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When ‘Where’ Matters: Anchoring Jurisdiction in Insolvency

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Special Report

When ‘Where’ Matters: Anchoring Jurisdiction in Insolvency

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INSOL International is very pleased to publish a Special Report titled *“When ‘Where’ Matters: Anchoring Jurisdiction in Insolvency”* by Jason D. Karas, Madeleine G. Harland and Scott B. Foreman of Lipman Karas - Hong Kong, Australia and London.

Courts in most jurisdictions generally enforce otherwise valid contractual agreements as to where and how disputes between parties should be heard and determined. Underlying this presumption of enforceability is the policy that party autonomy entitles contractual counterparties to decide where to litigate or arbitrate.

This is not, however, necessarily the case if one of the parties becomes insolvent after executing a contract containing a forum selection clause. In such circumstances, a tension arises between the policy objectives that underlie the enforcement of forum selection clauses, and the policy considerations, which apply in an insolvency context. The latter include centralised asset collection and distribution and the investigation of the company’s affairs in the public interest.

The case law as to the extent to which claims involving an insolvent company should be permitted to be resolved through the arbitral process or whether such claims should be allowed pursuant to other pre-insolvency contractual arrangements is still developing. Important public policy questions as to the role of insolvency law are therefore frequently being debated.

This paper examines the judicial approach to the conflicting legal policies underlying the insolvency process and forum selection clauses, and details the trends that have emerged from the decided cases in different jurisdictions. It also examines the common law and civil code jurisprudence as to the extent to which claims involving an insolvent company may be resolved through the arbitral process or pursuant to other pre-insolvency contractual arrangements.

INSOL International sincerely thanks Jason D. Karas, Madeleine G. Harland and Scott B. Foreman for carrying out extensive research and for writing this excellent special report.

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When 'Where' Matters: Anchoring Jurisdiction in Insolvency

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A. Introduction

The use of agreements as to where and how disputes between contracting parties should be heard and determined (forum selection clauses) in commercial contracts is well accepted as a legitimate and desirable practice.

The benefits of such clauses are obvious. They promote party autonomy by empowering the parties to decide for themselves how their disputes should be resolved. They reduce the scope for disputes over forum. In the case of clauses which select arbitration over litigation, they reduce the burden on public resources.

Accordingly, courts in most jurisdictions will enforce an otherwise valid forum selection clause. In particular:

- courts retain a *discretion* to hear proceedings brought other than in the contractually designated forum, but generally a forum selection clause will be enforced in the absence of *strong reasons* not to do so; and
- legislation generally *mandates* that arbitration proceedings brought other than in the contractually designated seat of arbitration be stayed, pending arbitration.

Underlying the presumption of enforceability is the policy that party autonomy entitles contractual counterparties to decide where to litigate or arbitrate.

However, this is not necessarily the case if one of the parties becomes insolvent after executing a contract containing a forum selection clause. In such circumstances, a tension arises between the policy objectives which underlie the enforcement of forum selection clauses, and the policy considerations which apply in an insolvency context. The latter include centralised asset collection and distribution and the investigation of the company's affairs in the public interest.

The case law on the extent to which claims involving an insolvent company should be permitted to be resolved through the arbitral process or pursuant to other pre-insolvency contractual arrangements is still developing, with important questions arising. These include:

- whether statutory insolvency claims can be pursued in a court other than the court with jurisdiction over the winding up?;
- if not, whether a forum selection clause will be enforced when to do so will deprive the insolvent company of those statutory insolvency claims?; and
- if statutory insolvency claims can *only* be brought in the court with jurisdiction over the winding up, how will the court treat any related claims which are being pursued at the same time?

In recent years, these questions have arisen internationally, including before the intermediate appellate courts in England[1], Singapore[2], and Guernsey[3].

A number of themes emerge from the decided cases:

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* The views expressed in this report are the views of the authors and not of INSOL International, London.

1 *AWB (Geneva) SA v North America Steamships Ltd* [2007] 2 Lloyd's Rep. 315. See also *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333, which, whilst in a non-insolvency context, endorsed the decision of the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414, and has been influential in a number of decisions in the insolvency context.

2 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414.

3 *Carlyle Capital Corp Ltd (in liq) v Conway* (Unreported, Court of Appeal of Guernsey, Beloff, McNeill and Bennett JJA, 5 March 2012); *Carlyle Capital Corp Ltd (in liq) v Conway* [2013] 2 Lloyd's Rep 179.

- *Overriding effect of insolvency*: if statutory insolvency claims brought by a liquidator can *only* be heard by the court with jurisdiction over the winding up, or the relief sought can only be granted by that court, a forum selection clause will not be enforced, at least in relation to that claim.

- *Pre-insolvency claims*: where insolvency is not an integral part of the cause of action or relief is sought in the form of a winding up order, a detailed examination of the facts and circumstances will dictate the court's approach.

- *Non-fragmentation principle*: all aspects of a dispute should be heard in a single composite trial, absent impossibility. Where a statutory insolvency claim is anchored in the insolvency court but related claims are subject to a forum selection clause, the court will generally decline to enforce the forum selection clause, so that all aspects of the proceedings can be heard together. However, where enforcement of a forum selection clause is mandatory, the fragmentation of disputes will be unavoidable in such circumstances.

This Technical Paper will examine the judicial approach to the conflicting legal policies underlying the insolvency process and forum selection clauses. It will then examine the common law and civil code jurisprudence on the extent to which claims involving an insolvent company may be resolved through the arbitral process or pursuant to other pre-insolvency contractual arrangements.

B. When 'where' matters

When cross-jurisdictional disputes arise, it will often be unclear which court or other forum should most appropriately hear the dispute. Jurisdiction and arbitration clauses exist to minimise this uncertainty.

In some cases, the choice of forum will simply affect which party has to travel further to attend hearings or the applicable procedural rules[4]. However, the issue can be of more substantive significance and, on occasion, decisive because the choice of forum may determine not only where the dispute is heard, but also:

- the mandatory laws which will apply to the dispute[5];

- the availability of statutory causes of action[6];

- applicable limitation periods;

- the scope of the parties' discovery rights and obligations;

- the recoverability of legal costs;

- the availability of external litigation funding[7];

- the likely length of the proceedings; and

- judicial attitudes, cultures and practices, including whether the matter will be heard by judge alone (as distinct from a jury).

Of particular importance to insolvency professionals and their advisors is the effect of forum selection clauses on the statutory rights of companies and their liquidators against the company's former directors, officers and advisors. A number of courts and commentators –

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4 *Koonmen v Bender* (Court of Appeal of Jersey, 14 November 2002, Nutting, Rokison and Smith JJA) at [39] per Rokison JA; *NABB Brothers Ltd v Lloyd's Bank International (Guernsey) Ltd* [2005] I.L.Pr. 37, [2005] EWHC 405 (Ch) at [60] per Lawrence Collins J.

5 Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [7-002].

6 *Carlyle Capital Corp Ltd (in liq) v Conway* (Unreported, Court of Appeal of Guernsey, Beloff, McNeill and Bennett JJA, 5 March 2012) at [48(iii)-(iv)] per Beloff JA.

7 *Lubbe v Cape PLC* [2000] 1 WLR 1545 at 1557A-1560E per Lord Bingham.

including in England[8], Australia[9], Guernsey[10], Canada[11] and the United States of America[12] – have recognised that local insolvency statutes are not justiciable elsewhere[13]. The choice of a foreign forum, if enforced, can therefore preclude insolvent companies and their liquidators from invoking substantive statutory rights which exist pursuant to the insolvency regimes under which they have been appointed.

For this reason, it is not uncommon for parties to spend substantial resources litigating the issue of jurisdiction[14]. It is also not uncommon for forum disputes to be litigated to the final appellate courts[15].

C. Forum selection clauses – an overview

The construction, validity and enforcement of forum selection clauses has been the subject of considerable discussion, with entire text books having been devoted to this subject alone[16]. Before examining the interaction between forum selection clauses and insolvency proceedings, below is a brief overview of these topics.

1. *Definition*

At its most basic, a 'forum selection clause' is a contractual term which nominates the forum in which prescribed disputes will be determined. Such clauses can either (a) nominate a particular *court or courts* which the parties agree will have jurisdiction over disputes (jurisdiction clauses); or (b) nominate that disputes will be determined by way of arbitration in an agreed seat and pursuant to an agreed set of rules (arbitration clauses).

Jurisdiction clauses are often categorised as 'exclusive' or 'non-exclusive'. Non-exclusive clauses are permissive, providing that the parties to the contract agree that proceedings may be brought in a nominated jurisdiction, whereas exclusive jurisdiction clauses are mandatory and provide that the nominated forum is the *only* forum in which proceedings may be brought. As such, a non-exclusive jurisdiction clause is less likely to prevent a liquidator from bringing statutory insolvency claims in the jurisdiction in which the liquidation is being conducted. Accordingly, this paper focuses on exclusive jurisdiction clauses.

Forum selection clauses are also commonly accompanied by a choice of law clause, identifying the proper law of the contract. However choice of law and choice of forum are distinct and it is possible (although uncommon) for a contract to prescribe that the law of one country will apply to the contract, but the courts of a different country will have exclusive jurisdiction to hear disputes under the contract. With respect to arbitration clauses, it has been recognised that *"[t]here is no international consistency as to how to determine the law of the arbitration clause where none has been expressed*[17]*".*

2. *Construction*

The common law regards forum selection clauses as ordinary contractual terms[18]. As such, a forum selection clause must be construed by reference to the law governing the contract in

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[8] See Lord Hoffmann, 1996 Denning Lecture (18 April 1996) at 9-10; I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) at [2.77].

[9] See I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) at [2.90], referring to Australian commentary.

[10] *Carlyle Capital Corp Ltd (in liq) v Conway (Unreported, Court of Appeal of Guernsey, Beloff, McNeill and Bennett JJA, 5 March 2012)* at [48(iv)] per Beloff JA.

[11] See I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) at [2.90], referring to Canadian commentary.

[12] *Taylor v LSI Logic Corp*., 715 A.2d 837, 841 per Walsh, Hartnett and Berger JJ (Del. 1998).

[13] Absent statutory provisions facilitating international cooperation, such as *Insolvency Act 1986* (UK), s 426 or *Cross-Border Insolvency Regulations 2006* (UK), reg 2.

[14] D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010) at [1.02].

[15] Including, for example, the House of Lords (*The Hollandia* [1983] 1 AC 565; *Spiliada Maritime Corporation v Cansulex Ltd ('The Spiliada')* [1987] AC 460; *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, [2001] UKHL 64; *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951) and the High Court of Australia (*Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418).

[16] See, for example, A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003); A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008); and D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010).

[17] See *Hong Kong International Arbitration Centre Press Release* dated 1 August 2014: 'HKIAC Adds Choice of Law Provisions to its Model Clause', referring to comments of James Spigelman AC QC (former Chief Justice of the New South Wales Court of Appeal, current Non-Permanent Judge of the Hong Kong Court of Final Appeal). See also Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16-013] observing that *"[t]here is, however, no international consensus on the choice of law rule applicable to an arbitration agreement".*

[18] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-109].

which it is found[19]. The clause will only be given effect if it is valid by reference to the applicable law. The approach to the construction of a forum selection clause is generally the same regardless of whether the clause is a jurisdiction clause or an arbitration clause[20]. In both cases, the court will read the contract as a whole to *"ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they … chose to express them*[21]*".*

A number of courts and commentators – including in England[22], Australia[23], Singapore[24], Guernsey[25] Hong Kong[26] and the United States of America[27] – have recognised that the purpose underlying forum selection clauses requires that they be given an expansive reading. Accordingly, unless the contractual language makes it clear that certain questions are intended to be excluded from the scope of a forum selection clause, a forum selection clause will be read broadly so as to encompass all disputes arising from the contract in question.

Closely related to the question of the scope of forum selection clauses is whether disputes related to validity, rescission, frustration or termination of the contract are to be dealt with in accordance with the forum selection clause. On the one hand, if the court enforces the forum selection clause, it is assuming the validity of the contract in circumstances where that is the very matter being litigated. On the other hand, many (if not most) contractual disputes will include an allegation that the contract has been terminated or avoided; if a forum selection clause could be circumvented by a mere allegation that the relevant contract has been terminated or avoided, such clauses would lose much of their benefit.

The courts have resolved this tension in favour of enforcement of forum selection clauses, concluding that agreements on forum are separate and distinct from the substantive contract of which they form part. This is known as the 'principle of separability'. As such, forum selection clauses are not ordinarily impeached by the discharge, termination, avoidance or voiding of the underlying contract[28].

3. *Validity and enforcement*

The validity of a forum selection clause will be assessed by reference to the proper law of the contract[29]. However, validity will also be determined by reference to the laws applicable in the forum in which the proceedings are brought, as courts will not enforce an otherwise valid jurisdiction clause if that clause is inconsistent with the mandatory rules of the forum[30].

In the context of arbitration clauses, this approach is confirmed by the *New York Convention*[31]*,* which provides that the recognition and enforcement of an arbitration award may be refused where *"the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"* (article V(1)(a)). As noted above at page 3, (Section C.1 paragraph 3) there is a lack of consistency as to how to determine the law of the arbitration clause where the arbitration agreement does not specify the applicable law. This has led the authors of *Dicey & Morris* to conclude that *"[i]n light*

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[19] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-103].

[20] *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 593B-G per Steyn LJ (UK); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc,* 473 US 614 (1985); *Sarabia v The Ocean Mindaro* (1996) 26 BCLR (3d) 143 at [32] per Huddart JA (Canada).

[21] *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724 at 736 per Lord Diplock.

[22] *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at [5]-[8], [13] per Lord Hoffmann.

[23] *Global Partners Fund Ltd v Babcock and Brown Ltd (In Liq)* (2010) 79 ACSR 383 at [60]-[65] per Spigelman CJ (Giles and Tobias JJA agreeing). Although cf *Rinehart v Welker* [2012] NSWCA 95 at [121] per Bathurst CJ, [204] per Young JA and [219] per McColl JA, finding that the construction of forum selection clauses is to be undertaken by reference to the terms of the contract, the meaning of which is to be determined by what a reasonable person would have understood them to mean, rather than a presumption that the parties intended any dispute arising out of the relationship into which they have entered be decided by the same tribunal unless the language makes it clear certain questions were intended to be excluded.

[24] *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [12]-[19] per VK Rajah JA.

[25] *Winnetka Trading Corporation v Bank Julius Baer and Company Ltd* [2009-10] GLR 260 at [64]-[66] per Beloff JA (Steel and Martin JJA agreeing).

[26] G Johnston, *The Conflict of Laws in Hong Kong* (Sweet & Maxwell, 2nd ed, 2012) at 148 [3.122(3)(p)].

[27] *Ashall Homes Ltd v ROK Entertainment Group,* 992 A 2d 1239, 1252-53 (Del, 2010); *Universal Grading Serv v eBay, Inc., 2009 US Dist LEXIS 49841*, 50-51 (EDNY, 2009).

[28] See, for example, D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010) at [4.36-4.48]; Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16-011]; *Mackender v Feldia AG* [1967] 2 QB 590; *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951.

[29] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-118].

[30] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-118].

[31] *United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

of the pervasive reach of the New York Convention in modern times, this rule, although not itself prescribing a choice of law rule of general application, nevertheless provides a strong indication of one, since invalidity of the arbitration agreement under the applicable law may render the resulting award unenforceable[32]*".*

Further, whether the court retains discretion to enforce a forum selection clause, and if so, how that discretion is to be exercised is also determined by reference to the laws applicable in the forum in which the proceedings are brought[33].

In most jurisdictions, arbitration clauses are now regulated by domestic legislation[34], the *New York Convention*[35] and / or the *UNCITRAL Model Law on International Commercial Arbitration*[36]*.* The *New York Convention* and the implementing legislation provides that, where parties have contracted for their disputes to be resolved by arbitration, arbitration is mandatory (Article II(1)-(3)).

As a result, in countries where the *New York Convention* has been domestically implemented, a party to a written contract containing a valid arbitration clause may apply to have any proceedings concerning arbitrable issues within the scope of the clause stayed, and the matter referred to arbitration. On such an application, the courts *must* stay the proceedings; the courts in these jurisdictions have no discretion to hear proceedings brought in breach of arbitration clauses[37]. Further, courts have also been prepared to grant injunctive relief to prevent proceedings from being brought in a foreign court in breach of an arbitration clause[38].

Similarly, the *Brussels I Regulation*[39] (which applies to agreements conferring jurisdiction upon the courts of a member state of the European Union (EU)) and the *Hague Convention on Choice of Court Agreements*[40] (which will apply to exclusive jurisdiction agreements in favour of non-EU courts, when it eventually comes into force) require the mandatory enforcement of jurisdiction clauses. The *Hague Convention on Choice of Court Agreements* is closely modelled on the *New York Convention* and is intended to provide a parallel framework outside of the arbitration context[41].

In the absence of legislation, a jurisdiction clause cannot oust the jurisdiction of the court. For example, the English Court of Appeal noted in *A/S D/S Svendborg v Wansa* [1997] 2 Lloyd's Rep 183 that parties cannot, by private agreement, deprive the courts of jurisdiction (at 186):

> *"English Courts, like those of many other countries, do not regard themselves as bound in all circumstances to comply with a private contract which seeks to deprive them of jurisdiction."*

Similarly, in *Bremen v Zapata Off-Shore Co.,* 407 US 1 (1972), the United States Supreme Court described the argument that a jurisdiction clause could *"oust"* a court of jurisdiction as *"hardly more than a vestigial legal fiction"* (at 13).

Notwithstanding this discretion, the courts recognise the legitimate benefits of agreeing on forum, and will enforce a jurisdiction clause unless "*strong cause*" or "*strong reasons*" are shown

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[32] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16-014].
[33] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [5.79]-[5.82]
[34] See, for example, *Arbitration Act 1975* (UK); *Federal Arbitration Act* (US); *International Arbitration Act 1974* (Cth); *Arbitration Act* (Singapore, Cap 10, 2002 rev ed) and *Arbitration Ordinance* (Hong Kong, Cap 609).
[35] All of the jurisdictions surveyed in this paper are Contracting States to the *New York Convention*: see http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.
[36] *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex I, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I. Of the jurisdictions surveyed in this paper, the following have implemented legislation that gives force to the provisions of the *UNCITRAL Model Law*: Australia, Bermuda, New Zealand, Singapore, Hong Kong, United Kingdom (Scotland only), other European Union countries (Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovenia and Spain) and United States (certain States): see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
[37] See, for example Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16-075]; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010) at [11.09].
[38] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16-088]; *The Angelic Grace* [1995] 1 Lloyd's Rep 87. However, since the decision of the European Court of Justice in *Allianz SpA v West Tankers Inc (Case C-185/07) ('The Front Comor')* [2009] 1 AC 1138, it is no longer open to the English Courts to restrain (by way of anti-suit injunction) a party from bringing or taking steps in proceedings in the courts of a Member State of the EU under *Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters* [2001] OJ L 12/8, art 23(1) (Brussels I Regulation). See pages 63-64 below under the title Arbitration Agreement – paragraphs 1 to 3.
[39] *Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters* [2001] OJ L 12/8.
[40] *Hague Convention on Choice of Court Agreements,* opened for signature 30 June 2005, 44 ILM 1294 (not yet in force).
[41] See further pages 64-67 below under the title the Hague Convention on Choice of Court Agreements - paragraphs 1 - 10.

why this should not be so. The applicable principles were outlined by Brandon J (as he then was) in *The Eleftheria* [1969] 1 Lloyd's Rep 237 (at 242):

> *"The principles established by the authorities can, I think, be summarised as follows:*
>
> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> *(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.*
>
> *(3) The burden of proving such strong cause is on the plaintiffs.*
>
> *(4) In exercising its discretion the court should take into account all the circumstances of the particular case.*
>
> *(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:—*
>
> *(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.*
>
> (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
>
> *(c) With what country either party is connected, and how closely.*
>
> *(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*
>
> *(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."*
>
> (emphasis and formatting added)

The *"strong cause"* test propounded by Brandon J has been consistently applied by the English and other common law courts[42].

The extent to which the existence of statutory insolvency claims, anchored in the court with jurisdiction over the winding up proceedings, can constitute *"strong reasons"* for keeping any related claims in the same court, is considered in Part D below.

4. *Procedural issues and anti-suit injunctions*

Forum selection clauses can be invoked in a number of ways by the party seeking to enforce the clause, namely by:

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[42] Lord Brandon cited his test from *The Eleftheria* with approval following his elevation to the Court of Appeal (see *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119), and then upon his appointment to the House of Lords (see *The Sennar (No 2)* [1985] 1 WLR 490). More recently, the *"strong reasons"* test has been endorsed by the House of Lords in *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, [2001] UKHL 64 at [24] per Lord Bingham.
The *"strong reasons" test* has also been adopted in a number of other common law jurisdictions including, (1) Australia (*Global Partners Fund Ltd v Babcock and Brown Ltd (In Liq)* (2010) 79 ACSR 383 at [83]-[92] per Spigelman CJ (Giles and Tobias JJA agreeing)); (2) Bermuda *(Saad Investments Company Ltd (in liq) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] Bda LR 83 at [24] per Kawaley J; now Kawaley CJ); (3) Hong Kong (*Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631 at [36]-[37], [49]-[51] per Ma CJHC) (see also the discussion in G Johnston, *The Conflict of Laws in Hong Kong* (Sweet & Maxwell, 2nd ed, 2012) at 141 [3.122(3)(b)]; (4) Singapore (*Morgan Stanley Asia v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [29] per Ang Saw Ean J); (5) New Zealand (*Society of Lloyd's v Hyslop and Oxford Members' Agency Ltd* [1993] 3 NZLR 135 (CA), at 142 per Cooke P, Richardson and McKay JJ)); and (6) Guernsey (*Carlyle Capital Corp Ltd (in liq) v Conway* (Unreported, Court of Appeal of Guernsey, Beloff, McNeill and Bennett JJA, 5 March 2012) at [95]-[96]) per Beloff JA.

- obtaining leave to serve proceedings in the forum nominated by the forum selection clause (the contractual forum) on a defendant outside of that jurisdiction, where such leave is required;

- having service of proceedings in a forum outside of the contractual forum (the non-contractual forum) set aside;

- obtaining a stay of proceedings in the non-contractual forum; or

- obtaining an anti-suit injunction of proceedings in the non-contractual forum.

A court’s power to hear and determine disputes between parties was historically founded on the presence of the defendant within the jurisdiction. Most jurisdictions now have procedures for plaintiffs to serve proceedings on defendants outside of the jurisdiction with the leave of the court. A plaintiff wishing to commence proceedings in the contractual forum can rely on the forum selection clause as grounds for obtaining leave to serve the proceedings on the counterparty outside of the jurisdiction: the forum selection clause provides strong evidence that the contractual forum is the proper forum to hear the dispute.

Conversely, a defendant to proceedings in a non-contractual forum may rely on the forum selection clause in support of an application to stay the proceedings as *forum non conveniens* or to have leave to serve outside the contractual forum set aside.

A defendant seeking to resist proceedings in a non-contractual forum may also commence parallel proceedings in the contractual forum for an anti-suit injunction, seeking to prohibit the counterparty from continuing proceedings in the non-contractual forum. From a practical perspective, an anti-suit injunction is *not* directed to the non-contractual court, which is free to continue hearing the proceedings. Rather, anti-suit injunctions bind the plaintiff and prohibit the plaintiff from continuing proceedings in the non-contractual forum. A plaintiff can in theory continue with proceedings in the non-contractual forum in breach of the anti-suit injunction. However:

- The plaintiff would risk being held in contempt in the contractual forum. The impact of such an order would depend on whether it could be enforced against the plaintiff. As such, it may be of little consequence to a plaintiff with no business or property interests in the contractual forum.

- The plaintiff would risk being unable to enforce their judgment against the defendant if successful in the non-contractual forum. In particular, the court which ordered the anti-suit injunction is unlikely to recognise any judgment obtained in contempt of its order.

The availability of anti-suit relief opens the possibility that a plaintiff who successfully resists an attempt to stay the proceedings in the non-contractual forum may find that their victory is hollow if the defendant subsequently obtains anti-suit relief. See, for example, *Akai Pty Ltd v The People's Insurance Company* Ltd (1996) 188 CLR 418*; Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90. Those proceedings concerned a claim by Akai Pty Ltd (Akai) under its credit insurance policy: Akai sold goods to its customers on credit and was insured by People’s Insurance Company (PIC) against loss arising from non-payment of those credit agreements. In 1993, Akai commenced proceedings in New South Wales (NSW) seeking indemnity for loss caused by non-payment by a retailer in NSW.

The insurance policy contained a forum selection clause which nominated England as the exclusive jurisdiction for all disputes under the policy and made English law the proper law of the contract. PIC applied to stay the Australian proceedings on the basis of that clause. However, the Australian High Court rejected the application on the basis that the exclusive jurisdiction clause was void under Australian law. The High Court’s decision was founded on the Australian *Insurance Contracts Act 1984* (Cth) s 8(1), which provided that the *Insurance Contracts Act 1984* (Cth) applied to all contracts of insurance and could not be contracted out of. It was common ground that the English High Court would not give effect to that provision, as the contract specified English law as the proper law of the contract. The combined choice of law and exclusive jurisdiction clause effectively circumvented the operation of the Act.

However, Akai's victory was short lived. Soon after the Australian High Court's decision, the English High Court granted an anti-suit injunction restraining Akai from continuing with the Australian proceedings: see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90. The English Court held that PIC was entitled to rely on the forum selection clause notwithstanding the operation of the Australian *Insurance Contracts Act 1984* (Cth). The parties had bargained for English law to apply to the contract and it was not contrary to English law for that clause to be enforced.

Similarly, in *Magic Sportswear Corp v OT Africa Line Ltd* [2007] 2 FCR 733 and *OT Africa Line v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170, [2005] EWCA Civ 710 (CA), a plaintiff sought to bring proceedings in Canada to take advantage of the mandatory laws of that forum. However, the contract between the plaintiff and the defendant contained a forum selection clause prescribing the English courts as the exclusive forum to hear disputes. The defendant in the Canadian proceedings, Magic Sportswear Corp, obtained an anti-suit injunction from the English High Court before the Canadian courts had decided whether to exercise jurisdiction and hear the proceedings. At first instance, the Canadian Court allowed the proceedings to continue notwithstanding that an anti-suit injunction had been granted by the English Court restraining the plaintiffs from continuing those proceedings. On appeal, the Canadian Court of Appeal stayed the proceedings on the basis that, in light of the English anti-suit injunction, allowing the Canadian proceedings to continue was likely to lead to fragmented and parallel proceedings.

These cases demonstrate that where a party is seeking to rely on the mandatory laws of a forum in breach of a forum selection clause, it is important to protect the proceedings in the non-contractual forum from interference by the contractual forum.

This protection can be obtained through an *'anti-anti-suit'* or *'defensive'* injunction. As Andrew Bell SC has observed[43]:

> *"… Anti-suit injunctions are employed by American courts in particular to prevent what those courts perceive to be attacks on their jurisdiction, including by anti-suit injunctions granted by courts of foreign forums. Such attacks do not relate to the mere potential threat posed by 'competing' proceedings in a foreign jurisdiction; rather they are represented by cases where 'the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions'. The hostile reaction of the American courts to the injunctions granted by the Court of Appeal in both British Airways and Midland Bank plc v Laker Airways Ltd arose directly in this context. Their 'sole purpose' was seen as being 'to terminate the American action'. In such circumstances, Wilkey J stated that 'an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction. This would be particularly true if the foreign forum did not offer the remedy sought in the domestic forum.' To this end, the mechanism of the so-called 'anti-anti-suit injunction' or 'defensive' anti-suit injunction has been developed. This is an injunction which orders a party not to seek injunctive relief in another forum in relation to proceedings in the issuing forum. Considerations of comity are cancelled out prospectively by anticipation that the foreign forum will grant anti-suit relief.*
>
> *…*
>
> *The expedient of seeking an anti-anti-suit injunction will be especially important where there is a difference in the substantive law to be applied in the competing forums, whether by reason of the operation of a mandatory law of one forum that overrides an expressly chosen law, as was the case in Akai, or simply by dint of different choice of law rules. To take the case of a mandatory law of the forum, because that law's operation will only be local, an exclusive jurisdiction clause in a contract with a foreign law clause may be rendered void or inoperative in that forum in which proceedings have been commenced with the consequence that the breach of the jurisdiction clause will, there, only be apparent, whereas it will be real in the stipulated forum where the mandatory law does not operate. What the judge of one country would see as no breach of an exclusive jurisdiction clause by virtue of the beneficial operation of the mandatory law would be seen by a judge of another country as a flagrant breach of contract."* (emphasis added, footnotes omitted)

[43] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.137], [4.141].

Whilst the courts have been careful not to limit the categories of case in which anti-suit injunctive relief may be granted, the protection of the Court's jurisdiction and processes has been variously described as *"the golden thread running through the rare cases in which an injunction has been granted*[44]*", "an idea [which] generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings*[45]*"* and *"the counterpart of the court's power to prevent its processes being abused*[46]*".* The relief is also available to protect the court's very ability to hear parties on claims properly before it[47].

This "*golden thread*" is not limited to English jurisprudence. In *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909 (DC Cir, 1984) Judge Wilkey of the United States Court of Appeals (District of Columbia Circuit) identified (a) the protection of a court's legitimately conferred jurisdiction; and (b) the prevention of litigants' evasion of important public policies of the forum as the two circumstances in which anti-suit injunctive relief is most often necessary. Judge Wilkey commenced his analysis of this justification for the grant of injunctive relief by observing (at 927) that:

> "*Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigants' participation in the foreign proceedings.*"

Wilkey J continued to say that "*[a]nti-suit injunctions are also justified when necessary to prevent litigants' evasion of the forum's important public policies*" (at 931). In that case, the "*evasion of the forum's important public policies*" took the form of the appellant company's attempt to escape the application of American anti-trust laws to its conduct of business in the United States. Wilkey J concluded that there was nothing improper in the Court "*enjoin[ing] appellants from seeking to participate in the English proceedings solely designed to rob the court of its jurisdiction.*" The injunction granted by the United States Court was purely defensive, rather than offensive and as such, comity concerns did not arise. As Wilkey J stated (at 938):

> "*The district court's antisuit injunction was purely <u>defensive</u> – it seeks only to preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law. This judgment would neither make any statement nor imply any views about the wisdom of British antitrust policy. In contrast, the English injunction is purely <u>offensive</u> – it is not designed to protect English jurisdiction, or to allow English courts to proceed to a judgment on the defendant's potential liability under English anti-competitive law free of foreign interference. Rather, the English injunction seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the court's adjudicatory jurisdiction.*" (emphasis in original)

Wilkey J's decision was referred to with approval by Lord Goff in *Bank of Tokyo v Karoon* [1987] AC 45 (at 58-59) and again in *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (at 136 to 137). In the latter case, Lord Goff referred to Wilkey J's statement *"that anti-suit injunctions are most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum",* and went on to observe that:

- in single forum cases (i.e. where a claim is available only in one forum, which will generally be the case for statutory insolvency claims) the relevant connection with England "*may, as Judge Wilkey's statement of principle (<u>Laker Airways Ltd v Sabena, Belgian World Airlines</u>, 731 F.2d 909, 926-927) suggests, involve consideration of the question whether an injunction is required to protect the policies of the English forum*" (at 139G); and

[44] *Bank of Tokyo v Karoon* [1987] AC 45 at 60F per Goff LJ.
[45] *Societe Nationale Industrieile Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892H-893A per Lord Goff (Aerospatiale).
[46] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390-391 per Dawson, Toohey, Gaudron, McHugh Gummow and Kirby JJ.
[47] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.125]. See also Lord Collins (ed), Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) at [12-081].

- his statement of the "*general rule*" regarding the availability of anti-suit injunctive relief was "*consistent with Judge Wilkey's statement, at pp.926-927, that anti-suit injunctions are "most often" necessary for the two purposes which he specified*" (at 140C-D)[48].

The High Court of Australia has also acknowledged the availability of anti-suit relief to protect the jurisdiction of Australian Courts, explaining in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 (at 390-92) (*CSR v Cigna*):

> *"The phrase 'anti-suit injunction' is now in common use and, at least in some instances, resembles an injunction granted to protect the legal or equitable rights of the plaintiff or a common injunction to protect the processes of the Chancery Court against interference by the processes of other courts…*
>
> *The counterpart of a court's power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion. And in some cases, it is that counterpart power of protection that authorises the grant of anti-suit injunctions. Thus, for example, if 'an estate is being administered ... or a petition in bankruptcy has been presented ... or winding up proceedings have been commenced ... an injunction [may be] granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets'. Similarly, as Gummow J pointed out in National Mutual Holdings Pty Ltd v Sentry Corporation, a court may grant an injunction to restrain a person from commencing or continuing foreign proceedings if they, the foreign proceedings, interfere with or have a tendency to interfere with proceedings pending in that court.*
>
> *The inherent power to grant anti-suit injunctions is not confined to the examples just given. As with other aspects of that power, it is not to be restricted to defined and closed categories. Rather, it is to be exercised when the administration of justice so demands or, in the context of anti-suit injunctions, when necessary for the protection of the court's own proceedings or processes."* (emphasis added, footnotes omitted)

In circumstances where a liquidator brings statutory insolvency claims which are only available in the jurisdiction of incorporation, the court's power to protect against interference with the court's processes once set in motion and the evasion of important public policies of the forum, provides a proper basis for anti-suit relief to protect the insolvency proceedings. Indeed, courts have recognised the protection of insolvency proceedings, reflecting important public policies of the forum, as justifying the intervention of the court by anti-suit relief[49].

Andrew Bell SC has commented that[50]:

> *"…Whereas, as shall be seen in the case of oppressive or vexatious conduct, proceedings are restrained because no legitimate or just advantage can be said to lie for a plaintiff proceeding in a particular foreign forum, it is the very existence of an advantage outside the forum which may justify injunctive relief in cases where a plaintiff is considered to be evading the forum's important public policies. The classic instance of such a case is where a creditor of a bankrupt estate or company in liquidation seeks to move against assets outside the jurisdiction and thus secure an advantage over other creditors whose claims will be met according to a legislatively prescribed order of priorities and in accordance with the principles of pari passu distribution."* (emphasis added, footnotes omitted)

In *Carlyle Capital Corp Ltd (in liq) v Conway* [2013] 2 Lloyd's Rep 179, the Guernsey Court of Appeal held that, once the Guernsey Court had concluded that Guernsey insolvency law required that the statutory insolvency claims be brought in Guernsey, it was appropriate to grant an anti-anti-suit injunction to protect the jurisdiction, notwithstanding the operation of a forum

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[48] See also the decision of Lawrence Collins LJ of the English Court of Appeal in *Masri v Consolidated Contractors International (UK) Ltd & Ors (No 3)* [2009] QB 503 which states the position very clearly at [26]: "…*the English court has power over persons properly subject to its in personam jurisdiction to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments.*"

[49] See *Carlyle Capital Corp Ltd (in liq) v Conway* [2013] 2 Lloyd's Rep 179 at [102]-[106]; A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.143]; *CSR v Cigna* at 391-392; and *Aerospatiale* at 892H-893A.

[50] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.143]. See also M Davies, A Bell and P Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) at [9.14], [9.16]- [9.17].

selection clause in favour of Delaware. The Privy Council refused leave to appeal, agreeing that once jurisdiction had been accepted, the *"anti-anti-suit injunction followed logically*[51]".

D. Conflicting policies in an insolvency context

Although there are sound reasons for the enforcement of forum selection clauses, different principles and objectives intervene when one party enters insolvent liquidation and the conduct of the affairs of the company by the directors and management for the benefit of shareholders is replaced by a statutory winding up process by a liquidator for the benefit of creditors, shareholders and the general public[52].

At a practical level, the need to balance the policy in favour of enforcing forum selection clauses and the policy underlying insolvency regimes gives rise to questions, such as:

- Should creditors be permitted to rely on forum selection clauses to recover assets outside of the jurisdiction in which the winding up is being conducted in circumstances which may lead to other than *pari passu* distribution amongst creditors?; and

- Should a company's former management be permitted to evade potential statutory insolvency claims against them under the law applicable in the jurisdiction where the company was incorporated by contracting for the jurisdiction of a foreign forum (according to foreign law) where legal obligations may be less onerous and statutory remedies unavailable?

Such questions are not easily answered. They highlight the tension between the following three policy considerations:

- the policy favouring enforcement of forum selection clauses (based on the principles of party autonomy and decentralisation) – see Part D.1 below;

- the public interest in insolvency proceedings and their efficient and cost-effective prosecution (including centralised asset collection and distribution and the investigation of the company's affairs in the public interest) – see Part D.2 below; and

- the principle that all aspects of a dispute should be heard in a single composite trial and should not be fragmented, absent impossibility – see Part D.3 below.

Each of these policy considerations is addressed below, followed by a comparative analysis of the approach taken by courts in both common law and civil code countries.

1. *Enforcement of forum selection clauses*

The juridical approach to the construction and enforcement of forum selection clauses derives from the basic proposition that forum selection clauses are contractual terms and should be approached on that basis. Accordingly, the primary rationale for the policy in favour of enforcing forum selection clauses is that it is necessary *"to secure compliance with the contractual bargain"*. This justification was articulated by the House of Lords in *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 as follows (at [24] per Lord Bingham):

> *"[T]he English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad …) to secure compliance with the contractual bargain … [T]he general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."*

This same proposition formed the basis of the principle articulated by Lord Hoffmann in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951; [2007] UKHL 40 that forum selection

[51] See further pages 39-43 below under the title Guernsey - paragraphs 1 to 15.

[52] *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [1] per VK Rajah JA (Keong CJ and Leong JA agreeing); *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [52] per Lord Millett and [77] per Lord Walker.

clauses should be construed broadly to give effect to the presumed intention of the parties (at [5]-[8], [13]).

The contractual basis for the enforcement of forum selection clauses informs the degree to which the law should intrude on, or override, forum selection clauses. It also explains the limited public policy grounds on which an otherwise valid forum selection clause can be overridden. See A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) (at [1.22]):

> *"One characteristic of a mature legal system is that persons who have legal capacity should be able to make agreements in such terms as they consider to serve their interests, and should be able to expect the courts, or other dispute resolution tribunals, to be prepared to enforce them according to their terms. In principle, the degree to which the law should intrude on or override these private agreements should be no more than is necessary to serve and secure a broader public interest. So, for example, contracting parties should be able to make, and to expect the courts to enforce, agreements on jurisdiction and choice of law".*

The courts (and legislatures in most jurisdictions) also recognise that arbitration agreements have the additional advantage of decentralising dispute resolution, thereby reducing the burden on the public purse and potentially allowing for faster, more efficient resolution of disputes[53].

2. *The public interest in insolvency proceedings*

2.1 Centralised winding up

Commonwealth and United States courts have acknowledged a principle of modified universalism, which emphasises the importance of insolvency proceedings being conducted under a single, unitary system, but subject to the discretion of the local courts to *"evaluate the fairness of the [principal proceedings] and to protect the interest of local creditors*[54]*".* The trend toward universalism and its current meaning were recently addressed by the United Kingdom Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236 (Rubin v Eurofinance) and by the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (Singularis v PwC).

In *Rubin v Eurofinance*, Lord Collins, with whom Lords Walker and Sumption agreed, stated (at [16]-[20]):

> *"… [T]here has been a trend, but only a trend, to what is called universalism, that is, the 'administration of multinational insolvencies by a leading court applying a single bankruptcy law': Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276, 2277. What has emerged is what is called by specialists 'modified universalism'.*
>
> *The meaning of the expression 'universalism' has undergone a change since the time it was first used in the 19th century, and it later came to be contrasted with the 'doctrine of unity'. In 1834 Story referred to the theory that assignments under bankrupt or insolvent laws were, and ought to be, of universal operation to transfer movable property, in whatever country it might be situate, and concluded that there was great wisdom in adopting the rule that an assignment in bankruptcy should operate as a complete and valid transfer of all his movable property abroad, as well as at home, and for a country to prefer an attaching domestic creditor to a foreign assignee or to foreign creditors could-*
>
> > *'hardly be deemed consistent with the general comity of nations … [T]he true rule is, to follow out the lead of the general principle that makes the law of the owner's domicil conclusive upon the disposition of his personal property,' ….*

[53] See, for example, the comment by the United States Court of Appeal in *Selcke v New England Ins Co*, 995 F 2d 688, 689 (7th Cir, 1993), describing the *"favorable judicial attitude toward arbitration"* as a *"selfish attitude, in part, because the courts are heavily burdened these days and arbitration is an alternative to adjudication".*

[54] *Re Maxwell Communication Corp,* 170 BR 800 (SDNY, 1994).

Professor Cheshire, in his first edition (Cheshire, Private International Law, (1935), pp 375-376), said that although English law ‘neglects the doctrine of unity it recognizes the doctrine of universality.’ What he meant was that English law was committed to separate independent bankruptcies in countries where the assets were situate, rather than one bankruptcy in the country of the domicile (the doctrine of unity), but also accepted the title of the foreign trustee to English movables provided that no bankruptcy proceedings had begun within England (universality). He cited Solomons v Ross for this proposition:

> *"The English Courts … have consistently applied the doctrine of universality, according to which they hold that all movable property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee."*

In HIH [2008] 1 WLR 852, para 30, Lord Hoffmann said:

> *‘The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.’*

And in Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc (“Cambridge Gas”) [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> *‘The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.’*

The US Bankruptcy Court accepted in In re Maxwell Communication Corpn, 170 BR 800 (Bankr SDNY, 1994) that the United States courts have adopted modified universalism as the approach to international insolvency:

> *‘… the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.’ ”* (emphasis added)

In *Singularis v PwC,* Lord Sumption, with whom Lord Clarke agreed, expressed the principle of modified universalism as a *“duty”* of local courts to assist foreign liquidators to *“transcend the territorial limits”* of the (foreign) court administering the liquidation, insofar as the local court could do so within the limits of its statutory and inherent powers (at [19], [23], [25] and [29]):

> *“[19]…the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in HIH, and by Lord Collins (with whom Lord Walker and Lord Sumption agreed) in Rubin v Eurofinance SA. Nothing in the concurring judgment of Lord Mance in that case casts doubt upon it … In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers.*
> *…*
>
> *[23]…The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an*

> *orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status*
> *…*
>
> *[25] The power is subject to the limitation in In re African Farms Ltd and in HIH and Rubin, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda.*
> *…*
>
> *[29] Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. … Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum-shopping". In the opinion of the Board it is correct."* (emphasis added)[55]

In a separate but concurring judgment, Lord Collins at [33], [52], [53] and [58] reiterated his earlier comments in *Rubin v Eurofinance* that *"commercial necessity"* had encouraged courts to "*assist foreign winding up proceedings so far as it properly can*".

The limits of the trend toward universalism have been the subject of judgments in the UK, Australia and Bermuda in recent years:

- In *Rubin v Eurofinance*, the majority concluded that that the principle of modified universalism articulated by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] 1 AC 508 (Cambridge Gas), did not displace the common law rule applicable to the enforcement of foreign judgments (at [128]):

  > *"The dicta in Cambridge Gas and HIH do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new*

[55] The dissenting judgments of Lords Mance and Neuberger show that the scope and application of the principle of modified universalism remains controversial. Lord Mance held at [135] that the principle could not justify the Court assuming or exercising a common law power to *"haul anyone before the court … to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so"*. In a concurring judgment, Lord Neuberger cautioned against the extension of common law powers based on the principle of modified universalism, noting (at [154] and [158]) that the Courts had struggled to provide clear guidance on the *"extent of the extra-statutory powers of a common law court to assist foreign liquidators"* and that the *"the logic of the withdrawal [by the UK Supreme Court in Rubin v Eurofinance] from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle"*.

rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation."

Lord Collins also added that it followed from his reasoning that the decision of the Privy Council in *Cambridge Gas* was wrong. The principle of universalism did not justify the Manx courts in that case recognising and enforcing a judgment of the United States Bankruptcy Court purporting to assign shares of a Manx company in circumstances where the United States Court had neither in personam jurisdiction over the shareholder nor *in rem* jurisdiction over the shares[56].

- In *Singularis v PwC*, the Privy Council (per Lords Sumption, Lord Collins and Clarke) reiterated that the principle of modified universalism was not itself the source of jurisdiction over those affected, in the absence of jurisdiction in rem or in personam according to ordinary common law principles (per Lord Sumption at [15] and [18], and Lord Collins at [83]):

  "[15]…Cambridge Gas is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant.

  …

  [18] Cambridge Gas marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in Rubin v Eurofinance SA [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in Al Sabah v Grupo Torras SA [2005] 2 AC 333, a case cited in argument in Cambridge Gas but not in the advice of the Board. Lord Walker, giving the advice of the Board in Al Sabah, had expressed the view that there was no inherent power to set aside Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as Cambridge Gas suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins…It follows that the second and third propositions for which Cambridge Gas is authority cannot be supported

  …

  [83] the opinion in Cambridge Gas … was not only wrong in its recognition of the New York order regulating the title to Manx shares, as decided in Rubin v

[56] It was unclear to what extent Lord Collins' dicta narrowed the broader principle of universalism articulated by Lord Hoffmann in that case. See for example J Verrill, *'The Snipping of the Golden Thread and the Sacking of the Temple of Universalism'* (2013) 26 INSOL International Technical Series I, in which the author comments (at p.33) that:

"The Supreme Court's decision [in Rubin] represents a depressing retreat and narrowing of the power of the English courts to assist foreign office holders since the golden age of Lord Hoffmann, but perhaps only in so far as enforcement of judgements is concerned. It does not necessarily affect the recognition of the insolvency proceedings themselves or indeed the granting of assistance within those proceedings, but it does apparently severely limit the scope of such assistance having concluded that Cambridge is wrongly decided."

This uncertainty has now been addressed by the judgment of the Privy Council in *Singularis v PwC*, discussed above, which confirmed that, while the decision in *Cambridge* was wrongly decided, the principle of modified universalism has not been discredited and remains a part of the common law.

> *Eurofinance SA, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or "as if" they applied"* (emphasis added)

(see also Lord Collins at [33] and [89])

The majority held that the principle of universalism could not be used to permit liquidators to override jurisdictional limits laid down by statute or apply domestic insolvency laws "as if" the foreign company was being wound up domestically. Specifically, the Liquidators of Singularis Holdings Ltd (SHL) could not obtain the benefit of investigative powers under or analogous to the Bermuda *Companies Act 1981,* s 195, against auditors, in circumstances where the Act had no application because of insufficient connection between the auditors and Bermuda. Lord Collins observed (at [63]-[64]):

> *"In the Court of Appeal in the present case Auld JA had described the development of the common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally as amounting to impermissible "legislation from the bench." In answer, the liquidators in their argument to the Board relied on many dicta to the effect that the common law develops to meet changing circumstances.*
>
> *In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function."*

- In *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57 (*Saad v DCT*), the Full Court of the Federal Court of Australia noted that the principle of universalism could not be used to transmit funds out of the local jurisdiction in circumstances where to do so would destroy the rights of local creditors.

  The foreign representative of Saad Investments Company Ltd (Saad), which was in liquidation in the Cayman Islands, sought orders that the proceeds of the sale of Saad's Australian assets be remitted to the Cayman liquidator to be distributed in the principal liquidation. The Deputy Commissioner of Taxation opposed the remission of those funds on the basis that it was unable to prove for Australian tax debts in the Cayman liquidation. The Full Court of the Federal Court of Australia commented that *"the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far".* It held that the principle of modified universalism did not require the remission of the Australian assets to the principal liquidator without allowance being made to pay the Deputy Commissioner of Taxation at the same rate as other creditors in the principal liquidation.

While the above cases show the limits to the principle of universalism, they do not challenge the underlying desirability of a centralised, principal insolvency to ensure that all creditors participate in a *"single system of distribution".*

This unitary approach to insolvency proceedings requires that all of the assets of the insolvent company be realised and remitted to a single liquidator and distributed to all of the creditors of the company in accordance with a single set of priority rules. Critically, the dividend received by a creditor should neither turn on the jurisdiction in which the creditor is located, nor where the assets of the company are located[57]. This fundamental objective would be undermined if individual creditors were able to obtain an advantage over other creditors through recourse to foreign courts.

The classic instance is where a creditor of an insolvent company moves against the assets of the company outside of the jurisdiction[58]. Since the 19th Century, courts have restrained such conduct through anti-suit injunctions, restraining rogue creditors from continuing proceedings in

[57] I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) at [2.93].
[58] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.143].

foreign courts, thereby protecting the unity of English bankruptcy proceedings[59]. However, it is unclear whether courts would be prepared to restrain such proceedings if the foreign proceedings were brought pursuant to a forum selection clause.

2.2 Investigation of the pre-insolvency conduct of a company

The mandatory enforcement of forum selection clauses would also lend itself to potential abuse by the pre-insolvency directors, officers and managers of a company who are in a position to dictate the forum which will hear any disputes that arise between them and the company.

The effect on insolvency proceedings may be profound. Insolvency statutes are generally not justiciable outside of the forum in which the winding up order is made (see pages 2-3 above under section B - paragraph 3). As a consequence, the effect of a choice of forum on insolvency proceedings is fundamentally different from the effect in ordinary litigation, in that the choice of forum also affects the substantive law that will apply[60].

This gives rise to the possibility that company directors, officers and managers might attempt to avoid accountability pursuant to the statutory insolvency regime applicable in the jurisdiction where the winding up order is made, by purporting to carry out their duties under contractual arrangements which nominate a foreign forum. Such an outcome would be at odds with the long-standing recognition that the investigation and enforcement aspects of company liquidation serve an important public purpose in the forum of the winding up[61].

In particular, there is a strong public interest in liquidators bringing culpable directors to account, to promote higher standards of commercial conduct and to deter fraud, misfeasance or breach of fiduciary duty and other improper practices. This objective was identified almost three decades ago by the Cork Committee on Insolvency Law and Practice, whose 1982 Report led to the enactment of the *Insolvency Act 1986* (UK):

- *"it is a basic objective of the law to support the maintenance of commercial morality and encourage the fulfilment of financial obligations"* (at [191]); and
- *"the insolvency laws, through their investigative processes, are the means by which the demands of commercial morality can be met"* (at [235(b)]).

This remains the position today. In *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 (Pantmaenog), Lord Millett observed (at [52]) that *"the liquidator … exercise[s] functions which serve the public interest and not merely the financial interests of the creditors and contributories[62]".* Lord Walker further explained that insolvency proceedings and the winding up of a company serve a dual purpose (at [77]-[79])[63]:

> *"One purpose is the orderly settlement of a company's liabilities and the distribution of any surplus funds ... The other is the investigation and the imposition of criminal or civil sanctions in respect of misconduct … The first function is primarily a concern of a company's creditors and shareholders; the second function serves a wider public interest.*
> *…*

[59] See *Stichting Shell Pensioenfonds v Krys & Anor (British Virgin Islands)* [2014] UKPC 41 at [18] to [24]. See also I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) at [2.96].

[60] See, for example, Lord Hoffmann's statement in the 1996 Denning Lecture (18 April 1996):
"Jurisdiction should not affect the outcome of the case. If the parties have made a contract governed by English law, that law should be applied whether the case is tried in London or in Paris. And once the issue in dispute between the parties has been decided, there are strong incentives to limit the circumstances in which it can be tried again in another jurisdiction. Bankruptcy, on the other hand, is very different. First, an English court has no jurisdiction to apply any insolvency law other than the Insolvency Act 1986. Jurisdiction therefore also determines the choice of law. There are no separate choice of law rules … [R]ecognition of an order made in another country necessarily involves acceptance of the law of that country."

[61] United Kingdom, *Insolvency Law and Practice: Report of the Review Committee*, Cmnd 8558 (1982) at [192], [198(i)] and [1734]) ('The Cork Report').

[62] See also *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] 4 All ER 164, [2007] UKPC 26 at [32] per Lord Scott, observing that *"liquidation, although from a financial point of view carried out for the benefit of creditors, is a public act or process in which the public has an interest".*

[63] See too Lord Millett at [47], who referred to the *"hope"* of the Cork Committee that the revival of liquidation procedures designed to expose serious misconduct *would "help to promote higher standards of commercial and business morality and serve as a sanction against former officers of a failed company who had not adequately assisted the official receiver and the liquidator in their investigations into the company's affairs".* See also *Whitehouse v Wilson* [2007] BCC 595, [2006] EWCA Civ 453 at [52], [54] per Chadwick LJ and at [75]-[84] per Lindsay J.

> *There have been three principal procedures available on winding up for the protection of the public: the initiation of criminal proceedings, originating in section 167 of the Companies Act 1862; summary proceedings for misfeasance or some other breach of duty in the course of the winding up, originating in section 10 of the Companies (Winding up) Act 1890; and proceedings for disqualification, originating in section 75(4) of the Companies Act 1928 (but only in respect of a director found guilty of fraudulent trading). The modern forms into which these three procedures have evolved are now found respectively in section 218 of the Insolvency Act 1986, sections 212-214 of the Insolvency Act and the Disqualification Act. It is unnecessary to set out the intermediate history. Ever since the 1862 Act the court has made clear that these procedures exist for the protection of the general public, not in the interests of the creditors or shareholders of the particular company which is in liquidation. Indeed it may be contrary to the financial interests of the creditors and shareholders for these procedures to be invoked."* (emphasis added)

More generally, there is a public interest, which is closely related to the interest in holding culpable directors to account, in ensuring that the general public are protected from the abuse of limited liability and the adverse effects which insolvency can produce[64]. The need to safeguard the general public is a *"constant theme"* in the development of corporate insolvency law[65].

2.3 Mandatory enforcement of insolvency regime

Related to the matters addressed in 2.2 above, is the proposition that insolvency provisions are mandatory, such that it is contrary to public policy for a party to *'*contract out*'* of the applicable insolvency regime.

In *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758, Lord Cross stated (at 780H) that in the context of insolvency *"it is to my mind irrelevant that the parties to the 'clearing house' arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a 'contracting out' must, to my mind, be contrary to public policy."*

To similar effect, in *Krasner v Dennison* [2001] Ch 76, Chadwick LJ stated (at [46]) that *"[t]he starting point, as it seems to me, is the long established principle that it is contrary to the public interest to allow a party to contract out of the operation of the Bankruptcy Code."*

Further, in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 an application was made to stay a winding up petition presented against a company by a contributory on the basis that the proceedings infringed a contractual arbitration clause between the joint venture parties. Warren J (now Warren CJ) declined to stay the proceedings on the basis that the arbitration clause was ineffective and unenforceable. Warren J stated that *"[s]uch matters cannot and ought not be subject to private contractual arrangement"* (at [13]) and that *"[i]n essence, the arbitration clause in the joint venture agreement is contrary to the provisions of the Corporations Law and cannot be applied"* (at [18]).

Even where a company is incorporated abroad, the fact that it is being wound up in the local jurisdiction means that the courts must apply *"the mandatory scheme laid down by"* the law of the place of the winding up[66]. For example, if a Cayman Islands' company is wound up in England, the applicable "mandatory scheme" is English law.

3. *The non-fragmentation principle*

One approach to the conflict between the policy in favour of enforcing forum selection clauses and the public policy considerations inherent in statutory insolvency claims, is to exclude such claims from the operation of a forum selection clause while allowing any related claims to be dealt with in accordance with the forum selection clause. This approach, which was adopted by the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414, attempts to strike a balance between the policy in favour of enforcing forum selection clauses while preserving liquidators' statutory insolvency claims. However, this approach has the

[64] *Bishopsgate Investment Management (in Provisional Liquidation) v Maxwell* [1993] Ch 1 at 24G-H per Dillon LJ.
[65] *Pantmaenog* at [78] per Lord Walker.
[66] *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 at [67] per Arden LJ.

potential to fragment related proceedings, by, for example, requiring that a contractual claim against an agent or advisor be litigated in the contractual forum, while requiring an almost identical claim for misfeasance against the same agent as a *de facto* director be litigated in the forum conducting the liquidation.

To allow the fragmentation of claims in this way adversely affects the efficient conduct of litigation. In particular, (a) it gives rise to a risk of inconsistent decisions; and (b) it results in delay, duplication and increased costs[67]. It also undermines the principle of certainty which underlies the courts' approach to forum selection clauses and statutory insolvency claims.

This result would also be inconsistent with the longstanding and consistent line of authority, both in the context of considering the enforcement of forum selection clauses and in forum disputes more generally, emphasising the undesirability of the fragmentation of claims. This policy has been variously described as:

- the principle requiring one-stop litigation[68];
- the principle against fragmentation of disputes between different jurisdictions, absent necessity or impossibility[69]; and
- the search for the forum in which there can be a single composite trial[70].

However described, the principle requires the court to seek to ensure, as far as possible, that multiplicity of legal proceedings is avoided. The objectives underlying the principle are:

- the avoidance of multiple or duplicative proceedings;
- the saving of costs and the avoidance of waste of resources;
- its corollary, the avoidance of delay;
- the minimisation of the risk of inconsistent decisions;
- ensuring that plaintiffs enjoy the benefit of a composite trial;
- the avoidance of uncertainty and satellite disputes, such as on questions of issue estoppel or res judicata; and
- the avoidance of potential prejudice to third parties.

The principle against fragmentation of proceedings is one of general application in modern litigation and is not limited to the *forum conveniens* context. Fragmentation will only be countenanced where by reason of particular circumstances it is impossible to conduct a single composite trial; for example where part of an action must be dealt with by way of arbitration. The *forum conveniens* context is but one example of its application.

Whilst there are numerous judicial statements on this topic in various contexts, they all speak with one voice.

At a general level, in laying down the proper approach of the English courts to questions of forum, the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd ('The Spiliada')* [1987] AC 460, noted (at 477G) that *"the question is whether there exists some other forum which is clearly more appropriate for the trial of the action"*. Critically, the enquiry is which forum can hear the entire action, not individual issues comprising the action[71].

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[67] See, for example, *Konkola Copper Mines plc v Coromin* [2006] 1 All ER 437 (Comm) where Rix LJ observed (at [27]): *"… the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of inconsistent decisions".*

[68] See, for example, *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 at 724D-E per Hoffmann LJ.

[69] See, for example, *Konkola Copper Mines plc v Coromin* [2006] 1 All ER 437 (Comm) at [27]-[29] per Rix LJ; *Attorney-General of Zambia v Meer Care & Desai (A Firm)* [2006] 1 CLC 436 at [25] per Sir Anthony Clarke MR; *Walsh and Taal v Horizon Bank International Ltd (in provisional liquidation)* [2006] Bda LR 42 at [25] per Kawaley J.

[70] See, for example, *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 at [36] per Lord Bingham.

[71] See also *Du Pont v Agnew* [1987] 2 Lloyd's Rep 585 at 593 per Bingham LJ: *"the Court must in my judgment view the case in the round. … [The] appropriateness and the requirements of justice should be assessed taking account of the case as a whole";* and *Hindocha v Gheewala* [2004] 1 CLC 502; [2003] UKHL 77 at [20] per Lord Walker: *"[the dispute] must be determined as a whole in one jurisdiction or the other"* (emphasis added).

The undesirability of fragmented proceedings has also been made plain by the courts in numerous cases concerning the enforcement of forum selection clauses. See for example:

- *Evans Marshall & Co Ltd v Bertola SA (No 1)* [1973] 1 WLR 349, which concerned a tripartite dispute where only two of the parties were bound by an exclusive jurisdiction clause in favour of the Barcelona Court. The plaintiffs sought leave to serve proceedings out of the jurisdiction. At first instance Kerr J held "*without hesitation*" that this was a proper case for service out, notwithstanding the exclusive jurisdiction clause. The grant of leave was upheld unanimously by the Court of Appeal. Cairns LJ stated (at 385C-F) that *"this [was] one of those exceptional cases"* in which it was right to allow the plaintiffs to sue in England, notwithstanding the forum selection clause, because the plaintiffs' claim against one defendant was properly brought in England and it would *"greatly delay the enforcement of any claim the plaintiffs have against [that defendant] and inhibit the obtaining of an interlocutory injunction against them"* if the plaintiff was required to bring their claim against the other defendant in Barcelona in accordance with the forum selection clause.

- *Aratra Potato Co Ltd v Egyptian Navigation Co ('The El Amria')* [1981] 2 Lloyd's Rep 119, where the primary dispute was between cargo interests and the owner of the vessel, and both parties were bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. However, the cargo interests had also issued proceedings against a third party which was not bound by the jurisdiction clause. The learned Judge and Court of Appeal both refused a stay. Brandon LJ, delivering the leading judgment of the Court of Appeal, stated (at 128) that It would be *"a potential disaster from a legal point of view"* if the primary dispute and third party claim were heard in different fora *"because of the inherent risk in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries"*.

- *Citi-March Ltd v Neptune Orient Lines Ltd* [1996] 1 WLR 1367, where Colman J held that enforcing a forum selection clause in favour of the courts of Singapore would inevitably lead to split trials. This outcome would be *"a highly unsatisfactory procedural situation"* and was a factor which was *"highly relevant"* to maintaining English jurisdiction over the case. Colman J stated (at 1375-1376) that if the plaintiffs were to be required to pursue one defendant in Singapore, whilst their claims against the other three defendants continued in England *"[n]ot only would this be inconvenient; but it would be potentially unjust, for it would preclude the plaintiffs from having the benefit of getting the evidence of all four defendants before the same court. … In addition, there is a risk, if actions in respect of the same loss must be brought in different jurisdictions, that there will be inconsistent decisions on the facts."*

- *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, which is the leading English authority on the circumstances in which proceedings should be permitted to continue in disregard of a forum selection clause. Lord Bingham found that the risk of separate proceedings between the parties in New York and England, if the forum selection clause was to be enforced, should be given "*great weight*". He went on to conclude (at [34]-[36]) that:

  > *"It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole of the dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.*
  >
  > *… I cannot for my part accept that the ends of justice would be well served if [the plaintiff's] allegations concerning the transfer and sale and purchase agreements were determined in England and its allegations concerning the collection agreement and trust fund withdrawals were determined in separate proceedings in New York. The judgment made of the motives and honesty of the four alleged conspirators in the one context would plainly have an important bearing on the judgment made in the other.*
  >
  > *In my opinion … the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of [the defendant]."* (emphasis added)

- *Konkola Copper Mines plc v Coromin* [2006] 1 All ER 437 (Comm) (CA), where the English Court of Appeal reiterated that the courts should "*if possible*" avoid fragmentation of disputes between different jurisdictions, and that enabling all aspects of an overall dispute to be determined in a single set of proceedings constituted "*strong reasons*" for a court to decline to enforce an exclusive jurisdiction clause. Rix LJ (with whom Sir Anthony Clarke MR and Richards LJ concurred) stated (at [27]-[29]) that:

  > *"I have said above that the bifurcation of KCM's claims against the Zambian underwriters and against Coromin is an unusual state of affairs. This is because the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of inconsistent decisions. …*
  >
  > *Exclusive jurisdiction clauses in different contracts can in particular lead to such fragmentation of disputes. … Under the English common law, however, there remains a discretion, even in the case of an exclusive jurisdiction clause, to decline to enforce it if there are strong reasons for taking that course, such as to enable all aspects of an overall dispute to be canalised into a single set of proceedings: Donohue v Armco Inc [2001] UKHL 64. Even so, such canalisation is not always possible …*
  >
  > *So in the present case also it is impossible now to prevent the fragmentation of KCM's claims.*" (emphasis added)

- *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, where a stay of proceedings in Australia was declined despite an exclusive jurisdiction clause in favour of England. In his reasoning, Allsop J (now Allsop CJ) addressed the powerful, but conflicting, considerations which arose in circumstances where only part of a claim could be heard in the contractual forum, and concluded that the balance favoured consolidating the claims in a single venue (at [47], [62]-[66]):

  > *"At this point, one has the intersection of two powerful considerations in international litigation: first, the desire of courts to hold commercial parties to their bargain in terms of exclusive jurisdiction clauses; secondly, the desire of courts to avoid disruption and multiplicity of litigation, in particular a desire to avoid parallel proceedings and the risk of inconsistent findings, and to avoid causing inconvenience to third parties.*
  > *…*
  >
  > *The very existence of the possibility, if not probability, of duplicated litigation is, on modern authority of the highest persuasive stature a cogent consideration in assessing the effect of an exclusive jurisdiction clause. This is for good and powerful reasons based on the cost and inconvenience of litigation and the desire not to foster the circumstances of courts coming to different conclusions about the same facts on perhaps different, or even the same, evidence. If I may be permitted to say, respectfully, the views of judges of such eminence and experience as McNair J, Lord Denning, Lord Brandon, Colman J, Rix J and the Law Lords in Donohue v Armco are overwhelmingly persuasive of the great importance of this consideration. Related to it, but a distinct and equally powerful consideration in the administration of justice, is the inability to be certain that third parties, whether as witnesses or as parties, will not become involved in the London proceedings as well as the Australian proceedings at duplicated inconvenience and cost … The promotion of duplication may tend to encourage parties to view the interconnection and overlap of the cases as a field of potential tactical advantage. That is something which should be avoided and which can be avoided if it is possible to have all aspects of the dispute resolved in one convenient location.*
  > *…*
  >
  > *The balance is a fine one, but overall in my view this Court should not promote competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy."* (emphasis added)

- *S Net Freight (HK) Ltd v Namsung Shipping Co Ltd* [2011] HKEC 1061, where Reyes J dismissed an application to stay proceedings in Hong Kong and refused to enforce an alleged exclusive jurisdiction clause in favour of Korea, finding that there were compelling reasons for that course. Reyes J regarded as significant the risk of fragmentation of proceedings and inconsistent decisions (at [32]-[34], [41]):

  > *"Even if MBL c.3 amounted to an exclusive jurisdiction clause, the clause would not be conclusive on the question of a stay. The Court retains a discretion to refuse a stay where there are compelling reasons for a case to be heard here. See The 'El Amria' [1981] 2 Lloyd's Rep 119.*
  >
  > *If MBL cl.3 were an exclusive jurisdiction clause, I would nonetheless refuse a stay on the ground that, in any event, the exact same circumstances underlying the loss of the cargo will have to be investigated by this Court at the trial of Star Rich's claim against S-Net. It makes sense from the viewpoint of saving time and money for there to be a single investigation of the relevant circumstances in one (as opposed to two) jurisdictions.*
  >
  > *I am particularly concerned that, if there were to be two trials in relation to the damaged cargo, one in Hong Kong between Star Rich and S-Net and another in Korea between S-Net and Namsung, there would be a real risk of the two legal forums arriving at inconsistent decisions. That would be inimical to the interests of justice.*
  > *…*
  >
  > *… Accordingly, I do not think that it would be just for this Court by the grant of a stay to compel S-Net to expend significant amounts of time and money to litigate this matter in two jurisdictions."* (emphasis added)

- *Carlyle Capital Corp Ltd (in liq) v Conway* (Unreported, Court of Appeal of Guernsey, Beloff, McNeill and Bennett JJA, 5 March 2012) (*CCC v Conway*), (discussed further at pages 40-43 below in the section on Guernsey), where the Guernsey Court of Appeal dismissed an application to set aside leave to serve out and stay proceedings in Guernsey. The proceedings were brought by CCC and its liquidators against the former directors and manager of CCC seeking damages for breaches of tortious, contractual, fiduciary and statutory duties. The statutory duties in particular, were only judiciable in Guernsey. The defendants sought to stay the proceedings in Guernsey on the basis of a forum selection clause in a contract between CCC and its former managers. The Court rejected the application, reasoning (at [103]) that the plaintiffs' insolvency law claims were anchored in Guernsey and the "*need where possible to avoid fragmentation between jurisdictions*" provided strong reasons for the related claims to remain in Guernsey notwithstanding the Delaware forum selection clause. On a separate application in the same proceedings, the Court of Appeal granted a defensive anti-suit injunction to ensure that the proceedings could continue as a single composite trial in Guernsey, reasoning that the injunction followed as a matter of course[72]. The Privy Council refused leave to appeal reasoning that the anti-anti-suit injunction "*followed logically*".

- *Morgan Stanley Asia v Hong Leong Finance Ltd* [2013] 3 SLR 409, where Ang Saw Ean J of the Singapore High Court confirmed (in the context of a non-exclusive jurisdiction clause) that the undesirability of creating parallel related proceedings outweighed the parties choice of Singapore as the non-exclusive jurisdiction for their dispute. The Court held (at [56]-[65]) that *"[i]n the final analysis, [the forum selection clause] was merely one factor that I had to weigh up against all the other factors in the case"* and was insufficient to shift the *"gravity"* of the combined disputes from New York to Singapore:

  > *"…[B]oth sets of proceedings against [Morgan Stanley] in New York are closely connected. It follows that the centre of gravity of both sets of disputes is in New York and it remains expedient to hear them in the same jurisdiction. As I see it, a refusal to grant an anti-suit injunction would create the best chance for all matters to be effectively determined in one jurisdiction. In this way, there would be no risk*

[72] *Carlyle Capital Corp Ltd (in liq) v Conway* [2013] 2 Lloyd's Rep 179 at [77]-[79], [96], [101]-[103] and [106] per Beloff, McNeill and Bennett JJA.

> *of inconsistent judgments. Equally, the undesirability of parallel proceedings elsewhere would be obviated.*
> …
>
> *A non-exclusive clause leaves open the possibility that there may be another appropriate jurisdiction. In my view, having regard to the overall circumstances, Singapore was an appropriate jurisdiction but not clearly the most appropriate forum for the determination of claims brought by [Hong Leong] in the NY Proceedings. Accordingly, I found that [Morgan Stanley] had failed to discharge their burden of showing that Singapore is the more appropriate forum than New York."* (emphasis added)

Accordingly, when enforcement of a jurisdiction clause will result in proceedings being fragmented and a single composite trial of the proceedings in the non-contractual forum is possible, the courts will generally exercise their discretion by *declining* to enforce the clause and allowing the proceedings to be heard in a single forum.

A similar approach was taken with respect to arbitration clauses prior to the enactment of domestic arbitration legislation, the *New York Convention* and the *UNCITRAL Model Law on International Commercial Arbitration*. For example, in *Taunton-Collins v Cromie* [1964] 1 WLR 633 Lord Denning observed that it was an exercise of "*wise discretion*" to override an arbitration clause in order to avoid fragmentation (at 636)[73]. However, as discussed above, modern arbitration legislation in most jurisdictions now requires that *'*arbitrable*'* disputes which are the subject of a valid arbitration clause *must* be stayed and referred to arbitration. Courts have no discretion to decline to enforce the clause.

The mandatory stay of arbitrable disputes will result in claims being split if only part of the action or only some of the parties to litigation are subject to the arbitration clause[74]. In these circumstances, the court cannot avoid fragmentation of the proceedings "*even though, in the interest of the efficient administration of justice, it might well be preferable if related issues were resolved in a single set of proceedings*[75]*".* In such circumstances the court will usually:

- stay the non-arbitrable claims pending the outcome of arbitration[76]; or
- defer the arbitration, under its case management powers, until after it hears the non-arbitrable matters[77].

Neither of these options avoids splitting proceedings and several cases have commented on the unsatisfactory nature of this outcome and have sought practical ways around it[78]. As discussed below, there is an emerging line of authority holding that a liquidator's statutory insolvency claims are non-arbitrable. However, as such claims will often be brought in combination with common law claims, the potential for fragmentation of the dispute, and the associated expense and potential for inconsistent judgments, should be borne in mind when formulating a claim which may be subject to an arbitration clause.

E. Forum selection clauses in an insolvency context

In recent years, courts in various jurisdictions have been required to examine the tension between the public policy considerations in favour of enforcing forum selection clauses and the public policy considerations inherent in statutory insolvency claims. The development of the case law on this issue is analysed in some detail below and demonstrates a strengthening trend of prioritising liquidators' access to the courts, statutory insolvency claims and procedures of the place of the liquidation, over the enforcement of forum selection clauses in appropriate cases.

This approach is justified:

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[73] See also *Halifax Overseas Freighters Ltd v Rasno Export* [1958] 2 Lloyd's Rep 146 at 151-152 per McNair J.
[74] D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010) at [11.02].
[75] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16.079].
[76] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [16.079].
[77] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [195]-[204] per Austin J.
[78] See, for example, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [195]-[204] per Austin J; *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* (1998) 217 ALR 435.

- as a matter of contractual construction, in that statutory insolvency claims fall outside of the scope of any forum selection clause executed by the company's management, because the former management have no legitimate interest in the conduct of the affairs of the company once the statutory insolvency regime intervenes; and

- as a matter of public policy, in that a forum selection clause cannot be used to avoid the mandatory laws of the non-contractual forum. In particular, the public interest in insolvency proceedings being conducted in accordance with the law applicable in the place of the winding up outweighs the policy in favour of the enforcement of forum selection clauses. As such, forum selection clauses will not be enforced in these circumstances.

England

A small number of English authorities have considered the application of forum selection clauses to statutory insolvency claims brought by insolvency office holders: see, for example, *AWB (Geneva) SA v North America Steamships Ltd* [2007] 2 Lloyd's Rep. 315 (concerning claims brought by a Canadian Bankruptcy Trustee under the *Companies' Creditors Arrangement Act*) (AWB) and *Akers v Samba Financial Group* [2014] EWHC 540 (Ch); [2014] EWCA Civ 1516 (concerning claims brought by Cayman Islands' liquidators under the *Insolvency Act 1986* (UK)) (Akers). These decisions evidence a trend in prioritising statutory insolvency claims over the enforcement of jurisdiction clauses.

AWB concerned a series of swaps contracts which the plaintiffs had entered with the defendants relating to the market rate for certain freight routes. The swaps contracts used a standard form, the ISDA Master Agreement, which included an exclusive English law and jurisdiction clause. In 2006, the market moved against the defendant, North America Steamships Ltd (NASL), resulting in the company incurring net liabilities under its swap contracts to the plaintiffs and others of more than US$40 million. As a result, NASL filed an assignment in bankruptcy under the Canadian bankruptcy legislation in November 2006. However, the market moved in NASL's favour in 2007, such that the swaps contracts between NASL and the plaintiffs for 2007 required that the plaintiffs pay up to $22.5 million to NASL.

The Canadian Bankruptcy Trustee of NASL sought orders from the Supreme Court of British Columbia, under the *Companies' Creditors Arrangement Act,* that the plaintiffs were not entitled to avoid the 2007 swaps contract by reason of NASL's bankruptcy. In response, the plaintiffs commenced proceedings in the English High Court and sought an anti-suit injunction against the Canadian proceedings on the basis that the Canadian proceedings concerned the construction and operation of the swaps contract, which was subject to the exclusive jurisdiction of the English Court. The plaintiffs were unsuccessful at first instance and sought permission to appeal to the Court of Appeal.

In dismissing the application for permission to appeal, Thomas LJ (delivering the judgment of the Court of Appeal) rejected the submission that the Canadian proceedings were *"an attempt to re-write the contractual obligations and therefore fell within the jurisdiction clause"* (at [25]), and held that the relief sought in those proceedings fell outside of the scope of the jurisdiction clause. Further, Thomas LJ emphasised the breadth of insolvency proceedings and held that such proceedings were not *"proceedings which related to a dispute under the contract"* which could be subject to the exclusive jurisdiction clause (at [26]-[27]):

> *"…if the proceedings in Canada were proceedings which related to a dispute under the contract, then that would be characterised as a contractual issue and subject to the exclusive jurisdiction clause which I accept is wide in its scope.*
>
> *However that is not the nature of the proceedings in Canada. Those proceedings are part of insolvency proceedings and the issues that arise within them are governed by Canadian law. The issues encompassed within insolvency proceedings are wide. AWB and Pioneer accepted that those included questions of whether claims should be recognised and admitted in the insolvency, the relative priority among creditors, avoidance of pre-insolvency transfers as preferences and fraudulent transfers. In my view, the scope of the insolvency proceedings extends to the present claim for relief in Canada as it is relief sought within the proceedings. AWB is a creditor and Pioneer is, at present, a contingent creditor. They are therefore within the potential jurisdiction of the insolvency proceedings and accept that the Canadian Court can, in relation to*

> *certain insolvency issues, exercise its jurisdiction. It is, in my view, a matter for the Canadian Court to decide on the relief that it is prepared to grant within the scope of those proceedings as it is concerned with issues of insolvency and not with issues that relate to the contractual obligations under the agreement. The application in relation to the exercise of its insolvency jurisdiction is therefore not within the clause."* (emphasis added)

Although the Court of Appeal declined to issue an anti-suit injunction against the Canadian proceedings, they did allow the plaintiffs to proceed with their application for declaratory relief in relation to the construction of the swaps contracts on the basis that, in circumstances where the case concerned the widely used ISDA Master Agreement form, it was desirable that the construction question be resolved by the English Courts without delay (at [37], per Thomas LJ).

Having found that the relief sought in the Canadian proceedings fell outside of the scope of the English jurisdiction clause, the issue as to whether the Court should exercise its discretion to enforce the exclusive English law and jurisdiction clause by granting an anti-suit injunction did not arise (at [33], per Thomas LJ). However, in a case review published after the *AWB* decision had been delivered, counsel for NASL commented that had the Court of Appeal been called upon to exercise its discretion, it may well have reached the same conclusion by reason of the *"overriding effect"* of collective insolvency proceedings[79]:

> *"…the conclusion reached by Field J and Thomas LJ accords with the approach adopted, on wider 'insolvency' grounds, in the United States and the European Union. As a matter of US jurisprudence, it appears firmly established that the court of one State will ordinarily ignore an exclusive jurisdiction clause, even where such clause might purport to apply, and stay its own civil proceedings in favour of collective insolvency proceedings in some other State or foreign jurisdiction, which will be recognised as having an overriding effect. Similarly, where main proceedings under Article 3 of Council Regulation (EC) No 1346/2000 (the Insolvency Regulation) have been commenced in one Member State, the courts of other Member States are bound to recognise the overriding effects of the main proceedings, including on 'current contracts to which the debtor is a party' (Article 4(2)(e)) and 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors' (Article 4(2)(m)). Any proceedings deriving directly from main proceedings in one Member State and being closely connected with them will fall outside the scope of Council Regulation (EC) No 44/2001 (the Judgments Regulation) and may (if the law of the main proceedings so provides) override contractual rights irrespective of exclusive jurisdiction clauses in favour of some other Member State. It is also suggested that the position in the United States and the European Union accords with the demands of comity and judicial restraint commended by Lord Millett, writing extra-judicially, and ought therefore to be followed in England. For these three reasons, it is suggested that wider 'insolvency' considerations provide a further basis for the decisions of Field J and Thomas LJ, in addition to the narrow 'contractual' grounds actually relied on."* (emphasis added)

In *Akers,* the Liquidators of a Cayman Islands company brought proceedings in England under the *Insolvency Act 1986* (UK) s 127 (avoidance of property dispositions), to set aside an alleged disposition of the company's property after the company had been placed into liquidation.

The Liquidators alleged that Mr Al-Sanea had held shares on trust for the company, Saad Investments Co Ltd (SICL), pursuant to a series of transactions governed by Saudi Arabian and Bahraini law and which contained exclusive jurisdiction clauses in favour of Saudi Arabia and Bahrain. Further, the shares were registered in Mr Al-Sanea's name in Saudi Arabia. After SICL was placed into liquidation, Mr Al-Sanea purported to transfer the shares to the defendant, Samba Financial Group (Samba). Samba sought a stay of the proceedings on the basis that Saudi Arabia was a more convenient forum.

The key issue was whether the shares belonged to SICL at the time of its liquidation, given that the shares were registered in the name of Mr Al-Sanea and Saudi Arabian and Bahraini law did not recognise trusts. The Chancellor, Sir Terence Etherton, held (on the stay application) that

[79] R Dicker QC and S Robins '*Anti-suit injunctions against Foreign Insolvency Proceedings: AWB (Geneva) SA v North America Steamships Ltd [2007] EWHC 1167 (Comm); [2007] EWCA Civ 739'* (2008) 5(2) *International Corporate Rescue* 123 at 126.

the shares were not the property of the company and so the Liquidators' s 127 claim was doomed to fail. Accordingly, the Chancellor stayed the proceedings to allow any remaining claims to be litigated in Saudi Arabia. For present purposes, the Chancellor's concluding comment is particularly noteworthy. Having determined to stay the proceedings on the basis that the s 127 claim was doomed, the Chancellor added that, had there been any merit to the s 127 claim, it would have refused the stay because (inter alia) the s 127 claim could not be brought in Saudi Arabia. In other words, the Chancellor would have overridden the forum selection clause to ensure that the s 127 claim was protected, had the s 127 claim been reasonably arguable.

On appeal, the Court of Appeal overturned the Chancellor's finding that the trusts were governed by the laws of Saudi Arabia and Bahrain and lifted the stay. Samba did not challenge the Chancellor's alternative determination and so the Court of Appeal did not address the tension between the public policy considerations in favour of enforcing the forum selection clauses nominating Saudi Arabia and Bahrain as the exclusive jurisdiction for the claim and the public policy considerations inherent in the Liquidators' pursuing their statutory insolvency claims. Nonetheless, it is clear from the Court of Appeal's judgment that the Court endorsed the Chancellor's alternative determination. Vos LJ, delivering the judgment of the Court of Appeal, noted at [2] and [81] that:

> *[2]…the claim is under section 127 of the Insolvency Act 1986 (the "IA 1986") for a declaration that the relevant transaction was a void disposition. It is a claim that could not and will not be brought either in substance or in form in Saudi Arabia. England is, therefore, in reality the only available forum for the claim (apart perhaps from the Cayman Islands), and the question is and was whether the claim has any realistic prospect of success.*
> *…*
>
> *[81] Ultimately Samba did not proceed with its challenge to the Chancellor's alternative determination that, if it had been reasonably arguable that Cayman Islands law applied, he would not have granted a stay. We think that was a sound decision, since it would have been extremely difficult to displace the Chancellor's discretion on the point.*

In a non-insolvency context, the leading English decision on the enforcement of a forum selection clause where enforcement would violate an applicable mandatory law or strong public policy of the forum in which a plaintiff brings proceedings, is the decision of the House of Lords in *The Hollandia* [1983] 1 AC 565 (The Hollandia).

The Hollandia involved a dispute arising out of a contract between the plaintiff shippers and the defendant carriers. The goods being transported under the contract were damaged due to the alleged negligence of the carrier, with damage alleged to be worth £22,000; however the extent to which the shippers could recover that sum depended on the forum in which the dispute was heard:

- If the dispute was heard in the Court of Amsterdam in accordance with the forum selection clause in the bill of lading, liability under the contract would have been limited under the *Hague Rules* (applicable in the Netherlands) to £250.

- On the other hand, if the dispute was heard in England, the contract would have been governed by the *Hague-Visby Rules* (applicable in England pursuant to the *Carriage of Goods by Sea Act 1971* (UK)) and the limit of liability in the circumstances would have been approximately £11,000.

It was common ground that the Amsterdam Court would not have applied the higher limit mandated by the *Hague-Visby Rules*. However, English law mandated that those rules applied *"in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states"* (at 571F per Lord Diplock). Further Article III, paragraph 8 of the *Hague-Visby Rules* provided that any agreement which capped a party's damages in a manner inconsistent with the *Hague-Visby Rules* was *"null and void and of no effect"*.

The issue before the House of Lords was therefore whether the forum selection clause should be enforced in circumstances where it would have effectively circumvented the operation of the

Carriage of Goods by Sea Act 1971 (UK). Lord Diplock, with whom the other Law Lords agreed, emphasised (at 572H–573A) that the courts should not allow a "*literalist*" construction of the Act to enable *"the stated purpose of the international convention, viz., the unification of domestic laws of the contracting states relating to bills of lading, to be evaded by the use of colourable devices"*. His Lordship held that in circumstances where the effect of the forum selection clause was to evade the operation of the *Hague-Visby Rules* and impose a lower cap on liability, the forum selection clause was null and void pursuant to *Hague-Visby Rules* Article III, paragraph 8 (at 574C-G per Lord Diplock).

Although the statute under consideration in *The Hollandia* contained a clause expressly invalidating any contractual provision which purported to exclude it, the decision is widely cited for the more general principle that *"effect [will not] be given to a jurisdiction agreement which, although valid by the applicable law, offends against a mandatory rule of English law*[80]*".*

Similarly, the English Court of Appeal has confirmed that it will enforce a party's statutory right to access the English courts by the grant of an anti-suit injunction notwithstanding a forum selection clause in favour of a foreign court. In *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] 2 CLC 104 (Samengo-Turner), the English Court of Appeal granted an anti-suit injunction against proceedings in New York notwithstanding the existence of an exclusive jurisdiction clause nominating New York as the forum for all disputes.

The plaintiffs in *Samengo-Turner* had been employed by the first defendant under an employment contract and had also been entitled to various incentives under a separate bonus agreement. The bonus agreement provided that certain incentives were to be repaid in the event of the employment contract being terminated and nominated New York as the exclusive jurisdiction for disputes in relation to the agreement. However, because the plaintiffs were domiciled in England, any disputes relating to the plaintiffs' contracts of employment had to be determined by the English Courts pursuant to the *Brussels I Regulation,* s 5.

Following the plaintiffs' resignation, the defendants commenced proceedings in New York seeking repayment of certain bonuses. When the New York Court refused to stay the proceedings, the plaintiffs sought an anti-suit injunction from the English courts.

The English Court of Appeal held that the statutory right to litigate in England justified an anti-suit injunction against the foreign proceedings, notwithstanding that the dispute was otherwise subject to a forum selection clause in favour of the foreign forum. Tuckey LJ (with whom Longmore and Lloyd LLJ agreed) explained that in such circumstances, the Court was faced with a choice between granting an injunction to protect the plaintiffs' statutory rights and doing nothing; and that, in the circumstances, it would not be just to do nothing (at [38]-[39], [41]-[43]):

> *"So does it follow that we should grant an anti-suit injunction? Mr Dunning submits that we should because it is the only way to make the claimants' statutory right to be sued here effective. Damages would not be an effective remedy. Mr Rosen accepted that we could grant an anti-suit injunction if we found that section 5 was engaged but urges us not to do so as a matter of discretion and judicial restraint and in the interests of comity.*
>
> *The position we are in is as follows: The New York court has rejected the challenge to its jurisdiction because of the clear and unambiguous terms of the exclusive New York jurisdiction clause in the bonus agreements. Had we not been concerned with the contracts of employment we should have upheld such a clause as well. But, as it is, our law says that we cannot give effect to it. The claimants can only be sued here. What shall we do? The only choice it seems to me is between an anti-suit injunction or nothing.*
> *…*

[80] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-118]. See also at [12-151]: *"English law as the lex fori determines the effect which will be given to the jurisdiction clause, and, in particular, the circumstances in which the court has discretion to override it. A stay will be refused if the choice of jurisdiction is contrary to a statutory rule against ousting the jurisdiction of the court or against referring a dispute to the courts and law of a foreign country. Thus in The Hollandia it was held that the effect of the Hague Visby Rules … was to prohibit the submission of a dispute to the courts of a foreign country which would give effect to a limitation of the liability of the carrier under the original Hague Rules."*

> *We were referred to various English cases which have dealt with these problems in the context of commercial disputes where injunctions have been claimed on the basis of an exclusive jurisdiction clause or forum conveniens. But no case was cited to us where the exclusive jurisdiction of the English court was mandated by statute. Mr Dunning submitted that where that was so, the case for an injunction was at least as strong as a case based on an exclusive jurisdiction clause. I do not necessarily accept this. In general, if parties agree an exclusive jurisdiction clause they should be kept to their bargain; if, as here, the exclusive jurisdiction of the English courts is imposed by statute it can be said that the case for an injunction is not so strong, particularly where the statute has provided that an agreed exclusive jurisdiction clause is of no effect.*
>
> *The converse of this problem arose in OT Africa Line v Magic Sportswear Corp [2005] 1 CLC 923 where a cargo claim under a bill of lading containing an English law and exclusive jurisdiction clause was made in Canada relying on Canadian legalisation which allowed such a claim to be made there in spite of the clause. This court granted an anti-suit injunction to restrain the Canadian proceedings on the ground that the parties should be kept to their English law bargain. This is an illustration of the court giving full effect to party autonomy which under Article 23 of the Regulation it is required to do, but under Articles 20 and 21 it cannot. We are in the latter position: we cannot give effect to the exclusive New York jurisdiction clause.*
>
> *Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions."* (emphasis added)

More recently, the English Court of Appeal considered, in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 (Fulham FC), whether the right to a statutory remedy which was not available through arbitration rendered the issue non-arbitrable. The dispute concerned the role of Sir David Richards, the chairman of the Football Association Premier League Limited (FAPL), in the transfer of a football player between two premier league clubs, Tottenham Hotspur and Portsmouth City, for £9 million. Another premier league club, Fulham FC, had offered £9 million for the transferred player, which offer had been rejected. In the circumstances, Fulham FC alleged that Sir David had acted unfairly and to the prejudice of Fulham FC in facilitating the transfer of the player to Portsmouth City.

The members of FAPL were the 20 football clubs who participated in the premier league, including the plaintiff, Fulham FC. As such, Fulham FC had standing to bring a complaint against Sir David pursuant to *Companies Act 2006* (UK) s 994 (unfair prejudice), which provides that:

> "A member of a company may apply to the court by petition for an order under this Part on the ground—
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."*

The relief sought by Fulham FC included (a) an injunction restraining Sir David from acting as an unauthorised agent or from participating in any way in negotiations regarding the transfer of players; or (b) alternatively, an order that Sir David should cease to be the chairman of the FAPL. Even though the claim also included the prayer for *"relief as the court shall think fit"*, there was no possibility of a buy-out or winding up orders on the facts of the case (at [13], [33]).

FAPL and Sir David sought to stay the proceedings on the basis that the articles of association of FAPL required that all disputes between FAPL and its members be referred to arbitration. Fulham FC opposed the stay on the basis that an arbitrator could not grant the same range of

remedies (including injunctions binding on third parties) which were available to it on an application to court under the *Companies Act 2006* (UK).

The Court of Appeal rejected Fulham FC's argument and stayed the proceedings on the basis that:

- neither the *Companies Act 2006* (UK) nor any general public policy prohibited matters relating to unfair prejudice being determined by arbitration (at [96]-[102] per Longmore LJ); and

- although certain remedies available under the *Companies Act 2006* (UK) could not be granted by an arbitrator, *"[t]he inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved"* (at [103] per Longmore LJ).

On the first point, Patten LJ noted (at [27]) that *"one has to be looking for a statutory provision or a rule of public policy which has the effect of rendering the arbitration agreement either void or unenforceable in so far as it purports to bind the parties to an arbitral determination"* of the issues. In this regard, Longmore (at [97]-[99], with whom Rix LLJ agreed at [107]), added that the *Arbitration Act 1996* (UK) set a high threshold for determining when matters of public policy were sufficient to outweigh the policy in favour of enforcing arbitration clauses[81]:

> *"[D]oes public policy prohibit or invalidate an agreement to refer to arbitration the question whether a company's affairs are being (or have been) conducted in a manner that is unfairly prejudicial to the interest of at any rate some of its members? If public policy does prohibit such an agreement, there could of course be no question of the court staying any petition seeking relief under sections 994 to 996 of the Companies Act 2006 because the court would be satisfied (within the meaning of section 9(4) of the Arbitration Act 1996) that the arbitration agreement would, to the extent that it purported to apply to unfair prejudice petitions, be 'null and void' or, perhaps, 'inoperative'.*
>
> *It is this question that is at the heart of the appeal and I would, for my part, derive some guidance from the principle set out in section 1(b) of the 1996 Act namely 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. To the extent therefore that public policy has a part to play it can only be as a 'safeguard … necessary in the public interest'.*
>
> *This is a demanding test and I cannot see that it is necessary in the public interest that agreements to refer disputes about the internal management of a company should in general be prohibited; nor can I see any reason why it is necessary to prohibit arbitration agreements to the extent that they, in particular, apply to disputes whether a company's affairs are being (or have been) conducted in a manner unfairly prejudicial to the interests of its members."* (emphasis added)

Patten LJ framed the question of whether the *Companies Law 2006* (UK) claim was non-arbitrable on public policy grounds as whether the issue *"attracts a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process"* (at [39]-[42], [50]):

> *"Mr Marshall … submitted, that arbitration is a consensual dispute resolution process and therefore one which is unsuitable for use in connection with a dispute in which the interests and representations of third parties need to be taken into account or where the appropriate relief is an order which creates rights in rem or affects the public at large. A similar statement of principle can be found in Born, International Commercial Arbitration , 3rd ed (2009), vol I, p 768, where the author says:*

[81] By contrast, Patten LJ (at [29]) considered that *Arbitration Act 1996* (UK) s 1(b) was *"neutral"* and gave no indication of when public policy considerations would be sufficient to render an issue not arbitrable.

> *'Although the better view is that the Convention imposes limits on contracting states' applications of the non-arbitrability doctrine, the types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offences; labour or employment grievances; intellectual property; and domestic relations. The types of disputes which are non-arbitrable none the less almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect.'*

This extract is interesting because it attempts to identify some common criteria applicable in the cases in which the matter in dispute has been held to be non-arbitrable. But it also, I think, indicates that the limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable. As Mustill & Boyd point out, it does not follow from the inability of an arbitrator to make a winding up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes inter se as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.
…

One can point to a number of examples of statutory intervention designed to preserve a right of access to the courts. In the field of matrimonial law post-nuptial agreements dealing with maintenance on any subsequent separation were held to be unenforceable on grounds of public policy in so far as they purported to remove the right of the parties to apply to the court for financial relief. This reservation is now statutory: see Hyman v Hyman [1929] AC 601 and sections 34–36 of the Matrimonial Causes Act 1973 . In relation to employment and discrimination, there are statutory restrictions on the enforceability of any agreement which excludes or limits an employee's access to the employment tribunal: see section 203 of the Employment Rights Act 1996 and section 144(1) of the Equality Act 2010 as discussed in Clyde & Co LLP v Van Winkelhof [2011] CP Rep 31.

These examples show that in a number of areas the right of the party to apply to the court or tribunal is expressly preserved. Such a provision is inconsistent with an agreement to submit the dispute to binding arbitration and would therefore defeat any application for a stay of the proceedings either under section 9 or under the inherent jurisdiction. …" (emphasis added)

Finally, Patten LJ endorsed the view expressed in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 and *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 that *"many aspects"* of the statutory insolvency regime were *"immune from interference by the members of the company, whether by contract or otherwise",* observing (at [74])[82]:

> *"There is no doubt that many aspects of this regime are immune from interference by the members of the company whether by contract or otherwise. They cannot override the provisions of the 1986 Act which apply on liquidation by agreeing between themselves or with a particular creditor that property which belongs to the company in liquidation should be dealt with other than in accordance with the Act: see British Eagle International Airlines Ltd v Cie Nationale Air France [1975] 1 WLR 758 . The same must go for the exercise of the liquidator's powers under sections 238 to 239 of the Insolvency Act 1986* ['transactions at undervalue' and 'unfair preference']. *They involve an exercise of a statutory power to intervene in and set aside transactions with third parties in the context of the insolvency regime. These are rights vested in the liquidator for the benefit of the creditors as a whole and cannot be overridden by a contract entered into by the company prior to its liquidation."* (emphasis added)

[82] See also at [69]-[76].

In relation to the effect of remedies conferred by statute not being available through arbitration, the Court of Appeal held that this did not render arbitration contrary to public policy (at [84] per Patten LJ and at [103] per Longmore LJ). Patten LJ added that in circumstances where statutory remedies were not available through arbitration, an arbitration agreement would operate as an agreement to resolve the *underlying dispute* by arbitration. After the conclusion of the arbitration, the parties would be entitled to approach the court for enforcement (at [79]-[83] per Patten LJ).

The distinction between cases which involve essentially private disputes (as was the case in Fulham FC) and those which invoke the aspects of the statutory insolvency regime which are "*immune from interference by the members of the company"* was developed by the Court of Appeal in *Salford Estates (No 2) Limited v Altomart Limited* [2014] EWCA 1575 (Salford Estates).

Salford Estates concerned a petition to wind up a company (Altomart) on the basis that it was unable to pay its debts. Altomart sought to have the petition stayed or struck out pursuant to the *Arbitration Act 1996* s 9 on the basis that the debts which formed the basis of the petition were disputed and the dispute had to be referred to arbitration. The Court of Appeal held that the petition to wind up the company was not a claim for payment of the underlying debt and so did not fall within the scope of the mandatory stay provisions in section 9 of the *Arbitration Act*. Importantly, the Court distinguished the decision in Fulham FC on the basis that the public policy considerations which apply in circumstances of insolvency were not present in that case (at [35], [37]-[38] per Sir Terence Etherton C, Longmore and Kitchin LLJ agreeing):

> *"[35] …it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.*
> *…*
>
> *[37] I do not consider that we are assisted on this appeal by the decision in the Fulham Football Club case. The relief sought by the section 994 petition in that case was an injunction restraining Sir David from acting as an unauthorised agent or from participating in any way in negotiations regarding the transfer of players; in the alternative, an order that Sir David should cease to be chairman of the FAPL and such other relief as the court thought fit. No order was sought to wind up the FAPL. Furthermore, that case, typical of the usual section 994 petition, was essentially a private dispute in relation to the affairs of a solvent company which, therefore, neither engaged any public policy objective of protecting the public where a company continues to trade despite being unable to pay its debts nor involved a class remedy for the company's creditors…*
>
> *[38] For all those reasons, at least in respect of an alleged due but unpaid debt, I do not agree with the view expressed by Warren J in Rusant at paragraph [19] that an issue on a winding up petition which is essential to the foundation of the petition becomes a claim and falls within section 9. That section has no application to the Petition in the present case."* (emphasis added)

Nonetheless, while the Court held that the dispute was not subject to the mandatory stay provisions in the Arbitration Act, it exercised its discretion under *Insolvency Act 1986* s 122(f) to stay the proceedings to compel the parties to resolve their dispute over the debt in accordance with their agreement to arbitrate. The Court reasoned that to do otherwise would be inconsistent with the policy underlying the Arbitration Act and would leave the way open to one party *"through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden…of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds"* (at [40]).

It is apparent from the above analysis, that the English courts will seek to give priority to statutory insolvency claims vested in the liquidator for the benefit of creditors over the enforcement of a forum selection clause, by construing the scope of a forum selection clause so as to exclude the statutory insolvency claims, or by declining to enforce a forum selection clause on public policy grounds. Statutory insolvency claims falling into this category may include

unfair preference and other avoidance claims which seek to set aside transactions in the context of the insolvency regime, but not unfair prejudice claims where the relief sought does not affect creditors or other third parties.

Australia

In Australia, the courts have held that statutory rights under the *Corporations Act 2001* (Cth) which are conferred on company liquidators *personally* are not subject to a pre-insolvency forum selection clause between the company and a third party.

For example, in *New Cap Reinsurance Corporation Ltd v A E Grant* [2009] NSWSC 662, Barrett J dismissed an application to stay a liquidator's application for repayment of unfair preferences under the *Corporations Act 2001* (Cth) s 588FF(1), on the basis that the claim fell outside of the scope of the arbitration clause (at [87]-[88]):

> *"But even on the most generous interpretation of the words "[a]ll matters in difference between the parties arising under, out of or in connection with this Reinsurance", they do not extend to the present proceeding under s 588FF(1) of the Corporations Act in which the liquidator of one party to the reinsurance contract seeks an order for the payment of money to that contracting party by the other contracting party. This proceeding has nothing to do with the reinsurance contract. It is a proceeding upon a statutory cause of action maintainable by the liquidator of one of the former contracting parties. The cause of action is not available to the contracting party itself. Its liquidator, when suing upon the statutory cause of action, does not attempt to enforce some right of the contracting party. Furthermore, the event giving rise to the proceeding is not anything done under, by reference to or in relation to the reinsurance contract. The relevant event is the making of a payment by one of the parties to the reinsurance contract to the other of them pursuant to a new and separate contact by which they agreed to compromise and release the rights and obligations created by the reinsurance contract.*
>
> *In summary, the 'matters in difference' in these present proceedings are matters between NCRA's liquidator and the defendants. They are matters arising from events that happened after the agreed termination of the reinsurance contract and, following the commencement of NCRA's winding up, caused a statutory cause of action to become vested in the liquidator. There was no cause of action and no claim upon the defendants until the winding up of NCRA intervened. The arbitration provision in the reinsurance contract — which ceased to be in force between NCRA and the defendants when, in December 1998, they became parties to the commutation agreement — has no bearing on the statutory right that the subsequently appointed liquidator of NCRA subsequently acquired to seek orders against the defendants under s 588FF(1)."* (emphasis added)

Australian courts have also recognised that forum selection clauses will not apply to insolvency proceedings in some circumstances on public policy grounds. One such case is the decision of Warren J (now Warren CJ) in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 (A Best Floor Sanding). In that case, it was held that an arbitration clause[83] between the members of a company was "*null and void*" on the basis that it *"has the effect of obviating the statutory regime for the winding up of a company [and] if adhered to, would frustrate the contributory … in its efforts to seek relief from the court under the winding up provisions of the Law*" (at [11]-[15], [18]):

> *"[T]he English Court of Appeal in Re Peverill Gold Mines, Limited (1898) 1 Ch 122 … considered an application on behalf of two shareholders to stay proceedings for the compulsory winding up of a company … At p.130 of the judgment the Master of the Rolls, Lord Lindley cited the speech of Lord Macnaghten in Welton v Saffery (1897) AC 324:*
>
> > *"These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to*

[83] It is noteworthy that the arbitration agreement in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 expressly purported to extend to disputes concerning the dissolution and winding up of the company.

> *creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors - perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concerns. Their security in a great measure depends on the directors adhering to the requirements of the Act."*
>
> *The Master of the Rolls went on to hold that any article of association of a company which purported to limit the rights of a contributory under the relevant companies law to petition for a winding up would be 'an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid'. This view was supported by Chitty and Vaughan Williams, LLJ.*
> *…*
>
> *Upon incorporation, the Corporations Law applies to the new entity. Its company directors and management are subject to regulation under the Corporations Law. The Corporations Law contains provisions relating to the company's constitution, general meetings of members, management of the company, the company's dealings with other parties, the company's financing, the handling of its affairs when it is subject to a financial crisis and, most significantly for present purposes, its winding up and dissolution. The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the company. Such matters cannot and ought not be subject to private contractual arrangement.*
> *…*
>
> *Throughout Chapter 5 of the Corporations Law there exists a statutory structure setting out the manner in which applications for the winding up of a company are to be made, the persons or parties who are permitted under the Law to make an application for the winding up of a company and, most significantly, the effect of a winding up order on creditors and contributories. A major aspect of the control by the court of the winding up of a company is the fact that the court appoints an official liquidator to be liquidator of the company. In this respect the Corporations Law sets out the powers and duties of a liquidator or a provisional liquidator of the company in the course of the winding up of that company.*
> *…*
>
> *The application by A.B. Floor to stay the winding up application strikes at the very heart of the corporation structure enshrined in the Corporations Law. The arbitration clause in the joint venture agreement is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of the company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company. Moreso, the arbitration clause, if adhered to, would frustrate the contributory, Skyer Australia in its efforts to seek relief from the court under the winding up provisions of the Law. In essence, the arbitration clause in the joint venture agreement is contrary to the provisions of the Corporations Law and cannot be applied."* (emphasis added)

Accordingly, Australian courts have made clear that where the effect of a forum selection clause would be to circumvent Australia's statutory insolvency regime, the clause will not be enforced.

This conclusion is supported by other Australian decisions addressing the tension between jurisdiction clauses and legislative regimes in a non-insolvency context. In a number of decisions, Australian courts have declined to enforce forum selection clauses on the basis that to do so would contravene Australian public policy[84]:

- In *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, the High Court of Australia, applying *The Hollandia*, ordered that proceedings brought in the NSW Supreme Court pursuant to the Australian *Insurance Contracts Act 1984* (Cth) be allowed to continue

[84] See also *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, where Allsop J of the Federal Court of Australia (now Allsop CJ) declined a stay of proceedings in Australia, despite an exclusive jurisdiction clause in favour of England. In reaching this conclusion, Allsop J placed emphasis on the non-fragmentation principle and was concerned *"not [to] promote competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy"* (at [66]).

notwithstanding that the relevant insurance policy was the subject of an exclusive English law and jurisdiction clause. The majority (Toohey, Gaudron and Gummow JJ) held that the combined effect of the choice of law and choice of forum clauses was to circumvent the *Insurance Contracts Act 1984* (Cth), contrary to ss 8 and 52[85].

- In *Qantas Airways Ltd v Rolls-Royce PLC* [2010] FCA 1481, Rares J referred to an unreported decision of the Moore J, in which Moore J had granted an anti-anti-suit injunction to protect the plaintiff's claims under the Australian *Trade Practices Act 1974* (Cth) (Australia's then consumer protection and anti-competitive behaviour legislation), notwithstanding that the plaintiff's claims were otherwise subject to an exclusive jurisdiction clause in favour of England. Rares J's decision makes plain the circumstances in which the anti-anti-suit injunction was granted. Importantly, there was evidence from Professor Adrian Briggs that an English Court would likely grant an anti-suit injunction to enforce the exclusive jurisdiction clause to the exclusion of claims under the *Trade Practices Act* which were only available to the plaintiff in Australia.

In *Akai* and *Qantas*, had the forum selection clause been enforced, it would have forever precluded the plaintiff from relying on its Australian statutory rights under the *Insurance Contracts Act 1984* (Cth) and *Trade Practices Act 1974* (Cth). In other words, to adopt the language used by the High Court in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, to enforce the clause *"would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament"* (at 447).

Singapore

The decision of the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 (Larsen Oil) is one of the most authoritative decisions to have addressed the conflict between an arbitration clause on one hand, and statutory insolvency claims on the other. The Singapore Court of Appeal concluded that an arbitration clause could not be used as a device to circumvent a liquidator's right to bring statutory insolvency claims in the courts of Singapore.

Larsen Oil involved a claim by Petroprod Ltd (Petropod) and four of its subsidiaries, each of which was in liquidation in the Cayman Islands and Singapore, to set aside payments which the companies had made to their former manager, Larsen Oil and Gas Ltd (Larsen), shortly before the companies were wound up. In particular, the Singapore Liquidators sought to:

- avoid a number of payments that Petropod Ltd had made to Larsen, on the ground that these payments amounted to unfair preferences or transactions at an undervalue within the meaning of the *Bankruptcy Act,* ss 98 and 99 (Cap 20, 2009 Rev Ed), read with the *Companies Act,* s 329(1) (Cap 50, 2006 Rev Ed); and

- avoid a number of payments made by the four subsidiaries to Larsen pursuant to the *Conveyancing and Law of Property Act,* s 73B (Cap 61, 1994 Rev Ed), on the ground that they were made with the intent to defraud Petropod as a creditor of the subsidiaries.

Larsen applied to stay the proceedings on the basis of an arbitration clause in its management agreement with Petroprod. Larsen's stay application was dismissed, and it appealed to the Court of Appeal.

VK Rajah JA (with whom Keong CJ and Leong JA agreed) commenced by expressly identifying the tension between the principles of party autonomy and decentralisation of private dispute resolution underlying the *Arbitration Act* (Singapore, Cap 10, 2002 rev ed), and the policy of centralisation of disputes in the insolvency context (at [1]):

> "Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The

[85] Which prohibited the selection of foreign fora or any other means of restricting the operation of the Act. See *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 447-448 per Toohey, Gaudron and Gummow JJ.

> appeal before us raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process?"

VK Rajah JA then proceeded to analyse the interaction between these competing policy considerations in two contexts: first in relation to the proper construction of the arbitration clause; and secondly in relation to the question of enforcement; in particular, whether the issues were *"arbitrable"* so as to be capable of being referred to arbitration.

On the first issue, VK Rajah JA endorsed the approach to construction of forum selection clauses, established by Lord Hoffmann in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951; [2007] UKHL 40, based on common sense and the presumed intention of the parties (at [13]-[15]):

> *"The case of Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] 2 CLC 553 (Premium Nafta) heralded a change in how arbitration clauses ought to be construed. … The House of Lords eschewed the traditional technical approach towards the construction of arbitration clauses in favour of a commonsensical one based on the presumed intention of the parties.*
> *…*
>
> *The Premium Nafta approach suggests that an arbitration clause should be construed widely so as to include all disputes relating to the contract, whether the underlying cause of action is based on tort or contract, unless the language used in the arbitration clause clearly excludes the particular dispute.*
>
> *Other jurisdictions have also favoured a generous approach towards the construction of arbitration clauses. The Supreme Court of the United States has taken the view that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' …".*

However, applying this test to the statutory insolvency claims brought by the Liquidators of Petroprod, VK Rajah JA *"drew a line"* between private remedial claims and claims that could only be made by a liquidator/judicial manager of an insolvent company. VK Rajah JA reasoned that the assumption that the parties, as rational businessmen, were likely to have preferred a dispute resolution mechanism which could deal with all disputes in a single forum, *did not apply to claims that could only be brought in an insolvency context* – the company's pre-insolvency management had no legitimate interest in such claims, and so it should be assumed that such claims were not in the contemplation of the parties (at [20]-[21]):

> *"The underlying basis for a generous approach towards construing the scope of an arbitration clause is the assumption that commercial parties, as rational business entities, are likely to prefer a dispute resolution system that can deal with all types of claims in a single forum. This assumption is reasonable in relation to private remedial claims, which may arise either before or during the period when a company becomes insolvent. It is conceivable that the company's pre-insolvency management would prefer all these claims to be dealt with in a single forum. However, this reasoning cannot be applied to avoidance claims pursued during insolvency proceedings. The commencement of insolvency proceedings results in the company's management being displaced by a liquidator or judicial manager. Since avoidance claims can only be pursued by the liquidators or judicial managers of insolvent companies, there is no reason to objectively believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement.*
>
> *For the reasons stated above, it makes sense to draw a line between private remedial claims (either common law or statutory), which the company's pre-insolvency management have good reason to be concerned about, and claims that can only be made by a liquidator / judicial manager of an insolvent company, to which they are completely indifferent. We therefore hold that arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the*

> *contrary and that the Arbitration Clause did not cover Petroprod's claims against Larsen."* (emphasis added)

Although the Court of Appeal's finding on scope was sufficient to dismiss the appeal, VK Rajah JA observed that it was nonetheless appropriate to address the question of arbitrability on the basis that *"the question of the arbitrability of insolvency-related claims has never been raised in the local courts, and would certainly be of great importance to arbitration and insolvency practitioners"* (at [22]).

On this issue, the Court of Appeal held that claims arising from the insolvency regime *per se* were not arbitrable, regardless of the scope of the arbitration clause. Importantly, the Court of Appeal reasoned that the objective of the insolvency provisions would be compromised if a company's pre-insolvency management could restrict the avenues by which a liquidator could bring misfeasance claims against them (at [45]-[46]):

> *"A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.*
>
> *We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."* (emphasis added)

The decision in *Larsen Oil* provides guidance on the relationship between arbitrability and public policy generally. In particular, VK Rajah JA emphasised that insolvency law is *"an area replete with public policy considerations"* which would trump the policy of encouraging arbitration (at [27], [29]-[30]):

> *"The question of whether avoidance claims are arbitrable cannot be answered without a proper understanding of the relationship between the concept of arbitrability and the essential principles of insolvency / bankruptcy law.*
>
> *...In 2000, the Committee published its final report, Review of Arbitration Laws, LRRD No 3/2001 ('the Report') as well as the draft Arbitration Bill 2001. … The Report also makes it clear that the policy of encouraging arbitration as encapsulated in the [Arbitration Act (Singapore, Cap 10, 2002 rev ed)] is subject to other competing policy considerations, especially insolvency and bankruptcy issues.*
> *…*
>
> *It can be seen from the Report that the drafters of the [Arbitration Act (Singapore, Cap 10, 2002 rev ed)] and [International Arbitration Act (Singapore, Cap 143A, 2002 rev ed)] regarded the question of arbitrability as being subject to public interest considerations. More importantly, they recognised that insolvency / bankruptcy law is an area replete with public policy considerations that were too important to be settled by parties privately through the arbitral mechanism. However, the Report did not clarify what type of claims relating to insolvency could not be arbitrated."* (emphasis added)

Larsen Oil, Fulham FC and *A Best Floor Sanding* were all recently considered in *Silica Investors Ltd v Tomolugem Holdings Limited* [2014] SGHC 101 (Silicia Investors), a decision which concerned the arbitrability of a minority oppression claim under the *Companies Act,* s 216 (Singapore, cap 50, 2006 rev ed). *Silica Investors* demonstrates that the line between claims which are arbitrable and those which are non-arbitrable may be difficult to draw, and that there are no hard and fast rules.

The plaintiff had brought proceedings in Singapore alleging that it had been wrongly excluded from participating in the management of the eighth defendant. Relief sought by the plaintiff included, inter alia, (a) a buy-out of the plaintiff's shares in the eighth defendant; and (b) alternatively, an order winding-up the eighth defendant. Subsequently, the second defendant sought an order, under the *International Arbitration Act,* s 6 (Singapore, Cap 143A, 2002 rev ed) and/or the inherent jurisdiction of the Court that the proceedings be stayed in favour of arbitration, pursuant to an arbitration clause in a Share Sale Agreement between the plaintiff and the second defendant which required that any disputes between the parties be referred to, and resolved by, arbitration in Singapore. At first instance, the Assistant Registrar refused the stay. This decision was upheld on appeal by Quentin Loh J.

In determining the appeal, Loh J applied the same two-step analysis adopted in *Larsen Oil*, namely, first, whether the plaintiff's matter fell within the scope of the arbitration clause, and secondly, whether the s 216 claim was arbitrable.

Endorsing the approach in *Larsen Oil* that *"arbitration clauses should be generously construed"*, Loh J concluded that it was quite clear that the plaintiff's claim would fall within the scope of the arbitration clause (at [56]-[59]).

Turning to consider the second question, Loh J surveyed the approach taken in a number of jurisdictions including England (*Fulham FC*, at [62]-[74]), Australia *(A Best Floor Sanding*, at [75]-[84]) and Singapore (*Larsen Oil*, at [94]-[105]). Loh J concluded (at [112]-[113]):

> *"From the foregoing authorities, it is clear that some statutory claims and / or remedies are solely within the purview of the court, eg, winding up of a company, granting a judgment in rem in admiralty matters, avoidance claims, bankruptcy and matrimonial matters, and criminal prosecutions.*
>
> *However, just because a statutory claim may be redressed or remedied by an order that is only available to the courts, that does not mean the claim is automatically non-arbitrable. It may well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim is framed, and the remedy or relief sought."* (emphasis in original)

Having drawn the distinction between statutory claims that were purely non-arbitral, and statutory claims that straddled the line between arbitrability and non-arbitrability, Loh J found that minority oppression fell within the latter category (at [120]):

> *"The remedy ordered under s 216(2) of the CA is invariably linked, usually inextricably, to the nature and extent of the commercial unfairness or unfair prejudice itself. It must follow that the arbitrability of the remedy sought could affect the arbitrability of the claim. In light of the broad remedial powers conferred upon the courts under s 216(2) of the CA, some of which cannot be made by the arbitral tribunal, it would appear that the minority oppression claim is one of those statutory claims that straddles the line between arbitrability and non-arbitrability."* (emphasis added)

Loh J then went on to consider the available approaches to a s 216 claim. One of the approaches considered by Loh J was to *"adopt a broad reading of Fulham and allow all minority oppression claims to go for arbitration; if the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to Court to obtain the necessary orders, but if not, the award takes effect in the normal way"* (at [121(b)]). Having reviewed *Fulham FC* and related commentary, Loh J emphasised that the facts of *Fulham FC* were unique and that the reasoning had some limitations. This led Loh J to conclude that a broad reading of *Fulham FC* (i.e. that all minority oppression claims were arbitrable) should not be adopted in Singapore. Rather, the arbitrability of minority oppression claims was a fact-sensitive exercise to be undertaken on a case by case basis (at [127], [141]-[142]):

> *" … I have serious doubts whether a broad reading of the Fulham approach should be adopted in Singapore. That decision was probably correct on its unique facts with the issue being whether the chairman acted in breach of the Football Association and FAPL rules and the remedy sought being the prevention of the chairman from acting in a certain manner or termination of his chairmanship. There was no evidence of the other club members intervening in the court proceedings or objecting to the termination of his chairmanship. Further, FAPL was unique, as were its shareholders. In fact, a careful reading of the Fulham judgment shows that Patten LJ recognised some limitation (see Fulham at [65]-[66]) and the excerpts set out at [68] and [69] above). I therefore do not read the ruling in Fulham as necessarily endorsing a rule of general application.*
> …
>
> *In my judgment, the nature of a minority oppression claim and the broad powers of the Court under s 216(2) of the CA would mean that a minority oppression claim is one that may straddle the line between arbitrability and non-arbitrability. It would not be desirable therefore to lay down a general rule that all minority oppression claims under s 216 of the CA are non-arbitrable. It will depend on all the facts and circumstances of the case. No single factor should be looked at alone. Nor should the remedy or relief asked for assume overriding importance, as that would enable litigants to manipulate the process and evade otherwise binding obligations to refer their disputes to arbitration.*
>
> *That said, except for those cases where all the shareholders are bound by the arbitration agreement, or where there are unique facts like Fulham, and the Court is satisfied that, first, all the relevant parties (including third parties whose interests may be affected) are parties to the arbitration and, secondly, the remedy or relief sought is one that only affects the parties to the arbitration, many if not most of the minority oppression claims under s 216 of the CA will be non-arbitrable. This will often be in cases where, eg, there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make."* (emphasis added)

Applying this analysis to the facts of the case, Loh J concluded that the plaintiff's minority oppression claim was non-arbitrable, and accordingly that the Assistant Registrar was correct to refuse a stay of the proceedings (at [143]):

> *"Applying these considerations to this case, there is no doubt that the Plaintiff's minority oppression claim against the 2nd Defendant is non-arbitrable. There are relevant parties, including other shareholders, who are not parties to the arbitration. The Plaintiff has also asked for remedies that the arbitral tribunal cannot grant, including winding up ([7] above). These two factors alone are sufficient for me to say that the Plaintiffs' minority oppression claim is not arbitrable."* (emphasis added)

Accordingly, the position in Singapore appears to be that whilst certain claims brought by liquidators will be non-arbitrable and therefore not subject to an arbitration clause, the demarcation between arbitrable and non-arbitrable claims is a fact sensitive question. Consistent with the approach taken in England, the Singapore courts have held that avoidance claims will be non-arbitrable, by reason of the scope of the arbitration clause or on public policy grounds. However, there is no general rule as to the arbitrability or otherwise of oppression/unfair prejudice claims, as such claims may straddle the line between arbitrability and non-arbitrability depending on the facts of the case and the relief sought.

Guernsey

A year after *Larsen Oil* was decided, the Guernsey Court of Appeal handed down its reasons in *CCC v Conway* in March 2012, declining to enforce a jurisdiction clause to enable the Guernsey liquidators of a Guernsey company to pursue statutory insolvency claims and other non-statutory claims against the company's former directors and managers.

The plaintiffs in *CCC v Conway* comprised a Guernsey company, CCC, and its liquidators. CCC had been incorporated in Guernsey on 29 August 2006. It was promoted by the Carlyle Group, one of the world's largest private equity firms, to invest in residential mortgage backed securities and by July 2007 had raised capital totalling US$945 million through a series of private placements and an initial public offering. However, by March 2008, the entire of CCC's capital had been lost and the company had a substantial deficit. On 17 March 2008, CCC was placed into compulsory liquidation in Guernsey pursuant to *The Companies (Guernsey) Law 1994,* s 94(a).

Four of the seven directors of CCC were officers or employees of the Carlyle Group. The Carlyle Group had also appointed the three 'independent' directors. The eighth defendant, CCC's investment advisor, CIM, was also a company within the Carlyle Group.

Following their appointment, the Liquidators of CCC caused the company to commence proceedings in Guernsey against the directors, CIM and two other Carlyle Group entities alleging breaches of equitable, legal and statutory duties. The statutory claims included claims for wrongful trading, disqualification and misfeasance under the *Companies (Guernsey) Law*.

The defendants sought to have the Guernsey proceedings stayed (or service set aside) in favour of proceedings in Delaware and applied to the Delaware Court of Chancery seeking anti-suit relief. In doing so, the defendants relied primarily on a jurisdiction clause in the Investment Management Agreement (IMA) between CIM and CCC, which provided that the agreement was *"governed by, and construed in accordance with, the laws of Delaware"* and that the *"federal or state courts sitting in Delaware shall have exclusive jurisdiction over any action, suit or proceedings with respect to"* the agreement. The defendants alleged that the 'primary' claims fell within the jurisdiction clause and that the entire proceeding (including the statutory claims which were not subject to the jurisdiction clause) should therefore be stayed in favour of proceedings in Delaware.

The *Companies (Guernsey) Law*[86] provided that, on application by a company liquidator, *"the Court"* may:

- make disqualification orders against the company's former directors, officers and advisors[87]; or
- *"declare that any persons who were knowingly parties to the carrying on of the business [with intent to defraud creditors or for any fraudulent purpose] shall be liable to make such contributions to the company's assets as the Court thinks proper*[88]*"*; or
- declare that a company director or shadow director who *"at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation"* shall *"make such contribution to the company's assets as the Court thinks proper*[89]*".*

"The Court" was defined to mean *"the Royal Court sitting as an Ordinary Court*[90]*".* As such, the power conferred by ss 67A-67D and ss 427-436 could only be exercised by the Guernsey Royal Court[91] and the Liquidators' misfeasance, disqualification and wrongful trading claims against CCC's former directors and management could only be determined in Guernsey.

At first instance, Deputy Bailiff Collas granted a stay of the entire proceedings, holding that the statutory claims were *"secondary"* to the claims against CIM for breach of the investment management agreement[92]:

> "*In substance the case is more concerned with failures of the investment advice, the investment policy, the investment guidelines and, generally, the duties of CIM under the*

[86] *Companies (Guernsey) Law, 1994* ss 67A – 67D and *Companies (Guernsey) Law, 2008* ss 427-436.
[87] *Companies (Guernsey) Law, 1994* s 67A; *Companies (Guernsey) Law, 2008* s 427-428.
[88] *Companies (Guernsey) Law, 1994* s 67B; *Companies (Guernsey) Law, 2008* s 433.
[89] *Companies (Guernsey) Law, 1994* s 67C; *Companies (Guernsey) Law, 2008* s 434.
[90] *Companies (Guernsey) Law, 1994* s 117 and *Companies (Guernsey) Law, 2008* s 532.
[91] See *CCC v Conway* at [48(iv)]; *Technocom Ltd v Roscomm Ltd & Klabin* (Royal Court of Guernsey, Day LB, 16 May 2003) at 11; *Jeffcoat v Queensland Coal & Oil Shale Mining* [2000] FCA 655 at [22] per Kiefel J.
[92] *Carlyle Capital Corp Ltd (in liq) v Conway* (Unreported, Royal Court, Deputy Bailiff Collas, 22 July 2011) at [10].

IMA. Those issues need to be understood before considering the failures of the Directors whether they be de jure, de facto or shadow directors. In that sense, the breaches of the IMA are the primary issues and the allegations against the Directors are secondary."

The Guernsey Court of Appeal overturned this decision, holding that the *"public interest dimension"* of the insolvency proceedings gave the Liquidators' statutory insolvency claims *"particular importance"* and that the ends of justice would best be served by a single, composite proceeding in Guernsey. Beloff JA, delivering the judgment of the Court of Appeal, stated that (at [48]-[49], [51], [60], 103]):

"*On the premise, which we consider we have established, that it is for the above reasons at least proper for us to revisit the DBs exercise of discretion, it is useful to remind ourselves of certain matters which are indisputable …*

iii. The Royal Court in Guernsey has jurisdiction to consider all the claims.

iv. The Chancery Court of Delaware does not have jurisdiction to consider all the claims. As far as wrongful trading is concerned, the Royal Court under the Act is the only Court which has jurisdiction: see the references to the Court in the 1994 Law, sections 67C and 117(1). As far as directors disqualification is concerned a Delaware court could not exercise a regulatory function conferred only on organs or officers in another jurisdiction. In our view the same must be true by parity of reasoning of the Section 106 claim brought under a Guernsey statute. No evidence submitted by experts in Delaware law by the Directors sought to suggest otherwise or sought to contradict similar evidence submitted by the Appellants experts consistent with this proposition.

iv. Delaware law will govern the IMA breach of contract claims only. All claims of breach of duty by the Defendants whether as Directors de jure, de facto or shadow will be governed by Guernsey law.

In our view factors (iii-vi) tell strongly in favour of Guernsey as the forum conveniens. Factors (iii) and (iv) engage the presumption against fragmentation. As to factor (v), where the principal issues are those of internal management of a corporation and correlative breach of duty, the place of incorporation will presumptively be the appropriate forum because of its ability to judge matters by its own standards of business conduct: see, for example, Ceskoslovenska Obchodni Banka AS v Nomura International plc 2003 I. L. Pr. 20 at paragraph 12(2) and (5).

…

The Directors submit that the Guernsey-specific claims outwith the reach of Delaware jurisdiction should be discounted. We need not repeat what we have said about wrongful trading and directors' disqualification above. We should however emphasise that the provisions underlying those claims, and those under section 106, have a public interest dimension which gives them a particular importance.
…

For decades legislators have been astute continuingly to monitor the operation of limited liability companies and to protect the public from abuse of the protection from some liabilities which incorporation brings. One of the protective mechanisms is that, upon winding up, the process of winding up is in the hands of an officer of the court, the liquidator. That process brings with it, therefore, an independent appraisal of the manner in which the company has been operated, by a person not bound to the commitments of the company and those with whom it has contracted.
…

The main points, as we see it, which favour this jurisdiction for disposal of these proceedings are those set out in paras 48 and 49 above, coupled with the need where possible to avoid fragmentation between jurisdictions; see, among a host of citations, Donohue cit sup para 36 where Lord Bingham said:

> *"In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue.""* (emphasis added)

Addressing the policy implications of company directors and managers agreeing for a foreign forum to have exclusive jurisdiction over disputes concerning the management of the company, Beloff JA also emphasised that it was not appropriate for company directors to take advantage of the benefits of incorporation in a particular jurisdiction without accepting the responsibilities imposed on them under that jurisdiction (at [48(vi)]):

> *"The Directors were responsible for the choice of Guernsey as the place of incorporation of CCC with the perceived advantages that such choice would bring. The Carlyle Group chose to incorporate CCC in Guernsey and the Director Defendants chose to be Directors of a Guernsey company. They opted, in short, to take advantage of the legal, fiscal and regulatory regimes applicable in Guernsey; furthermore prior to applying to place CCC in liquidation, the Directors considered which forum to adopt for that procedure and again chose Guernsey. All the Directors must have contemplated at the very least that they could be the subject of litigation in Guernsey. In emphasising the alleged primacy of the choice of forum clause (which we shall consider below) they could fairly be charged with blowing hot and cold, or, to mix the metaphor, having their cake and eating it."* (emphasis added)

In a subsequent judgment in the same proceedings, the Guernsey Court of Appeal upheld an anti-anti-suit injunction restraining the Carlyle defendants from continuing their efforts to have the jurisdiction clause enforced by the Delaware Court of Chancery, so as to protect the Guernsey proceedings from further interference: see *Carlyle Capital Corp Ltd (in liq) v Conway* [2013] 2 Lloyd's Rep 179.

The defendants' Delaware proceedings would, if successful, have prevented the Liquidators from continuing their action in Guernsey, notwithstanding the decision by the Guernsey Court of Appeal that Guernsey was the proper forum for the action. Beloff JA, again delivering the judgment of the Court of Appeal, found that the combined considerations of protecting the Liquidators' statutory claims and having the proceedings conducted in a single forum, required that the anti-anti-suit injunction followed as a matter of course (at [78], [96], [101]-[103] and [106]):

> *"We repeat that we accept that the mere fact that we have found Guernsey to be the forum conveniens is not of itself a sufficient basis to grant the anti-anti suit injunction. However, we have gone significantly further than finding Guernsey to be forum conveniens. We have found that the Guernsey court is the only court in which all the causes of action, common law and statutory, can be pursued.*
> *…*
>
> *In the present case the relevant part of the domestic law is not merely a power to assume jurisdiction and thus provide an alternative forum, it is rather an unique code which, in contradistinction to the laws enforceable by the Delaware Courts, will govern all claims for substantive relief arising out of allegations of breach of duty by the Defendants whether as Directors de jure, de facto or shadow.*
> *…*
>
> *There are these additional considerations, beyond the need to avoid fragmentation and inconsistency, which can subvert the apparent paramountcy of an [exclusive jurisdiction clause].*
>
> *First the existence of a statutory right in one forum is itself a reason for ignoring an [exclusive jurisdiction clause] where a right could otherwise not be given effect. The (English) Court of Appeal held in Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] 2 CLC 104 (CA) that a statutory right to litigate in England will justify an anti-suit injunction against foreign proceedings, even if the dispute was otherwise subject to a forum selection clause in favour of the foreign forum. Tuckey LJ (with whom Longmore and Lloyd LLJ agreed) explained that in such circumstances, the*

> *Court was faced with a choice between granting an injunction to protect the plaintiff's statutory rights and doing nothing; and that it would not be just to do nothing …*
>
> *Likewise in Qantas Airways Ltd v Rolls-Royce Plc [2010] FCA 1481 the Federal Court of Australia granted an anti-suit injunction to protect the plaintiff's rights under the Australian Trade Practices Act, notwithstanding that the plaintiff's claim was otherwise subject to an exclusive jurisdiction clause in favour of England.*
> *…*
>
> *The central allegation in this case after all is that each of the defendants recklessly breached their fiduciary and other duties to CCC, which are governed by Guernsey law and raise important questions of Guernsey company law and public policy. The joint liquidators claim (amongst other matters) insolvency remedies under the 1994 Law against each of the defendants, namely relief for wrongful trading (under section 67C) and misfeasance (under section 106) as well as orders for disqualification (under section 67A). Those statutory claims are justiciable only by this court and are inextricably linked with the liquidators' non-statutory claims governed by Guernsey law for breach of fiduciary duty and gross negligence against each of the defendants.* (emphasis added)

Beloff JA also noted that an anti-anti-suit injunction was necessary to protect the enforcement of Guernsey public policies (at [107], [112]):

> *"Secondly a Court has a right to protect the integrity of its own judgments. In Masri v Consolidated Contractors International (UK) Ltd & Ors (No3) [2009] 2 WLR 669, Lawrence Collins LJ (as he then was) observed that a court has power to make 'ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments' (at [26]).*
> *…*
>
> *We would therefore, if necessary, characterise the purpose of the Carlyle Defendants' pursuit of the Delaware Anti-Suit Proceedings, and of this Appeal, as vexatious. It is calculated to (1) to prevent the Liquidators from continuing to pursue this litigation in a single forum to a single trial; and (2) to prevent the Liquidators from ever pursuing their statutory insolvency remedies against the Carlyle Defendants, which are available to the Liquidators only in Guernsey."* (emphasis added)

In obtaining the anti-anti-suit injunction to protect the proceedings in Guernsey from being restrained by an order of the Delaware Court, the Liquidators thereby extinguished the risk which subsequently manifested in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 (see pages 7-8, under the title Procedural issues and anti-suit injunctions paras 5 to 7).

The defendants' application for leave to appeal to the Privy Council in relation to both forum and anti-anti-suit judgments was refused.

CCC v Conway has confirmed that, in Guernsey, there is an important public interest in liquidators being able to bring statutory insolvency claims and other related non-statutory claims against the former management of insolvent Guernsey companies in a single forum.

Hong Kong

There appears to be very little jurisprudence on the enforceability of forum selection clauses in an insolvency context in Hong Kong. One such decision is *Re Sky Datamann (Hong Kong) Ltd* [2002] HKLRD (Yrbk) 22 (Re Sky), where Yuen J (now Yuen JA) held that the Court was not bound to strike-out or stay a winding up petition on the grounds of non-payment of a debt merely because a contract contained an arbitration clause or because arbitration had commenced; it was a matter for the discretion of the court in each case. This was because a winding up petition on the grounds of non-payment of a debt was not an *"action"* between *"parties"* within the meaning of Article 8(1) of the *UNICITRAL Model Law on International Commercial Arbitration*; rather, it was a class right available to all creditors. Further, in exercising its discretion the Court would consider all relevant circumstances, including the financial position of the company, the existence of other creditors and the position taken by them (at [11]-[12]).

The decision in *Re Sky* was recently considered by Harris J in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] HKEC 1241 (Quiksilver), albeit in a non-insolvency context. As was observed by Harris J, the decision in *Quiksilver* is notable for being *"the first case in Hong Kong which requires the Court to consider the extent to which it is permissible or appropriate to stay or dismiss a petition issued by a shareholder of a solvent company to wind up a company on the just and equitable ground and require the underlying dispute to be determined in the first instance in accordance with an arbitration agreement in a shareholders agreement between the petitioner and the respondent shareholders"* (at [12])*.*

The claimant had served a notice to commence arbitration proceedings in California, which was followed by the respondent's issuing of petitions to wind up two companies in Hong Kong (which were jointly owned by the claimant and the respondent), on the just and equitable ground. Relying on the approach of the English Court of Appeal in *Fulham FC,* the claimant sought orders that the winding up petitions be struck out or stayed pending the outcome of the arbitration.

In ordering that the two winding up petitions be stayed pending determination of the outcome of the arbitration, Harris J placed emphasis on the following factors:

- Whilst the relief sought in the petitions (winding up orders) could not be granted by an arbitrator, the question of whether or not the conduct of a shareholder was inconsistent with the terms of a shareholders' agreement clearly could be determined by an arbitrator, and to that extent the determination of the facts and matters which founded the winding up petitions were arbitrable (at [14]). Accordingly, the fact that the precise relief sought in the petitions was not available from an arbitrator was not a critical consideration, although it was relevant (at [22]).

- The terms of the arbitration clause were sufficiently wide to allow the respondent to seek a determination from the arbitrator that matters had occurred which justified the respondent seeking a winding up order (at [15]).

- A winding up petition on the just and equitable ground was of a different nature to a winding up petition on the grounds of insolvency, and therefore *Re Sky* could be distinguished. In particular, when invoking the just and equitable ground, the shareholder was required to demonstrate a sufficient interest in the winding up, which was commonly satisfied by the shareholder asserting that the company was *solvent* and that he would be entitled to a distribution following the liquidation of its assets by a liquidator. This being the case, the "class" interested in the petitions was limited to the two shareholders, both of whom were parties, and the petitions did not affect persons other than the parties. Accordingly, Harris J stated that *"[t]here is nothing in my view in the nature of the right that the [respondent] seeks to exercise that justifies the conclusion that the right is inalienable and that the underlying dispute between the parties is not arbitrable"* (at [18]-[19]).

Harris J concluded that the correct approach was to identify the substance of the dispute between the parties, and then ask whether or not that dispute was covered by the arbitration agreement. In this case, the substance of the dispute could be determined by arbitration, and if the arbitrator concluded that the respondent was correct, an application could then be made to the Hong Kong Court for winding up orders. Accordingly, it was permissible, practical and desirable for the Court to stay the winding up petitions pending the outcome of the arbitration. Further, given that the arbitration was underway, it was undesirable that two sets of proceedings continue in parallel (at [22]-[23]):

> *"I have already rejected the objection that because of its nature a just and equitable winding-up petition cannot be stayed to arbitration. I have also explained why the fact that the precise relief sought in a petition is not available from an arbitrator is not a critical consideration, although it is relevant. In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement.*
>
> *In the present case the dispute between the parties concerns the basis upon which the joint venture is to end. In broad terms Glorious Sun says that Quiksilver should sell its shares and grant a new licence in respect of the trademarks. Quiksilver say, although only recently, that Quiksilver Glorious Sun JV and Quiksilver Glorious Sun Licensing*

> *should be wound up. These issues can be determined by arbitration. If the arbitrators conclude that Quiksilver is correct an application can then be made to the Court for winding up orders. As Petitions have already been presented this will only require that the stays of the Petitions that I have ordered be lifted. This Court will not need to rehear the substantive arguments. In my view it is both permissible for the Court to stay the winding-up Petitions pending the outcome of the arbitration. It is also practical and desirable. The arbitration is underway and it is undesirable that two sets of proceedings continue in parallel. The arbitration can address both claims and make an award, which gives the successful party what it wishes, although in the case of Quiksilver an award in its favour will require the stay to be lifted and the Court invited to make a winding-up order. The Court cannot deal with Glorious Sun's claim."* (emphasis added)

Although the jurisprudence in Hong Kong is still developing, *Re Sky* and *Quiksilver* highlight the analytical distinction between a winding up petition (a) on the grounds of insolvency; and (b) on the just and equitable ground, and the different consequences of each to the decisions in those cases. This again demonstrates the need for very careful evaluation of the facts and circumstances of each case and of the relief sought.

Bermuda

The Bermuda Court has declined to enforce a forum selection clause on pragmatic grounds, in circumstances where enforcement of the forum selection clause would undermine centralised asset collection and distribution and the ability of a liquidator to pursue claims on behalf of creditors.

The leading Bermudian authority on this point is the judgment of the Supreme Court of Bermuda in *Saad Investments Company Ltd (in liq) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] Bda LR 83 (*Saad v Greenway*). In that case, Kawaley J (now Kawaley CJ) *"declined to give effect to an exclusive jurisdiction clause … on essentially pragmatic grounds*[93]*"*, in circumstances where there was a real risk that the Liquidators of the plaintiff company would be prevented from pursuing their claims in the foreign forum designated by an exclusive jurisdiction clause (at [29]-[30]).

The proceedings concerned a dispute between the Joint Liquidators for SICL, a Cayman Islands incorporated company which was being wound up in the Cayman Islands, and the second defendant, a Swiss bank (CAS), as to title to the shares in the first defendant, a Bermudian company (Greenway).

Kawaley J recognised the orders made by the Cayman Court winding up the plaintiff and appointing the Joint Liquidators, and went on to grant an application by the Joint Liquidators for an interlocutory injunction restraining the defendants from making any payment or distribution in relation to the shares pending determination by the Bermuda Court of the title to the shares. The Joint Liquidators had contended that if the injunction was not ordered, monies from the redemption of the shares could be tied up, possibly for years, in a Swiss mini-bankruptcy (which the Joint Liquidators would not be able to control), to the prejudice of the plaintiff's unsecured creditors. Of particular concern was the possibility that unsecured Swiss creditors might be entitled to distributions from the Swiss mini-bankruptcy estate (at [27]). The Joint Liquidators were also granted leave by the Court to serve the Bermuda proceedings on the second defendant in Switzerland (the Bermuda proceedings).

The second defendant applied to set aside the grant of leave for service out. The primary argument advanced by the second defendant was that the dispute as to the beneficial ownership of the proceeds of the shares was governed by a Pledge Agreement which contained an exclusive jurisdiction clause in favour of the courts of Switzerland. Alternatively, the second defendant contended that Switzerland was a more appropriate forum for adjudicating the claims.

Kawaley J determined that the dispute fell within the scope of the exclusive jurisdiction clause (at [9]-[17]), and went on to consider whether there existed any strong reasons for declining to enforce the exclusive jurisdiction clause.

[93] As described by Kawaley CJ in the subsequent decision in *In the Matter of Sea Containers Ltd* [2012] SC (Bda) 26 at [19].

Kawaley J found that putting the "*pivotal insolvency dimension*" to one side and having regard to *"traditional principles alone"* there were "*[no] strong reasons ... for displacing the strong presumption in favour of giving effect to the [exclusive jurisdiction clause]"* (at [26]). However, it was important to bear in mind that *"the entire rhythm of the principles in this area of law, do not march easily in step with the distinctive jurisdictional body of principles concerned with cross-border insolvency"* (at [25]).

Significantly, Kawaley J recognised that the insolvency dimension of the dispute raised "*serious doubts"* as to whether it would be appropriate to give effect to the exclusive jurisdiction clause (at [8])[94]:

> *"The pivotal insolvency dimension apart, the present application might have appeared to be a simple case where the real dispute between the parties was governed by Swiss law and fell within the ECJ, with the relief sought against the Fund only properly arising if and when the Plaintiff established its right to receive the Shares or their proceeds. However the insolvency of the Plaintiff meant that the practical result of enforcing the ECJ, based on the 2nd Defendant's own expert evidence, would likely be as follows. The Joint Official Liquidators (the "JOLs") would have no ability to sue in Switzerland at all. Assets which are contended to belong to the Plaintiff and liable to be distributed for the benefit of its worldwide creditors would be remitted to the 2nd Defendant in Switzerland where, assuming a Swiss Mini-Bankruptcy Trustee took proceedings to establish their ownership by the Plaintiff, the assets would be distributed on a priority basis to the Plaintiff's Swiss creditors. This raised serious doubts as to whether it would be appropriate to give effect to the ECJ."* (emphasis added)

Kawaley J went on to consider the *"impact of insolvency on the discretion to enforce the ECJ"* (at [27]), and identified the following issues of substance (at [29]):

- first, whether the Swiss mini-bankruptcy would be competent to deal with the ownership of monies located in Bermuda; and
- secondly, whether the plaintiff would have a fair hearing of its claim as to the title of the shares currently pursued in the Bermuda proceedings, having regard to the *"dramatically significant fact"* that the claim would only be pursued by a Swiss trustee (if at all) for the primary benefit of the Swiss mini-bankruptcy estate.

With respect to the second issue, Kawaley J reiterated that the likely effect of compelling the plaintiff to rely on the Swiss trustee to pursue its claim would be that (at [29]):

"(a) *the JOLs will not be able to pursue the claim at all, in circumstances where*

(b) it is unclear (and seems unlikely) that a Swiss Trustee would determine that it is commercially viable to pursue a claim which will not result in a direct distribution to Swiss creditors (because the relevant assets are actually located in Bermuda, even if they are notionally located in Geneva for jurisdictional purposes)."

Kawaley J found that *"these concerns are meritorious and constitute strong grounds for not enforcing compliance with the ECJ; the onset of insolvency has made substantial compliance with the ECJ (as regards funds located in Bermuda) impossible"* (at [30]).

Kawaley J ultimately concluded that the second defendant had failed to make out a case for setting aside the order for service out of the jurisdiction of the Bermuda proceedings on *forum non conveniens* or other grounds (at [31]). In reaching this conclusion, Kawaley J observed (at [32]):

> *"having regard to the fact that SICL's JOLs appointed in the Plaintiff's domicile have sought the assistance of this Court on behalf of the primary liquidation, I find that Bermuda is the most appropriate forum to determine whether or not redemption monies frozen by the June 8 injunction are beneficially owned by the Plaintiff or the 2nd Defendant, the ECJ notwithstanding."*

[94] See also at [22].

The decision in *Saad v Greenway* endorses the strong reasons test for declining to enforce a jurisdiction clause. Further, the facts of this case demonstrate that such strong reasons will be present where the enforcement of a jurisdiction clause would undermine centralised asset collection and distribution and the ability of a liquidator to pursue claims on behalf of creditors.

British Virgin Islands and Cayman Islands

A series of decisions by the courts of the British Virgin Islands (BVI) and the Cayman Islands have concluded that disputes about a petitioning creditor's debt must be resolved in accordance with an applicable forum selection clause, before the creditor can bring a winding up petition based on that debt[95]. However, the recent decisions of the BVI Court in *Artemis Trustees Ltd v KBC Partners LP* [2013] 3 JBVIC 1202 and of the Grand Court of the Cayman Islands in *Cybernaut Growth Fund LP* (Cause no. FSD 73 of 2013 (AJJ), 23 July 2013), demonstrate the difficulty in distinguishing between matters which must be determined by the courts with jurisdiction to wind up companies, from matters which are merely preliminary to the winding up process.

The first decision in this line of authorities is of the BVI Court of Appeal in *Sparkasse Bregenz Bank AG: Re Associated Capital Corporation* (BVI Civil Appeal, 18 June 2003) (Sparkasse). In that case, the Court of Appeal dismissed a petition to wind up Associated Capital Corporation on the basis that there was a genuine and substantial dispute about the debt, and a jurisdiction clause between the parties required that the dispute be determined in Austria.

Delivering the judgment of the Court of Appeal, Byron CJ (Redhead and Georges JJA agreeing) held that a winding up order should not be made where there is a *"genuine and substantial dispute"* about the company's debt to the creditor and that dispute is to be determined by another court – if the Court were to attempt to resolve the dispute, it would inappropriately encroach on the jurisdiction which the parties had conferred on another court (at [4]-[5]):

> *"The agreement between the parties clearly mandated that the agreement is subject to the law of Austria and that the Court responsible for the bank's headquarters in Vienna has exclusive jurisdiction over any possible legal dispute arising out of the agreement. This provision is unambiguous. Austrian law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned trial judge concluded that there were disputes of both a factual and legal nature and it is not for this court to resolve those disputes. … If he had attempted to resolve the dispute he would have been improperly encroaching on, and usurping, a jurisdiction which the parties had conferred on the Austrian Court.*
>
> *There is authority for the proposition that a winding up order should not be made where the company is claiming that it has a genuine and substantial dispute with the creditor to the extent or in excess of the alleged debt and that dispute is to be determined by another court or tribunal."* (emphasis added)

This approach was applied by Bannister J in *Pioneer Freight Futures Company Ltd v Worldlink Shipping Ltd, Samoa* [2009] 7 JBVIC 0101 (Eastern Caribbean Supreme Court) (Pioneer Freight) in the context of an application to set aside a statutory demand.

Section 157(1)(a) of the *Insolvency Act, 2003* (BVI) required that the court *"shall set aside a statutory demand if it is satisfied that … there is a substantial dispute"* about the debt. The creditors in *Pioneer Freight* argued that this provision imposed a duty on the Court to decide for itself whether the defence raised by the debtor company was one of substance.

Rejecting this argument, Bannister J held that in light of the approach taken in *Sparkasse*, it was not open to the Court to rule on the merits of the defence raised by the company. The Court was *"precluded by the exclusive jurisdiction clause from deciding whether that ground of defence is one of substance"* and, if the Court attempted to do so, it would *"be improperly*

[95] *Sparkasse Bregenz Bank AG: Re Associated Capital Corporation* (BVI Civil Appeal, 18 June 2003); *Pioneer Freight Futures Company Ltd v Worldlink Shipping Ltd, Samoa* [2009] 7 JBVIC 0101; *Re Times Property Holdings Ltd* (2011) 1 CILR 223.

encroaching on, and usurping a jurisdiction which the parties have conferred upon the [nominated] Court" (at [13], [17])[96].

Similarly, the Grand Court of the Cayman Islands stayed a petition to wind up a Cayman company pending the conclusion of arbitration proceedings between the parties in *Re Times Property Holdings Ltd* (2011) 1 CILR 223 (Times Property Holdings). The applicant in *Times Property Holdings* had issued a winding up petition against the company on grounds of insolvency. The company applied to have the petition dismissed on the grounds that the debt was disputed, and that an arbitration agreement between the parties required that the dispute be determined by arbitration in Hong Kong. Foster J stayed the petition pending the determination of the underlying dispute by arbitration.

Foster J endorsed the approach adopted by the BVI Court of Appeal in *Sparkasse* and commented that "*[w]here, as here, parties have expressly agreed that any dispute between them arising out of the relevant contract is to be determined in a particular forum by a particular tribunal, it is not obvious to me why they should not be held to that agreement*" (at [19]).

Foster J therefore concluded that the appropriate forum for the resolution of the dispute was the Hong Kong arbitration (at [22]):

> "*In my opinion, the parties having agreed that any dispute arising out of or relating to the Subscription Agreement should be resolved by arbitration in Hong Kong, which is now taking place and will result in a determination of the dispute between the parties, it is not appropriate for this Court, even if minded to do so, to deprive the Company of putting its case and pre-judging the issue by seeking to determine that the Company's dispute of the alleged indebtedness has no real substance. It seems to me that that question is for the arbitral tribunal in Hong Kong, with the agreement of the parties*".

In *Artemis Trustees Ltd v KBC Partners LP* [2013] 3 JBVIC 1202 (*Artemis Trustees*), the BVI Court allowed an LCIA arbitration to proceed, both in respect of the disputed grounds for dissolution of a limited partnership and in respect of an award for the actual dissolution of the limited partnership.

In that case, Bannister J concluded that the provisions in the BVI legislation pertaining to court ordered winding up did not represent a statutory scheme for the winding up of a partnership (at [27]). Accordingly, unlike in the case of the winding up of a limited company, Bannister J held that there was nothing to preclude an arbitral award for the dissolution of a limited partnership (at [29]):

> "*Taking all this material together, it seems to me to be impossible to extract from it any indication that a limited partnership formed under Part VI has any separate existence apart from those of its constituent members. … An award dissolving a limited partnership would take effect by doing no more than dissolving, progressively, the contractual and equitable bonds which bind its members. There is no difficulty in such an award being made by an arbitrator, any more than there is an arbitrator making any other arbitral award affecting a contractual or equitable relationship."*

Bannister J also held that, until the partnership was brought within a statutory insolvency regime, an arbitral award dissolving a limited partnership would not affect the rights of third parties (at [31]):

> "*The long standing objection to arbitrators purporting to wind up limited companies is not based only, however, on the inability of a private individual to dissolve an entity which is entirely the creature of statute. It is based at least as firmly in the inability of a private individual, acting as an arbitrator, to make awards binding persons other than the parties to the arbitration. An appointment of liquidators to a company within the meaning of the Insolvency Act, 2003 by the Court immediately affects the rights of third parties. I do not consider that by making an award dissolving a limited partnership an arbitrator would be purporting to do any such thing. The dissolution of a partnership,*

[96] It should be noted here that Bannister J subsequently sought to temper the stringency of these remarks in *Alexander Jacobus de Wet v Vascon Trading Limited* [2011] 12 JBVIC 0601. In that case, Bannister J reconsidered his analysis of *Insolvency Act, 2003* (BVI), s 157(1)(a) in *Pioneer*, and held that *"the Court must first decide, on the evidence before it, whether there is a dispute at all. … Only if a substantial dispute is identified will the exclusive jurisdiction clause fall to be taken into account"* (at [16]).

> *general or limited, like a members' voluntary winding up, leaves the rights of creditors and others unaffected. They remain free to pursue liable partners singly or collectively unless and until those partners are themselves brought within a statutory insolvency regime."*

Artemis may be contrasted with the decision of the Grand Court of the Cayman Islands in *Cybernaut Growth Fund LP* (Cause no. FSD 73 of 2013 (AJJ), 23 July 2013) (Cybernaut). In that decision, the Grand Court held that an arbitration clause did not prevent a petition to wind up a limited partnership on the just and equitable ground from proceeding before the Court. The winding up petition had been brought by five of the six limited partners and arose as a consequence of their loss of trust and confidence in the general partner.

The general partner had sought to argue that because the alleged loss of trust and confidence was based upon allegations of breach of contract, and those contractual breaches were disputed by the general partner, those disputes should necessarily be resolved through arbitration, before the winding up petition could proceed. In rejecting this argument, Jones J distinguished *Fulham FC* (where the unfair prejudice remedy sought by the plaintiff was held to be distinct from the collective action of winding up), on the basis that the limited partners were not seeking redress for contractual breaches, but were instead petitioning to wind up the partnership (at [8]). Jones J held that the issue raised on the winding up petition was non-arbitrable for two inter-related reasons, observing (at [7]):

> *"I think it is common ground that it is for this court to determine whether there is any rule of public policy or statutory provision which renders the arbitration agreement, or some particular matter within its scope, null and void, inoperative or incapable of being performed. (See Fulham Football Club (1987) Ltd v Richards [2012] Ch 333, per Patten LJ at paragraph 36). Counsel for the Petitioners challenges the strike out and stay applications, inter alia, on the basis that the only relief sought in their petition is a winding up order and the appointment of a qualified insolvency practitioner as liquidator. As a matter of principle, I think that this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding up order (whether relating to a company or an exempted limited partnership) is an order in rem which is capable of affecting third parties. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. Secondly, any dispute about who should be appointed as liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business. The shareholders of a solvent company and the partners of a solvent exempted limited partnership are given a free hand to appoint whomsoever they please as voluntary liquidator. If a company or partnership is or may be insolvent, or the liquidation is brought under the supervision of the Court for whatever reasons, a qualified insolvency practitioner must be appointed in place of the shareholders / partners' chosen liquidator. There is a public interest in ensuring that all businesses are properly liquidated in the interests of all of their stakeholders. The appointment of a liquidator in these circumstances is therefore a public process which is not suitable for determination in private by an arbitral tribunal, even where all the shareholders / partners are themselves parties to an arbitration agreement in terms wide enough to encompass a dispute about the appointment or removal of a voluntary liquidator. I regard winding up orders, supervision orders and orders for the appointment / removal of liquidators as class remedies, which in turn leads me to the conclusion that such proceedings fall within the exclusive jurisdiction of the Court."* (emphasis added)

In his concluding remarks, Jones J observed (at [12]) that *"[i]f, on its true construction, the arbitration clause extends to a disputed application for a winding up order and / or appointment of independent liquidators, it is null and void, inoperative and incapable of being performed. It follows that the GP and Oriental are not entitled to a stay of proceedings. It also follows that there is no alternative remedy available to the Petitioners"*.

Two recent decisions of Bannister J of the BVI Commercial Court are also worth noting. The first decision is *Gao Chunhe Nasbulk Ltd v Nanjing Ocean (BVI) Co Ltd* [2013] 5 JBVIC 0101 (Gao Chunhe), which arose in the context of a non-exclusive jurisdiction clause and which emphasises the importance of demonstrating that claims can only be heard in the non-contractual forum when seeking to override a forum selection clause. In this case, Bannister J

declined to stay proceedings in the BVI alleging unfair prejudice under the *BVI Business Companies Act, 2004,* s 184(I), notwithstanding a non-exclusive jurisdiction clause in favour of the People's Republic of China. In reaching this conclusion, Bannister J found that *"what is being invoked is a specific remedy given by the legislature here to members of companies which are incorporated here and which is not, as such, available otherwise than in this jurisdiction. It seems to me that this feature puts this case outside the Spiliada line of authority* (at [18])*,* and that it would "*be a very serious matter for this Court to drive away a claimant who wished to make a case under a provision of a BVI statute which had been enacted for his potential benefit"* (at [19]). However, an appeal to the Court of Appeal was allowed on the basis that there was no evidence that the plaintiffs would be denied any juridical advantage if the non-exclusive jurisdiction clause was enforced. This was because the plaintiff/respondent had failed to establish that their claims could not be brought in the PRC. PRC law was therefore deemed to be the same as BVI law [97]. On that narrow factual basis, there was no tension between the unfair prejudice claims and the forum selection clause.

The second decision is *Kea Investments Ltd v Novatrust Ltd* (Unreported, BVI Commercial Court, Bannister J, October 2014) (Kea Investments) which concerned the application of an exclusive jurisdiction clause to winding up proceedings.[98] In this case, a joint venture company was incorporated in the BVI by Kea Investments Limited (Kea) and Novatrust Limited (Novatrust). The choice of law and exclusive jurisdiction clause in the shareholders agreement between the two parties nominated English law and the English courts, respectively. A dispute developed between the joint venture parties, with the result that Kea applied to a BVI court for the winding up of the joint venture company on just and equitable grounds.

Novatrust responded first, by commencing proceedings in England for the enforcement of certain terms of the shareholders agreement and, second, by seeking the dismissal of the winding up application in the BVI on the basis of the exclusive jurisdiction clause. When the matter came before Bannister J, the central issue was whether the exclusive jurisdiction clause mandated that the BVI winding up application be dismissed.

Bannister J declined to dismiss the proceedings in BVI and give effect to the exclusive jurisdiction clause, observing that Kea's right to apply for the winding up of the joint venture company arose from the joint venture company's memorandum and articles of association, and was given statutory recognition in the BVI *Business Companies Act, 2004*. Such statutory rights could not be excluded merely by the entry of Kea into a contractual arrangement, like the shareholders agreement, which contained an exclusive jurisdiction clause, and express words would be required in order to abrogate such statutory rights:

> *"it would be extraordinary if [Kea] could have been deprived of [the right to wind the company up] by contractual arrangements entered into subsequently, unless of course the subsequent contract [contained] express wording precluding Kea from relying upon its rights under the [Business Companies] Act, which are distinct from its rights as a party to the [shareholders agreement]."*

As such, Bannister J appears to have given considerable weight to the company's Constitution and the statutory insolvency regime in the BVI in declining to give effect to the exclusive jurisdiction clause.

The decisions in *Cybernaut* and *Gao Chunhe* demonstrate that courts in the BVI and the Cayman Islands will not enforce a jurisdiction clause where to do so will infringe public policy, including the interests in the enforcement of local insolvency laws where the relief sought is not available in the contractual forum. However the decision in *Artemis* demonstrates the difficulties in defining the precise scope of that public policy. Further, the decisions in *Sparkasse*, *Pioneer* and *Times Property Holdings* suggest that the tension between the enforcement of jurisdiction clauses and the protection of local insolvency laws may be resolved by fragmenting the proceedings to be heard consecutively, where it is appropriate to do so. Finally, *Kea Investments* illustrates a judicial reluctance to allow an exclusive jurisdiction clause to prevent a party from seeking to rely on their rights created by the statutory insolvency regime, unless this

[97] *Nanjing Ocean (BVI) Co Limited v Gao Chunhe Nasbulk Ltd* (Unreported, Transcript dated 15 January 2014, Henry and Blenham JJA), p.8.

[98] The decision of Bannister J has not been the subject of a formal published ruling, but was expressed in a note provided to the parties on a confidential basis. The following summary is taken from a note prepared by the legal representatives of one of the parties. See R Brown and P Kite, *BVI Court issues pivotal guidance on exclusive jurisdiction clause* (7 October 2014): http://www.harneys.com/publications/legal-updates/bvi-court-issues-pivotal-guidance-on-exclusive-jurisdiction-clause

is obviously part of the contractual bargain struck between the parties, as indicated by express and definite language.

New Zealand

The interplay between forum selection clauses and insolvency issues has been considered by the courts of New Zealand on a limited number of occasions.

In *Air Nauru v Niue Airlines Ltd* [1993] 2 NZLR 632 (Air Nauru), the High Court of Auckland held that winding up proceedings should be allowed to continue in New Zealand, notwithstanding an agreement between the petitioning creditor and the debtor company that the Supreme Courts of Nauru would have exclusive jurisdiction over disputes between them and an agreement that disputes would be arbitrated.

Air Nauru involved an application by Air Nauru to wind up Niue Airlines Ltd (Niue Airlines) on the basis that Niue Airlines had failed to pay certain sums to Air Nauru for the provision of air services pursuant to a written agreement. Niue Airlines applied to have the proceedings dismissed or stayed on the basis that the existence of the underlying debt was in dispute and the written agreement provided that (a) the courts of Nauru had exclusive jurisdiction over that dispute; and (b) in any event, that such disputes be arbitrated.

Master Kennedy-Grant held that the Court had jurisdiction to hear the proceedings notwithstanding the jurisdiction and arbitration clauses and that it should exercise its discretion by allowing the proceedings to continue because *"the determination of the existence of a debt owed by the defendant to the plaintiff is a necessary part of the present proceeding, going to the status of the plaintiff as creditor"* and *"the Court has a discretion, notwithstanding the exclusive jurisdiction clause contained in the agreement, to consider and determine the question of the existence of the debt"* (at 640).

The decision in *Air Nauru* pre-dates the more recent cases in other jurisdictions which are discussed above, and the subsequent decision of Bell AJ in *Perpetual Trustee Company v Downey & Black* (unreported, Bell AJ, High Court of New Zealand, 25 October 2011) (Perpetual Trustee) would appear to be more consistent with those authorities. In *Perpetual Trustee* Bell AJ directed that a preliminary (contractual) question be dealt with in accordance with the forum selection clause, with the liquidation question to be resolved in the New Zealand court subsequently.

Perpetual Trustee concerned parallel applications brought by Perpetual Trustee Company (Perpetual) in New Zealand and Australian courts concerning Perpetual's right to damages or debt on redeemable notes issued by HIH Holdings (NZ) Ltd:

- Perpetual had filed a proof of debt in the liquidation of HIH Holdings (NZ) Ltd for the debt owing on the notes. That proof was rejected in full and Perpetual applied to the New Zealand High Court for leave under the *Companies Act 1993* (NZ), s 284 to apply to reverse that decision pursuant to s 284(1)(b).

- However, the quantum of Perpetual's claim turned on whether its right under the notes was in the nature of debt or damages; it having been agreed between the parties that Perpetual would be limited to nominal damages in the latter case. The notes were subject to Australian law and contained an Australian exclusive jurisdiction clause. Accordingly, Perpetual applied to the Australian courts for declaratory relief as to the quantum of its entitlement.

The approach proposed by Perpetual was that the Australian court would determine the substance of the parties' rights under the notes, in accordance with Australian law, which decision would then inform the New Zealand court on the application to reverse the Liquidators' decision. This approach necessarily involved the fragmentation of dispute into two separate proceedings.

Bell AJ noted that, although forum selection clauses are generally enforced, this was subject to the operation of the court's supervisory jurisdiction in a New Zealand insolvency (at [36]-[40]):

> *"If HIH NZ were not in liquidation, there would be no reason not to give effect to the choice of the New South Wales courts. Any alleged inconvenience to HIH NZ in having to litigate in Australia would not be a strong enough reason not to give effect to the forum agreement. Perpetual would be entitled to insist on any dispute being heard in New South Wales without having to provide any justification for its stance.*
> *…*
>
> *The matter is different when a company goes into liquidation. Once a company is put into liquidation in New Zealand, the liquidators conduct the liquidation under the supervision of this court. The Companies Act 1993 has reduced the Court's supervisory role. Part 16 of the Act allows a liquidator to conduct the liquidation with as little interference from the court as possible. All the same, a liquidator may seek directions, and interested persons may apply to the Court to review the liquidator's actions. The primary provision for that supervision is s 284. Another is the Court's power to grant leave to take proceedings against the company under s 248(1)(c).*
> *…*
>
> *The liquidator cannot avoid the supervision provided by s 284. He cannot by contract oust this court's jurisdiction. It is not open to a liquidator to say that because of a dispute resolution provision in a contract between the company and the creditor, the creditor cannot apply to this court to review the liquidator's decision. A contractual choice of a foreign forum does not stand in the way of a creditor applying to this court under s 284.*
>
> *Just as a liquidator is subject to this court's supervision, notwithstanding a forum agreement between the creditor and the company, so it is with a creditor … an exclusive forum clause cannot prevail over the provisions for making claims and challenging liquidators' decisions under Part 16 of the Companies Act."* (emphasis added)

However, having held that the exclusive jurisdiction clause did not have a *"dominant effect"* in circumstances where the claim fell within the Court's exclusive insolvency jurisdiction, Bell AJ went on to resolve the jurisdiction dispute on a *forum non conveniens* analysis. Bell AJ placed emphasis on the *"increasing globalisation [and] increasing interaction and co-operation among courts of different law areas*" and found that it was not incongruous for *"a New Zealand court [to] allow an Australian court to decide some of the issues in a New Zealand proceeding*" (at [48]-[50]). Ultimately, in circumstances where the proceedings in Australia were likely to dispose of the substantive issues, leaving little left for determination in New Zealand on the s 284 application, Bell AJ held that Australia was the more appropriate forum and granted a stay of the New Zealand proceedings.

The New Zealand authorities demonstrate the discretionary and fact-sensitive nature of the exercise in balancing the enforcement of jurisdiction clauses and the protection of local insolvency proceedings. In particular, in *Pioneer* the Court recognised the overriding importance of local insolvency proceedings, while acknowledging that in some circumstances it may still be appropriate to enforce a jurisdiction clause.

Canada

In Canada, it has been recognised that the Canadian courts have exclusive jurisdiction in respect of certain matters, including those matters falling within the concept of "*public order"*, and that such matters cannot be circumvented by a forum selection clause in favour of a foreign court or arbitration proceedings.

In recent times, the tension between the exclusive jurisdiction of the courts and *"public order"* principle on the one hand, and the enforcement of arbitration clauses on the other hand, has been considered by Canadian Courts in the context of the arbitrability of minority oppression claims in a non-insolvency context.

The jurisprudence in this context emanates from the decision of the Supreme Court of Canada in *Desputeaux v Éditions Chouette (1987) Inc* [2003] 223 DLR (4th) 407 (Desputeaux). That case concerned an application by a co-author of the much admired *Caillou* series of children's books for the annulment of the decision of an arbitrator as to the parties' reproduction rights.

One of the central issues concerned whether the dispute between the parties was arbitrable, it giving rise to a question of intellectual property the province of the *Copyright Act*, RSC 1985, c C-42.

LeBel J, delivering the judgment of the Supreme Court, held that the dispute was indeed arbitrable. The Supreme Court rejected a contention that s 37 of the *Copyright Act*, RSC 1985, c C-42 gave the Canadian Courts primacy to adjudicate proceedings within the scope of the Act. LeBel J noted of that provision that it was solely concerned with defining the jurisdiction *ratione materiae* of the Federal Court and the provincial courts, in order to avoid the fragmentation of trials concerning matters of copyrights. His Honour emphasised the importance accorded to arbitration in the modern Canadian justice system and found that arbitral jurisdiction could not be excluded by anything less than clear, express words (at [42] and [46]):

> *"[Section 37 is] not intended to exclude arbitration. … It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.*
> *…*
>
> *Section 37 of the Copyright Act gives the Federal Court concurrent jurisdiction in respect of the enforcement of the Act, by assigning shared jurisdiction ratione materiae in respect of copyright to the Federal Court and 'provincial courts'. That provision is sufficiently general, in my view, to include arbitration procedures created by a provincial statute. If Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so (for a similar approach, see Automatic Systems Inc. v. Bracknell Corp. 1994 CanLII 1871 (ON CA), (1994), 113 D.L.R. (4th) 449 (Ont. C.A.), at pp. 457-58; J. E. C. Brierley, "La convention d'arbitrage en droit québécois interne", [1987] C.P. du N. 507, at para. 62). Section 37 is therefore not a bar to referring this case to arbitration. …"* (emphasis added)

The Supreme Court also considered a number of statutory provisions (of general application) relating to arbitration in Quebec. Justice LeBel noted that Article 2639 of the *Civil Code of Québec*, SQ 1991, c 64 expressly prevented parties from submitting a dispute over "*the status and capacity of persons … or other matters of public order*" to arbitration. LeBel J observed of this provision (at 51]):

> *"Thus the law establishes a mechanism for overseeing arbitral activity that is intended to preserve certain values that are considered to be fundamental in a legal system, despite the freedom that the parties are given in determining the methods of resolution of their disputes."*

His Honour continued (at [52]):

> *"… The development and application of the concept of public order allows for a considerable amount of judicial discretion in defining the fundamental values and principles of a legal system. In interpreting and applying this concept in the realm of consensual arbitration, we must therefore have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion."* (emphasis added)

LeBel J held that a broad interpretation of the concept of "*public order*" had been eschewed by the legislature in inserting a second paragraph in Article 2639 which provided that "*the rules applied by an arbitrator are in the nature of rules of public order is not a ground for opposing an arbitration agreement*" (at [54]). His Honour went on (at [54]) to provide some guidance as to how future courts might arrive at a decision as to whether a matter is "*of public order*":

> *"… First, as we have seen, arbitrators are frequently required to consider questions and statutory provisions that relate to public order in order to resolve the dispute that is before them. Mere consideration of those matters does not mean that the decision may be annulled. Rather, art. 946.5 C.C.P. requires that the award as a whole be examined, to determine the nature of the result. The court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. In this case, the Code of Civil Procedure is more*

> *concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 C.C.P., corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Quebec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (See: E. Gaillard and J. Savage, eds., Fouchard, Gaillard, Goldman on International Commercial Arbitration (1999), at pp. 955- 56, No. 1649; J.- B. Racine, L'arbitrage commercial international et l'ordre public, vol. 309 (1999), at pp. 538- 55, in particular at pp. 539 and 543; Société Seagram France Distribution v. Société GE Massenez, Cass. civ. 2e, May 3, 2001, Rev. arb. 2001.4.805, note Yves Derains.) And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 C.C.P., which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award."* (emphasis added)

LeBel J found that copyright matters were not "*of the public order*". His Honour was in large part influenced by the primarily economic concerns of the *Copyright Act*, RSC 1985, c C-42, as well as the fact that s 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*, RSQ, c-32.01 expressly provided for disputes between artists and promoters to be submitted to arbitration (in the absence of express renunciation) (at [58]-[60]).

Whilst the decision of the Supreme Court of Canada in *Desputeaux* was directed at discerning whether an arbitral decision that had already been made should be invalidated on the basis that it dealt with a subject matter concerning public order, the same principles have subsequently been applied to an inquiry into whether an action for minority oppression in a non-insolvency context should be stayed in favour of arbitration proceedings.

In *Tremblay v Acier Leroux* [2004] RJQ 839, the appellant brought an action for minority oppression against a number of shareholders in a company in which he had acquired a substantial shareholding, pursuant to the *Canada Business Corporations Act*, s 241 (RSC 1985, c C-44). The appellant sought injunctive relief and damages. The respondent company sought to have the proceedings stayed on the basis of an arbitration clause contained in the shareholders' agreement, pursuant to which Tremblay acquired his shares. That clause required the submission to arbitration of any dispute between the parties, to the exclusion of any court. The Court of Appeal of Quebec was called to determine whether the arbitration clause had the effect of ousting the jurisdiction of the Superior Court of Quebec to determine Tremblay's claims.

Hilton JA (with whom Beauregard and Delisle JJA agreed) approached the question raised for determination by applying *Desputeaux*. His Honour quoted extensively from the judgment, noting LeBel J's analysis of the definition of "*public order*" (extracted above at page 53 in the section on Canada - paragraph 7). Hilton JA also noted the statement of Rayle J in *Bridgeport International Canada v Ericsson Canada Inc* [2001] QJ No 2470 (at [10]) that arbitration agreements "*should … be interpreted in a liberal way*". In concluding that a minority oppression claim was arbitrable, Hilton JA observed (at [30], [35]-[36]):

> *"Despite doctrinal support for the notion that the oppression remedy under the CBCA is one of public order since it invokes concepts of fraud and bad faith, I believe that the evolution of the case-law demonstrates that in principle the parties to a shareholders' agreement can fashion an arbitration clause that would enable an arbitrator to adjudicate an oppression remedy. That conclusion is implicit from this Court's judgment in Camirand, and flows as well from the elaborate judgment of LeBel, J. in Desputeaux v. Éditions Chouette Inc. in which he noted the virtually unfettered autonomy of parties in deciding what they may submit to arbitration, and which also emphasized the liberal and generous interpretation that courts should give to arbitration clauses.*
>
> *…*

> *In applying the analysis of LeBel, J. in Desputeaux, I have no difficulty in concluding that a shareholder's oppression remedy is not one that it is necessary to have adjudicated by a court, to use his words, in order "to preserve certain values that are fundamental in a legal system". The mere fact that there are allegations of fraud or bad faith in an oppression remedy is not enough to engage issues of fundamental values that are comparable to the legal status of persons.*
>
> *Without diminishing the importance of this remedy to minority shareholders, it is of no greater significance in the commercial world than many other types of recourses that are submitted routinely to arbitration where questions of fraud or bad faith may be raised without any suggestion that public order is offended. Such an approach is consistent with the concept that public order should not be given a broad interpretation so as to unduly limit recourse to so potentially an effective and expeditious process as arbitration. This is especially so in circumstances where the parties are in a position to choose as an arbitrator someone with vast experience and expertise in the particular subject matter in issue, qualities that are not necessarily as readily available in the judicial system where the choice of a decision-maker may not be a function of experience or expertise but rather of unrelated factors."* (emphasis added; footnotes omitted)

Despite this finding, Hilton JA went on to find that the dispute was not arbitrable in the specific circumstances of the case, as it did not fall within the terms of the arbitration clause. Hilton JA expressed concerns about the poor drafting of the arbitration clause and its use of terminology inconsistent with that used in the rest of the shareholders' agreement. His Honour, therefore, doubted whether the parties had intended to submit disputes of the character of those raised by Tremblay to arbitration. Hilton JA also held (at [55]) that "*[e]ven on a generous and liberal view of the text of the arbitration clause, it does not extend to the adjudication of disputes relating to the parties' rights and obligations as shareholders under the law of general application, and especially those provisions of law relating to the duty to act in good faith and the fiduciary duties of directors*".

The arbitrability of a minority oppression claim in a non-insolvency context was subsequently considered by the Court of Appeal of British Columbia in *ABOP LLC v QTrade Canada Inc* (2007) 284 DLR (4th) 171. The appellant brought a petition in the Supreme Court of British Columbia claiming that the business of the respondent had been conducted in a manner that was both oppressive and unfairly prejudicial to the appellant as a shareholder in the respondent. The respondent brought a corresponding application for a stay of the petition on the ground that the shareholders' agreement required that any dispute between the parties be referred to "*and finally resolved by*" arbitration. That stay was granted and was appealed by the shareholder.

Thackray JA (with whom Finch CJBC and Prowse JA agreed) dismissed the appeal and upheld the order for a stay of the oppression proceedings, thus enabling the arbitrator to adjudicate the respective rights of the parties. However, the Court of Appeal recognised that the relief sought by the appellant, which included a finding of oppression and the appointment of a receiver or receiver manager of the respondent, *"require[d] a resolution by the court"*. Accordingly, if there was still a dispute between the parties following the arbitration, the appellant could return to the Court to pursue this relief. In reaching this conclusion, his Honour specifically approved the approach of the judge at first instance, Groves J, and quoted extensively from the learned Judge's reasons. The relevant passage is as follows (at [12]):

> *"Having reviewed the agreement and the petition I conclude the following: First, the dispute between the parties is a dispute related to the Agreement. It is the different interpretations of the Agreement and the different interpretations as to the consequence of the transfer of ownership of ABOP that give rise to the dispute. That, in my view, is clearly founded in the Agreement. Secondly, the only aspect of the petition which requires a resolution by the court, rather than by an arbitrator, is the request in the petition for a finding of oppression and a request for the appointment of a receiver or receiver manager of the assets of Qtrade.*
>
> *I agree that the latter two concerns are within the exclusive jurisdiction of the court. However, in my view, a request for the finding of an oppression and an oppression remedy that is not available to be provided by an arbitrator does not mean that the matter should necessarily be resolved by the courts, rather than by arbitration. Here,*

for whatever reason, the parties entered into an Agreement which gave the petitioner rights that it likely would not have had considering its limited shareholding in the ordinary course of the operation of the company. The parties clearly negotiated an Agreement which provided the petitioner certain rights and provided for an arbitration clause. It is abundantly clear to me that the dispute between the parties relates to their different interpretations of the Agreement. They have clearly agreed that any dispute over their interpretation of the Agreement is to be dealt with by arbitration. Simply put, in oppression relief, claims should not automatically oust the jurisdiction of the arbitration clause the parties agreed to.

Additionally, in my view, a stay of the proceeding at this stage does not oust the review of this matter by the courts or deprive the plaintiff ultimately of the oppression relief it requests. An arbitrator can and should, as the parties have agreed, adjudicate on the respective rights of the parties. That is what the parties agreed to when they consented to the arbitration clause in the agreement. Once the arbitrator has done his work, if there is still a dispute between the parties which requires the additional relief requested in the petition, the oppression relief, under the federal Business Corporations Act, then that matter can be pursued in the Courts at that time. Much of the work would then be done. A stay that is requested by the respondent does not, in my view, end the oppression action. It would simply hold it in abeyance until the arbitrator did the work that the parties agreed he or she should do if the parties had a dispute or came to an impasse which could not be resolved." (emphasis added)

Groves J's analysis of the issue, as approved by Thackray JA, acknowledges that there are certain matters that are within the exclusive jurisdiction of the court. However, the two stage solution adopted by the Court of Appeal only had the effect of delaying, but not ousting, its jurisdiction[99].

It is apparent that Canadian courts have adopted a similar approach to that taken in Singapore, namely that the arbitrability or otherwise of a minority oppression claim will depend on the specific facts of the case, including whether the arbitral tribunal has the power to grant the relief sought in the petition.

United States of America

Introduction

The extent to which forum selection clauses bind bankruptcy trustees has been considered in a number of cases in the United States of America, and the applicable principles are relatively well developed.

The potential problems associated with the presumptive or mandatory enforcement of forum selection clauses are well recognised by United States courts. In *The Chaparral* 428 F 2d 888 (5th Cir, 1970), Wisdom J cautioned that *"in cases of bankruptcy, divorce, successions, real rights and regulation of public authorities, for example, courts cannot remit the dispute to a foreign forum lest a foreign forum render a decree conflicting with our ordering of these affairs"* (at 906).

The tension between clauses compelling arbitration, which have a tendency to decentralise litigation, and the underlying policy of the *Bankruptcy Code* to centralise litigation between debtors and creditors has been considered on numerous occasions since Wisdom J's comment.

- In *Hays & Co v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F 2d 1149 (3d Cir. 1989), Stapleton CJ of the United States Court of Appeals for the Third Circuit noted that while the competing policies underlying bankruptcy proceedings and arbitration clauses had previously been resolved by giving priority to the bankruptcy policies, amendments to the *Bankruptcy Code* and increasing recognition of the importance of arbitration had significantly increased the threshold for giving priority to such bankruptcy policies (at 1160-1161):

[99] The approach adopted by Thackray JA was later applied and approved by Myers J sitting in the Supreme Court of British Columbia in *1462560 Ontario Inc v 636381 BC Ltd* [2011] BCSC 886 (at [10], [13]).

"In Zimmerman, we concluded our analysis with the following summary:

> *… because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act.*

[However] given the recent Supreme Court cases concerning the Arbitration Act, we can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over that Act. The message we get from these recent cases is that we must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code." (emphasis added)

- In *Pardo v Pacificare of Tex, Inc (In re APF Co.),* 264 BR 344 (Bankr D Del, 2001), Walsh USBJ refused to enforce an arbitration clause where to do so would have resulted in fragmented litigation and greater expense to the bankrupt estate. Walsh J noted that to enforce the arbitration clause would have undermined central bankruptcy policies, without achieving the goals of the policy in favour of arbitration (at 364):

  "Arbitrarily staying the adversary proceeding to resolve only those claims which are based on contracts that happen to contain arbitration clauses will result in piecemeal litigation and unnecessary expense for both parties. I fail to see how doing so promotes the policies of the FAA nor has Pacificare suggested any benefits to arbitration under the circumstances.
  …

  [S]taying the subject adversary proceeding in favor of arbitration seriously jeopardizes Bankruptcy Code objectives. Of primary concern is the preservation of the Debtors' estate by not requiring Plaintiffs to expend limited resources and energies pursuing similar cases in several geographically diverse fora. Doing so inherently conflicts with the fundamental tenet of centralized resolution of purely bankruptcy issues. No competing federal policy favors the use of arbitration provisions to sidestep a bankruptcy court's conventional jurisdiction. … Finally, enforcing the arbitration clauses here also disrupts equality of distribution, another fundamental bankruptcy policy. "It is inequitable since it would give any aggrieved party who could cite to an arbitration clause in its contract an exalted status over all other creditors. This would occur even though the other creditors were not privy to the underlying contract and reaped no benefit from the contractual bargain". In re FRG, 115 B.R. at 74.

  I am mindful of the strong federal policy favoring arbitration. However, it seems to me that particularly in a case such as this, where the parties have not commenced or requested arbitration outside of bankruptcy, this court is the most efficient and effective forum in which to resolve these fundamental Bankruptcy Code issues." (emphasis added)

- In *Re Hagerstown Fiber Ltd Partnership v Carl C Landegger*, 277 BR 181 (Bankr SDNY, 2002) (Hagerstown), Bernstein USBJ commented that, given the "*congressional declaration of a liberal federal policy favoring arbitration agreements*" (at 197)[100] and the conflicting policy of centralisation and expeditious resolution of bankruptcy proceedings, *"[w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop"* (at 198-199,202-203):

[100] At 197 per Bernstein USBJ:
"The Federal Arbitration Act … signifies a congressional declaration of a liberal federal policy favoring arbitration agreements" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration … the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation", citing *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, 460 US 1 and *Dean Witter Reynolds Inc. v Byrd,* 470 US 213 (1985)."

> *"If an arbitrable dispute involves a federal statutory right, the court must next decide if Congress intended to except the dispute from arbitration. 'Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command.' Shearson / American Express, Inc. v. McMahon, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987). The party opposing arbitration bears the burden of demonstrating that 'Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.' Id. at 227. This intent may be deduced 'from [the statute's] text or legislative history ... or from an inherent conflict between arbitration and the statute's underlying purposes.' Id. (citations omitted); accord Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).*
> *…*
>
> *When arbitration law meets bankruptcy law head on, clashes inevitably develop.*
> *…*
>
> *Assuming that the parties agreed to arbitrate the dispute, the bankruptcy court must consider whether it has any discretion to refuse to compel arbitration. Initially, the bankruptcy court must decide if the proceeding is core or non-core. If the dispute is non-core, that will generally end the inquiry. The bankruptcy court will lack the discretion to refuse to compel arbitration.*
>
> *If the matter is core, the bankruptcy court must still examine the nature and reason for its 'coreness.' Many proceedings are procedurally core; they are garden variety pre-petition contract disputes dubbed core because of how the dispute arises or gets resolved. Objections to proofs of claim and counterclaims asserted by the estate, the types of core proceedings involved in Singer and Winimo, exemplify this type of matter. The arbitration of a procedurally core dispute rarely conflicts with any policy of the Bankruptcy Code unless the resolution of the dispute fundamentally and directly affects a core bankruptcy function. See In re United States Lines, 197 F.3d at 638-39.*
>
> *Other proceedings are core for substantive reasons; they are not based on the parties' pre-petition relationship, and involve rights created under the Bankruptcy Code. As discussed below, such disputes will often fail the preliminary question of arbitrability because the parties did not agree to arbitrate them. Nevertheless, even if they are covered by the arbitration clause, it is more likely that arbitration will conflict with the policy of the Bankruptcy Code that created the right in dispute. The bankruptcy court enjoys much greater discretion to refuse to compel the arbitration of this type of dispute."* (emphasis added)

- In *Bethlehem Steel Corporation v Moran Towing Corporation (Re Bethlehem Steel Corp),* 390 BR 784 (Bankr SDNY, 2008) Glenn USBJ referred to the potentially "*polar*" opposite effect of bankruptcy and arbitration policy in some circumstances (at 793):

> *"[T]here will be occasions where a dispute involving both the Bankruptcy Code … and the Arbitration Act … presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution'. U.S. Lines, Inc. v. Am. Steamship Owners Mut. Prot. and Indem. Assoc. (In re U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999) (quoting Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987))."*

United States courts have formulated three broad principles to enable these competing considerations to be balanced:

- Claims brought by bankruptcy trustees under the *Bankruptcy Code* which are not derived from the debtor company (i.e. do not concern the enforcement of a pre-bankruptcy chose in action of the company) but instead are brought for the benefit of the company's creditors, are not arbitrable because bankruptcy trustees are not bound by the arbitration clause with respect to such claims.

- There is no public policy against arbitration of *"non-core"* or *"procedurally core"* bankruptcy claims which relate to rights derived from the debtor company. Courts have no discretion and must stay such proceedings in favour of arbitration.

- However, if a bankruptcy trustee brings a *"core"* bankruptcy claim (even if it derives from the debtor) and it would *"seriously jeopardise"* the objectives of the *Bankruptcy Code*, the Court has discretion to allow such proceedings to continue despite any arbitration clause.

The leading authorities establishing these principles are *Allegaert v Perot* 548 F 2d 432 (2d Cir, 1977) (Allegaert) and *Hays & Co v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 885 F 2d 1149 (3d Cir, 1989) (Hays).

Separate identity of the trustee

Allegaert concerned a claim by a trustee in bankruptcy against a minority shareholder (Perot) of the bankrupt company (Walston), alleging that the shareholder had defrauded the company of its assets through a complex 'realignment' scheme. Under the scheme, Walston had assumed the liabilities of another company owned by Perot and paid the company's expenses. As a result of the 'realignment', Walston lost over $30 million in 8 months and was forced to file for bankruptcy.

The trustee in bankruptcy brought proceedings under the *Bankruptcy Act*, securities legislation, corporations legislation and the common law against the shareholder and his affiliated companies, the former directors of the bankrupt company and the New York Stock Exchange. All of the defendants (apart from four of the former directors) moved to stay the proceedings on the basis of arbitration clauses in the 'realignment' contracts and the New York Stock Exchange constitution.

The Court of Appeals for the Second Circuit held that the trustee's claims under the *Bankruptcy Act* fell outside of the scope of the arbitration clause because they were brought by the trustee in his own right, rather than having been derived through the company (at 435-436)[101]:

> *"The trustee's position that he and the bankrupt are different legal entities is certainly correct. We said precisely that in Shopmen's Local 455 v Kevin Steel Products, Inc., 519 F.2d 698, 704 (2d Cir. 1975), where we pointed out that a bankruptcy trustee is '[a] new entity ... with its own rights and duties, subject to the supervision of the bankruptcy court.' … [T]he trustee's complaint shows the lack of identity to be particularly important here. Seven counts state claims under various sections of the Bankruptcy Act, and charge that the realignment scheme resulted in fraudulent, preferential or post-bankruptcy transfers of Walston's assets to the Perot interests, which the Act allows the trustee to set aside or recover for the benefit of Walston's creditors. These are statutory causes of action belonging to the trustee, not to the bankrupt, and the trustee asserts them for the benefit of the bankrupt's creditors, whose rights the trustee enforces."*

This approach was subsequently confirmed by the Court of Appeals for the Third Circuit in *Hays*. Hays was the trustee in bankruptcy of Monge Oil Corporation. In that capacity, he brought proceedings against Merrill Lynch, with whom Monge held two corporate trading accounts, alleging that Merrill Lynch had caused Monge losses of approximately $200,000 by (a) engaging in speculative trading on behalf of Monge contrary to Monge's instructions and without disclosing the risks to Monge; and (b) mixing the funds in Monge's corporate account with funds

[101] The Court of Appeals would also have overturned the stay on the basis that the public policy underlying the securities legislation prohibited the trustee's right of access to the Court to bring claims under that Act from being circumscribed by an arbitration clause. This basis of the decision has been undermined by subsequent narrowing of the public policy exception to enforcement of arbitration clauses. see *Hays* at 1155:
"The court held that the seven securities claims asserted by the plaintiff (four claims involved the Securities and Exchange Act of 1934, and three the Securities Act of 1933) were not arbitrable because enforcement of the arbitration clause would be inconsistent with the statutes giving rise to them. The court analogized to private antitrust claims which had also been held by that court to be inappropriate subjects for arbitration. The Allegaert court also relied on factors such as the "public interest" in the dispute and the degree to which the nature of the evidence makes a judicial forum preferable in rendering a decision.
Given the change in the legal landscape since 1977, these concerns are no longer valid. As to its first rationale, the Supreme Court has since held that arbitration clauses are enforceable in antitrust, Mitsubishi, 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346, Securities and Exchange Act of 1934, McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332, and in Securities Act of 1933 cases. Rodriguez de Quijas v. Shearson, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). The Allegaert court's second rationale has subsequently been rejected by the Supreme Court. See infra Part V, Section B. Finally, Allegaert was decided before the enactment of the Bankruptcy Reform Act of 1978, the 1984 Amendments, and the above-cited recent Court decisions reaffirming the strong federal policy favoring arbitration." (emphasis added)

in personal accounts held by Monge's president and his wife. Merrill Lynch sought a stay on the basis of an arbitration clause in its customer agreement with Monge.

Delivering the judgment of the Court of Appeals, Stapleton CJ endorsed *Allegaert* and held that Hays' avoidance claims under 11 USCA s 544(b) were not derived from the bankrupt company and so were not subject to the arbitration clause. However, Stapleton CJ also emphasised the converse position: actions brought by the trustee as successor to the debtor's interest would be subject to any arbitration agreement which would have bound the debtor (at 1153-1155):

> *"The question with which we are presented is whether the trustee is bound by that agreement signed by the debtor before entering Chapter 11 bankruptcy. We hold that the trustee-plaintiff stands in the shoes of the debtor for the purposes of the arbitration clause and that the trustee-plaintiff is bound by the clause to the same extent as would the debtor. We also hold that the trustee's section 544(b) claims are not arbitrable under the arbitration clause because they are not derivative of the debtor and the trustee is accordingly not bound by the Customer Agreement with respect to them.*
> *…*
>
> *We also find support for our conclusion that arbitration agreements should be treated like other contractual commitments in those cases which have held that a debtor-in-possession in a reorganization case is bound by a pre-petition agreement to arbitrate. … We see no reason why the trustee should be treated any differently … Thus, we conclude that in actions brought by the trustee as successor to the debtor's interest under section 541, the 'trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. [Conversely,] the trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor.' Collier on Bankruptcy, para. 323.02[4]. One such defense is a contractual arbitration provision. Accordingly, we hold that the trustee is bound to arbitrate all of its claims that are derived from the rights of the debtor under section 541.*
> *…*
>
> *While we reject Hays' primary argument that it is free to ignore the Customer Agreement altogether, we do agree with it that the two claims brought under the trustee's section 544(b) powers are not subject to arbitration.*
>
> *Claims asserted by the trustee under section 544(b) are not derivative of the bankrupt. They are creditor claims that the Code authorizes the trustee to assert on their behalf. The Supreme Court has made it clear that it is the parties to an arbitration agreement who are bound by it and whose intentions must be carried out. … Thus there is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative from one who was a party to it. In this respect our conclusion is supported by Allegaert, 548 F.2d at 436 (With respect to those of the trustee's claims, such as fraudulent and preferential transfers, that arose under the Bankruptcy Act, the court stated that 'these are statutory causes of action belonging to the trustee, not to the bankrupt, and the trustee asserts them for the benefit of the bankrupt's creditors, whose rights the trustee enforces.'). It follows that the trustee cannot be required to arbitrate its section 544(b) claims and that the district court was not obliged to stay them pending arbitration."* (emphasis added)

More recently, the principle of separate identity established in *Allegaert* was endorsed by Bernstein USBJ in *Hagerstown*. Bernstein USBJ endorsed and explained the principle in the following terms (at 206-207):

> *"A trustee in bankruptcy wears two hats. First, he stands in the shoes of the debtor, and may bring any suit that the debtor could have brought before bankruptcy. Hirsch v Arthur Andersen & Co., 72 F.3d 1085, 1093 (2d Cir. 1995); Shearson Lehman Hutton, Inc. v Wagoner, 944 F.2d 114, 118 (2d Cir. 1991). When the trustee sues as statutory successor to the debtor, his rights are limited to the same extent as the debtor's under applicable non-bankruptcy law. If the debtor agreed in a pre-petition contract to arbitrate a dispute, the trustee, suing as successor to the debtor, is likewise bound by the arbitration clause. Hays, 885 F.2d at 1154; Pardo v Pacificare of Texas, Inc. (In re APF Co.), 264 B.R. 344, 363 (Bankr. D. Del. 2001).*

> *Second, under section 544, 24 the trustee also stands in the 'overshoes' of the creditors. Podell & Podell v Feldman (In re Leasing Consultants, Inc.), 592 F.2d 103, 110 (2d Cir. 1979); Goldin v Primavera Familienstif-tung (In re Granite Partners, L.P.), 194 B.R. 318, 324 (Bankr. S.D.N.Y. 1996). With certain exceptions that are not germane, § 544(b) authorizes the trustee to avoid any transfer that an actual creditor holding an allowable claim could have avoided under applicable law. Under non-bankruptcy law, the debtor cannot sue itself to recover its own fraudulent transfers. Section 544(b), however, puts the trustee in the creditors' shoes, and allows him to assert claims that only they could assert outside of bankruptcy.*
>
> *The claims inherited from the creditors are not arbitrable for the reasons explained in Allegaert v Perot, 548 F.2d 432 (2d Cir.), cert. denied, 432 US 910, 53 L. Ed. 2d 1084, 97 S. Ct. 2959 (1977)."* (emphasis added)

Public policy and core and non-core bankruptcy issues

The United States Bankruptcy Code identifies certain issues as being "core" bankruptcy issues in 28 USC s 157(b)(2), and provides that the United States Bankruptcy Courts have *non-exclusive* jurisdiction over such claims. The Court of Appeal in *Hays* held that the conferral of non-exclusive, opposed to exclusive, jurisdiction on the Bankruptcy Court undermines any suggestion that the United States recognises a policy in favour of all bankruptcy matters being heard in the United States Bankruptcy Court[102]:

> *"Hays asserts that the Bankruptcy Code is designed to "consolidate jurisdiction over property of the debtor" and reflects a "policy favoring a unified and consistent exercise of jurisdiction and supervision over a debtor and the debtor's estate". Whatever relevance these observations may have in other bankruptcy contexts, they do not help Hays here. While one can argue with some force that the Bankruptcy Reform Act of 1978 was intended to focus all bankruptcy related matters in a single bankruptcy court with power of summary disposition, the 1984 Amendments confer on the district court original but not exclusive jurisdiction over suits of this character. 12 28 U.S.C.A. § 1334(b). Thus, it is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court"*

Further, United States Bankruptcy Courts only have jurisdiction over "core" bankruptcy claims, and lack jurisdiction to determine "non-core" matters[103]. Whilst the Bankruptcy Courts can make recommendations concerning non-core matters, such determinations are subject to *de novo* review by the District Court if challenged by one of the parties. Therefore, the limitations on the Bankruptcy Court's jurisdiction prevent an insolvency claim from anchoring a broader dispute in the United States Bankruptcy Courts.

Although *Hays* did not expressly address whether a bankruptcy court has discretion to enforce an applicable arbitration clause where core bankruptcy issues are at stake, the Court of Appeals has subsequently held that the Court *did* have such discretion:

- In *Re National Gypsum Co*, 118 F 3d 1056 (5th Cir, 1997), the Court of Appeals for the Fifth Circuit endorsed *Hays* as making *"eminent sense"* and being *"universally accepted"* with regard to non-core matters, but added that the discretion to deny enforcement of a forum selection clause in relation to a core bankruptcy issue *"rested on a finding that arbitration would conflict with the provisions or purpose of the Bankruptcy Code"* (at 1066, 1068 per Garwood CJ).

- In *United States Lines, Inc v American SS Owners Mut Prot & Indem Ass'n, Inc (Re United States Lines, Inc)*, 197 F 3d 631 (2d Cir, 1999) the Court of Appeals for the Second Circuit confirmed that the Bankruptcy Courts must *"carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing the arbitration clause"* and forum selection clauses *"should be enforced 'unless [doing so] would seriously jeopardize the objectives of the Code"* (at 640 per Walker CJ).

[102] *Hays* 885 F.2d 1149 at 1157-158 and 1160-1161.
[103] A bankruptcy court cannot issue final orders or judgments over non-core proceedings unless the parties assent. 28 U.S.C.A. § 157(c)(2).

The United States courts have rejected the argument that arbitration of core proceedings will necessarily jeopardise the objectives of the *Bankruptcy Code* or that the core nature of the dispute, will, without more, create the type of *"inherent conflict"* with the *Arbitration Act* necessary for the *Bankruptcy Act* to override the *Arbitration Act's* prescription of mandatory enforcement of arbitration clauses[104]. Accordingly, *"a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration*[105]".

In *Hagerstown*, Bernstein USBJ construed these authorities as requiring a two-stage process (at 202-203):

- First, the court must consider whether each claim is core or non-core. Proceedings which are non-core must be referred to arbitration.

- Secondly, if the proceedings are 'core' proceedings, the court must enquire whether enforcement of the forum selection clause in relation to those claims would *"jeopardize Bankruptcy Code policy".* Only where enforcement of the forum selection clause would jeopardise *Bankruptcy Code* policy will the court exercise its discretion to override the clause:

  > *"Assuming that the parties agreed to arbitrate the dispute, the bankruptcy court must consider whether it has any discretion to refuse to compel arbitration. Initially, the bankruptcy court must decide if the proceeding is core or non-core. If the dispute is non-core, that will generally end the inquiry. The bankruptcy court will lack the discretion to refuse to compel arbitration.*
  >
  > *If the matter is core, the bankruptcy court must still examine the nature and reason for its 'coreness.' Many proceedings are procedurally core; they are garden variety pre-petition contract disputes dubbed core because of how the dispute arises or gets resolved. Objections to proofs of claim and counterclaims asserted by the estate, the types of core proceedings involved in Singer and Winimo, exemplify this type of matter. The arbitration of a procedurally core dispute rarely conflicts with any policy of the Bankruptcy Code unless the resolution of the dispute fundamentally and directly affects a core bankruptcy function. See In re United States Lines, 197 F.3d at 638-39."*

Core claims

The above analysis begs the question: what sort of claims are so central to the bankruptcy framework that arbitration or reference to a foreign forum would *"jeopardize Bankruptcy Code policy"*? It has been suggested that where "core" issues identified in the *Bankruptcy Code* merely provide a procedure through which a debtor or bankruptcy trustee could enforce pre-bankruptcy rights, it would rarely conflict with the policy of the *Bankruptcy Act* to require such disputes to be arbitrated in accordance with the debtor's pre-bankruptcy agreement[106]. On the other hand, substantive rights conferred on trustees by the *Bankruptcy Act,* including preference claims under ss 547 and 550[107], fraudulent conveyance claims under ss 544(b) and 548[108], and actions under s 542 seeking turnover of property of the estate[109], have been held to be non-arbitrable.

Comity

Finally, practitioners should be mindful that when the insolvency proceedings are centred in a foreign jurisdiction, the US Courts are guided by the additional consideration of comity. The importance of considerations of comity in the insolvency context is noted in S Bufford et al *International Insolvency* (2001), which is published by the United States Federal Judicial Center (at 33):

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[104] *Re National Gypsum Co*, 118 F 3d 1056 at 1069 per Garwood J (5th Cir, 1997).
[105] *United States Lines, Inc v American S.S. Owners Mut Prot & Indem Ass'n, Inc (Re United States Lines, Inc)*, 197 F 3d 631 at 640 per Walker J (2d Cir, 1999).
[106] *Hagerstown* at 203 per Bernstein J; *Cardali v Gentile (Re Cardali)* 2010 Bankr LEXIS 4113 at [23] per Lane J (Bankr SDNY, 2010).
[107] *Pardo v Pacificare of Tex, Inc (Re APF Co),* 264 BR 344 at 351 and 364 per Walsh J (Bankr D Del, 2001).
[108] *OHC Liquidation Trust v Am Bankers Ins Co (Re Oakwood Homes Corp),* 2005 Bankr LEXIS 429 at [13]-[14] per Lindsey J (Bankr D Del, 2005); *Bethlehem Steel Corp v Moran Towing Corp (Re Bethlehem Steel Corp),* 390 BR 784 at 794-795 per Glenn J (Bankr SDNY, 2008).
[109] *Hagerstown* at 209-210 per Bernstein J. See also *Pardo v Pacificare of Tex, Inc (Re APF Co),* 264 BR 344 at 351 and 364 per Walsh J (Bankr D Del, 2001).

> *"As a general rule, a freely negotiated forum-selection clause in an international contract unaffected by fraud, undue influence, or onesided bargaining power should be given full effect, absent a strong showing that it should be set aside. However, in the insolvency context such provisions often must yield to considerations of comity. After an insolvency proceeding has been commenced, comity and the interests of all creditors may require that the rights of the parties be determined by the insolvency court rather than in the venue chosen by the parties."* (emphasis added)

United States courts have consistently recognised the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities[110]. The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner in a single proceeding, rather than in a haphazard, erratic or piecemeal fashion[111].

The intervention of foreign insolvency proceedings requires a mandatory contractual forum selection clause to yield to considerations of comity and the interests of all creditors[112]. For example, forum selection clauses in favour of United States courts were present in each of *Kenner, Gercke, Allstate* and *JP Morgan*, yet the court in each case deferred to the foreign insolvency proceedings. More specifically:

- in *Kenner*, the United States District Court for the Southern District of New York granted comity to bankruptcy proceedings in France, despite a forum selection clause in a guaranty contract in favour of the courts of New York and a governing law clause designating the laws of New York;

- in *Gerke*, the United States Bankruptcy Court for the District of Columbia granted deference to proceedings in the English Companies Court under the *Insolvency Act 1986* (UK) despite a mandatory contractual forum selection clause designating the courts of the District of Columbia as the exclusive forum for adjudicating disputes and a governing law clause in favour of the laws of the District of Columbia;

- in *Allstate*, the United States Court of Appeals for the Second Circuit granted comity to Australian insolvency proceedings, despite the presence of a mandatory contractual forum selection and choice of law clause which selected New York as a forum and New York law to govern the agreement; and

- in *JP Morgan*, the United States Court of Appeals for the Second Circuit granted comity in favour of Mexican bankruptcy proceedings, despite a mandatory contractual forum selection clause in favour of the courts of New York and a choice of law clause in favour of New York law.

In each of these decisions, in determining whether the foreign insolvency proceedings warranted an extension of comity, the United States courts were concerned to ensure that the foreign insolvency proceedings met fundamental standards of procedural fairness. In each case, the United States Court was satisfied that such standards were met and comity was extended.

European Union

Jurisdiction Agreements

Provided that at least one party is domiciled in the EU, an agreement conferring jurisdiction upon the courts of an EU member state will, generally speaking, be binding: *Brussels I*

[110] See *Kenner Products Co. v. Societe Fonciere et Financiere* 532 F. Supp. 478 (S.D.N.Y. 1982) at 479 (Kenner); and *Cunard S.S. Co. v. Salen Reefer Services A.B.*, 773 F.2d 452 (2d Cir. 1985) at 458 (Cunard)

[111] See *Kenner* at 479; *Cunard* at 458; *JP Morgan Chase Bank v. Altos Hornos De Mexico, SA*, 412 F.3d 418, 429 (2d Cir. 2005) at 424 (JP Morgan); *Allstate Life Ins. v. Linter Group Ltd*., 994 F.2d 996, 1000 (2d Cir. 1993) at 999 (Allstate); and *Finanz AG Zurich v. Banco Economico, SA* 192 F.3d 240, 246 (2d Cir. 1999) at 246 (Finanz).

[112] See *Kenner* at 479-480, in which the Court noted that submission to jurisdiction of United States court did not override concerns of comity and judicial efficiency and *JP Morgan* in which the Court commented (at 429):
"[R]egardless of the parties' pre-litigation agreement, once a party declares bankruptcy in a foreign state and a foreign court asserts jurisdiction over the distribution of assets, US courts may defer to the foreign bankruptcy proceeding on international comity grounds"
See also *In re Gercke, 122 B.R. 621* (Bankr. D.D.C. 1991) at 632 (Gercke) and *Allstate* at 1000.

Regulation[113]*.* Unlike other jurisdictions, the enforcement of the jurisdiction agreement is mandatory; that is, the chosen court has no discretion to decline jurisdiction, and other courts have no power to override the agreement[114].

However, the *Brussels I Regulation* is subject to the following insolvency exception in article 1(2)(b):

> *"2. The Regulation shall not apply to:*
>
> *(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings …;"*

In the leading case of *Gourdain v Nadler (Case 133/78)* [1979] ECR 733, it was determined that the application of the insolvency exception requires a nexus between the insolvency itself and any legal claims (at [4]):

> *"it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the convention, that they must derive directly from the bankruptcy and winding-up and be closely connected with the proceedings for the 'liquidation des biens' or the 'règlement judiciare'."*

Determining whether the insolvency exception applies therefore requires careful examination of the nature of any legal claims. Claims against directors of an insolvent company for breach of duty[115] and actions by a liquidator to recover debts due to an insolvent company[116] have not historically been covered by the insolvency exception. On the other hand a dispute concerning the transfer of shares by a liquidator exercising power derived from insolvency legislation has been held to fall within the insolvency exception[117]. The resulting position is that only those claims that derive directly from the insolvency (rather than merely relate to it) attract the insolvency exception[118].

Where a claim invokes the insolvency exception under the *Brussels I Regulation*, proceedings brought or intended to be brought are regulated by the *Insolvency Regulation*[119]*,* rather than any jurisdiction agreement. In such a case, the courts of the Member State within which the centre of the debtor's main interests are situated (presumed to be the place of the registered office in the absence of proof to the contrary) have the exclusive jurisdiction to open the main insolvency proceedings[120]. The overall aim being to relegate proceedings in all other courts to a subordinate role, and ensure that the lead role is given to a single court in the EU[121].

Arbitration Agreements

Generally speaking, in countries in which the *New York Convention* has been adopted (of which every EU Member State is one), arbitration is mandatory if parties have contracted for their disputes to be resolved in that way[122].

However, in an insolvency context, where both parties to the arbitration agreement are EU Member States, articles 4(2)(e) and 15 of the *Insolvency Regulation* mean that the law of the place of main insolvency proceedings and the law of the place of arbitration, respectively, may

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[113] *Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters* [2001] OJ L 12/8. Note: From 10 January 2015, *Brussels I Regulation* has been replaced by *Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2012] OJ L 351/11, and the requirement that at least one party to the agreement be domiciled in the EU no longer applies: art 25(1).

[114] Lord Collins (ed), *Dicey Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 at [12-109]; A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at [7.02].

[115] *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [1995] 1 Lloyd's Rep 374 at 400 per Mance J.

[116] *Re Hayward* [1997] Ch 45 at 55 per Rattee J.

[117] *SCT Industri AB v Alpenblume AB (Case C-III/08)* [2009] ECR I-5655 at [33] per Advocate General Sharpston. In this case, the Liquidator relied upon provisions enacted in Swedish insolvency law which provide that, in the event of insolvency, debtors lose the right to freely dispose of their assets and the liquidator has to administer the assets of the insolvency on the creditors' behalf.

[118] *UBS AG v Omni Holding AG (in liq)* [2000] 1 WLR 916 at 922 per Rimer J.

[119] See recital 6.

[120] *Insolvency Regulation*, art 3(1).

[121] A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) at 382.

[122] See further pages 4-5 above in section C.3 - paragraphs 4 to 5)

alter that general position. In *Syska v Vivendi Universal SA* [2008] EWHC 2155 (Comm)[123], the English High Court confirmed that, in the event of the insolvency of a party to such an arbitration agreement:

- the law of the place of the main insolvency proceedings governs the arbitration agreement insofar as it relates to future, non-pending, arbitral proceedings (at [100]-[101] per Clarke J); and

- the law of the place of arbitration governs the arbitration agreement insofar as it relates to existing, pending arbitral proceedings (at [103] per Clarke J).

Whilst the domestic laws of the majority of EU Member States do not affect the validity of arbitration agreements[124], the laws of others render arbitration agreements null and void upon the insolvency of one of the parties[125]. For example, in *Swiss Supreme Court (Tribunal Fédéral) [CHE], First Civil Law Department, Judgment 4A 428/2008 of 31 March 2009 (Vivendi et al)*, the Swiss Federal Supreme Court agreed with an ICC arbitral tribunal in Geneva that the Polish bankruptcy of the principal respondent (Elektrim) deprived that arbitral tribunal of jurisdiction[126]. Hence, where an arbitration agreement is in place and insolvency intervenes, it is particularly important to examine the domestic laws of the relevant place of insolvency or arbitration.

The Hague Convention on Choice of Court Agreements

The *Hague Convention on Choice of Court Agreements* (*Hague Convention*) requires that courts give effect both to agreements of the parties regarding the proper forum for the settlement of disputes and to the resulting judgments rendered by the relevant court. The *Hague Convention* is closely modelled on the *New York Convention*, and some commentators have suggested that it may come to *"serve as the litigation counterpart to the very successful United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*[127]*".*

Although concluded in 2005, the *Hague Convention* has not yet entered into force as it requires two Contracting States to do so. Any country may become a Contracting State to the Convention by either signature followed by ratification, acceptance, approval or accession (article 27). Mexico acceded to the *Hague Convention* in November 2007. In April 2009, the European Commission signed the *Hague Convention* and recently, on 4 December 2014, the Council of the European Union (EU) adopted the approval on behalf of the European Union and directed that the approval be deposited *"within one month of 5 June 2015"*[128]. The *Hague Convention* will enter into force as between the EU and Mexico three months after the EU instrument of approval is deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands[129]. It can therefore be expected that the *Hague Convention* will enter into force between the EU and Mexico in around September 2015.

The United States signed the *Hague Convention* in January 2009, but has gone no further at the time of writing.

Neither the *Brussels I Regulation* (nor the new Regulation which replaces *Brussels I Regulation* in January 2015)[130] apply to exclusive jurisdiction agreements in favour of non-EU courts, which is where the *Hague Convention* will have effect.

Articles 1 and 1A provide that the *Hague Convention* applies to *"exclusive"* jurisdiction agreements concluded in *"civil or commercial matters"*. The expression *"civil or commercial matters"* is not defined in the *Hague Convention*, however this expression is used in various European instruments and is typically given a wide interpretation.

[123] Vivendi Universal SA appealed the decision, but the appeal was dismissed: *Syska v Vivendi Universal SA* [2009] EWCA Civ 677.
[124] See, for example, France, Germany, the Netherlands and the United Kingdom.
[125] See, for example, Poland and Spain.
[126] By reason of Article 142 of the Polish *Bankruptcy and Reorganisation Act* which provided that: *"Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date of bankruptcy is declared and any pending arbitration proceedings shall be discontinued".*
[127] R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at 3.
[128] Council Decision 2014/887/EU.
[129] See Articles 27(4) and 31(1).
[130] See footnote 113 above.

Exclusions from the scope of the *Hague Convention* are provided for in article 2(2). Like the *Brussels I Regulation,* an insolvency exception is provided for in article 2(2e) which extends to *"insolvency, composition and analogous matters"*. Although the scope of this exception is untested, some commentators have suggested that the type of proceedings covered by this exclusion is broad. Further, whilst the core of the exclusion should be clear enough, there may be issues concerning the exclusion at the margins[131]:

> *"There has been a strong trend in international commercial law and policy to centralize insolvency and analogous proceedings in a single forum – usually the forum of domicile or residence of the insolvent person – and to restrict the practice of 'ring-fencing' whereby courts in various countries take jurisdiction over assets within the particular country and parcel the assets out according to local rules. The objective is to create a fair and uniform global result for all claimants, not dependent on the quirks of local attachment law and local bankruptcy procedure. It was viewed as undesirable to have the Convention intrude on any emerging regime, especially as the intrusion might result in fracturing litigation among various courts according to prior choice of court agreements.*
>
> *The type of proceedings covered by this exclusion is broad. Thus 'insolvency' applies to the bankruptcy both of natural and legal persons (however labelled as a matter of municipal law, e.g. "liquidation" or "winding-up" as opposed to personal bankruptcy). 'Composition' involves any set of procedures allowing agreements between a debtor and creditors for re-scheduling, moratoria, suspension, or discharge of debts. The phrase "analogous matters" is intended to assist an insolvent part in coping with the insolvency, including mechanisms that allow the continued operation of the insolvent while steps are taken to regain solvency.*
>
> *As is true of all the exclusions in Article 2(2), the bankruptcy exclusion is one of subject matter unconnected to the name of the tribunal assigned jurisdiction over such matters under the national law of a given Contracting State. Although the core of the exclusions should be clear enough, there may be issues concerning the exclusion at the margins. It is not clear whether an issue is excluded from scope merely because it could be resolved in an insolvency proceeding … Issues that intrinsically can be raised only in an insolvency proceeding, such as the priority of creditors, clearly are excluded from the scope of this Convention. However, not all issues relating to an on-going insolvency proceeding necessarily are within the exclusion. For example, if someone asserts that an insolvent owes him money pursuant to a contract which includes a choice of court agreement, the Convention text provides no clear resolution of whether the existence vel non of the debt may be adjudicated only in the chosen forum pursuant to this Convention, only in the insolvency forum pursuant to other rules of law, or in either".* (emphasis added)

Where the *Hague Convention* does apply, the following three rules would be invoked:

- the chosen court must hear the case (article 5);
- any court not chosen must decline to hear the case (article 6); and
- any judgment rendered by the chosen court must be recognised and enforced in other Contracting States (articles 8 and 9).

The requirement to hear the case and to give recognition to and enforcement of judgments, is subject to certain exceptions which are identified in articles 6 and 9. Most notably for present purposes, two exceptions include where:

- *"giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised"* (Article 6(c)); and
- *"recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment*

[131] R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at 60.

were incompatible with fundamental principles of procedural fairness of that State" (Article 9(e)).

These exceptions could be seen as the counterpart to the exception to the enforcement of forum selection clauses on public policy / mandatory law grounds at common law, rooted in decision of the House of Lords in *The Hollandia* [1983] 1 AC 565 (see page 26 above in the section on England - paragraphs 11 et seq).

However, it may be that the bar is set higher under Article 6(c) and Article 9(e) as compared to the common law. Some commentators have suggested that these exceptions should only be applied in rare cases, and with caution and circumspection. As to the scope of Article 6(c), it has been suggested that[132]:

"The language of this exception involves the application of three concepts: (1) giving effect to the agreement; (2) would lead to manifest injustice; and (3) would be manifestly contrary to the public policy of the court seised. These phrases, individually and cumulatively, are best viewed as traffic signals cautioning the court seised that it may proceed with the case under this exception only in unusual circumstances, and with the greatest circumspection. …

'Would lead to or be' means that manifest injustice or a violation of public policy is highly probable in the particular case if the court seised suspends or dismisses the proceedings. This exception should not be invoked on the speculative possibility that something undesirable might happen if the court of court agreement is honoured. A threshold level of reasonable certainty that an unacceptable result 'would' result is required. …

'Manifest injustice' is intended to underscore the caution with which this exception should be invoked. The result must be incontrovertibly unjust from the perspective of the law and policy of the state of the court seised …

'Manifestly contrary to the public policy of the State of the court seised' requires additional, extended scrutiny. … The issue of whether the inconsistency is 'manifestly' contrary to the public policy is interpreted in light of the traditional force given to the terms in the Hague Conventions. Thus, 'manifestly contrary' means that the violation of public policy which would result from the decision in the particular case to give effect to the choice of court agreement is not an arguable violation, but must be one which is definitively recognizable as such. In the context of purely private litigation, a mere violation of local rules of convenience is not a violation of public policy. The violation must be of rules or policies that reflect basic choices of the public order of the state of the court seised. …

There appears to be no question that Article 6(c) applies if giving effect to the choice of court agreement would lead to either procedural injustice or procedural practices manifestly contrary to the public policy of the states of the court seised". (emphasis added)

As to the scope of Article 9(e), it has been suggested that *"the intent is to have a high standard that will only rarely result in refusal of recognition or enforcement*[133]*"*.

F. Conclusions

The enforceability of forum selection clauses when insolvency intervenes is an evolving area. Nonetheless, a number of trends have emerged.

First, the courts have acknowledged that the power of a company's pre-insolvency management to bind the company to litigate in a particular forum must be subject to certain limits. In particular, a company's management cannot curtail the ability of a subsequently appointed

[132] R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at 91-93.
[133] R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at p 118.

liquidator to investigate the company’s affairs and enforce the company’s statutory insolvency remedies.

Second, there is a distinction between:

- claims or actions which are central to the winding up process and which cannot be circumvented by arbitration or jurisdiction clauses - claims which vest in the liquidator and substantive rights created under the applicable insolvency legislation fall into this category; and

- claims or actions which are procedural or incidental to the winding up process and may not enjoy the same protection - procedures and remedies available under the insolvency legislation, but which arise out of a pre-existing cause of action or seek a winding up order as a remedy may fall into this category.

As to which category a claim or action may fall will be a highly fact sensitive question.

Third, in balancing the competing policy objectives of enforcing jurisdiction clauses and preventing the fragmentation of proceedings, the desirability of a single composite trial of all aspects of the proceedings will generally prevail, absent impossibility. Where proceedings incorporate overlapping insolvency claims and non-insolvency claims, the courts with jurisdiction over the winding up will be the *only* courts with the jurisdiction to hear the entire claim in a consolidated set of proceedings. As such, courts will generally decline to enforce the jurisdiction clause to enable the insolvency and non-insolvency claims to be heard together in a single composite action.

Fourth, where the only insolvency aspect of the claim is the remedy sought, courts will generally require that the substance of the dispute first be determined in accordance with the forum selection clause, leaving the potential for the case subsequently to be remitted to the court with jurisdiction to grant the relief sought.

Fifth, where any non-insolvency aspects of the proceedings are subject to a valid arbitration clause, courts have no discretion to allow those parts of the proceedings to be heard together with the insolvency claims. In such circumstances, fragmentation is inevitable.

Sixth, whilst courts may afford comity to insolvency proceedings conducted in a foreign jurisdiction, the mandatory enforcement of the insolvency regime is only binding on the courts of that jurisdiction. An anti-suit injunction granted by a court in the contractual forum may have the effect of undermining the jurisdiction of the insolvency court.

Seventh, if a liquidator brings statutory insolvency claims in the court with jurisdiction over the winding up but which is not the contractual forum, two procedural steps may be required to ensure that jurisdiction is anchored in the insolvency court, namely:

- to resist any application to stay or set aside leave to serve those proceedings outside the jurisdiction on *forum non conveniens* grounds; and

- to prevent the contractual forum from granting an anti-suit injunction restraining the liquidator from prosecuting those claims.

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Cleary Gottlieb Steen & Hamilton LLP
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