Australian courts with wide jurisdiction in respect of remedies for breach of the agreement. While such an approach may have the effect of dramatically limiting the scope of the arbitration clause (when compared with the more limited “urgent interlocutory relief” provisions mentioned above) not enforcing the jurisdiction clause in *Seeley* would have ignored the parties’ express words.

There have also been decisions in other Commonwealth countries where courts have given effect to express “carve outs” from arbitration clauses where the parties have designated or reserved certain matters for litigation.²⁵ There is also supportive US authority.²⁶

Hence, while it is appropriate that courts now give broad and commercially sensible constructions of arbitration agreements, such a philosophy must yield to the parties’ clear intention to litigate in specified circumstances.

3. Priority by Subsequent Agreement

Another situation where litigation has properly been found to trump arbitration involves the case where parties have entered an arbitration agreement but have then subsequently agreed to litigate the same matters that would otherwise have fallen within the scope of the arbitration clause.

In such a case, the arbitration agreement, while presumptively enforceable under Article II(3) of the New York Convention, is now rendered “inoperative” under that provision. Again the approach taken here is one of interpretation: provided that the parties’ intention is clear to supersede the arbitration agreement by litigation, arbitration will be deemed to have been waived. Decisions in Australia,²⁷ New Zealand,²⁸ Canada,²⁹ Malaysia³⁰ and the United States³¹ all support this view.

²⁴ “‘Double-Barrelled’ Dispute Resolution Clauses? Lessons from Down Under” *White & Case International Disputes Quarterly* (Spring 2008), www.whitecase.com/idq/spring_2008/.

²⁵ *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Ltd* [2006] NZHC 1228 (High Court of New Zealand); *Temiskaming Hospital v Integrated Medical Networks Inc* (1998) 46 BLR (2d) 101 (Ontario Court of Justice); *T1 T2 Ltd Partnership v Canada* (unreported, Ontario Superior Court of Justice, 10 November 1994).

²⁶ See eg *Mignocchi v Merrill Lynch, Pierce, Fenner & Smith Inc* 707 F Supp 140 (SDNY 1989); *Hignan Marine Services Inc v BPO Amoco Chemical Company* 114 F Supp 2d 593 at 597 (SD Tex 2000); *Camero USA Corp v STPC Partners LP* 410 F Supp 2d 1268 (SD Fla 2006).

²⁷ *The Golden Glory* [1991] FCA 235 (Fed Ct Aust).

²⁸ *Ishimaru Ltd v Page* [2007] NZHC 571.

²⁹ *The Kinugawa* [1998] 2 FC 583 (Fed Ct Can).

³⁰ *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd* [2010] MYCA 76 at [30] (Malaysian Court of Appeal).

³¹ *Applied Energetics Inc v NewOak Capital Markets LLC* 645 F 3d 522 (2nd Cir 2011); *Biremis Corp v Merrill Lynch, Pierce, Fenner and Smith Inc* 2012 US Dst Lexis 30988 (EDNY).

For example, in *The Golden Glory*³² the plaintiff sued in the Federal Court of Australia seeking a declaration that it had a binding contract for sale of a ship and an order for specific performance of that contract. The ship was arrested and the court granted the release of the ship on the defendant's undertaking to the court and to the plaintiff to submit to the jurisdiction of the Federal Court for resolution of any disputes. Upon the defendant seeking a stay of the principal court proceedings in favour of arbitration the court held the arbitration agreement inoperative by reason of the subsequent agreement to litigate by the parties.

C. OPTIONAL ARBITRATION/LITIGATION CLAUSES

One area on which common law courts are divided is the effect of an agreement which gives parties the choice of arbitration or litigation, with both provisions expressed in optional terms. Such a provision is different to a clause which simply states that "any dispute arising out of this agreement *may* be referred to arbitration" without reference to litigation at all. With respect to the latter type of clause, there is wide consensus among common law courts that a requirement to arbitrate springs into existence from the moment a party asserts its right to arbitrate, such as where it seeks a stay of court proceedings and referral to arbitration.³³

Where parties, however, provide for *an express choice* between arbitration and litigation the position is less clear for in this situation a stronger argument can be made for the fact that pursuit of litigation was expressly authorised by the parties on at least an equal basis to arbitration. The above observation, however, does not apply where parties provide a choice between arbitration in country X and the courts of country X but then one party sues in the courts of country Y.

In *William Co v Chu Kong Agency Co Ltd*³⁴ the parties agreed to arbitrate in China or litigate in the Chinese courts but the plaintiff sued in Hong Kong (prior to the 1997 handover). The court stayed the proceedings in favour of arbitration in China, noting that the plaintiff had chosen a dispute resolution path not provided for in the agreement. No deference to the Hong Kong proceeding was therefore appropriate. Precisely the same approach and outcome occurred in the Singapore decision of *The Dai Yun Shan*.³⁵ There the parties again agreed that they may resort to arbitration in China or litigation in the

³² *The Golden Glory* [1991] FCA 235.

³³ *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 302 (High Court of Australia); *Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 (High Court of Singapore); *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] HKCA 248 (Hong Kong Court of Appeal).

³⁴ *William Co v Chu Kong Agency Co Ltd* [1993] 2 HKC 377.

³⁵ *The Dai Yun Shan* [1992] 1 SLR (R) 461.

Chinese courts. Litigation in Singapore, however, was not provided for by the parties and so the plaintiff's suit was stayed with the party directed to either commence arbitration or court proceedings in China.

Again, these outcomes seem entirely consistent with the parties' expressed intentions in their agreement and US courts³⁶ have taken a similar approach. The more difficult and contentious situation arises where parties choose arbitration or litigation in a particular place, one party sues in that place, and the other seeks a stay of the court proceedings in favour of arbitration. English courts here seem to have applied the same principles from the situation where a "stand-alone" optional arbitration agreement exists and have routinely ordered arbitration in this context, paying little if any regard to the jurisdiction clause.

In *Lobb Partnership v Aintree Racecourse Company Ltd*³⁷ the Commercial Court granted a stay of court proceedings in favour of arbitration on the basis that an arbitration clause may be triggered at any stage when a party seeks referral to arbitration, even after litigation has been commenced. The fact that a party has chosen to litigate in accordance with the agreement is irrelevant; the jurisdiction clause only applies if *neither* party selects arbitration.³⁸ Such a view has the effect of completely ignoring the parties' jurisdiction clause.

The same result was reached in *NB Three Shipping Ltd v Harebell Shipping Ltd*³⁹ which concerned a charter contract containing an English exclusive jurisdiction clause and a clause which conferred an option on one of the parties only (the owner) to arbitrate in London. The plaintiff charterer sued in England and the owner successfully sought a stay in favour of arbitration. Despite the plaintiff charterer arguing that it was not in breach of the arbitration agreement by commencing the court proceedings, the court found that the option to arbitrate could be exercised by the owner to defeat the court proceedings. This conclusion seems particularly harsh on the facts of that case since the charterer's only means of instigating dispute resolution under the agreement was through the issue of court proceedings; there was a 'unilateral' arbitration clause in which only the owner had the right to request arbitration.⁴⁰ In effect, the owner's 'exclusive' option to arbitrate was found to be mandatory for both parties despite the existence of a bilateral exclusive jurisdiction clause.

An older English decision, *The Messiniaki Bergen*,⁴¹ is often cited as the guiding authority on this topic of optional arbitration/litigation provisions⁴² but this

³⁶ See eg *Summit Packaging Systems Inc v Kenyon & Kenyon* 273 F 3d 9 (1st Cir 2001).

³⁷ *Lobb Partnership v Aintree Racecourse Company Ltd* [2000] 1 Building LR 65.

³⁸ There is Australian authority to the same effect: see *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13.

³⁹ *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm).

⁴⁰ See further S Nesbitt and H Quinlan, "The Status and Operation of Unilateral or Optional Arbitration Clauses" (2006) 22 *Arbitration International* 133.

⁴¹ *The Messiniaki Bergen* [1983] 1 Lloyd's Rep 424.

⁴² See eg Joseph, *supra* n 1, [4.79].

view may be challenged. *The Messiniaki Bergen* involved a contract containing both English jurisdiction and London arbitration clauses. The plaintiff, however, sued in a US court and the defendant successfully obtained a stay of the proceeding. The defendant then commenced an English action seeking an order for appointment of an arbitrator in accordance with the agreement to arbitrate in London. The court granted the order, holding that the optional arbitration agreement created a binding obligation upon one party invoking its right to arbitrate.

The Messiniaki Bergen is therefore different to *Lobb Partnership* and *Three Shipping* because in those latter decisions the plaintiff had sued in the country (England) whose courts were stipulated in the jurisdiction clause. In *The Messiniaki Bergen*, by contrast, the English jurisdiction clause was not invoked by either party; rather, one party had sued in the US and the other, after having this proceeding stayed in favour of arbitration, sought an order to appoint the arbitral tribunal from the English court. Arbitration was therefore properly upheld in *The Messiniaki Bergen* as this proceeding was expressly provided for by the parties in their contract.

D. ALTERNATIVE APPROACHES TO CONFLICTING RIGHTS

In the majority of cases mentioned above, such as priority by allocation of subject matter, priority by express contractual wording and priority by subsequent agreement, courts have been mindful to adhere to the intention of the parties and give due weight to the reference to litigation where appropriate. Where, however, there is a choice between equally weighted arbitration and litigation clauses (ie both are optional or both mandatory) courts have often favoured arbitration even where a party has invoked its right to litigate first, in the forum stipulated by the parties. If both litigation and arbitration are to be treated equally and the terms of the parties' agreement properly respected, then another approach is required.

1. Tandem Proceedings

One alternative would be to allow each party to pursue their own choice of dispute resolution in tandem – for example, party A invokes arbitration and party B litigation with the question of priority left unresolved. While such a method accords equal status to arbitration and litigation⁴³ it is very impractical. Not only do parallel proceedings lead to significant additional costs and inconvenience for parties but there is also a great risk of inconsistent results between

⁴³ An Australian judge has supported such an approach: see *Mulgrave Central Mill Co Ltd v Haggunds Drives Pty Ltd* [2001] QCA 471 (Thomas JA).

the tribunals leading to great complexity at the stage of enforcement of any judgment or award. Common law courts today strongly emphasise the need for “one-stop shop” adjudication in order to reduce fragmentation and duplication of dispute resolution. Such a strategy has been particularly noticeable in the decisions in which broad interpretations have been taken of jurisdiction and arbitration clauses.⁴⁴ Allowing litigation and arbitration of the merits of a dispute to run simultaneously is not consistent with that objective.⁴⁵

2. The Arbitration Clause Is Void or Inoperative

An argument commonly raised by a party to avoid arbitration, where parties make a choice of both litigation and arbitration in their agreement, particularly where the reference to both is mandatory rather than optional, is to say that the arbitration clause is rendered void or inoperative by the mere presence of the right to litigate. Such an outcome has already been seen in the cases above where a jurisdiction clause was entered into *subsequent to* an arbitration clause but here the argument is that the presence of both dispute resolution rights in the same agreement creates that effect. This view eliminates the arbitration clause entirely and in all circumstances. If equal treatment of dispute resolution provisions is a key touchstone in this area, then this approach also cannot be accepted.

3. A ‘More Appropriate Forum’ Test?

Another alternative to resolving a conflict between an option to litigate or arbitrate is to resolve the priority between the competing clauses on the basis of which forum is more appropriate to resolve the dispute, with recognition to be given to the tribunal which has been first seised by a party. If a party sues first in the courts of country X pursuant to a contractual clause which stipulates such courts, then its choice should generally be given deference, assuming the suit is brought in good faith and the forum has some connection with the parties and the subject matter of the dispute. Likewise, if a party seeks to trigger arbitration by issuing a notice to arbitrate or seeking an order from the court to appoint the arbitral tribunal before any court proceedings on the merits have been filed, then the arbitration clause should be given priority, absent any vexatious conduct by the party. Commencing litigation in a non-stipulated forum, however, carries no weight.

⁴⁴ See eg in the English context *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 and in Australia *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 and *Global Partners Fund v Babcock & Brown* [2010] NSWCA 196; 79 ACSR 383.

⁴⁵ Of course, interlocutory measures or relief may be sought from a court during the currency of an arbitration; such a situation does not raise the same problems of fragmentation since both tribunals are not resolving the same substantive dispute.

In common law countries, the well-established test for resolving conflicts of jurisdiction between courts in different countries is to apply the discretionary principles of appropriate forum with weight given to the tribunal which is seised first in time. For example, in *Henry v Henry*⁴⁶ the High Court of Australia noted that where proceedings are already pending in a foreign country's courts, it is prima facie vexatious and oppressive to commence proceedings in an Australian court in relation to the same matter and parties.⁴⁷ Respect for the court first seised is appropriate in such a case both out of regard for the claimant's right to choose its forum (assuming that it is not vexatious) and as a neutral and certain factor for resolving deadlocks between tribunals. Yet, such a test properly does not give absolute priority to the court first seised; the court retains a general discretion as to whether to decline jurisdiction and will look at all the circumstances of the case including the claimant's objective in commencing the proceedings. For example, where a claimant commences proceedings in a forum with limited contacts with the defendant or the subject matter of the action or seeks artificial relief in the way of a negative declaration with the aim of pre-empting the other party's choice of forum, the court should give much less weight to the tribunal first seised.⁴⁸ Of course, where both the arbitration and jurisdiction clauses stipulate tribunals in the same country, then connecting factors will have less significance and a higher status will be accorded to the tribunal first seised, assuming such proceeding is brought in good faith. The position in other common law countries, including England⁴⁹ (in cases outside the Brussels I Regulation and Lugano Convention), Singapore⁵⁰ and Hong Kong,⁵¹ is similar to that adopted in Australia. The flexibility and balance of such a test seems appropriate to the present context of competing jurisdiction and arbitration clauses.

It is important to note that some commentary has been sceptical as to the application of a principle which gives any weight to the tribunal first seised in conflicts between arbitral tribunals and national courts.⁵² The argument is that Article II(3) of the New York Convention confers exclusive jurisdiction on the arbitral tribunal in matters falling within the scope of the arbitration clause,

⁴⁶ *Henry v Henry* (1996) 185 CLR 571.

⁴⁷ *Ibid.*, 590–91.

⁴⁸ C McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff, 2009), 129, 187; *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 371 (CA).

⁴⁹ *The Abidin Daver* [1984] AC 398 at 411–12 (Lord Diplock); *De Dampierre v De Dampierre* [1988] AC 92; *Galaxy Special Maritime Enterprise v Prima Ceylon Ltd* [2006] EWCA Civ 528.

⁵⁰ *Chan Chin Cheung v Chan Fatt Cheung* [2009] SGHC 96; *The Reecon Wolf* [2012] SGHC 22.

⁵¹ *Hing Fat Plastic Manufacturing Co Ltd v Advanced Technology Products (HK) Ltd* [1992] HKCFI 336.

⁵² See B Cremades and I Madalena, "Parallel Proceedings in International Arbitration" (2008) 24 *Arbitration International* 507, 510–11; J Lew, "Concluding Remarks" in B Cremades and J Lew, *Parallel State and Arbitral Procedures in International Arbitration* (Kluwer Law International, 2005), 311; International Law Association Report on *Lis Pendens* in International Arbitration (2006) extracted in (2009) 25 *Arbitration International* 3, 21.

with courts required to stay their proceedings in all cases where an arbitration clause is present. In response it may be said that such an observation is correct where court proceedings are brought in breach of an arbitration agreement and no competing jurisdiction clause exists. Where, however, parties have agreed both jurisdiction and arbitration clauses, arbitration has no superior claim in principle to apply; indeed Article II(3) of the Convention does not address this situation. Some other mechanism for resolving the conflict is therefore required.

A more appropriate forum test, with some recognition granted to the tribunal first seised, therefore enjoys support in the general principles of private international law. There are also sound arguments for applying the principle to resolve the dilemma of conflicting jurisdiction and arbitration clauses. First, a claimant suing in the court stipulated by the jurisdiction clause could not be said to be engaging in forum shopping, either by selecting a court with no connection to the subject matter or bringing an “artificial” action to stymie the other party’s rights to adjudicate. Instead, suing in the stipulated forum is a legitimate pursuit of a party’s contractual rights. Secondly, application of such a rule in the context of conflicting jurisdiction and arbitration provisions arguably gives equal recognition to both clauses and consequently is more reflective of the express terms of the parties’ agreement. Thirdly, even if an appropriate forum test cannot be sourced in the intentions of the parties, then adoption of such a principle may be justified by “external” reasons of efficiency and convenience through provision of a neutral and balanced means of resolving the conflict between the parties. By contrast, the approach of allowing both sets of proceedings to run to judgment creates potential chaos in enforcement of awards and the argument that the presence of competing dispute resolution clauses results in their mutual invalidity seems rather nihilistic. Also, the current English approach cannot be accepted because it favours arbitration in every case except where both parties consent to litigate or where wording of primacy is attached to the jurisdiction clause. In effect, an arbitration/litigation option agreement is interpreted as if the reference to litigation is not present. Such an outcome fails to recognise that the parties may have deliberately provided an equally balanced choice to arbitrate or litigate.

Moreover, on a broader level, adoption of the suggested approach may go some way to restoring the position of litigation relative to arbitration as a method of dispute resolution. If, as has been argued, the explanation for the approach of the English courts in favouring arbitration over jurisdiction clauses lies in some notion of the inherent superiority of the arbitral process, then the accuracy of this assumption must be examined. It is clear that the popularity of international commercial arbitration has grown enormously in recent years with the easier scope for cross-border enforcement of awards relative to court judgments being a major factor. Yet, the advantages of litigation before

national courts with commercial experience and integrity should not be forgotten. Not only is litigation normally cheaper than arbitration but it can often provide a single forum for resolving complex disputes with multiple parties – a result that arbitration, being a creature of contract, struggles to emulate. In any case, however, regardless of the merits of each method of dispute resolution, if parties have chosen *both* arbitration and litigation in their agreement, respect for their drafting requires an even-handed approach that does not presumptively favour one over the other.

Hence, on the topic of conflicting optional or mandatory litigation/arbitration clauses a new approach is required which does not involve the courts simply opting for arbitration. An analysis that gives equal weight and recognition to both clauses is needed and this can be accomplished under a test that seeks the more appropriate forum.

E. MANDATORY JURISDICTION AND ARBITRATION CLAUSES

The next series of cases concern agreements with directly conflicting *mandatory* jurisdiction and arbitration clauses. One group of decisions involves agreements with a jurisdiction clause stipulating the courts of country X and an arbitration clause with its seat also in country X, and the other (smaller) group of decisions involves the seat of arbitration and stipulated jurisdiction being in different countries.

1. Local Jurisdiction and Arbitration Clauses

The leading English case in the first group is *Paul Smith Ltd v H&S International Holding Inc.*⁵³ *Paul Smith* involved an agreement which contained the following clauses:

“13 SETTLEMENT OF DISPUTES

If any dispute or difference shall arise between the parties ... the dispute or difference shall be adjudicated under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators ...’

14 This Agreement ... shall be interpreted according to English law.

The Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit.”

After a dispute arose between the parties the defendant requested arbitration under the ICC Rules with the ICC Court of Arbitration ruling that there was a valid arbitration agreement and London was the seat of arbitration. The

⁵³ *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd’s Rep 127.

plaintiff then issued a writ in England claiming a declaration that the plaintiff had validly terminated the agreement, that the pending ICC arbitration was not validly constituted and an injunction restraining the defendants from proceeding with arbitration.

The plaintiff argued that clauses 13 and 14 were hopelessly inconsistent in providing for both litigation and arbitration and so must be struck down. Steyn J rejected this view, saying that it was a “drastic and very unattractive result ... [in that] it involves the total failure of the agreed method of dispute resolution in an international commercial contract”.⁵⁴ In the judge’s view, however, there was a “simple and straightforward answer” to the suggestion of inconsistency. Clause 13 should be read as specifying the dispute resolution mechanism (arbitration) and clause 14 should be regarded as indicating the curial or procedural law of the arbitration. Such law is different to the substantive law of the contract which was already expressly provided for in the first sentence of clause 14.

By way of comment, the judge’s suggestion that there was no inconsistency on the face of the two provisions seems hard to support. While it is true that striking down the provisions would have been an undesirable consequence, that path, as has been discussed above, is not the only way of resolving such a conflict. The judge’s solution, whereby the English exclusive jurisdiction clause was stripped of any jurisdictional effect and turned into a “choice of procedural law clause”, seems plainly at odds with the parties’ agreement. It is true that at the time of entering the agreement the place of arbitration was unknown and so the curial or procedural law of the arbitration – which is almost always that of the place of arbitration⁵⁵ – could not be determined. In that respect, using the English jurisdiction clause to determine the procedural law fills that gap, even though it is more likely that the parties did not turn their minds to this issue. Yet, by the time the matter was heard, the ICC had confirmed London as the seat of arbitration and so, strictly speaking, English procedural law would now apply in any event. The gap in the parties’ agreement had been filled. Steyn J made no reference to this subsequent development.

The same result, however, in *Paul Smith* would be achieved under a more appropriate forum analysis. Here was a case where the defendant acted in clear good faith, taking first in time steps to have the parties’ dispute arbitrated in accordance with the agreement, only to be stymied by the plaintiff approaching the court. The jurisdiction and arbitration clauses are both expressed in mandatory form and so are irreconcilable but need not be struck down. Instead, the defendant should be entitled to arbitrate the dispute as it was first in time, there being no suggestion of forum shopping or abusive tactics.

⁵⁴ *Ibid*, 129.

⁵⁵ *James Miller & Partners Ltd v Whitworth Street Estates Ltd* [1970] AC 572.

The next case in this group is *The Nerano*.⁵⁶ This case involved a bill of lading which provided for the incorporation of the relevant conditions of the relevant charterparty that were to have precedence in the event of conflict with the terms of the bill of lading. The parties agreed English law and jurisdiction clauses on the front of the bill. On the back of the bill of lading was a further clause that provided that “all terms and conditions ... and the arbitration clause of the [c]harterparty ... are herewith incorporated”. The arbitration clause in the charterparty specified that “disputes arising shall be determined in London, England”. The plaintiff sued in the English Commercial Court for damage to cargo and the defendant sought a stay in favour of arbitration.

Clarke J first found that the terms of the charterparty were incorporated in the bill of lading. The judge then held that, similar to Steyn J in *Paul Smith* that although there was “some overlap” between the jurisdiction and arbitration clauses, there was “no conflict”.⁵⁷ Once again, this view appears to ignore a glaring inconsistency which should have been directly confronted. Furthermore, Clarke J adopted Steyn J’s solution for reconciling the clauses: the dispute would be submitted to arbitration but the reference to English courts on the front of the bill of lading was to be construed as a choice of the curial or procedural law of the arbitration “on the basis that English courts ‘retain’ a supervisory jurisdiction over the arbitration”.⁵⁸

As has been noted, however,⁵⁹ such a reference to the curial law was “meaningless” given that, in *The Nerano*, the arbitration clause had already stipulated London as the seat of arbitration. As noted above, choice of the seat is a customary shorthand selection of the procedural law of the arbitration. The implication therefore which could possibly be drawn in *Paul Smith* (given the absence of choice of a seat in the agreement) was not available here. Despite this conclusion, can the court’s decision to favour arbitration over litigation be otherwise supported?

Application of the suggested more appropriate forum approach would lead to a different conclusion since the plaintiff brought a good faith claim first in time for breach of the bill of lading in the court stipulated in the jurisdiction clause. On this basis, litigation should prevail. Yet, there is a further argument in favour of arbitration in this case. It will be recalled that the parties also included a provision in the bill of lading which stated that “the conditions as per relevant charterparty are incorporated and have precedence if there is a conflict”. Such a provision could be argued to give “primacy” to the arbitration clause in the charterparty over the jurisdiction clause in the bill consistent with

⁵⁶ *The Nerano* [1994] 2 Lloyd’s Rep 50.

⁵⁷ *Ibid.*, 54.

⁵⁸ *Ibid.*, 55.

⁵⁹ Tan, *supra* n 1, 18.

the cases mentioned in Section B.1 above. The decision to uphold arbitration was therefore correct.

A few years after *The Nerano*, the issue of conflicting jurisdiction and arbitration clauses stipulating the same country arose again in *Shell Petroleum Co Ltd v Coral Oil Ltd*.⁶⁰ *Shell Petroleum* involved an agreement which contained one clause (Article 13) which provided that “any dispute shall be referred to the jurisdiction of the English courts and this agreement, its interpretation and the relationship of the parties hereto shall be governed and construed in accordance with English law” and another clause (Article 14) which provided that “any dispute which may arise ... in connection with this agreement shall be ... settled by arbitration in London”. Shell terminated the agreement and Coral purported to sue Shell in the Lebanese courts for breach of Lebanese law. Shell sought an anti-suit injunction to restrain Coral proceeding in Lebanon.

Coral argued, similar to the plaintiffs in *Paul Smith* and *The Nerano*, that the clauses were hopelessly inconsistent and so both must be rejected. Again, the court rejected this argument, finding that the clauses were capable of reconciliation. Yet the judge, Moore-Bick J, did not adopt the interpretation of the English exclusive jurisdiction clause in the above two decisions. Instead, he held that substantive disputes should be referred to arbitration under article 14 and disputes “about the proper law” should be referred to English jurisdiction.

By way of comment, again the court ignored a clear inconsistency between the clauses: while this approach may have been prompted by the dire consequences advocated by the defendant it should nevertheless have been acknowledged. Secondly, the judge’s strategy for reconciliation of the clauses is even more questionable than in the previous decisions. It is not at all clear what “disputes about the proper law” could be. Certainly there could have been no issue as to the proper law of the contract as the parties had expressly chosen English law and so this reference again appears to be redundant and of limited value as a tool of interpretation.

Yet the decision in *Shell Oil* to grant the injunction and restrain the defendant’s pursuit of the Lebanese proceedings can be supported on other grounds which do not require a resolution of the conflict between the jurisdiction and arbitration clauses. Here the defendant had commenced proceedings in a foreign court – in breach of both the London arbitration clause and the English exclusive jurisdiction clause. It was appropriate, therefore, that the party should be restrained. In this regard it is interesting to note that Moore-Bick J himself noted that the claim “falls within the arbitration or exclusive jurisdiction clauses”⁶¹ and so provides a basis for an anti-suit injunction. It is this last observation, which effectively admits on the facts of the case that no conflict between

⁶⁰ *Shell Petroleum Co Ltd v Coral Oil Ltd* [1999] 1 Lloyd’s Rep 72.

⁶¹ *Ibid*, 76.

the jurisdiction and arbitration clauses existed since the defendant had sued in a non-stipulated forum, which provides a much sounder basis for the decision.

By contrast, litigation was rightly upheld in *MH Alshaya Company WLL v Retek Information Systems Inc.*⁶² There, the plaintiff commenced arbitration proceedings in respect of moneys payable under two contracts, a licence agreement and a maintenance agreement. The licence agreement contained an English exclusive jurisdiction clause and an arbitration clause but the maintenance agreement contained only an English exclusive jurisdiction clause. Because there was no arbitration clause in the maintenance agreement and the court construed the arbitration clause in the licence agreement not to embrace the maintenance agreement claims, it allowed all of the claims to proceed in court. While the arbitration proceedings were clearly filed first, the English court was arguably the more appropriate forum since it had the capacity to resolve the whole dispute in a single proceeding. Fragmentation of a single dispute between a court and an arbitral tribunal is to be discouraged as it is inefficient and can lead to inconsistent outcomes. Litigation was therefore more appropriate.

The next relevant decision is *Axa Re v Ace Global Markets Ltd*⁶³ which involved a claimant reinsurer seeking a declaration that a reinsurance contract did not include an arbitration agreement and injunctive relief to restrain the reinsured from pursuing arbitration proceedings, which had been commenced six months earlier. The contract of reinsurance provided that it “shall be subject to English law and jurisdiction” and incorporated standard market terms which included a clause requiring that “any dispute ... shall first be the subject of arbitration [in London] with English law as the proper law of the contract”.

Gloster J, after finding that the standard terms were incorporated, then applied the *Paul Smith* decision to hold that there was no conflict between the jurisdiction and arbitration clauses since the English jurisdictional provision should be interpreted to be a choice of the procedural law of the arbitration with all substantive disputes to be referred to arbitration.⁶⁴ Yet again, however, this conclusion ignored the fact that the seat of arbitration had already been chosen by the parties and so the jurisdiction clause could not be interpreted to provide what already existed.⁶⁵ Also, there is again the seeming incongruity of treating a jurisdiction clause as dealing entirely with choice-of-law matters and stripping it of jurisdictional content.

Despite the criticisms, however, this is a case like *Paul Smith* where the result can be supported because the reinsured acted in good faith to seise first the arbitral tribunal with the dispute. The reinsurer’s action in the English courts

⁶² *MH Alshaya Company WLL v Retek Information Systems Inc* [2001] *Masons Computer Law Reports* 99.

⁶³ *Axa Re v Ace Global Markets Ltd* [2006] 1 *Lloyd’s Rep IR* 683.

⁶⁴ *Ibid.*, [33]–[34].

⁶⁵ Tan, *supra* n 1, 19–20.

appeared to be purely obstructive – designed to shut down the arbitration and delay resolution of the parties’ dispute. Again, the arbitral tribunal was the most appropriate forum.

There have also been some non-English decisions in the category of cases involving mandatory jurisdiction clauses stipulating the courts of country X and mandatory arbitration clauses with their seat in the same country. In Malaysia the issue has been considered by the Court of Appeal twice in recent decisions with the arbitration clause prevailing in one case and the jurisdiction clause upheld in the other.

In *R Kathiravelu all Ramasamy v American Home Insurance Co Malaysia*⁶⁶ an insurer issued a notice of arbitration to an insured after a dispute arose and also sought an order from the court that an arbitrator be appointed. The court rejected an argument that the mandatory Malaysian exclusive jurisdiction and arbitration clauses in the policy were conflicting. The arbitration clause was intended to resolve all substantive disputes while the jurisdiction clause meant that “the Malaysian court had the exclusive power to interpret the policy”. It is not clear what is meant by this last expression – surely if the substantive dispute is to be referred to arbitration, then, absent a challenge to the award or the arbitrators’ powers, the Malaysian court will not be placed in a position to interpret the policy. Yet in terms of the result this case is consistent with the appropriate forum view suggested above. Here the insurer sought, in good faith, to invoke arbitration proceedings first in time and its choice was rightly upheld.

In an earlier case, *TNB Engineering and Consultancy Sdn Bhd v Projass Engineering Sdn Bhd*,⁶⁷ the same court reached the opposite conclusion in the context of mandatory Malaysian exclusive jurisdiction and arbitration clauses in a contract. What is notable about this case is that the court frankly admitted that the clauses were inconsistent but without much reasoning felt that the jurisdiction clause should prevail. Similar to the *American Home Insurance* decision, *TNB Engineering* was a case where arbitration was invoked first and in good faith by one of the parties. Hence the plaintiff’s action in seeking a declaration from the court that the appointment by the defendant of an arbitrator was invalid could be seen simply as an obstructionist tactic to hinder a good faith resolution of the substantive dispute. The court should therefore have deferred to the arbitration tribunal as the more appropriate forum.

The Singapore High Court had the opportunity to consider the issue of conflicting mandatory jurisdiction and arbitration clauses in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd*.⁶⁸ The court there had to consider an action

⁶⁶ *R Kathiravelu all Ramasamy v American Home Insurance Co Malaysia* [2009] 1 MLJ 572 (Malaysian CA).

⁶⁷ *TNB Engineering and Consultancy Sdn Bhd v Projass Engineering Sdn Bhd* [2007] MYCA 117.

⁶⁸ *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13.

for damages for breach of contract by Tri-MG which Norse sought to stay in favour of arbitration. The contract contained a clause which provided that “all disputes under this agreement shall be submitted for resolution by arbitration pursuant to the Rules of [the ICC]” and also a provision declaring “that the courts of ... Singapore shall have jurisdiction to hear and determine any suit, action or proceedings”.

While the court emphasised that its task was “to best give effect to parties’ intentions”⁶⁹ it ultimately opted for the approach in *Paul Smith* in reconciling the competing clauses. Here the parties had not chosen a seat of arbitration and so the selection of the Singapore courts could have work to do beyond merely being a jurisdiction clause: it represented a choice of the procedural law of the arbitration. The arbitration clause was therefore left to resolve any substantive disputes.

While there is some logic to the court’s approach it still ignores the fact that the reference to Singapore courts is first and foremost a choice of *exclusive jurisdiction*; and hence there is a direct inconsistency with the arbitration provision. Such inconsistency should be resolved by choosing between the clauses. Because the plaintiff in *Tri-MG* brought, first in time, a good faith action for breach of contract, the court was the more appropriate forum and the proceeding should not have been stayed in favour of arbitration.

The court in *Tri-MG* did, however, make an important observation on the scope of the *Paul Smith* doctrine: “such an approach would not have been possible if the parties had, in their arbitration agreement, expressly stipulated a third country as the seat or place of arbitration”.⁷⁰ Such an observation is sound and reflects what was said in the *Navierra Amazonica* case above: that a court should be very reluctant to conclude that parties had chosen a seat of arbitration in country X but subject to the procedural law of country Y. Hence, in the *Tri-MG* case, had the parties chosen a seat of arbitration *outside* Singapore, the court would not have been able to draw the inference that the Singapore exclusive jurisdiction clause provided the procedural law of that arbitration and so perhaps a stay may not have been awarded.

2. Local Arbitration/Foreign Jurisdiction or Local Jurisdiction/ Foreign Arbitration

This last point has relevance to the final category of cases which will be examined: where the jurisdiction clause stipulates the courts of country X but the seat of arbitration is in country Y.

⁶⁹ *Ibid*, [45].

⁷⁰ *Ibid*, [50].

The first case in this group is *Indian Oil Corp v Vanol Inc*⁷¹ which involved a plaintiff suing in England for breach of a sales contract which contained specifically agreed written terms providing for English law and exclusive jurisdiction and also incorporated standard terms providing for Indian law and mandatory arbitration in India. The court held that the specifically agreed written terms prevailed over the incorporated provisions where there was conflict between them.⁷² Hence the English exclusive jurisdiction clause was given preference on the basis that the parties were more likely to have been guided and aware of the specifically negotiated terms as opposed to the provisions incorporated by reference. Such an approach therefore resolves the issue of conflict by reference to the parties' intentions expressed in the agreement.

The next relevant English case is the decision of the Court of Appeal in *Neo Investments Inc v Cargill International SA*.⁷³ The plaintiff commenced proceedings for breach of a sales contract and relied on English choice-of-law and non-exclusive jurisdiction clauses. The defendant argued that certain standard terms and conditions were also incorporated in the contract which included Geneva arbitration and Algerian choice-of-law clauses.

No conflict was, however, found between the jurisdiction and arbitration clauses in this case because the standard terms and conditions had not been incorporated in the contract with the result that the arbitration clause did not apply. Yet, even if they had been incorporated, the court felt that this was not an appropriate case for application of the *Paul Smith* doctrine. While it may be possible to infer that an English jurisdiction clause amounts to a choice of English law as the procedural law of an arbitration where the seat of arbitration is not identified, it can have no sensible application in the case of an expressly chosen foreign seat. It will be recalled that in the *Naviera Amazonica* case it was suggested that a court should resist the conclusion that an arbitration is governed by foreign procedural law. Such thinking may well have influenced the Court of Appeal in its approach here.

A more recent English decision, *Ace Capital Ltd v CMS Energy Corp*,⁷⁴ has considered the relationship between a foreign "service of suit" (non-exclusive jurisdiction) clause and a local arbitration provision. While, as noted at Section B.1 above, the decision in this case to uphold the arbitration clause is best explained on the basis of a mandatory provision (the arbitration clause) trumping an optional one (the non-exclusive jurisdiction clause), the court made a number of other comments on the relationship between jurisdiction and arbitration clauses that are worthy of note.

⁷¹ *Indian Oil Corp v Vanol Inc* [1991] 2 Lloyd's Rep 634.

⁷² *Ibid*, 636.

⁷³ Unreported 19 July 1993.

⁷⁴ [2008] 2 CLC 318.

In *Ace* an English underwriter sought an injunction to restrain court proceedings in Michigan, USA, that had been brought by a Michigan insured. The insurance policy contained clauses providing for English choice of law and mandatory London arbitration. The policy also provided that “this in no way infringes on any rights accorded in the service of suit clause of this Policy the effect of which is to provide without waiver of any defence an ultimate assurance of the amenability of Underwriters to process of certain courts”. Further, it was agreed “that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States.”

Clarke J proceeded first to examine the large body of US law on the relationship between service of suit and arbitration clauses in insurance policies. The judge felt that such an inquiry was desirable because although the policy was expressly governed by English law, US authorities were persuasive particularly in circumstances such as these where “courts on either side of the Atlantic” may have to interpret the same clauses and so consistency of approach was important.⁷⁵ As Clarke J noted, the clear majority of both federal and state US decisions support the view that where an insurance policy contains both a service of suit clause, whereby the parties submit to the jurisdiction of X court, and a mandatory arbitration clause, the arbitration clause has been held to prevail.

Two main principles underlie the approach taken in the US decisions. The first is that the purpose of a service of suit clause is merely to ease the difficulties “which the insured might encounter in obtaining jurisdiction over [a foreign] insurer” and that “the assent of the insurer to jurisdiction does not prevent it from raising a defense [that it has a right to arbitrate]”.⁷⁶ In other words, a service of suit clause may be trumped by a compulsory arbitration provision because it is in essence only a non-exclusive jurisdiction clause, allowing a party to sue in the stipulated forum but not preventing it from commencing proceedings before another tribunal. This view is consistent with the opinion expressed at Section B.1 above.

The second basis under US law for favouring arbitration clauses over jurisdictional provisions is more difficult to accept. Clarke J noted that there is in US law “a strong federal policy in favour of arbitration embodied in the Federal Arbitration Act, as established by the Supreme Court”.⁷⁷ Such a policy is said to support a preference for arbitration over litigation, not only in interpretation of the scope of an arbitration clause but “also in considering allegation[s] of

⁷⁵ *Ibid*, [17].

⁷⁶ *Hart v Orion Ins Co Ltd* 453 F 2d 1358 at 1361 (10th Cir 1971).

⁷⁷ *Moses H Cone Memorial Hospital v Mercury Construction Corp* 460 US 1 (1983); *Patten Securities Corp Inc v Diamond Greyhound & Genetics Inc* 819 F 2d 400 at 407 (3rd Cir 1987).

waiver, delay or a like defense to arbitrability”.⁷⁸ This pro-arbitration policy has led US courts in most cases to uphold arbitration clauses over all jurisdictional provisions (whether exclusive or not) unless the jurisdiction clause “specifically precludes arbitration”, in other words, where litigation is given express priority over arbitration.⁷⁹ While it may be accepted that a mandatory arbitration clause should generally prevail over a service of suit or non-exclusive jurisdiction clause, on the basis that one is voluntary and the other obligatory, it goes too far to say that a mandatory arbitration clause should trump a *mandatory* jurisdiction clause in every case. This reasoning reflects the pro-arbitration bias which has been identified elsewhere in this article.

Unfortunately Clarke J, in upholding the arbitration clause and granting an anti-suit injunction to restrain the US court proceedings, also allowed himself to be influenced by this second “pro-arbitration” principle in the US decisions,⁸⁰ which was unnecessary for his decision. The judge noted that similar to US law, English law now adopts a benevolent attitude towards arbitration, with the House of Lords decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*⁸¹ cited in support of this view. Clarke J found that although *Premium Nafta* only concerned the issue of interpreting the scope of an arbitration clause alone and not the issue of a conflicting jurisdiction clause, the decision was indicative of a more general pro-arbitration stance which should also be extended to the situation where a jurisdiction clause was present. The judge, however, did not need to adopt such an all-encompassing principle in favour of arbitration to reach the result. His conclusion in favour of arbitration could have rested on the wording of the clauses alone, namely that the non-exclusive jurisdiction clause was optional and the arbitration provision was mandatory.

Interestingly, Clarke J also appeared to rely on principles of appropriate forum to favour London arbitration over the US courts. The judge noted that in *Ace Capital* there was a choice of English law (the same as the seat of arbitration) not US law. Given the desirability of a court or tribunal applying its own law to the merits where possible, such a factor was a legitimate basis for the English court to retain jurisdiction on appropriate forum grounds,⁸² a view

⁷⁸ *Moses H Cone Memorial Hospital v Mercury Construction Corp* 460 US 1 at 24–25 (1983).

⁷⁹ *Personal Security and Safety Systems v Motorola* 297 F 3d 388 at 395–96 (5th Cir 2002); *Bank Julius Baer & Co Ltd v Waxfield Ltd* 424 F 3d 278 at 284 (2nd Cir 2005). In a few decisions, however, courts have queried whether the policy of “arbitration preference” should be applied outside the strict context of interpreting the scope of an arbitration clause. Specifically, it has been suggested that where the issue is “whether an obligation to arbitrate exists” because of the presence of a conflicting jurisdiction clause, the presumption in favour of arbitration should not apply: see *Applied Energetics Inc v Newoak Capital Markets LLC* 645 F 3d 522 at 526 (2nd Cir 2011).

⁸⁰ *Ace Capital Ltd v CMS Energy Corp* [2008] 2 CLC 318 at [83].

⁸¹ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40.

⁸² *Ace Capital*, *supra* n 80, [93].

which was reinforced by the fact that one of the parties was an English corporation.

Finally, Clarke J sought to support his conclusion to uphold arbitration by defining the role of the US service of suit provision in this case. Such a clause “enables the assured to found jurisdiction in any US Court, declare the arbitral nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award or to confirm the jurisdiction of US Courts on the merits in the event that the parties agree to dispense with arbitration”.⁸³ The service of suit clause therefore had an important function to perform, despite the fact that arbitration was given priority in this case.

The most recent English case on conflicting foreign jurisdiction and local arbitration clauses is *Sulamerica Cia Nacional de Seguros SA v Zurich Brasil Seguros SA*.⁸⁴ *Sulamerica* involved an insurance policy which contained Brazilian choice-of-law and exclusive jurisdiction clauses and a mandatory London arbitration clause. After the insured made a claim under the policy the insurer denied liability and commenced arbitration proceedings. In the arbitration the insurer sought a declaration of non-liability and a declaration that a ‘material alteration’ had occurred under the terms of the policy. The insured responded by commencing proceedings in Brazil and the insurer then sought an anti-suit injunction from the English courts to compel arbitration.

Cooke J frankly and appropriately acknowledged that the jurisdiction and arbitration clauses were in conflict and he had therefore to “give priority to the arbitration clause [as] ... there is no other way of reconciling the two”.⁸⁵ “The only other option” he saw was to “allow both the right to litigate in Brazil and the right to arbitrate in tandem’ which was ‘a most unlikely construction of the parties’ intentions”.⁸⁶

As discussed above, however, Cooke J’s suggested “in tandem” alternative is not the only option for a judge confronted by conflicting mandatory jurisdiction and arbitration clauses. It is certainly unlikely that the parties would have intended both forms of dispute resolution to proceed simultaneously to judgment with enormous inefficiency, added costs and the risk of inconsistent results. It is more likely that the parties would have intended that the substantive disputes be heard in one forum only. To achieve this objective while at the same time giving equal weight and recognition to the jurisdiction and arbitration clauses, the more appropriate forum should be sought. In resolving this question, weight will be accorded to the tribunal first seised with the dispute, assuming the action is brought in a contractually stipulated forum, is in good

⁸³ *Ibid.*, [82].

⁸⁴ *Sulamerica Cia Nacional de Seguros SA v Zurich Brasil Seguros SA* [2012] EWHC 42 (Comm) (aff’d [2012] EWCA Civ 638).

⁸⁵ *Ibid.*, [50].

⁸⁶ *Ibid.*

faith and is not a form of abusive forum shopping. In the cases discussed thus far there has been no evidence that the first filed proceeding was unconscionable.

A question mark, however, surrounds the insurer's reference to arbitration in *Sulamerica* given that it consisted principally of a request for a declaration of non-liability under the policy. As noted above, negative declarations have on occasion been suggestive of abusive, artificial tactics to deprive a claimant of access to its proper forum.⁸⁷ In the absence of more facts surrounding the claims in the arbitration in *Sulamerica* it may be difficult to reach a firm conclusion. Yet given that the insured (a Brazilian company) was seeking to claim under a policy which concerned events in Brazil and so was the "natural plaintiff" in this dispute, the insurer's pursuit of negative relief in arbitration could be seen as an attempt to thwart the insured's access to its own (agreed) courts. If so, application of the appropriate forum test on the facts of *Sulamerica* should have led the English court to defer to the Brazilian tribunal.

A final observation could be made in relation to the *Sulamerica* decision. The contract in that case, containing London arbitration and Brazilian exclusive jurisdiction clauses, was expressly governed by Brazilian law. A possible argument that was not raised by the parties was that the conflict between the arbitration and jurisdiction clauses in the contract should be determined by the governing law of the contract, in this case Brazilian law. It would have been interesting to see how the English court would have responded to such an argument. What the insured did argue in *Sulamerica* was that the arbitration clause was invalid under Brazilian law because its enforcement required both parties' consent which was not present. The English court sidestepped this argument by saying that the law governing the arbitration agreement was English (since it was a London arbitration clause) and under English law the arbitration clause was valid. In the case of a conflict between jurisdiction and arbitration clauses, however, the correct choice-of-law rule to apply would be the law governing the contract *as a whole* not the law governing the individual arbitration clause. On that basis Brazilian law would have been applied to resolve the conflict in *Sulamerica*, an approach that may have produced a more favourable outcome for the insured.

F. IMPACT OF THE HAGUE CHOICE OF COURT CONVENTION

A final question that also arises is whether the 2005 Hague Convention on Choice of Court Agreements, if it enters into force in common law countries, will affect the issue of conflicting jurisdiction and arbitration clauses. The Con-

⁸⁷ See *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 371.

vention excludes “arbitration ... proceedings” from its scope in Article 2(4), and in Article 3(a) provides that an “exclusive choice of court agreement” (the subject matter of the Convention) must designate “the courts of one Contracting State”. Consequently, with arbitration excluded, it is arguable that an agreement which contains an exclusive jurisdiction clause and an arbitration clause will still be an “exclusive choice of court agreement” for the purposes of Article 3(a). Article 5 then provides for mandatory enforcement of an exclusive choice-of-court agreement which stipulates the courts of the forum and Article 6 provides for (almost) mandatory enforcement of a foreign exclusive choice-of-court agreement (subject to the “manifest public policy” of the forum state). If this argument is correct, then the Convention establishes a primacy of litigation over arbitration, in effect reversing the established US and English positions.

Two commentators, however, suggest that because such a result could “create mischief with arbitration” it would be better to classify an exclusive jurisdiction clause, when coupled with an arbitration clause, as a non-exclusive provision for the purposes of the Convention and so leave the matter to existing national law to resolve.⁸⁸ Unfortunately, for the reasons mentioned above, such an approach would have the result (if the dispute arose in an English court) that the arbitration clause would prevail in all cases. Such a solution is not only inconsistent with the parties’ express wording, but also, by diminishing the effect of the jurisdiction clause, suffers from a similar pro-arbitration bias to that exhibited elsewhere in the area of conflicting clauses. Since the aim of the Convention is to raise the status of exclusive jurisdiction clauses relative to arbitration, this ethos will hopefully encourage national courts to adopt neutral and even-handed solutions to the problem of conflicting provisions. A more appropriate forum test may be useful in this regard.

G. CONCLUSION

The focus of this article has been on the topic of conflicting jurisdiction and arbitration clauses, an issue that arises commonly in practice but has been debated little in the literature. Moreover, the majority of commentary and judicial decisions on the issue have taken the view that the arbitration clause should be upheld on the basis of the recent global trend in support of international commercial arbitration. Such reasoning, however, flies in the face of the parties’ express intention in many agreements to provide an option to arbitrate or to litigate. Even where parties have provided seemingly irreconcilable mandatory jurisdiction and arbitration clauses, an approach that seeks to give equal weight to both rather than simply ignoring one in favour of the other provision

⁸⁸ R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (Cambridge University Press, 2006), 42, n 2.

is more principled. It was suggested in this article that often the parties' agreement will provide the answer to resolving such conflicts in terms of indicating that one method of dispute resolution was to be given primacy over the other. Where, however, no such indication can be discerned, a neutral circuit breaker is required, such as a discretionary test based on seeking the most appropriate forum. While an important element in such a test is the time at which a particular tribunal was first seised, other considerations will also be relevant, including the purpose behind such proceedings and the connections between the tribunal and the parties and subject matter. In that way, equality of treatment can be maintained between arbitration and litigation.

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