Queen Mary
University of London

Centre for Commercial Law Studies
40
2020

English Jurisdiction Clauses in Ship Finance and Security

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Ship finance

- It is very common for ship finance contracts such as bank loan agreements to provide for asymmetric jurisdiction clauses.
- An asymmetric jurisdiction clause will typically provide that if the Borrower brings proceedings it may only do so in England, whereas the Bank may bring proceedings against the Borrower in any competent court.
- We will consider such clauses and the recent case law in relation to them
  - *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505
  - *Lornamead Acquisitions Ltd v Kaupthing Bank* [2011] EWHC 2611 , [112] per Gloster J (Article 17 of the Lugano Convention)
  - *Black Diamond Offshore Ltd v Fomento de Construciones Y Contratas SA [2015] EWHC 1035*, [43].
  - *Barclays Bank Plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri* [2016] EWCA Civ 1261; [2017] 2 All ER (Comm) 432
  - *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm); [2017] 1 WLR 3497
  - *Etihad Airways PJSC v Flother* [2019] EWHC 3107 (Comm); [2020] 2 WLR 333 under appeal

Security for the loan

- When a bank enters into a loan agreement for the purchase of a ship (whether a new build or second hand tonnage), the bank will take security for the loan which may include:
  - Mortgage of the ship
  - Assignment of the hull and machinery insurance policy on the ship and loss payee clause in that policy
  - Mortgagee's interest insurance
  - Assignment of the earnings of the ship eg the hire under a time charterparty or freights under voyage charterparties.
  - Guarantee from the Director of the shipowner or the Managers of the ship.
- We will consider jurisdiction clauses particularly in relation to the assignment of the hull and machinery insurance policy and the decision of the Supreme Court in *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11; [2020] 2 WLR 919.

The potential rules applicable to a jurisdiction clause

- 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 (recast) (the Recast Regulation). It applies to legal proceedings instituted on or after 10 January 2015 (Article 66)
- The 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 2007 Lugano Convention), clause 23 of which on jurisdiction agreements is in the same terms as Article 23 of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the EC Jurisdiction Regulation) which applied to proceedings commenced before 10 January 2015.
- The 2005 Hague Convention on Choice of Court Agreements (the 2005 Hague Convention).
- The common law rules.

The Recast Regulation

- The Recast Regulation continues to apply to the United Kingdom of Great Britain and Northern Ireland (the UK) during the transition period following the withdrawal of the UK from the EU as retained legislation until 11pm on 31 December 2020 (see the European Union (Withdrawal Agreement) Act 2020 which amends the European Union (Withdrawal) Act 2018).
- Article 25 provides for jurisdiction agreements:

  1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

  (a) in writing or evidenced in writing;

  (b) in a form which accords with practices which the parties have established between themselves; or

  (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

  2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

The *lis pendens* provisions of the Recast Regulation

Article 29

1. Without prejudice to Article 31(2) , where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established…

Article 31

…

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm); [2017] 1 WLR 3497

- Commerzbank Aktiengesellschaft, a German bank with a London presence entered into loan agreements for the building of a number of ships.
- Liquimar, a ship management company, guaranteed two of the loans to ship owning companies managed by it to the bank.
- Liquimar and one of the borrowers commenced proceedings in Greece.
- The Liquimar guarantee contained a governing law and an asymmetric jurisdiction clause, which was essentially similar to that in the loan agreements and subsequent forbearance agreements. It provided:

  "16 Law and Jurisdiction

  16.1 This Guarantee and Indemnity shall in all respects be governed by and interpreted in accordance with English law.

  16.2 For the exclusive benefit of the Lender, the Guarantor irrevocably agrees that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Guarantee and Indemnity and that any proceedings may be brought in those courts.

  16.3 Nothing contained in this Clause shall limit the right of the Lender to commence any proceedings against the Guarantor in any other court of competent jurisdiction nor shall the commencement of any proceedings against the Guarantor in one or more jurisdictions preclude the commencement of any proceedings in any other jurisdiction, whether concurrently or not.

  16.4 The Guarantor irrevocably waives any objection which it may now or in the future have to the laying of the venue of any proceedings in any court referred to in this Clause and any claim that those proceedings have been brought in an inconvenient or inappropriate forum, and irrevocably agrees that a judgment in any proceedings commenced in any such court shall be conclusive and binding on it and may be enforced in the courts of any jurisdiction …".

Liquimar

- The bank commenced proceedings in England seeking repayment of the sums due under the loan including interest and costs, declaration of non liability for the claims in the Greek courts and also declarations and damages and/or an indemnity for breaches of the jurisdiction clauses in the loan agreements and guarantees.
- The defendants applied for stays of the bank's claims, pursuant to article 29 of the Recast Regulation, on the basis that the Greek court was the court first seised. The issue arose whether the asymmetric jurisdiction clauses were agreements conferring exclusive jurisdiction on the English courts within the meaning of article 31(2) of the Regulation, which disapplied article 29.

The judgment of Cranston J in *Liquimar*

- Whether an asymmetric jurisdiction agreement can be characterised as conferring exclusive jurisdiction on a court of a Member State within the terms of Article 31(2) is a question of the autonomous interpretation of the Regulation.[52]
- Such a clause does confer exclusive jurisdiction within Article 31(2)

  "64. The natural meaning of the words in Article 31(2) - "an agreement [which] confers exclusive jurisdiction"- to my mind includes asymmetric jurisdiction clauses such as those in the various agreements in this case between the Bank and the defendants. Considered as a whole, they are agreements conferring exclusive jurisdiction on the courts of an EU member state, namely, England. That this applies in respect of a claim by the defendants alone does not detract from this effect."

  …

  70. Thus with the asymmetric jurisdiction clauses in the present case, the defendants agreed to sue only in the courts of one EU Member State, England. Instead, they have enabled another court, the Greek court, to be seized of the matter. It would undermine the agreements of the parties, and foster abusive tactics, if the jurisdiction clauses in these agreements were to be treated not as exclusive, but as non-exclusive.

- The 2005 Hague Convention was of no assistance in the interpretation of Article 31(2) ([37] – [39] [71] – [74] quoted on slides 21 and 22).

Judgment in *Liquimar*

- Cranston J further held that as the court chosen if the English court decides it has jurisdiction, it could "proceed with the case irrespective of how far advanced the Greek proceedings are" and did not have to stay its proceedings until the Greek court had decided whether it had jurisdiction. [78]
  - See *Dexia Crediop SpA v Provincia Di Brescia* [2016] EWHC 3261 (Comm)
  - *Generali Italia SpA v Pelagic Fisheries Cororation (The Kapitan Veselkov)* [2020] 1228 (Comm)
- He rejected Liquimar's subsidiary argument that the asymmetric jurisdiction agreement was not compatible with Article 25.

Etihad Airways PJSC v Flother [2019] EWHC 3107 (Comm); [2020] 2 WLR 333 under appeal

On 28 April 2017 Etihad entered into a facility agreement with Air Berlin in which it agreed to advance €350 million.

The facility agreement provided,

32. Governing Law

This Agreement and all non-contractual obligations arising from or connected with it are governed by English law.

33. Enforcement

33.1 Jurisdiction

33.1.1 The courts of England have exclusive jurisdiction to settle any disputes arising out of or in connection with this Agreement (including a dispute relating to non-contractual obligations arising from or in connection with this Agreement, or a dispute regarding the existence, validity or termination of this Agreement) (a " **Dispute** ").

33.2.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

33.1.3 This Clause 33 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

Etihad Airways PJSC v Flother [2019] EWHC 3107 (Comm); [2020] 2 WLR 333 under appeal

- Etihad also entered into three other agreements with AB between 28 and 30 April 2017 which were all governed by English law and contained English jurisdiction agreements similar to that in the Facility agreement.
- On 28 April 2017 Etihad gave a comfort letter to AB which did not contain a jurisdiction clause.
- In July 2018 the Insolvency administrator of AB in Germany commenced proceedings against Etihad in Germany alleging breach of the comfort letter or pre contractual obligations.
- In January 2019 Etihad commenced proceedings in England seeking declarations

The judgment of Jacob J in *Etihad*

- The essential question in the English proceedings was (i) whether there was a good arguable case that the claim commenced by Air Berlin in Germany fell within the scope of the jurisdiction clause in the facility agreement; and (ii) that jurisdiction clause fell within Article 31(2) of the Recast Regulation.
- The facility agreement and the comfort letter were both part of an overall support package and were closely linked. Interpreting the jurisdiction agreement in the Facility Agreement as a matter of English law, there was a good arguable case that (i) the jurisdiction clause in the Facility Agreement was applicable to the Comfort Letter and any non-contractual claim in connection therewith, and (ii) the claim commenced by Air Berlin in Germany fell within the scope of that clause.
- Etihad had a good arguable case that the dispute originated from the legal relationship in connection with which the jurisdiction agreement was concluded.
- Jacob J also considered the 2005 Hague Convention but held that it did not assist in the interpretation of the Recast Regulation ([215] – [217] quoted at slide 23 .
- Article 31(2) of Brussels Recast does apply to asymmetric clauses.
- Jacob J did not refer the issue on Article 31(2) to the Court of Justice of the European Union.

Jacob J cited Louise Merrett, *"The Future Enforcement of Asymmetric Jurisdiction Agreements" [2018] 67(1) ICLQ 37* with approval at [184]

"In an asymmetric agreement, the borrower has promised not to sue anywhere other than the chosen jurisdiction. The question of whether the other party did or did not agree to do the same does not arise when the bank is seeking to enforce the agreement and should be irrelevant. Thus, the point is not so much that "considered as a whole" [asymmetric agreements] are agreements conferring exclusive jurisdiction, as the judge put it in *Commerzbank* . Rather, each obligation can be considered on its own; the clause includes a promise by the borrower not to sue in any jurisdiction and that promise is capable of being protected by Article 31(2) . Each different obligation necessarily falls to be considered separately and the fact that the bank is not under a similar obligation is neither here nor there." (pages 55 – 56)

The 2007 Lugano Convention

- The 2007 Lugano Convention continues to apply to the UK during the transition period after the withdrawal of the UK from the EU as retained legislation until 11pm on 31 December 2020 (see the European Union (Withdrawal Agreement) Act 2020 which amends the European Union (Withdrawal) Act 2018).
- On 8 April 2020 the UK deposited its application to accede to the 2007 Lugano Convention in its own right at the end of the transition period [i]https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf
- Iceland, Norway and Switzerland had previously stated that they will support a request for accession from the UK https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007 accessed 12.6.2020. The consent of the EU and Denmark will be required.
- The Private International Law (Implementation of Agreements) Bill was introduced in Parliament on 27 February 2020. The Bill enables the UK to implement international agreements in Private International Law in domestic law in future via secondary legislation including the 2007 Lugano Convention.
- Under the predecessors to the Recast Regulation and the 2007 Lugano Convention there is no exception to the *lis pendens* provision where the court second seised is the chosen court. That court must stay its proceedings until the court first seised has established whether it has jurisdiction.
    - Case C-116/02 *Erich Gasser GmbH v MISAT SRL* (Article 17 of the EC Jurisdiction Convention)
    - *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (Article 23 of the Revised Lugano Convention). The English court was first seised and the Swiss court was second seised as a result of an alleged exclusive Swiss court jurisdiction clause. Waksman J rejected an argument that Article 27 of the Revised Lugano Convention must now be read in the light of and to the same effect as Article 31(2) of the Recast Regulation. As he held that there was a good arguable case that there was an exclusive Swiss jurisdiction agreement, he stayed the English proceedings.

The 2005 Hague Convention on Choice of Court Agreements

- So far the Convention is only in force in thirty one States, twenty seven of those the Member States of the European Union. It continues to apply to the UK during the transition period after the withdrawal of the UK from the EU as retained legislation until 11pm on 31 December 2020 (see the European Union (Withdrawal Agreement) Act 2020 which amends the European Union (Withdrawal) Act 2018).
- The Convention entered into force on 1 October 2015 in Mexico and the European Union, thus binding twenty seven of the EU Member States but not Denmark; on 1 October 2016 in Singapore; on 1 August 2018 in Montenegro; and on 1 September 2018 in Denmark. China signed the Convention on 12 September 2017 but has not yet ratified it.
- The UK intends to accede to the convention in its own right. It has notified the Ministry of Foreign Affairs of the Kingdom of the Netherlands the Hague that "The United Kingdom attaches importance to the seamless continuity of the application of the [convention] to the United Kingdom. The United Kingdom therefore intends to deposit a new instrument of accession at the appropriate time prior to the termination of the transition period" – see https://treatydatabase.overheid.nl/en/Treaty/Details/011343/011343_Notificaties_23.pdf. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018/ 1124 as amended by the Private International Law (Implementation of Agreements) Bill, are not yet in force.
- Contrast the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") which has been ratified by about 160 States including China and the UK.

Party autonomy is at the heart of the 2005 Hague Convention

- Party autonomy is at the heart of the 2005 Hague Convention, as it is in the New York Convention, and results in three basic principles:
  - If parties to a contract choose an exclusive court jurisdiction agreement that choice shall be given effect to unless the agreement is null and void under the law of that State - Choice of Court Convention, Article 5(1);
  - no other court should take jurisdiction - Choice of Court Convention, Article 6; and
  - any court judgment resulting from such choice should be recognised and enforced - Choice of Court Convention, Article 8.
  - Each of these principles is subject to exceptions.

Scope of the 2005 Hague Convention

- The 2005 Hague Convention does not apply to some matters in Article 2(2) including
  - *f)* the carriage of passengers and goods;
    g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; the carriage of goods
  - It does not therefore apply to a bill of lading or a voyage charterparty, but probably will apply to a time charterparty.
- The Convention does, however, apply to other maritime contracts such as
  - ship finance contracts,
  - ship mortgages and liens,
  - ship building contracts,
  - ship sale and purchase contracts,
  - time charterparties, and
  - contracts of marine insurance and reinsurance that relate to maritime matters, including cargo insurance (Article 17).

Exclusive choice of court agreements

Article 3
Exclusive choice of court agreements

For the purposes of this Convention -

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
c) an exclusive choice of court agreement must be concluded or documented -

i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

States may extend the application of the Convention to non exclusive jurisdiction clauses by making a declaration (art 22).

Application of the 2005 Hague Convention to asymmetric jurisdiction agreements - The Explanatory Report by Trevor Hartley and Masato Dogauchi

32 **Banking and finance.** Banking and finance are fully within the scope of the Convention. International loan agreements are, however, often subject to a non-exclusive choice of court clause. In such a case, the Convention would not apply unless the States concerned had made a declaration under Article 22. An asymmetric choice of court agreement (a choice of court agreement under which one party may bring proceedings exclusively in the designated court, but the other party may sue in other courts as well) is not regarded as exclusive for the purposes of the Convention.

Cranston J in *Liquimar* on the 2005 Hague Convention on Choice of Court Agreements

- 37. The Explanatory Report to the Hague Convention by Professors Trevor Hartley and Masato Dogauchi noted that asymmetric jurisdiction clauses are often used in international loan agreements. However, they continued, the Diplomatic Session had agreed that they: "are not exclusive choice of court agreements for the purposes of the Convention."
- 38. The Explanatory Report added that such clauses may be subject to the rules of the Convention if the States in question have made declarations under Article 22, which is the clause which provides for reciprocal declarations by Contracting States on the recognition and enforcement of judgments under non-exclusive jurisdiction clauses.
- 39. An earlier report by Professors Dogauchi and Hartley, at the time of the drafting of the Convention, suggested that to make it clear that asymmetric jurisdiction clauses were excluded from the definition in what is now Article 3(a) "it might be desirable to add…the words, 'Such an agreement must be exclusive irrespective of the party bringing the proceedings'." That was not done.

Cranston J in *Liquimar* on the Hague Convention

71. The Hague Convention, in my view, offers no assistance in the characterisation of asymmetric jurisdiction clauses under Article 31(2) of Brussels 1 Recast . There is no reference to the Hague Convention in Brussels 1 Recast, although the drafting of both occurred in tandem and Council Decision 2014/887/EU referred to ensuring coherence between the rules of the EU on the choice of court in civil and commercial matters and those of the Hague Convention.

72. While there is an overlap between the two instruments, however, there are important divergences. Thus there are differences between the two in the formal requirements for exclusive jurisdiction clauses, the Hague Convention in Article 3(c) requiring writing or an accessible form, Brussels 1 Recast in Article 25 allowing agreements to be established on a wider basis, through the practices of the parties or by commercial usage.

73. Further, there is a definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention , whereas there is no definition in Brussels 1 Recast. The reporters record that the Diplomatic Session adopting the Hague Convention accepted that the definition in Article 3(a) did not extend to asymmetric jurisdiction clauses, something the reporters themselves do not seem to have regarded as clear.

74. There are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in Article 3(a) of the Hague Convention cover asymmetric jurisdiction clauses. For present purposes, however, there is no need to reach a concluded view on the ambit of the definition. Even if it were to be read as excluding asymmetric jurisdiction clauses, however, that in my view is of no assistance as to the quite separate issue of their characterisation under Article 31(2) of Brussels 1 Recast .

Judgment of Jacobs J in *Etihad* – the 2005 Hague Convention

215. Air Berlin repeated substantially the same arguments concerning the Hague Convention which had failed to persuade Cranston J.: see paragraphs [71] – [74] of his judgment in *Commerzbank* . It is true, of course, that the some of the materials which preceded the Hague Convention indicate that asymmetric clauses were not to be equated with symmetric clauses for the purposes of that Convention. However, the language of the Hague Convention itself does not make that clear. Unlike the Brussels Recast, it contains a definition of the expression "exclusive choice of court agreement":

> "… means an agreement concluded by two or more parties that … designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts."

216. Some academic commentaries proceed on the basis that this definition in the Hague Convention does not apply to an asymmetric clause. The question was also touched upon by Bryan J. in *Clearlake Shipping Pte Limited v Xiang Da Marine Pte Ltd. [2019] EWHC 536 (Comm)* at paragraphs [62] – [64], but he did not need to reach a concluded view on the issue. Cranston J. was of the view that there are good arguments that the definition does apply to asymmetric clauses. The issue is discussed by Merrett at page 58 of her article. Her view is that the position is not entirely clear, but that the question should again be addressed by considering the effect of a particular obligation on a particular party. On this basis, she concludes that there is nothing in the structure or rationale of the Convention to mean that "if the claim is made against a borrower who has agreed to be sued in a particular jurisdiction and only that jurisdiction that the rules should not engage".

217. Like Cranston J. and Merrett, I consider that there are good arguments that the rules in the Hague Convention are engaged by an asymmetric clause. But in any event, I am concerned here with the rules in Brussels Recast which are differently worded and also have the important Recital (22). I have come to a clear view, based on the wording of Brussels Recast, its aims and background, as well as the decision in *Meeth* and the three prior cases on Article 31 (2) , that Article 31 (2) of Brussels Recast does apply to asymmetric clauses. I am far from convinced that even if a different result might arguably be reached under the Hague Convention, that this should dictate the answer under Brussels Recast. Indeed, there is a powerful case for saying that the conclusions reached in relation to Brussels Recast should assist in dictating the answer under the Hague Convention.

Common law

The common law rules would apply eg where Article 23(3) of the 2007 Lugano Convention applies (if neither party is domiciled in a Lugano Contracting State) or if there is a no deal Brexit.

- Jurisdiction depends on service.
- Service on the defendant within the jurisdiction.
    - Jurisdiction is founded as of right where a defendant is served with proceedings within the jurisdiction in accordance with Part 6 of the Civil Procedure Rules.
    - The defendant may apply to the court to exercise its discretion to stay the proceedings on the ground of eg. *forum non conveniens - Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 AC 460 at pages 474 and 476-478. The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.
- Service on the defendant outside the jurisdiction.
    - Where the defendant is not within the jurisdiction the claimant requires the permission of the court in order to serve a claim form out of the jurisdiction. The claimant must

    1. show that it has a good arguable case that the claim falls within one of the grounds in paragraph 3.1 of Practice Direction 6B supplementing Part 6 of the Civil Procedure Rules (Part 6 rule 36). Thus, for example, if the claim is in relation to a contract there will be a ground for the English court to give permission to serve out of the jurisdiction if

        (6) a claim is made in respect of a contract where the contract -

        (a) was made within the jurisdiction

        (b) was made by or through an agent residing within the jurisdiction;

        (c) is governed by English law; or

        (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.

        (7) a claim is made in respect of a breach of contract committed within the jurisdiction.

        (8) a claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).

    2. on the merits there is a serious question to be tried in the sense that the claim has a reasonable prospect of success (Part 6 Rule 37(1).
    3. England is the forum in which the case should properly be tried
        - *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 AC 460

Common Law

- Asymmetric jurisdiction agreements are valid and enforceable
  - *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 All ER 237,* p.249G-250A
  - *Bank of New York Mellon v GV Films* [2009] EWHC 2338 , [14];
  - *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd [2013] EWHC 1328 (Comm); [2013] 2 Lloyds Rep 121* , [37], per Popplewell J

Remedies for breach of an English jurisdiction agreement

- Anti- suit injunction
- Damages for breach of contract
- Damages for the tort of inducing breach of contract
- Indemnity costs for breach of a jurisdiction clause and anti-suit injunction
  - *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2658 (Comm)

Anti-suit injunction for breach of an exclusive English jurisdiction agreement

- S. 37(1) Senior Courts Act 1981. Discretionary - “just and convenient to do so".
- Not permissible where the other proceedings are in the courts of an EU Member State or Lugano Contracting State and the Recast Regulation or 2007 Lugano Convention applies
  - Case C-159/02 *Turner v Grovit* EU:C:2004:228; [2005] 1 AC 101
  - Case C185/07 *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA*) *v West Tankers Inc (The Front Comor)* [2009] 1 AC 1138; [2009] 1 Lloyd’s Rep 413 (London arbitration clause)
  - *Nori Holding Ltd v PJSC Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm); [2018] 2 All ER (Comm) 1009 (London arbitration clause and Recast Regulation)
- What about where the 2005 Hague Convention applies and the other proceedings are for example in Mexico, Singapore, or Montenegro?
- Available where the proceedings threatened or commenced are in the courts of a non EU Member State or non Lugano Contracting State.
  - *Donohue v Armco* [2001] UKHL 64; [2002] 1 Lloyd’s Rep 425 (New York)
  - *Bank of New York Mellon v GV Films* [2009] EWHC 2338 (Comm) (India)

Anti-suit injunction

- Delay
  - *Toepfer International GMBH v Molino Boschi SRL* [1996] 1 Lloyd's Rep 510
  - *Verity Shipping SA v NV Norexa* [2008] EWHC 213 (Comm); [2008] 1 Lloyd's Rep 652
  - *Essar Shipping Ltd v Bank of China Ltd (The Kishore)* [2015] EWHC 3266 (Comm); [2016] 1 Lloyd's Rep 427
  - *ADM Asia-Pacific Trading PTE Ltd v PT Buda Semestra Satria* [2016] EWHC 1427 (Comm)
  - *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; [2016] 1 Lloyd's Rep 360 (anti-enforcement injunction)
  - *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd (The Confidence Ocean)* [2018] EWHC 3009; [2019] 1 Lloyd's Rep 520
  - *Pan Ocean Co Ltd v China-Base Group Co Ltd (The Grand Ace 12)* [2019] EWHC 982
  - *Enka Insaat v Sanayi AS v OOO "Insurance Co Chubb*" [2020] EWCA 574
  - *Times Trading Corporation v National Bank of Fujairah (Dubai branch)* [2020] EWHC 1078 (Comm)
  - *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599
  - *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA* [2020] EWHC 1223 (Comm) (arbitration clause in bill of lading)
- Breach of an anti-suit injunction is a contempt of court
  - Custodial sentences
    - *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; [2015] 2 Lloyd's Rep 1; [2014] EWHC 3632 (Comm); [2015] 1 Lloyd's Rep 301
    - *Dell Emerging Markets (EMEA) Ltd v Systems Equipment Telecommunications Services SAL* [2020] EWHC 561 (Comm) and [2020] EWHC 1384 (Comm)
  - Fine
    - *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; [2015] 2 Lloyd's Rep 1; [2014] EWHC 3632 (Comm); [2015] 1 Lloyd's Rep 301

Damages for breach of an exclusive English jurisdiction agreement

- Damages are available where no anti-suit injunction is available because the other court proceedings are in the courts of an EU Member State or non Lugano Contracting State
  - *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T)* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 579
  - *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (*The Alexandros T)* [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep 579
  - *Barclays Bank plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici e Degli Odontoiatri* [2016] EWCA Civ 1261; [2017] 2 All ER (Comm) 432
- Presumably damages would be available where the 2005 Hague Convention applies
- Damages are available where the other proceedings are in a non EU Member State or non Lugano Contracting State
  - *Donohue v Armco* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425
  - *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; [2015] 2 Lloyd's Rep 1; [2014] EWHC 3632 (Comm); [2015] 1 Lloyd's Rep 301
  - *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA, Ace Seguros SA (The Hornbay)* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep 44
- Damages will be available for breach of contract and for the tort of inducing breach of contract
  - *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA, Ace Seguros SA (The Hornbay)* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep 44
  - *AMT Futures Limited v Marzillier* [2017] UKSC 13; [2017] 2 WLR 853

Conclusions on Asymmetric jurisdiction agreements

- Asymmetric jurisdiction agreements are exclusive as far as the Borrower is concerned under the Recast Regulation and the 2007 Lugano Convention, subject to the appeal in *Etihad*.
- The position under the 2005 Hague Convention is not clear but there is support in *Liquimar* and *Etihad* for saying that asymmetric jurisdiction agreements are exclusive as far as the Borrower is concerned.
- At common law asymmetric jurisdiction agreements are exclusive as far as the Borrower is concerned.

Security for the loan agreement - Assignment of the Hull and Machinery policy

- *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11; [2020] 2 WLR 919
- Aspen Underwriting Ltd and others insured the *Atlantik Confidence* owned by Kairos Shipping Limited, a Maltese company, under a hull and machinery insurance policy with a value of US$22m.
- The Policy had an exclusive jurisdiction clause by which each party submitted to the exclusive jurisdiction of the courts of England and Wales a follows:

  "This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales."
- Credit Europe NV (“the Bank”), a bank domiciled in The Netherlands, funded the re-financing of two vessels, including the *Atlantik Confidence*.
- The Bank took a mortgage over the Vessel and assignment of the Policy, which identified the Bank as mortgagee, assignee and loss payee.

Aspen Underwriting – the facts

- On 3 April 2013 the *Atlantik Confidence* sank off the coast of Oman.
- On 5 April 2013 the Bank authorised payment of the insurance proceeds to the insurance brokers, Willis Ltd, in a letter of authorisation from the Bank as follows:

  "We hereby authorise you to pay to Willis Ltd all claims of whatsoever nature arising from the above mentioned casualty provided that (i) there are no amounts due under the policy and (ii) … [the Bank] is the sole loss payee of the policy.

  We agree that settlement of such amounts in account or otherwise with Willis Ltd shall be your absolute discharge in respect of such amounts paid."
- On 6 August 2013 the Insurers entered into a settlement agreement with the owners and managers of the Vessel to pay US$22million to Willis. That settlement agreement also provided for English law and an exclusive English jurisdiction agreement.
- Three years later the Admiralty Court (*[2016] EWHC 2412 (Admlty)*; [2016] 2 Lloyd's Rep 525) held that the Owners and Managers had procured the scuttling of the *Atlantik Confidence* and therefore the insurers were not liable due to the wilful misconduct of the Owners.
- The Insurers commenced proceedings in the High Court in London against the Owners, the Managers and the Bank to recover the sums paid under the settlement agreement by seeking to avoid the settlement agreement on the grounds of the Owners' and Managers' misrepresentation or the Insurers' mistake, seeking damages for misrepresenation or restitution of the money which they had paid out.
- The insurers alleged that the bank had made the same representations or was vicariously liable for them; and in reliance on those representations, the insurers had entered into the settlement agreement.

The issues

- The Bank challenged the jurisdiction of the High Court in London in respect of the Insurers' claims against it. They argued that the claim was a matter relating to insurance and that therefore they were entitled to rely on Article 14 of the Recast Regulation which provides,

  1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

- The insurers argued that the Bank was bound by the English court jurisdiction clause (on the basis that the exclusive jurisdiction clause in the policy fell within Articles 15 and 25 of the Recast Regulation) and/or pursuant to Article 7(2) of the Regulation (on the basis that the claims were "matters relating to tort" and the harmful event had occurred in England).

The judgment of the Supreme Court

(i) The bank was not a party to the jurisdiction clause contained in the insurance policy or the settlement agreement.

(ii) The Insurers' claims against the Bank were "matters relating to insurance" within Chapter II, section 3 of the Regulation.

(iii) The Bank as the named loss payee was a beneficary of the policy and as such was entitled to rely on section 3 which affords protection to "a policyholder, insured or beneficiary". Everyone who fell within the categories of policyholder, insured or beneficiary was entitled to that protection without any qualification and the "weaker party" test was only used to determine if by analogy those protections were to be extended to other persons who did not fall within one of those categories. Therefore the bank could rely on Article 14 which only permits the insurer to sue where the defendant is domiciled. It was not necessary to refer a question to the Court of Justice of the European Union on this issue [59].

(iv) The question as to whether the Insurers' claims for restitution were matters relating to tort, delict or quasi-delict under Article 7(2) of the Regulation were therefore irrelevant.

(v) The English court did not therefore have jurisdiction and the only place where the insurers could sue the Bank was in the Netherlands where it was domiciled.

Lord Hodge delivering the judgment of the Supreme Court - the Jurisdiction agreement

25. …The court must therefore look to national law to determine whether the Bank can be seen in EU law as "the successor" of the Owners and Managers who are subject to the jurisdiction clause.

26. The Bank's entitlement to receive the proceeds of the Policy in the event that there was an insured casualty rests on its status as an equitable assignee. It is trite law that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, cannot transfer those obligations: *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660* , 668-670 per Collins MR. An assignment of contractual rights does not make the assignee a party to the contract. It is nonetheless well established that a contractual right may be conditional or qualified. If so, its assignment does not allow the assignee to exercise the right without being subject to the conditions or qualifications in question. As Sir Robert Megarry V-C stated in *Tito v Waddell (No 2) [1977] Ch 106* , 290, "you take the right as it stands, and you cannot pick out the good and reject the bad". This concept, which has often been described as "conditional benefit", is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract. Several examples of its application or consideration were cited to the court….

Lord Hodge delivering the judgment of the Supreme Court - the Jurisdiction agreement

27. In my view, the formulation of the principle by Hobhouse LJ in *" The Jay Bola"*, which the Court of Appeal approved in *" The Yusuf Cepnioglu"*, is the best encapsulation. In *" The Jay Bola"* the insurers of cargo for the voyage charterer asserted rights, which had been assigned to them by the voyage charterer by subrogation under foreign law, by raising court proceedings in Brazil against the owners and the time charterer. On the application of the time charterers, Morison J granted an anti-suit injunction against the insurers because the arbitration clause in the voyage charter regulated the means by which the transferred right could be enforced. The Court of Appeal upheld his order. Hobhouse LJ stated ([1997] 2 Lloyd's Rep 279, p 286):

> "… the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

This formulation emphasises the constraint on the assertion of a right as being the requirement to avoid inconsistency and, whether the clause is an arbitration clause, as in *" The Jay Bola"*, or an exclusive jurisdiction clause, as in *Youell* (above), it is the assertion of the right through legal proceedings which is in conflict with the contractual provision that gives rise to the inconsistency.

Lord Hodge delivering the judgment of the Supreme Court - the Jurisdiction agreement

29. In the present case the Bank did not commence legal proceedings to enforce its claim. Indeed, it did not even assert its claim but left it to the Owners and the Managers to agree with the Insurers the arrangements for the release of the proceeds of the insurance policy by entering into the Settlement Agreement. It is not disputed that the Bank was not a party to the Settlement Agreement and the Bank derived no rights from that agreement. The Letter of Authority, which the Bank produced at the request of the Owners and the Managers, enabled both the Insurers and Willis Ltd to obtain discharges of their obligations and to that end it was attached to the Settlement Agreement. The Letter of Authority facilitated the settlement between the Insurers and the Owners and provided the Owners/Managers with a mechanism by which the Bank as mortgagee, assignee and loss payee could receive its entitlement. At the time of payment of the proceeds of the Policy there was no dispute as to the Bank's entitlement and no need for legal proceedings. There was therefore no inconsistency between the Bank's actions and the exclusive jurisdiction clause. The Bank therefore is not bound by an agreement as to jurisdiction under article 15 or article 25 of the Regulation.

Lord Hodge delivering the judgment of the Supreme Court - the Jurisdiction agreement

30. The Insurers argue that, if they had refused to pay the proceeds of the Policy to the Bank and had commenced proceedings against the Bank in England seeking negative declaratory relief, the Bank would have been bound by the exclusive jurisdiction clause. They submit that it makes no sense to distinguish a claim for negative declaratory relief from the Bank's claim. This is because the Bank's right to sue for an indemnity under the Policy and the Insurers' right to sue for a declaration that it is not liable to the Bank are the same cause of action: *Gubisch Maschinenfabrik KG v Palumbo [1987] ECR 4861* (Case 144/86) , paras 15-19. This incoherence, it is submitted, militates against the Bank's analysis. I disagree. The Bank is not a party to the contract contained in the Policy. The Bank is not bound by that contract to submit to the jurisdiction of the English courts if the Insurers raise an action in England. If the Insurers' claims fall within section 3 of the Regulation, the Insurers may bring proceedings against the Bank only in the courts of the member state of the Bank's domicile, that is The Netherlands.

Lord Hodge delivering the judgment of the Supreme Court

58.It is correct, as Gross LJ observed in para 111 of his judgment ([2019] 1 Lloyd's Rep 221), that the present case concerns a marine insurance risk, and that the policyholder and the Insurers would have been able to enter into a jurisdiction agreement under articles 15(5) and 16. But that does not exclude the protections of section 3 in the absence of such an agreement which is binding on the policyholder, the insured or the beneficiary. It is important to recall the opening words of article 15: "The provisions of this section may be departed from only by an agreement". The clear implication is that in the absence of such an agreement, the policyholder, insured or beneficiary of an insurance contract falling within article 16 would come within the section 3 protections unless it contracted out of those provisions. There is no such agreement binding on the Bank in this case.

Comments on *Aspen*

- The result of the decision is that the Bank has had the benefit of the insurance policy but is not bound by the jurisdiction clause as it did not sue.
- The litigation is fragmented. The insurers must sue the Owners and Managers in England but must sue the Bank in the Netherlands with all the resulting increase in costs and risk of inconsistent judgments.
- The insurer should in future consider whether the Bank should be a party to the settlement agreement.
    - "There is much good sense in the proposition that the Bank *ought* to have been a party to the Settlement Agreement; but the question remains as to whether the Bank *was* a party." *Aspen Underwriting Ltd v Credit Europe Bank BV* [2018] EWCA 2590; [2019] 1 Lloyd's Bank BV per Gross LJ at [34]
    - "…In reaching this conclusion, I confess to a measure of regret, in that there would have been much good sense in the Bank being a party to the Settlement Agreement. But, however the matter is put, Underwriters' case that the Bank was a party to the Settlement Agreement (as distinct from ought to have been a party) falls tantalisingly short of disclosing a good arguable case…" *Aspen Underwriting Ltd v Credit Europe Bank BV* [2018] EWCA 2590; [2019] 1 Lloyd's Bank BV per Gross LJ at [44]
- The decision is consistent with the approach of the CJEU in *Assens Havn v Navigators Management (UK) Ltd (The Sea Endeavour I)* C-368/16 EU:C:2017:546 *Assens Havn* (third party claimant in a direct action on an insurance policy for a marine risk not bound by the jurisdiction clause in the insurance contract even though it falls within the equivalent of Articles 15(5) and 16 of the Recast Regulation) and *AAS Balta v UAB Grifs AG* Case C-803/18 (third party beneficiary of a liability insurance contract for a large risk not bound by a jurisdiction clause for the courts of Latvia even though it falls within Articles 15(5) and 16(5) of the Recast Regulation).
- The decision is significant for equitable assignment in general as well as for assignment of an insurance policy, loss payee clauses and subrogation. Contrast other third party situations such as the decision in *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2018] EWHC 1902 (Comm); [2018] 2 CLC 385 particularly [28] and [38] – [42]. Popplewell J held that a bank which became the lawful holder of a bill of lading became a party to the arbitration clause (incorporated into the bill of lading from the charterparty) pursuant to section 2 of the Carriage of Goods by Sea Act 1992 ("transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract"). The arbitration agreement could not be split into rights and obligations and therefore bound the bank whether it brought the proceedings or the proceedings were brought against it.

The Sea Master – the judgment of Popplewell J

28. It is well established that where an assignee acquires rights under a contract which contains an arbitration clause, its entitlement to exercise those rights is qualified by the obligation to do so in arbitration; this is so whether the assignment is contractual or statutory:
see *Schiffahrtsgesellschaft detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) [1997] 2 Lloyd's Rep 279* and *Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Naklyat Ve Ticaret AS (The Yusuf Cepnioglu) [2016] 1 Lloyd's Rep 641* at paragraphs [2], [23]-[25]. There is, however, no case to which I was referred which directly addresses whether an assignee of rights who is not seeking to exercise them is bound by an arbitration clause. It is therefore necessary to consider the problem from first principles.

The Sea Master – the judgment of Popplewell J

39. For these reasons I am unable to accept that the intended effect of sections 2 and 3 of COGSA is to bifurcate an arbitration clause in the contract of carriage contained in or evidenced by the bill of lading into rights and obligations, such as to confer arbitration rights under section 2 and arbitration obligations under section 3 . The operation of section 2 of COGSA involves a lawful holder becoming a party to the arbitration clause in the contract of carriage contained in or evidenced by the contract of carriage because the section treats him as if he had been a party to that contract. The holder is a party to that separate arbitration agreement, with all the consequences which flow from such agreement, including the mutual obligation to have any dispute falling within the scope of the agreement determined in arbitration, irrespective of whether it owes any substantive obligations under the matrix contract contained in the bill.