TRANSNATIONAL COMMERCE, CERTAINTY AND THE CONFLICT OF LAWS

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Introduction

1. Australia's economic future will be closely tied to Australian companies' ability to do business globally. Australian companies and, therefore, Australian commercial lawyers are increasingly involved in transnational commercial transactions.

2. As with any commercial transaction, a transnational transaction carries with it risk for the parties involved. That risk may or may not be insured against, and careful drafting of the commercial terms will be designed to minimise risk or at least uncertainty in the event of disputes arising. At one level, there will be greater scope for disputes to arise in a *transnational* contractual setting because often at least one party will be doing business in a country with which it may not be familiar including in terms of its legal and regulatory frameworks as well as in terms of its business culture and ethos.

3. Two of the particular and most fundamental risks which may arise in the context of a transnational commercial transaction are the risks of exposure to:
   i. an unfamiliar body of law; and or
   ii. an unfamiliar legal system or, alternatively, a legal system in which an Australian company may lack confidence because of real or perceived corruption, bias, inexperience, incompetence or dilatoriness.

4. In this paper, I focus upon the ways in which these two particular risks can be minimised through the careful drafting of choice of law and dispute resolution clauses (by which I include both jurisdiction or choice of court clauses, and arbitration clauses). The inclusion of such clauses in a transnational commercial contract or transnational financing documents is designed to inject certainty on the twin questions as to where, and by reference to what law, any disputes will be resolved. The degree of certainty injected, however, will be a function of the care taken in the drafting of such clauses.

5. In what follows, I highlight, by reference to a number of recent Australian decisions, some of the issues can arise where such clauses are not well drafted, and also some of the issues which, in my opinion, can be regarded as unsettled. I begin with choice of law clauses.

Choice of law clauses

6. Assume that a contract contains a choice of law clause in the following terms:

> *"This contract shall be interpreted [and/or construed] in accordance with German law."*

Such a clause, on its face, is confined to the *interpretation* and *construction* of the contract. It is far from self-evident that a clause drafted in this way will be effective to require that the contract in question be *governed by* German law. For example, the question of whether or not a party is entitled to terminate the contract is not typically regarded as a question of interpretation or construction. A party to a contract containing such a clause could be met with an argument to the effect that, whilst German law may govern the interpretation of the contract, another body or system of law has a claim to govern substantive contractual questions arising in a contractual dispute. Ultimately, this will turn on a question of the proper interpretation of the choice of law clause, but if the competing governing law may yield a different substantive answer to that which German law

would provide, a "wildcard" is introduced into the dispute resolution process which may be wielded to provide leverage where the other contracting party may have thought that the matter was clear.

7. It should be noted, parenthetically, that where there are multiple language versions of a particular contract, a word such as "*interpreted*" or "*construed*" may, upon translation, have or be given a different meaning, e.g. "*governed by*". Where multiple language versions of the contract are in existence, it is important for there to be a clause identifying which language version of the contract is authoritative or to prevail in the case of the inconsistency.

8. A superior form of drafting of the first example would be to provide that:

> *"This contract shall be governed by German law."*

This form of drafting eliminates the potential argument arising in relation to the first example, namely that the reference to German law and its applicability was intended to be limited to questions of interpretation and construction, and that some other body of law had a role to play in the resolution of the parties' dispute.

9. On the other hand, a clause which simply provides that "*This contract shall be governed by German law*" leaves an uncertain question as to whether or not the reference to German law is a reference to *German domestic law* or to German law including its own principles of private international law. Depending on the content of those principles, if the choice of German law was interpreted to include a reference to the entire body of German law including its principles of private international law, the operation of German law may require reference to another system of law to be applied to resolve the dispute, e.g. if the contract was being performed in a third country, the law of that country may be referred. This is the problem of *renvoi* which has long been the bane of academics and law students and has

tended to be treated as theoretical conundrum unlikely to be encountered in practice.

10. The issue has, however, been the subject of a relatively recent decision of the High Court in *Neilson v Overseas Development Corporation* (2005) 223 CLR 331 where it was held that, in a case being litigated in the Supreme Court of Western Australia, although the law governing what was in that case a tort, was the law of the place of the tort, namely China, Chinese law referred the matter, in a case (as *Neilson* was) involving nationals from the one (foreign) country, to the law of *that country* to resolve any disputes. On the facts of *Neilson*, this was not simply academic point-taking but was crucially important to the outcome of the case. Mrs Neilson was living in China with her husband who had been posted there by his Australian employer, the Defendant. The Defendant had provided the Neilsons with a form of housing for the period of Mr Neilson's employment in China. Mrs Neilson suffered serious injuries when a balustrade in the house in which they were living gave way. The tort undoubtedly occurred in China but, if Chinese domestic law were to apply, Mrs Neilson's claim was out of time under the Chinese limitation law. If, however, Australian law was to apply by reason of the fact that Chinese law "referred" the matter on to Australian law, the matter was not out of time because of the difference in the limitation periods under Chinese law and Australian law.

11. Returning to the question of drafting, the potential scope for *renvoi* can be eliminated by drafting a clause along the following lines:

> *"This contract shall be governed by German law excluding the principles of German private international law".*

I describe such clauses as an "anti-renvoi" clause. It is obvious that such a clause minimises the risk for debate as to the applicable law and adds certainty to dispute resolution. You may consider that this represents an excessive caution but, where the stakes are sufficiently high, any competent transnational litigator should be alive to this argument and will explore the question to ascertain whether or not (i) the nominated law may or would, in

the circumstances, refer the matter to another legal system, and (ii) if it did, whether such a reference would provide his or her client with some strategic benefit because of, for example, a difference in the substantive law of the legal system to which the dispute were referred.

12. But even a clause of the kind I have referred to in the previous paragraph does not, at least on its face, cover a situation whereby disputes arise between parties to a contract governed by, say, German law but where those disputes are not or may not be characterized as contractual in nature even though they may arise in the context of and/or in relation to the contract. The most obvious example is a claim in tort. Conceivably, one party may have a claim in contract to be governed by German law and a claim in tort which may fall to be governed by some other country's law, depending on the choice of law rules of the forum in which the dispute is litigated, regardless of the fact that there may be a very close overlap indeed between any contract claim and any tort claim. For example, assume a joint venture between an Australian and a German company to perform work in Indonesia with a German governing law clause. If the relevant tort occurred in Indonesia, Australian law would dictate that Indonesian law governed this claim, but the identical facts may give rise to a contractual claim which would fall to be determined by German law.

13. There is obvious merit from the perspective of certainty and indeed consistency in a single system of law being applied to govern all aspects of commercial disputes, in whatever form the various causes of action are dressed or may be characterized. The question is: can this be achieved by contractual drafting?

14. An example of a clause seeking to achieve this outcome was contained in the contract between Oil & Natural Gas Corporation of India ("**ONGC**") and Clough Engineering Ltd which was the subject of litigation ultimately concluded in the Full Court of the Federal Court: *Clough Engineering Limited v Oil and Natural Gas Corporation Limited* (2008) 249 ALR 458.

15. The relevant clause provided:

> *All questions, disputes or differences arising under, out of or in connection with this Contract shall be settled in accordance with laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the Courts in India, subject to the provisions of clause 1.3.2.* (emphasis added)

The draftsman could have added after the word Contract, to be abundantly cautious, words such as (whether contractual, tortious, restitutionary or statutory).

16. But even a clause such as this may not be fully effective to identify an exclusive body of law to govern the outcome of a dispute, as the facts of the litigation between Clough and ONGC serves to demonstrate. Australian Banks had furnished to ONGC performance bonds on the application of, and to guarantee the performance of Clough in the performance of large scale off shore construction work in India. The circumstances in which ONGC was entitled to call on the bonds were governed by the construction contract containing the choice of law clause as set out above. ONGC sought to call on the bonds but, prior to this call being honoured, Clough got wind of the call and moved *ex parte* in the Federal Court seeking to restrain the call on the bonds on the basis that to do so was unconscionable in contravention of s.51AA of the *Trade Practices Act*: see *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2007) 29 ATPR 42-166.

17. The case involved many issues and was ultimately resolved, in the context of a successful challenge to the jurisdiction by reference to the absence of a prima facie case, based upon the proper construction of the construction contract and an analysis of whether or not the contract required there to be an actual breach of contract as opposed to bona fide claimed breach in order to call on the bond. One argument which the Court did not need to resolve, however, was whether or not the Trade Practices Act in fact applied, given the widely drawn choice of law clause and whether or the choice of law

clause as set out above in fact meant that, by virtue of their agreement, the parties could not invoke a law other than a law of India to resolve any dispute between them.

18. Another case involving a clash between a contractually chosen governing law (and jurisdiction) clause, on the one hand, and an arguably mandatory law of the forum (mandatory in the sense of being a law which, on its proper construction, is intended to apply irrespective of the operation of common law choice of law principles) was the recently settled litigation between Qantas Airways Ltd and Rolls-Royce plc in relation to the A380 engine incident over Indonesia. Qantas commenced its proceedings in the Federal Court of Australia, raising claims for misleading and deceptive conduct under the Trade Practices Act and secured an ex parte anti-anti-suit injunction restraining Rolls-Royce from commencing proceedings in England seeking to enforce its express English choice of law and exclusive jurisdiction clauses on the footing that to do so would be to oust or run the risk of ousting or excluding a hearing of the Trade Practices Act claim on its merits (for the reason that the English choice of law rules would not "pick up" the Trade Practices Act cf. *Reinsurance Australia Corp Ltd v HIH Casualty and General Insurance Ltd (in liq)* (2003) 254 ALR 29.)

19. There are obviously competing policy considerations in play. On the one hand, practitioners will be familiar with statements in the cases to the effect that parties cannot "contract out of" the Trade Practices Act (albeit that these statements are usually found in the context of exclusion clauses although note *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532 and *Pty Limited v Kiukiang Maritime Carriers* (1998) 90 FCR 1). That legislation, and cognate provisions in the *ASIC Act* and Fair Trading Acts, is undoubtedly underpinned by normative policy considerations in relation to commercial dealing.

20. On the other hand, at least in the context of a transnational contract which is to be performed outside of Australia (as was the case in *Clough* but not

Qantas), the question may be posed as to why it would be contrary to policy to permit sophisticated commercial parties to agree on one governing law, even if not Australian and even though the effect of that choice may be that the operation of the Trade Practices Act is excluded. After all, as Kirby J. observed in *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Limited* (2000) 170 ALR 579; (2000) 74 ALJR 791 at [24]:

> Business is entitled to look to the law to keep people to their commercial promises. In a world of global finances and transborder capital markets, those jurisdictions flourish which do so. Those jurisdictions which do not soon become known. They pay a price in terms of the availability and costs of capital necessary as a consequence of the uncertainties of the enforcement of agreements in their courts.

21. In a related context, in *Comandate Marine v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45, Finn J. observed:

> I would merely add that, whatever advantage or disadvantage accrued to Pan from having both the relevant legal effects of its pre-contractual conduct and its Trade Practices Act claims determined in London according to English law (including relevant principles of conflict of laws), this is what has been agreed to by the parties as international commercial contractors. There is no legal principle of, nor is there any policy immanent in, Australian law that denies them what they have agreed.

22. As a matter of principle, there would seem to be a great deal to be said for permitting parties to make provision for the law which will govern any non-contractual as well as contractual claims arising *inter se*. Such an approach has two principal virtues. It ensures consistency in the sense that it eliminates the prospect of a claim in tort being governed by the law of country "X" whilst the claim in contract is governed by the law of country "Y", being the parties' agreed governing law, the example given in paragraph 12 above. The second virtue is that it could eliminate the notoriously difficult question which arises from time to time in transnational cases, namely identifying the place or "locus" of the tort. This is particularly important since *John Pfeiffer Pty Ltd v Rogerson* (2000) 2003 CLR 503 and *Renault v Zhang* (2002) 2010 CLR 491 which cases established, on a domestic and international level respectively, that the

Australian choice of law rule for torts is the *lex loci delecti* or law of the place of the tort.

23. Parenthetically, it may be noted that the simplicity of that formula masks the very real difficulty that can sometimes arise where it becomes necessary to identify the place where the tort occurred. That difficulty is at its most acute in cases which can be characterised as ones involving a negligent omission. Where does the negligent omission occur in a transnational context? Equally complex may be tortious claims involving conspiracy (where conspirators may be located in more than one jurisdiction) or claims involving the use communications via the internet. The issue of "locating" the tort was of importance in the High Court's decision in *Voth v Manildra Flour Mills Pty Limited* (1991) 171 CLR 538.

24. It is somewhat surprising that the prospect of a tort claim being the subject of a "choice of law agreement" does not appear to have attracted much if any attention in the academic writing. The principal exception to this is the outstanding monograph by Professor Briggs in the OUP Private International Law series entitled *Agreements on Jurisdiction and Choice of Law*.

25. If liability in tort can be excluded by virtue of a sufficiently clearly expressed contractual exclusion clause, it is difficult to understand why, as a matter of principle, parties should not be able to identify, *ex ante*, the law that is to govern any tortious (or statutory or otherwise non-contractual) claims arising as between the parties in a choice of law clause. And although the argument is probably more delicately balanced in the context of statutory causes of action, there is much to be said for an approach which encourages parties to choose in advance the legal system (and ideally one legal system) which is to govern their claims. (Of course, in *true* cases of consumer contracts, the Courts may be more reluctant to permit this, and the problem in Australia is that the *Australian Competition and Consumer Act* (formerly the *Trade Practices Act*) and cognate provisions in the ASIC and

Fair Trading Acts are, of course, not for the most part, so confined, and statutory unconscionability has been left somewhat and regrettably in limbo by reason of the High Court's decision in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.)

26. One final point to be made in the context of express choice of law clauses is that one must be careful in selecting any particular forum's law as the governing law as the Commonwealth Bank probably discovered in the context of its margin lending arrangements with former clients of Storm Financial. Even though the vast majority of individuals affected and who entered into borrowing facilities with the Commonwealth Bank were residents of Queensland, the standard form loan documentation contained an express choice of law clause nominating New South Wales law as the governing law. This had the fortunate consequence for the Queensland-based clients that the provisions of the New South Wales *Contracts Review Act 1980* (and the liberal jurisprudence relating to lending contracts that has developed around the interpretation of that Act) was arguably engaged, thus greatly improving their leverage in commercial negotiations. No similar legislative regime exists under the law of Queensland.

Jurisdiction clauses

27. Turning to the drafting of choice of court or jurisdiction agreements, it is extraordinary how often sloppy or shorthand drafting has led to expensive and extensive litigation in relation to the construction of such clauses. Sometimes such disputes are described by judges as "arid" and it is no doubt correct to say that semantic submissions in relation to the difference between, for example, the expression "arising under" and the expression "arising out of" are aptly so described. On the other hand, such disputes do not occur without good reason. There will invariably be perceived, a major tactical, strategic or substantive advantage in winning such a dispute. In that sense, such disputes are far from "arid".

28. On the question of the scope of jurisdiction (or arbitration) agreements, that is to say, questions as to the width or ambit of such clauses, recent decisions of the Full Court of the Federal Court of Australia (*Comandate Marine Corp. v Pan Australia Shipping* (2006) 157 FCR 45), the House of Lords (*Premium Nafta Products Limited v. Fili Shipping Company Limited* [2008] 1 Lloyd's Rep 254 (in which the Full Court's decision was cited) and the NSW Court of Appeal (*Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383) have done much to eliminate the scope for such disputes.

29. In the Australian context, an earlier Full Court decision, that of *Hi-Fert Pty Limited v Kiukiang Maritime Carriers* (1998) 90 FCR 1 had appeared to endorse a somewhat semantic approach to the construction of such clauses. Thus, in that case, an arbitration clause provided that:

> *Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the Arbitration Act, 1950, and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto.*
>
> *This Charter Party shall be governed by and construed in accordance with English Law.*

This clause was construed by the Full Court as excluding a claim brought under the *Trade Practices Act*. That decision went very much against the thrust of an earlier decision by the New South Wales Court of Appeal in *Francis Travel Marketing Pty Limited v Virgin Atlantic Airways* (1996) 39 NSWLR 60 in which Gleeson CJ had endorsed what in England had been described as a presumption of "one stop" adjudication, namely an approach to the interpretation of the scope of jurisdiction and arbitration clauses which attributed to commercial parties an intention that there be only one forum, or jurisdiction or mode of dispute resolution for all of the parties' disputes, whether tortious, contractual or statutory.

30. The decision in *Hi-Fert* was expressly disapproved in *Comandate Marine Corp. v Pan Australia Shipping* (2006) 157 FCR 45. In that case, *Pan* had commenced proceedings in Australia seeking to rely on the *Trade Practices Act* in order to extricate itself from a charterparty. The charterparty provided for arbitration in London, with English law to apply. *Pan* perceived that, one way or another, English maritime arbitrators were unlikely to apply the *Trade Practices Act* or, even if purporting to do so, would be unlikely to do so in a manner which correctly and fully gave effect to that Act's remedial operation.

31. Plainly enough, the earlier decision in *Hi-Fert* gave some encouragement to Pan in this forensic endeavour. At first instance, *Pan* succeeded in resisting a stay of the *Trade Practices Act* claim. On appeal, however, the Full Court said that the *Trade Practices Act* claim plainly fell within the scope of the arbitration clause which was to be broadly construed. The leading judgment was delivered by Allsop J. (as he then was). Important passages from his Honour's reasons included the following:

> This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

His Honour went on (at [175]) to observe, after an extensive reference to authority, that

> If, subject of course to the context and circumstances of any particular contract, the meaning of the phrase "arising out of a contract" can be equated with "arising in connection with" (as Hirst J and Gleeson CJ say) it seems to me clear that the words "arise out of the contract" are apt, or at least sufficiently flexible, to encompass a sufficiently close connection with the making, the terms, and the performance of the contract as permit the words "arise out of" aptly or appropriately to describe the connection

> with the contract. These words encompass more than merely arising as a contractually classified complaint from one party's rights or another party's obligations under, or in, a bilateral juridical relationship. The width of the phrase "arising out of" in this context and its synonymity with the expression "in connection with" reflect the practical, rather than theoretical, meaning to be given to the word "contract" out of which the disputes may arise. The notion of a contract can involve practical commercial considerations of formation, extent and scope, and performance of the juridical bonds between the parties, out of which disputes may arise.

32. As noted above, the Full Court's decision was cited with approval by the House of Lords in *Fiona Trust Holdings sub nom: Premium Nafta Products Limited v. Fili Shipping Company Limited* [2008] 1 Lloyd's Rep 254. In that case, Lord Hoffmann observed:

> Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
>
> In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its

> performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
>
> A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.

33. Whereas the decisions in *Comandate Marine* and *Fiona Trust* have signalled a clear approach towards the construction of the *scope* of jurisdiction agreements, no similar, broadbrush approach has been articulated in cases where the issue concerns *not the scope* of such clauses *but their nature*, i.e. whether the jurisdiction clause is exclusive or non-exclusive. This is a potentially vital distinction. Where a jurisdiction agreement is exclusive, a stay of proceedings commenced in the face of such a clause is far more likely to be granted as the strong presumption is that parties should be held to their bargain. Similarly, proceedings commenced in a foreign jurisdiction in breach of an exclusive jurisdiction clause may be restrained by the grant of an anti-suit injunction: see, for example, *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345; *The Angelic Grace* [1995] 1 Lloyds Rep. 87.

34. The context of this aspect of the discussion may be set by identifying some typical and potentially ambiguous forms of jurisdiction clause:

- Jurisdiction: England.
- This contract is subject to the jurisdiction of Australian courts.
- The parties submit to the jurisdiction of the courts of New Zealand.

Each of these clauses could be construed as exclusive or non-exclusive jurisdiction clauses. They might be contrasted with the following examples:

- (From *Safe Effect Technologies Limited (ACN 099 107 623) v Hood Group Holdings Ltd (ACN 097 778 375)* [2006] FCA 758):

  (a) This agreement is governed by the laws of New South Wales.

(b) Each of the parties irrevocably submits to the exclusive jurisdiction of the Courts of New South Wales.

- (From *Slater & Gordon v Porteous* [2005] VSC 398):

  This deed will be governed by and construed in accordance with the laws in force in the State of Victoria and each party submits to the exclusive jurisdiction of the courts of that State.

- (From *Wholesome Bake Pty Ltd v Sweetoz Pty Ltd* [2001] NSWSC 248):

  "This Agreement is governed by the laws of the State of Victoria, the Courts at which State shall have exclusive jurisdiction."

35. A useful summary of the principles applicable to the construction of such clauses was provided by Giles J. (as he then was) in *FAI Insurance Limited v Ocean Mutual Marine Insurance* (1997) 41 NSWLR 117:

(a) Whether a jurisdiction clause is an exclusive jurisdiction clause is a question of construction of the particular contract, with such regard to the circumstances surrounding the entry into the contract as is permissible.

(b) The word "exclusive" is not determinative, and a clause may be held to be an exclusive jurisdiction clause notwithstanding the absence of that or a similar word or phrase: as was said in *Continental Bank NA v Aeakos Compania Naviera SA* (at 594), it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen court is to be the exclusive forum.

(c) Although mutuality, in the sense that both parties agree to the relevant jurisdiction, has been thought to point to exclusive jurisdiction, I have some difficulty seeing why that should be so. Lack of mutuality is likely to tell against exclusive jurisdiction (*Continental Bank NA v Aeakos Compania Naviera SA*), but mutuality is consistent with no more than submission to the jurisdiction. However, when taken with other matters mutuality may assist in finding a contractual intention that disputes shall be submitted only to the courts of the relevant jurisdiction: *British Aerospace Plc v Dee Howard Co*; *Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd*.

(d) Other language in the clause or the nature of the contract may point towards that contractual intention, for example "under the jurisdiction of the English courts" and the assumed desire for certainty in *Sohio Supply Co v Gatoil (USA) Inc*; or the use of transitive language as in *Austrian Lloyd Steamship Co v Gresham Life Assurance Society, Ltd*, *British Aerospace Plc v Dee Howard Co* and *Continental Bank NA v Aeakos Compania Naviera SA*.

(e) If the courts of the relevant jurisdiction would have jurisdiction in the absence of the clause, that may indicate that the clause was intended to confer exclusive jurisdiction: *Sohio Supply Co v Gatoil (USA) Inc*; *Gem Plastics Pty Ltd v Satrex Maritime (Pty) Ltd*. It will not always be so, as the clause may have been intended only to put beyond doubt the existing jurisdiction (*S & W Berisford Plc v New Hampshire Insurance Co*), or be an unthinking inclusion.

36. Drafters of choice of court clauses sometimes fail to appreciate the technical distinction between a submission to suit and a jurisdiction clause. In *Autotrop SDN BHD v Powercrank Batteries Pty Limited* [2006] VSC 401, the clause relevantly provided:

> *This agreement shall be governed by and construed in accordance with the laws that are applicable in Sarawak, Malaysia.*
>
> *In relation to any legal action or proceedings arising out of or in connection with this agreement ('proceedings'), the Manufacturer and the Purchaser hereby irrevocably submit to the jurisdiction of the High Court in Sabah and Sarawak (in particular at Kuching) and waives any objection to proceedings in any such courts within the jurisdiction of the High Court in Sabah and Sarawak on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum or any similar grounds and the Purchaser agrees that any writ, summons, order, Judgment or other document shall be deemed duly and sufficiently served if addressed to the Purchaser and left at or sent by post to the address of the Purchaser last known to the Manufacturer.*

Whelan J of the Supreme Court of Victoria held that "*It seems to me that the clause here is an irrevocable submission to the jurisdiction of the courts of Malaysia. The words used do not relevantly go beyond that. It is not an exclusive jurisdiction clause*"

37. The decision of Jacobson J. of the Federal Court in *Armacel Pty Limited v Smurfit Stone Corporation* (2008) 248 ALR 573 provides an instructive illustration of the pitfalls that can follow poor drafting. In that case, the contract contained the following clauses:

> *21.3.1* *This Agreement must be read and construed according to the laws of the State of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this*

Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia.

21.3.2 *In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South Wales shall prevail.*

21.3.3 *If the licensee is in breach of this Agreement, the Licensee must pay to the Licensor on demand the amount of any legal costs and expenses incurred by the Licensor for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court.*

38. A dispute arose between the parties. Armacel contended that Smurfit had acted in breach of contract. Smurfit denied this and commenced proceedings in the United States seeking a declaration that it was not liable to Armacel. Armacel countered by commencing its own proceedings in the Federal Court of Australia some three weeks later. It did not, however, immediately seek an anti-suit injunction to restrain Smurfit from continuing with its proceedings in the United States. This was a mistake. Rather, Armacel sought a stay of the American proceedings on the basis, inter alia, of the jurisdiction clause contained in the contract. Smurfit sought a stay of the Federal Court proceedings in Australia on the basis that they were duplicative, commenced second in time and that the centre of gravity of the dispute was the United States.

39. Armacel's stay application came on for resolution first. In accordance with the American practice, that motion was decided on the basis of written arguments without oral hearing. The United States court interpreted clause 21.3.1 as simply a submission and not an exclusive jurisdiction clause, and applied United States law to reach this conclusion notwithstanding the parties' choice of New South Wales law. Accordingly, when Jacobson J. came to consider Smurfit's stay application, he was confronted with a decision of the United States' court which had already construed the jurisdiction clause.

40. Unlike the United States' court, Jacobson J. inclined to the view that the clause was intended to confer exclusive jurisdiction on Australian courts, as a matter of construction.

41. Notwithstanding this view, he considered, consistent with the authority of the House of Lords in *The Sennar (No 2)* [1985] 1 WLR 490 that the decision of the United States' court on the question of the construction of the jurisdiction clause, notwithstanding its interlocutory nature and that it had not applied principles of Australian law to govern this question, nevertheless gave rise to an issue estoppel such that he was bound to proceed on the footing that the clause was, in fact, non-exclusive in nature. In these circumstances, the basis for declining to stay the Australian proceedings became far less compelling. His Honour's reasoning on this issue is worth setting out because it is the first time that I am aware of that this matter – which once again highlights the importance of the race even to interlocutory judgments - has been decided in Australia:

> 66 Having approached the present matter with what, I hope, is the requisite degree of caution, I have come to the view that the present case is indistinguishable from *The Sennar* and that, accordingly, Armacel is barred by an issue estoppel from contending that cl 21.3.1 is an exclusive jurisdiction clause. In coming to this view, I have considered the decisions of the House of Lords, and the Court of Appeal in that case. The Court of Appeal decision is cited as *"The Sennar" (No 2)* [1984] 2 Lloyd's Rep 142.
>
> 67 It seems to me that the reasons for judgment of Kerr LJ and Sir Denys Buckley (Cumming-Bruce LJ concurring) make it clear that it is not possible to avoid the consequence of issue estoppel by simply re-characterising the issue as one which is sought to be litigated in accordance with the law of a different jurisdiction.
>
> 68 As Kerr LJ said at 149, it was not open to the plaintiffs to say, simply:
>
> *What we seek to litigate here are issues under English law, and it does not matter that we litigated precisely the same issues under other systems of law in Holland.*
>
> 69 The facts of *The Sennar* are of some importance. The plaintiffs, who were the holders of a bill of lading, invoked the jurisdiction of a Dutch Court by arresting a sister ship of *The Sennar* in Rotterdam. They brought an action for damages in the Dutch Court which held that their only cause of action lay in contract and that the Dutch court was bound to decline jurisdiction because the contract contained a clause under which the parties submitted to the exclusive jurisdiction of the Court of Sudan.

70 The plaintiffs then began an action in the Admiralty Court of England. However, although they succeeded on the jurisdictional question at first instance, the Court of Appeal held that they were barred from suing in the English Court by reason of an issue estoppel arising from the determination of the Dutch Court as to the construction and effect of the exclusive jurisdiction clause.

71 Kerr LJ observed at 148 that the classification of the plaintiffs' claim, as a matter of private international law, fell to be decided by Sudanese law as the proper law of the bill of lading. He said at 149 that by applying Sudanese law, the Dutch Court of Appeal had adopted the correct approach under the English rules of private international law.

72 However, as I have said, Kerr LJ at 149 also rejected the proposition that it was open to the plaintiffs to seek to re-litigate under English law the same issue that had been litigated under other systems of law in Holland.

73 His Lordship observed at 150 that to accept this proposition would altogether remove the possibility of an issue estoppel arising "from any decision by any Court" on the jurisdiction clause. It would permit uncontrolled forum shopping and run directly counter to the policy behind the doctrine of issue estoppel.

74 Sir Denys Buckley's analysis was to the same effect. He said at 159 that the Dutch Court answered the question by reference to Dutch law, except insofar as it paid attention to Sudanese law; an English court must answer the question by reference to English law except insofar as Sudanese law would be applied. He continued:

This does not, however, mean that the question for decision is not the same in each jurisdiction.

42. A further example worthy of note is the decision of Einstein J. in *HIH Casualty & General Insurance Limited (in liq.) v R J Wallace* (2006) 68 NSWLR 603. This was a case where, for reasons that were wholly unclear, the parties not only included an exclusive jurisdiction clause but also provided for arbitration, thereby generating uncertainty as to how the two clauses related to each other and interacted. The relevant provisions were as follows:

"ARTICLE XVIII SERVICE OF SUIT

The Reinsurer hereon agrees that:

1. In the event of a dispute arising under this Agreement, the Reinsurers at the request of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

2. Any summons notices or process to be served upon the Reinsurer may be served upon
MESSRS. FREEHILL, HOLLINGDALE & PAGE
M.L.C. CENTRE,
MARTIN PLACE, SYDNEY,
N.S.W. 2000 AUSTRALIA
who has authority to accept service and to enter an appearance on the Reinsurer's behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer's behalf.

3. If a suit is instituted against any one of the Reinsurers all Reinsurers hereon will abide by the final decision of such Court or any competent Appellate Court.

ARTICLE XIX ARBITRATION:

Disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall meet in Australia.

The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies.

Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated by the President of the Chamber of Commerce in Australia.

The Arbitrators shall reach their decision primarily in accordance with the usages and customs of Reinsurance practice and shall be relieved of all legal formalities. They shall reach their decision within four months of the appointment of the umpire.

The decision of the Court of Arbitration shall not be subject to appeal.
The costs of Arbitration shall be paid as the Court of Arbitration directs.
Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts."

43. One issue in the case was whether proceedings should have been stayed in favour of arbitration. In the result, Einstein J refused to do so on the basis that, on the proper construction of the relevant clauses, the reinsured (HIH) was given the option either to choose judicial determination in an Australian court or arbitration. This decision had important ramifications for the

manner in which, and the law or principles by reference to which, the ultimate dispute would be resolved.

44. Article XVIII(i) of the reinsurance policy in the *HIH* case was interpreted as permitting proceedings to be commenced "*in a competent court in the Commonwealth of Australia*". It then provided that "*such disputes should be determined in accordance with the law and practice applicable in such court*". In other words, in this case, the parties agreed to what was in effect a "floating" choice of law clause. The law to be applied to the resolution of the parties' dispute would depend upon the choice of forum made by the reinsured. In this context, it should be noted that the law, at least as contained in statutes, differs between the Australian states such that depending on the nature of the case, the choice may be strategically significant.

45. One critical point to note in relation to the *HIH* case was the interaction between the mode of dispute resolution and the governing law. As already noted, were proceedings to be instituted in the particular Australian State, the law of that State would apply. On the facts of that case, it was in HIH's interest to commence proceedings in New South Wales in order to take advantage of certain provisions of the New South Wales *Insurance Act*.

46. Furthermore, and perhaps more critically, had HIH not commenced proceedings but, rather, elected to arbitrate, as it was entitled to do under the reinsurance policy, the arbitrators were directed, by clause XIX to "*reach their decision primarily in accordance with the usages and customs of reinsurance practice and shall be relieved of all legal formalities*". The application of this standard may well have led to a different result on the particular question under consideration in that case, namely the construction of the "*paid to be paid*" clause in the policy, than a decision reached by a New South Wales court applying New South Wales law.

47. HIH not only wanted the benefits of the *Insurance Act*, as noted above, but also wished what was a very important but strictly legal question to be decided by a court of law applying a well recognised body of principles relating to contractual interpretation, and with a right of appeal from the decision in the first instance, to a decision loosely based on custom and practice with the minimum of legal formalities.

48. It might also be noted, in this context, that what HIH saw as an advantage to it in litigating rather than arbitrating was seen as a corresponding disadvantage by the defendant who sought to stay the proceedings in favour of arbitration. Whether or not this was because the defendant thought that the application of the "custom and usage" standard would advantage it is not known although it is highly likely, certainly the application of that standard would have injected a degree of uncertainty (and therefore would have created an appetite for settlement) which may not have existed in that event or simply to be resolved as a question of legal construction.

49. An even more recent case, *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383, represents what is arguably a very significant development in the law where a number of closely related parties are involved in a transaction (and then a dispute) but not all parties are bound contractually to each other. In that case, Global Partners Fund Pty Ltd ("**GPF**") commenced proceedings in the Supreme Court of New South Wales against four Babcock entities, BBL, BBI, BBUS and BBMGP. Only BBMGP was party to a Limited Partnership Agreement ("**LPA**") with GPF with the agreement expressly providing for English law accompanied by a widely drawn exclusive jurisdiction clause for England. GPF sought to justify its commencement of proceedings in NSW on the basis that, whilst BBMGP had the benefit of these two clauses, as a matter of contract, BBL, BBI and BBUS did not, and taking the matter "in the round", as it were, it was more convenient for the matter to be tried in New South Wales rather than England. The Court of Appeal would have none of this with Spigelman CJ saying:

[71] With respect to the proposition that cl 18.11 [the exclusive English jurisdiction clause] does not respond to claims made against non parties to the agreement, there are judgments which have interpreted an exclusive jurisdiction clause to bind a party with respect to proceedings against a non party. (See *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 ; [2001] UKHL 64 at [60]–[61] (*Donohue*) per Lord Scott of Foscote (although the issue was not argued in the House of Lords. See [14] per Lord Bingham).) Lord Scott's approach was applied to the clause construed in *Winnetka Trading Corp v Julius Baer International Ltd* [2009] 2 All ER (Comm) 735 ; [2008] EWHC 3146 (Ch) at [28]–[29]. On the other hand, other exclusive jurisdiction clauses have been interpreted as applying only to proceedings between the parties. (See, for example, *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777–8; *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2010] 1 Lloyd's L Rep 265 at [21]–[30] noting the observations with respect to Lord Scott's judgment in *Donohue* above at [30].)

[72] Each contract must be interpreted in its context. Similar, even identical, words do not necessarily have the same meaning in different contexts.

[73] In the present case, it hardly needs saying that BBL, BBI and BBUS do not have contractual rights with respect to the exclusive jurisdiction clause, because they are not parties to the LPA. BBMGP does have such rights which, in my opinion, it is entitled to assert both with respect to the claims against itself, and with respect to the closely related, indeed, relevantly identical, claims against BBL, BBI and BBUS. The focus of such an assertion is the fact that GPF, which is a party to the contract, has agreed to conduct litigation "arising out of or in connection with" the LPA in England. However, BBL, BBI and BBUS are also entitled to approach the court, in their own right, to request that the court exercise its discretion to grant a stay. This is so because of their involvement in the affairs of the partnership, as envisaged by the LPA itself, and the rights conferred upon them as indemnified persons under the LPA.

[74] GPF sought to categorise the first three respondents as "non parties". However, there are non parties and non parties. These respondents are not strangers to the LPA.

[75] I have set out at [29]–[32] above the provisions of the LPA that directly refer to the involvement of the members of the BB Group in the decision making processes of the partnership. These proceedings concern the internal decision making processes of the BB Group that determined how the funds of the partnership were to be invested, particularly the decision-making process that led to the Coinmach transaction being completed. The obligation imposed upon GPF by cl 18.11 should be interpreted to extend, at least, to the participants in the decision making processes envisaged by the LPA.

[76] The proceedings in this court arise, and arise only, from the internal decision making processes for which the LPA provides, namely the making of investments. By reason of the structure of the BB Group, the functions of BBMGP, as the managing general partner under the LPA, were subject to the assistance and direction of other members of the group in the manner alleged in the commercial list statement. Indeed, that participation is the very

foundation of the causes of action which GPF seeks to agitate in this court.

[77] An important clue to resolving this issue is found in the indemnity provisions in the LPA which I have set out at [32] above. Each of the respondents is entitled to the benefit of those provisions. Dr A Bell SC, who appeared for BBI, BBUS and BBMGP, informed the court that his clients intended to rely on these provisions as a contractual defence to the applicant's claims. GPF did not suggest that such issues do not legitimately arise.

[78] Notwithstanding the fact that BBL, BBI and BBUS are not parties to the LPA, they cannot be categorised as members of an undifferentiated group of "non parties". It may well be that cl 18.11 will not apply to other non parties. However, the respondents in the present case are in a quite distinct category.

[79] In a context where the very contract confers rights on identified non parties, the choice of law and exclusive jurisdiction clauses should be construed as binding the parties with respect to proceedings in which such an indemnity may arise. Furthermore, the principles underlying the conclusion that such a clause should not be narrowly construed set out at [61]–[69] above, apply, at least, to include claims against non parties who are so closely connected with the implementation of the contract as are BBL, BBI and BBUS.

[80] In my opinion the GPF's contention that, as a matter of construction, cl 18.11 does not apply to proceedings against BBL, BBI and BBUS

50. What is most interesting about this passage is that it, on one view, creates an exception to the orthodox doctrine of privity of contract cf. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. Spigelman CJ's reasoning went some way beyond the argument presented which was one by BBMGP to the effect that the claims against BBL, BBI and BBUS were claims "in relation to" or "arising out of" the LPA (even though those entities were not party to it) and GPF had promised it, BBMGP, that it would not bring such claims otherwise than in England. The argument was that this promise was one made to BBMGP and was one that is could enforce including and even in respect of claims not brought against BBMGP itself.

Conclusion

51. The apparently simple topic of choice of law clauses and choice of court clauses, so often considered by commercial lawyers as "boilerplate" provisions to be copied from a precedents database, can raise some difficult and complex questions of private international law, including renvoi, the

interaction of tort and contract, and public policy questions relating to parties' ability to stipulate and override statutory provisions of a legal system other than that chosen or preferred by the parties.

52. An understanding of these issues, and the potential for complexity, is essential for a commercial lawyer anxious to minimize the scope for adjectival litigation in relation to venue and applicable law. Poor drafting may lead to one party leveraging the uncertainty, and potentially different substantive outcomes that may arise through either the application of different laws to the parties' dispute, or the resolution of that dispute in different forums, or a combination of both.