**FOUNDING AND CONFOUNDING JURISDICTION -**

**FORUM AND JURISDICTION ISSUES IN MARITIME DISPUTES**

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# INTRODUCTION

**Why does this matter ?**

1. The subject matter of this talk may be dry in many senses, but it is of great importance to the shipping litigator. Before one gets near a hearing on the merits of a dispute, there may be serious and prolonged battles over whether it should take place at all. This handout to accompany our talk addresses some of the issues which arise for consideration by arbitral tribunals and courts alike, and examines some of the weapons at the disposal of those who seek either to attack or uphold arbitration and jurisdiction clauses.
2. Many of the points made apply to jurisdiction and forum battles generally and not just maritime ones. However shipping cases have certain particular idiosyncracies which make forum issues both common and potentially complex. These include:
   1. The international nature of shipping, whereby a typical voyage or “adventure” and the contracts involved may have connections with numerous jurisdictions, including those inside and outside the EU;
   2. Frequent use of arbitration or jurisdiction clauses which are unclear in scope and or inconsistent internally or with other contract provisions;
   3. The difficulties arising from incorporation/attempted incorporation of charterparty arbitration clauses into bills of lading.

# Validity – No Contract

1. One of the commonest disputes involving a challenge to jurisdiction as well as merits is whether there is a contract at all, or whether there is a contract between the parties to the arbitration. All the familiar issues of (a) no consent (b) uncertainty[[1]](#footnote-1) (c) lack of authority[[2]](#footnote-2) etc etc may be invoked.
2. The first conundrum is who should determine this initially where an arbitration clause is concerned.
   1. The Tribunal, whose jurisdiction is challenged?
   2. Or a court, and if so which court?
3. The second is what system of law decides the issue:
   1. The system of national law dictated by the conflicts rules of the relevant court (or of the seat of the arbitration)?
   2. Some other system of national law?
   3. Some supra national principles of law?
4. An important starting point in NYC states may be Art II.3 of the Convention, but this will not in itself resolve the problems which arise.

***Consent generally***

1. *Dallah*[[3]](#footnote-3) is an enforcement case, and not a shipping case, but an important decision for present purposes, as it:
   1. Exposes the divide on arbitration, sometimes seen as an Anglo-French divergence, and sometimes a wider one between common law and civil law systems, including the different approaches to:
      1. the validity of applying “transnational law”; and
      2. the effect of arbitration clauses on non-parties such as associated companies or state signatories (note that the French court of appeal also subsequently reached a different conclusion of French law to Aikens J.’s decision on French law[[4]](#footnote-4));
   2. Demonstrates that simply by invoking an ICC clause, and passing the ICC court filter, one party ended with an award in France. France recognises the concept of transnational law. English law does not generally[[5]](#footnote-5), but will recognise:
      1. Arbitration Rules giving the tribunal a discretion in choosing what system of law applies (eg ICC/LCIA);
      2. A system of law (eg Shariah or Jewish law/Beth Din) chosen by the parties even if not a national law - (*Halpern v Halpern[[6]](#footnote-6)*) and/or provisions supplanting a system of law even if not legal in nature (*Svenska v Lithuania[[7]](#footnote-7)* where the provision was for Lithuanian law “*supplemented... by rules of international business activities generally accepted in the petroleum industry*”)
   3. Airs the theory of delocalised international arbitration, a concept with which the English courts have yet to engage fully.
   4. Contains the Supreme Court recognition that NYC provisions (eg VI(1)(a)) which did not specifically refer to consent issues nevertheless were applicable to such issues.

***Kompetenz-Kompetenz***

1. The English approach to “Kompetenz-Kompetenz”, not a traditional common law doctrine, but enshrined in the Arbitration Act, has been problematic. At common law the idea that one could oust the court jurisdiction to decide whether there was an agreement or not was seen as heretical, and notions of Kompetenz-Kompetenz were described as “bootstraps”. But ss. 30[[8]](#footnote-8) and 32[[9]](#footnote-9) came in on a wave of opinion that courts should keep out of arbitrations as far as possible (perhaps striking the wrong balance and causing real problems for example with s. 44 on the Court power in support of arbitrations). S. 32 was interpreted as meaning that a party had to challenge arbitrability before arbitrators first and could not as a first step invoke the court jurisdiction to decide the “contract or no contract” issue (*Vale Doce*)[[10]](#footnote-10). A more traditional situation only prevailed in the court of appeal *AES v JSC*[[11]](#footnote-11). The Supreme Court has upheld the court of appeal[[12]](#footnote-12) without specific reference to this jurisdiction issue.
2. In practice decisions need to be made as to:
   1. Whether to propose/oppose an initial finding by the Tribunal.
   2. Whether to seek a declaration in court as to the existence/non-existence of an arbitration agreement.
   3. Where to seek a stay of any court action under s. 9 of the AA or the inherent jurisdiction (see *Golden Ocean v Humpuss*, referred to below).

# CONFLICTS ISSUES

***Which system of law?***

1. With s. 30 and the doctrine of “kompetenz-kompetenz” the logical difficulty of a tribunal deciding it has no jurisdiction as there is no contract, thus apparently negating jurisdiction to decide jurisdiction, is gone. How does a Tribunal go about deciding the issue?
2. The English court in the same position will generally apply putative applicable law to determine whether an agreement exists, as mandated under English conflict principles.
3. A Tribunal seated in England will almost always do the same.[[13]](#footnote-13) However “curial law” and “conflicts law” are not the same thing and a Tribunal is not necessarily bound to apply the conflicts law of the place of the seat. In some arbitral Rules the Tribunal is given discretion as to what laws to apply, at least on merits (see eg ICC Art 21 and LCIA Arts 14.2 and 22.3-4). The English Arbitration Act provides in s. 46 that the Tribunal may in the absence of choice of law by the parties it should apply the law that it “consider applicable” Questions arise such as:
   1. Where the Rules do not give a discretion does the Tribunal have it anyway?
   2. How wide are the boundaries of discretion in the choice or purported application of a system of conflicts law, before transgressing them becomes an error of law?
4. The recent case of *Shangang South Asia (Hong Kong) v Daewoo Logistics* [2015] EWHC 194 illustrated the potential for confusion between substantive law and curial law. The fixture note in question was based on a Gencon form but stated “Arbitration to be held in Hong Kong. English law to apply”. A dispute arose as to jurisdiction of the Tribunal which depended on whether English or Hong Kong procedural law was to apply. Hamblen J. had to grapple with the meaning of the clause and its effect in the context of the standard Gencon clause 19 providing for English law and arbitration. He held that Hong Kong curial law applied and the reference to “English law to apply” was to the substantive law of the fixture. The problems caused by inconsistent clauses in charterparties and other contracts

***Other related issues***

1. *ACE v CMS[[14]](#footnote-14)* illustrates the English court approach that where there are apparently conflicting jurisdiction and arbitration clauses, there is a presumption in favour of arbitration. This was applied in *Sul America.[[15]](#footnote-15)*
2. The doctrine of separability of arbitration agreements (AA s. 7) will mean that it generally survives factors that might vitiate the contract as a whole such as misrepresentation, duress, illegality: see *Fiona Trust*[[16]](#footnote-16).
3. Further complications arise where the arbitration agreement is said to be in one document incorporated into another contract. A recent example is *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] 2 Lloyd's Rep. 203.This issue often arises in insurance policies, but the paradigm case is in bills of lading (often containing no law or jurisdiction clause of their own) incorporating charterparty law and arbitration clauses. There is no issue that both contracts are in isolation valid, but should the question of incorporation be judged by putative law as if incorporated, or some other law (i.e. ascertaining the law of the bill without incorporation by another conflicts rule such as “closest connection” and then see if under the law so ascertained there is incorporation)?[[17]](#footnote-17) There is the further complication that under English law the Rome Convention/Rome I do not apply to arbitration agreements – so is it a question of formation or construction? *The Heidberg*[[18]](#footnote-18) and *Endesa*[[19]](#footnote-19) say one adopts the putative applicable law approach. *The* *Dolphina*[[20]](#footnote-20) applied this orthodoxy in a non-arbitration context to ascertain the applicable law. This is important as English law is more “pro” incorporation than some other systems of law.
4. The problem with incorporation is compounded where the consignee becomes a party to the contract by endorsement – “consenting” to a document he has not seen and usually has no way of seeing. English law does not see this as a problem: *The Epsilon Rosa No. 2*.[[21]](#footnote-21) (See also on a European perspective *The Tilly Russ*)[[22]](#footnote-22).
5. The issue of incorporation of arbitration and jurisdiction clauses into bills of lading generally is a large one beyond the scope of this talk. Its importance and topicality may be judged from the continuing stream of cases and other legal commentaries[[23]](#footnote-23) on the subject
6. Issue estoppel is important in the context of multiple proceedings. In *The Wadi Sudr*[[24]](#footnote-24)a cargo claimant in Spain commenced Spanish proceedings against shipowners whose application for a stay on the basis of an arbitration clause was dismissed with the court holding that the clause was not incorporated. This created an issue estoppel, as the three basic requirements for this ((1) a final and conclusive determination on the merits (2) between the same parties (3) of the same issue) were met. See also for a successful plea of “res judicata” *Kazakhstan v Istil* [2006] 2 Lloyd's Rep. 370, [2007] 2 Lloyd's Rep. 548 where the issue estoppel arose from a Paris court judgment.
7. This raises questions about the rationale and scope of issue estoppel by foreign judgments. Is it based on public policy in favour of finality or comity (or both)? In *Yukos v Rosneft[[25]](#footnote-25)* the main issue was on acts of state, but an issue was whether a Dutch court’s decision not to enforce an award, on public policy grounds, estopped the English court from considering this question afresh. It was held not, as Dutch and English public policy were different. Sometimes having two conflicting judgments is a lesser evil than precluding a party from pursuing a claim where he can found jurisdiction. Query whether there is scope to argue that a decision of court X on whether there is a contract made/incorporated, reached by applying “conflicts” law X1, creates no estoppel in relation to court Y which has to decide it by law Y1.
8. In *Sovarex v Alvarez*[[26]](#footnote-26) the English court held that it was not bound by a procedural order issued by a Spanish court which refused a stay in favour of arbitration, because the Spanish court had not finally determined the issue of whether there was an arbitration agreement. A similar conclusion was reached in *Enercon v Enercon[[27]](#footnote-27)*.
9. In a State context *Svenska v Lithuania* [2007] 1 Lloyd's Rep. 193 is instructive as holding that at an enforcement level an estoppel may arise from an award precluding a party from taking the “not a party to the agreement” issue.
10. Popplewell J. recently confirmed, in *Emirates Trading v Sociedade de Fomento* [2015] EWHC 1452 the correctness of the conventional view that an award on jurisdiction by a Tribunal creates an issue estoppel, subject to the right to challenge the award under s.67 of the AA.

***Tactical Strike – not Italian torpedo but Chinese missile***

1. Presented by some commentators as a case of “pre-emptive strike” in a “friendly” court”, in Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*[[28]](#footnote-28)* despite an arbitration agreement between the parties the claimant obtained a judgment in his favour in the PRC which he then sought to enforce, relying on the issue estoppel created by the judgment. The Defendant’s application in the Singapore courts for a stay of the enforcement proceedings failed, partly because they were enforcement proceedings and not properly the subject matter of arbitration. The defendant had not challenged the PRC court jurisdiction and he was now estopped by it.
2. In English law a specific provision of the CJJA (s. 32)[[29]](#footnote-29) prevents an estoppel arising from foreign court determinations of the validity of arbitration or jurisdiction clauses, except for EU state judgments.

*Case Study 1*

1. A good example of the potential complications is given in the recent case of *Golden Ocean Group v Humpuss Intermoda Transportasi Tbk* [2013] EWHC 1240 (Comm). The facts were deceptively simply. C contended that it had chartered a vessel, on terms including an English arbitration clause, from D1. D1 and D2 alleged that the charter was actually with D2, D1’s subsidiary. An addendum to the charter, between C and D2, agreed to refer disputes to Singapore arbitration. C argued that the addendum was void for mistake. C obtained an English award to the effect that the charter was with D1 and took various steps in an English court action to enforce the award and enjoin D2 from pursuing Singapore arbitration. Popplewell J. undertook a detailed review of the relationship between section 9 of the AA (concerning the stay of proceedings)[[30]](#footnote-30) and the doctrine of Kompetenz-Kompetenz, and granted an interim anti-arbitration injunction.

*Case Study 2*

1. For similar jurisdictional issues arising between rival English and Singapore arbitrations, see “*Arbitration 1/15*” 23 March 2015 LMLN. O fixed the vessel to “C”, a fraudster, on a voyage charter. C sub-chartered to S at lower freight rate. S was the shipper under a Congenbill bill of lading referring to “C/P dated 9/11/10”, the date of both charters. The charters had different terms, freight rates and arbitrations clauses (the headcharter providing for Singapore arbitration and the sub-charter for English arbitration). Owners started arbitration claiming freight at the higher rate, using English arbitral procedure under the AA Commonplace facts gave rise to numerous issues.
2. The question of which if either charter was incorporated went to
   1. Freight rates
   2. Payee
   3. Which arbitration clause applied
   4. (Potentially) what was the applicable law
3. Which system of conflict of laws applies? It was held that English law governed incorporation but as the claim was brought under the headcharter it was a Singapore arbitration. An invalid procedure had been used to commence it but this had been waived and so the Tribunal did have jurisdiction, and O did recover the freight at the higher rate.

***Identifying the parties***

*Case Study 3*

1. On this issue *The Elikon*[[31]](#footnote-31) is instructive in two respects. The first is a practical one, showing the importance of identifying parties to a charter before commencing arbitration; generic descriptions such as “disponent owners” or “charterers” are potentially ambiguous and a source of problems. The second is how apparently simple questions as to when an arbitral tribunal has jurisdiction to allow a party to be added can be complex and “perplexing” even to the court of appeal. The (simplified) facts and result were as follows. In the charter the owners were described as “S c/o I”. An arbitration was commenced in the name of S, but it was then discovered that the true party was I. It was held that the naming of S was not a mere matter of misnomer (as may occur when for example a company called Fercometal is described as Ferometal). The solicitors had intended to designate the actual owners but had wrongly thought that these were S. Because they were not, S was not a party to any contract, the arbitration was a nullity and the Tribunal had no power to add I as a party.
2. Cases on identity of parties to an arbitration agreement or arbitration proceedings may raise issues of estoppel or waiver, where party A is led to believe by B that B is the correct party, but B thereafter alleges that C is the correct party. The case of *Hussmann v Pharaon*[[32]](#footnote-32) illustrates that such matters will generally be issues for the Tribunal itself to determine, rather than the court on an appeal on jurisdiction. This is again a potential trap for the unwary party or tribunal; if they are not raised before the Tribunal it may be impossible to raise them later before a court.

***The Arbitration Agreement***

1. This was considered in *Sul America[[33]](#footnote-33)*. This is an anti-suit case of general interest, but a key issue was over the governing law of the arbitration agreement, which would have been invalid under Brazilian law, the law governing the main contract. The courts held, perhaps boldly, that the seat of the arbitration was a strong factor and thus the arbitration agreement was governed by English law, giving the courts the basis to grant an anti-suit. This approach was also applied in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep. 235.
2. “Seat” is a key factor in giving a court supervisory jurisdiction both for challenges and procedural issues. In *Enercon v Enercon[[34]](#footnote-34)* there was an English law clause and arbitration clause as follows

“All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London …The provisions of the Indian Arbitration and Conciliation Act 1996 shall apply.”

The seat was (unsurprisingly) held to be London.

1. In *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] 2 Lloyd's Rep. 218, the court similarly had little difficulty in holding that a reference to LCIA arbitration implied that the seat of the arbitration was in London.
2. Where proceedings are brought “in respect of” a matter which had been agreed to be referred to arbitration clause, the remedy is a stay (AA section 9). The court will examine the required connection between the proceedings and the clause in question as discussed in *Lombard North Central v Gatx*.[[35]](#footnote-35) In Shanghai Construction (Group) General Co. Singapore Branch v Tan Poo Seng*[[36]](#footnote-36)*, the Singapore High Court granted a temporary stay of proceedings in the exercise of its inherent jurisdiction. The stay was granted on the ground that there was an arbitration (not between the same parties) which was intended to take place and the outcome of that arbitration would effectively determine the issues in dispute in the court proceedings. This case illustrates how a stay of proceedings can be granted even when there is no arbitration agreement between the parties to those proceedings.

***Seat and Curial law***

1. These almost invariably coincide except where express provision to the contrary is made as in [*Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008]](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2008/426.html&query=delocalised+and+arbitration&method=boolean) 1 Lloyd's Rep. 608.

# BRUSSELS REGULATION (RECAST) AND CLAUSES OF EXCLUSIVE JURISDICTION

1. Any issues of jurisdiction that arise in legal proceedings instituted in an EU member state since 10 January 2015 will no longer be regulated by the familiar 2001 Brussels Regulation but instead by its replacement, commonly known as the Brussels Regulation (Recast).
2. A major change instituted by the Recast Regulation that is bound to have an impact in the shipping context relates to the new treatment of exclusive jurisdiction clauses.
3. The key provisions relating to this aspect of the changes are outlined in the table below:

|  |  |
| --- | --- |
| **2001 Brussels Regulation:** | **Brussels Regulation (Recast)** |
| **[See Art 1.2(d)]** | **Recital 12**  (12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.  A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.  On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.  This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award. |
| **Article 23**  If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. | **Article 25(1)**  If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. |
| **(No equivalent)** | **Article 25(5)**  An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.  The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. |
| **Article 27 (1) and (2)**  Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.  Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court. | **Article 31(1) and (2)**  Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.  Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. |
| **(No equivalent)** | **Article 33(1)**  Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:   |  |  | | --- | --- | | (a) | it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and |  |  |  | | --- | --- | | (b) | the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. | |

**The Arbitration Exception**

1. In a European context the Jurisdiction Regulation 44/2001 has been beset with difficulties of interpretation on the scope of the arbitration exception. Numerous English and European court decisions,[[37]](#footnote-37) often involving English arbitration clauses, failed to provide an answer which satisfied both the (usual) English desire to protect and uphold English arbitration and the European wish to preserve jurisdiction of national court.
2. The new Regulation 1215/2012 seeks to address this, but by recital 12 rather than a change to the operative text. The amended provisions on arbitration have been criticised as opaque and uncertain in effect. Much remains to be decided, as it has only applied since 10 January 2015.

**The major change: primacy of exclusive jurisdiction clauses**

1. The new provisions dictate (provided that certain conditions are met) that a clause in a contract which gives exclusive jurisdiction to the courts of an EU Member State will be effective regardless of (a) the domicile of the parties, and (b) whether another court has previously been seised of the matter.
2. The conditions for this to operate are listed in Article 25(1) and are that the clause must be:
   1. In writing or evidenced in writing;
   2. In a form which accords with the practices which the parties have established between themselves; or
   3. In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contract of the type involved in the particular trade or commerce concerned.
3. There are two highly significant aspects of this change:
   1. **The removal of the domicile requirement.** This means that an exclusive jurisdiction clause will fall within the scope of Article 25 even if none of the parties are domiciled in a member state. This broadens considerably the number of jurisdiction agreements that will be captured by the Brussels regime. In practical terms, this change also means that potentially protracted and costly investigations as to domicile can be avoided.
   2. **The removal of the old *lis pendens* rule.** Under the old rules, the first EU court seised of the dispute would have jurisdiction until it decided that it could or should not hear the case. This rule used to override any exclusive jurisdiction clause. The change is designed to avoid the phenomenon known as the “Italian torpedo” effect, by which a party would race to the most advantageous jurisdiction to it (often, as the term “Italian torpedo” suggests, a jurisdiction with notoriety for sluggish mechanisms of justice because the party seeks to delay and obfuscate the progress of proceedings). Under the Recast Regulation, an exclusive jurisdiction clause will have primacy, even if the court of a Member State other than the one named in the clause is first seised of the matter. That court must, under the new Article 31, stay proceedings unless and until the court of exclusive jurisdiction declines jurisdiction.

**Collateral changes**

*The law for determining the validity of the clause*

1. The final phrase of the first sentence of the new Article 25 makes clear that any dispute as to the validity of the jurisdiction clause itself will be determined by the law of the Member State named in that clause. That will be so, even if the law of the contract as a whole is different.
2. If there were any doubt about that, Recital 20 puts it to rest:

*“Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.”*

What is still not clear is what is meant by “substantive validity”.

*Severability*

1. Article 25(5) makes clear that an exclusive jurisdiction clause is severable, such that the invalidity of the underlying contract will not affect it. This was not stated expressly in the previous Regulation, although it was the position in England at common law.

*Limited international lis pendens*

1. This concerns the issue of when courts of a non-EU Member State (a “third State”) have been seised of the action before the courts of an EU Member State are seised of the same action. The new Article 33 provides (and Article 34 contains related provisions in relation to related actions) that, in this scenario, a subsequently seised court of a Member State *“may stay proceedings if*:
   1. *it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and*
   2. *the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.”*
2. The rules goes on to list situations where the court “may” continue proceedings, which include if the proceedings in the court of the third State are themselves stayed, or if the proceedings in the court of the third State are unlikely to be concluded within a reasonable time.
3. Article 33 also represents a big change. Under the Judgments Regulation it was well established that, if the court of a member state had jurisdiction based on the domicile of a defendant (or, possibly, under some other provision of the Regulation), then it could not stay its proceedings in favour of a non-EU Member State court on the basis that the latter had a closer connection to the dispute and would be a more appropriate forum for the case to be heard: *Owusu v Jackson* [2005] Q.B. 801. The decision in *Owusu v Jackson* gave rise to uncertainty as whether proceedings brought in a member state could be stayed in circumstances where (i) there were identical or related proceedings already pending in a non-member state court and/or (ii) where proceedings had been started in a non-member state court under an exclusive jurisdiction clause in favour of the courts of that state.
4. The new Article 33 creates a discretion for the court to stay proceedings.
5. However, that rule operates even where there is an exclusive jurisdiction clause in the contract. This introduces uncertainty into the equation that Article 25 otherwise seeks to remove. Although the “Italian torpedo” effect has been removed, there is nothing to stop parties racing to non-EU jurisdictions in an attempt to bypass an exclusives jurisdiction clause that names an EU Member State. A party wishing to prevent this might well have to rely on the availability of anti-suit injunctions.

*Service out*

1. This is not so much a change as a collateral consequence of the removal of the requirement of EU domicile. Since domicile is no longer relevant where there is an exclusive jurisdiction clause, even where all of the parties are located outside the EU, they can nominate an EU member court and the Recast Regulation will apply. This presumably means that, if the parties nominate England and Wales, permission is no longer required to serve any of the parties involved out of the jurisdiction. This is based on CPR 6.33(b)(iii), which permits service out without permission where there is a Brussels Regulation jurisdiction agreement.
2. A further corollary of this may be that the jurisdictional gateway contained in Practice Direction 6B that permits service out (with permission) where a contract *“contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract”* will become otiose, because the parties will no longer require permission in this situation.

**Remaining uncertainties**

*Asymmetric jurisdiction clauses*

1. It is clear that the rules discussed above do not apply to non-exclusive jurisdiction clauses (for the reason that the parties have expressly contemplated in drafting such a clause that courts other than the one named in the clause should be able to hear proceedings).
2. In contrast, an asymmetric jurisdiction clause is one which binds one or some parties to a particular jurisdiction, but permits others to commence proceedings in any competent court. It remains unclear how the new rules will apply to asymmetric clauses. In particular, can the concept of “substantive validity” be used to challenge whether or not an asymmetric clause is truly “exclusive”? In a maritime context the problem often arises with clauses which confer an option on one party to have a dispute referred to arbitration.
3. The failure of the Recast Regulation to address this subject has been the subject of criticism, especially because such clauses are so common in the lending and capital markets contexts, from which much of the criticism of the old regime emanated. In particular, the drafters’ failure to address the uncertainty caused by the decision of the French Supreme Court in *Ms X v Banque Privée Edmond de Rothschild*, which declared a hybrid or asymmetric jurisdiction clause void as contrary to the former Article 23 of the Brussels Regulation, has been roundly critiqued.
4. These clauses have routinely been upheld in English law. For example, Popplewell J cited with approval in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another*[2013] EWHC 1328 (Comm) (para 42) an article by Professor Fentiman *“Universal jurisdiction agreements in Europe”* (CLJ (2013) 72 (1) 24–27), in which Professor Fentiman states:

*“Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimising the risk that a debtor's obligations will be unenforceable. Such agreements are valid in English law … Indeed despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so … ”*

1. Given the popularity of these clauses, it is regrettable that their status under the Recast Regulation remains somewhat unclear.

*The lack of clarity on clauses designating non-EU Member States*

1. The Recast Regulation does not address the question of what happens when an EU-Member State court is the first court seised of the matter, but the contract contains an exclusive jurisdiction clause in favour of a non-EU Member State. Different Member States take different approaches to as to whether the domestic court can/should issue a stay of proceedings in this situation.
2. The only guidance is given in Recital 24:

*“When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.*

*That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.”*

**Conclusion**

1. On the whole, the Recast Regulation has been well received. In particular, it addresses what was arguably previously an unfair doctrine that permitted express agreements as to jurisdiction to be “torpedoed”.
2. It would be fair to conclude that we are bound to observe a rise in the use of exclusive jurisdiction clauses and a decline in the need to expend time and money researching issues of domicile and applications for permission to serve out of the jurisdiction. It would also be sensible to expect to see races to non-EU jurisdictions, previously not commonly sought out, and a corresponding rise in the deployment of anti-suit injunctions to prevent this.
3. However, we are left with lingering uncertainty as to the fate of asymmetric jurisdiction clauses and the effect of an exclusive jurisdiction clause nominating the courts of a non-EU Member State. Accordingly, the Recast Regulation has not removed the prospect of future litigation on these questions.

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***Anti-Suit Injunctions***

1. The international nature of shipping cases inevitably gives rise to the possibility of parallel proceedings in multiple jurisdictions. For that reason, parties to bill of lading contracts and charterparties normally include an exclusive jurisdiction clause or an arbitration clause in the terms of their agreement. Whether or not the parties have included such a clause in their contract, an anti-suit injunction can be an important method of preventing the inconvenience, risk of inconsistent judgments and costs associated with parallel proceedings.
2. An anti-suit injunction is an order requiring a party subject to the *in personam* jurisdiction of the English courts not to commence or continue proceedings, or to take the necessary steps to terminate or suspend proceedings, before a foreign court. The basic principles governing the granting of anti-suit injunctions are well established and familiar. In summary:
   1. If there is a valid and applicable exclusive jurisdiction clause or arbitration clause, an anti-suit injunction will be granted to restrain the actual or threatened foreign proceedings unless there are “*strong reasons*” to permit those proceedings to continue.[[38]](#footnote-38) Millet LJ emphasised in *The Angelic Grace*, in relation to arbitration clauses, that “*there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bri them*”.[[39]](#footnote-39)
   2. If there is no valid and applicable exclusive jurisdiction clause or arbitration agreement, an anti-suit injunction will normally only be granted if the threatened or actual foreign proceedings are, or would be, vexatious or oppressive for some reason, which requires the party applying for the injunction to demonstrate that: (i) England is clearly the appropriate forum for the resolution of the dispute; and (ii) justice requires that the pursuit of the foreign proceedings be restrained.[[40]](#footnote-40) This second element requires the party applying for the injunction to demonstrate, for example, that the foreign proceedings have been brought in bad faith. In *Deutsche Bank AG and another v Highland Crusader Offshore Partners LP*, Toulson LJ emphasised that “*[t]he prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive*”.[[41]](#footnote-41)
   3. An anti-suit injunction will not, however, be granted to restrain proceedings in another EU Member State, even where the foreign proceedings have been commenced in bad faith, because to do so would be contrary to the system of mutual trust established between national courts by the new Recast Brussels I Regulation[[42]](#footnote-42) (which has applied since 10 January 2015) and its predecessors.[[43]](#footnote-43) This applies even if the English proceedings are solely concerned with arbitration,[[44]](#footnote-44) provided that the foreign proceedings fall within the scope of the Recast Brussels I Regulation.[[45]](#footnote-45) However, it should be noted that Advocate-General Wathelet has recently suggested[[46]](#footnote-46) that a national court is free to grant an anti-suit injunction restraining proceedings in another EU Member State brought in breach of an arbitration agreement, as a result of the new recital 12 of the Recast Brussels I Regulation.[[47]](#footnote-47) The CJEU did not address this wider point; it merely noted that the original Brussels I Regulation applied in that case and stating that it was not contrary to that regulation for an arbitral tribunal seated within the EU to grant such an anti-suit injunction.

**The exclusivity of jurisdiction clauses**

1. One problem that may arise when seeking to obtain an anti-suit injunction to enforce a jurisdiction clause is uncertainty as to whether or not the jurisdiction clause is exclusive. If it is a non-exclusive jurisdiction clause, one must demonstrate that the foreign proceedings are vexatious or oppressive. The mere fact that there are parallel proceedings have been commenced will not be sufficient to satisfy this test.
2. The Court of Appeal recently discussed the proper interpretation of a jurisdiction clause in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd*.[[48]](#footnote-48) In that case, a freight forwarder, Hin-Pro, brought 23 sets of proceedings in China against a carrier, CSAV, for breach of 70 bills of lading. Hin-Pro claimed damages against CSAV, including the value of the cargo, on the basis that the cargo had wrongly been delivered without production of original bills of lading at ports in Venezuela. CSAV unsuccessfully challenged the jurisdiction of the Chinese courts on the basis that the bills of lading all contained an English jurisdiction clause. CSAV then brought a claim in the English Commercial Court seeking an anti-suit injunction to restrain pursuit of the Chinese proceedings.
3. The jurisdiction clause in the bills of lading was in an unusual form. It stated:

“Law and jurisdiction.

This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceedings shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such disputes and proceedings shall be referred to the Chilean Ordinary Courts.”

1. Cooke J held that this constituted an exclusive English jurisdiction clause.[[49]](#footnote-49) This was based on the proposition that: “*An agreement to English law and jurisdiction, absent any other relevant provision in the contract, is generally to be taken not only as an agreement to the mandatory application of English law, but also to the exclusive jurisdiction of the English court*”.[[50]](#footnote-50) As Cooke J said: “*Self-evidently, English courts would be seen by the parties as best able to apply the provisions of English law which the parties agreed to be applicable in the circumstances*”.[[51]](#footnote-51)
2. It was held that the final two sentences of the jurisdiction clause in the bills of lading in question did not change any of this because they merely provided for a fall-back position in the event that the courts of a foreign country failed to recognise the effectiveness of the first part of the jurisdiction clause. On that basis, and applying the principle set out in *The Angelic Grace* (viz. that strong reasons are needed if an exclusive jurisdiction clause is not to be enforced), Cooke J granted an anti-suit injunction to restrain the pursuit of the Chinese proceedings.
3. The fact that, if proceedings were to be begun by Hin-Pro in England (in accordance with the jurisdiction clause), the claim would be time barred as a result of the Hague Rules was held not to be a good reason to refuse an anti-suit injunction. Cooke J noted that Hin-Pro had commenced proceedings in China knowing that CSAV regarded the clause as an exclusive jurisdiction clause, and despite the fact that CSAV had previously obtained an anti-suit injunction against Hin-Pro from an English court on the basis of the same clause in other bills of lading.
4. Cooke J also awarded CSAV damages for breach of the jurisdiction clause, including all sums paid and to be paid as a result of judgments of the Chinese courts. He held that the relevant counterfactual for the purposes of assessing damages was not a scenario in which Hin-Pro had sued in England, but one in which it had not sued at all. Cooke J based that decision on the fact that the relevant breach was not a failure to bring a claim in England, but the wrongful bringing of a claim in China.[[52]](#footnote-52) The court, he said, was not required to speculate on what the result might have been if a claim had been brought by Hin-Pro in England.
5. The Court of Appeal recently upheld Cooke J’s decision that the clause in question was an exclusive English jurisdiction clause. Christopher Clarke LJ emphasised that the jurisdiction clause contained imperative language (“*shall be subject to … the jurisdiction of the English High Court*”). He also noted that, whilst non-exclusive jurisdiction clauses do have value, the natural commercial purpose of the clause was to provide for an exclusive forum for disputes between the parties. As Christopher Clarke LJ said:[[53]](#footnote-53)

“If ‘shall be subject to’ makes English law mandatory (as it does) the parties must as it seems to me … be taken to have intended (absent any convincing reason to the contrary that the same should apply to English jurisdiction. I do not think that the reasonable commercial man would understand the purpose of the clause to be confined to a submission to English jurisdiction, if invoked, or to an underscoring of the convenience of litigation here.”

**The incorporation of exclusive jurisdiction clauses**

1. A further problem that may arise when one seeks to obtain an anti-suit injunction in order to enforce an exclusive forum clause is uncertainty as to whether the clause is incorporated into the relevant contract. The Court of Appeal recently considered this issue in the context of bills of lading in *Caresse Navigation Ltd v Office National de l’Electricité and others (The Channel Ranger).*[[54]](#footnote-54)
2. A consignee and its insurers brought a claim in Morocco against a shipowner, Caresse Navigation, seeking damages for breach of a contract evidenced by a bill of lading as a result of damage to a cargo of coal. The bill of lading stated at clause 1: “*Freight payable as per charterparty. All terms, conditions, liberties and exceptions of the charterparty, dated as overleaf, including the law and arbitration clause, are herewith incorporated*” (emphasis added). The relevant charterparty was a voyage charter, which included the following term: “*This charterparty shall be governed by English law, and any dispute arising out of or in connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales*” (emphasis added).
3. Males J granted an anti-suit injunction to restrain pursuit of the Moroccan proceedings, on the basis that the bill of lading incorporated the exclusive jurisdiction clause contained in the charterparty.[[55]](#footnote-55) The Court of Appeal upheld that decision. It was held that the wording of the bill of lading was sufficient to incorporate not only the part of the clause dealing with choice of law, but also the exclusive English jurisdiction clause.
4. The consignee relied on the rule that general words intended to incorporate the terms of a charterparty into a bill of lading contract incorporate only terms that are directly “*germane to the receipt, carriage or delivery of the cargo or the payment of freight*”, and not ancillary terms such as jurisdiction clauses.[[56]](#footnote-56) The Court of Appeal held that the authorities stating that ancillary clauses such as arbitration or jurisdiction clauses will not be incorporated into a bill of lading by general words were not of assistance in this case because it was plain that the parties intended to incorporate at least one kind of ancillary clause into the charterparty.
5. Beatson LJ (with whom Sir Robin Jacob and Lord Dyson MR agreed) noted that: “*English law has long recognised the particular need for certainty that follows from the negotiable nature of a bill of lading, which may come into the hands of a person in another jurisdiction who has no ready means of ascertaining the terms of the charterparty*”.[[57]](#footnote-57) However, Beatson LJ said that in context, and having regard to normal principles of contractual interpretation, the reference in this bill of lading to an arbitration clause should be construed as a reference to the exclusive jurisdiction clause in the charterparty. That was the only clause to which the parties could reasonably have intended the words to refer.
6. It was emphasised that the original parties to the bill of lading in the case must have been aware that the charterparty did not contain an arbitration clause, so it was unrealistic to interpret the clause in the bill as stating “*arbitration clause, if any*”.

**Vexatious or oppressive proceedings**

1. The recent judgment of the Commercial Court in *Shipowners’ Mutual Protection and Indemnity Association v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)*[[58]](#footnote-58) gives an illustration of the sort of circumstances in which an anti-suit injunction may be granted in the absence of an applicable exclusive forum clause.
2. In that case, after a vessel ran aground on the Greek island of Mykonos, the charterers commenced arbitration proceedings in London under a time charter against the vessel’s owner. The charterers, however, also commenced proceedings in Turkey against the owner’s P&I Club, under a Turkish statute giving them a right of direct action against the Club.
3. The charters applied in England for an anti-suit injunction to restrain the pursuit of the Turkish proceedings. Teare J held that the right of direct action under the Turkish statute was in substance a claim to enforce the contract between the owners and the P&I Club (which contained a London arbitration clause).
4. It was held that the rule set out in *The Angelic Grace* (i.e. that an anti-suit injunction to enforce an exclusive forum clause should be granted unless there are strong reasons not to do so) could not apply where the defendant was not actually a party to the contract containing an exclusive jurisdiction or arbitration clause, which was the case here given that the charterers were not a party to the contract between the owners and the P&I Club.
5. However, Teare J nevertheless granted an anti-suit injunction. He held[[59]](#footnote-59) that England was clearly the appropriate forum for the resolution of the dispute and that the Turkish proceedings were vexatious and oppressive. On the latter issue, he held that one should focus on the effect of the foreign proceedings on the party seeking the injunction. In this case the Turkish proceedings were held to be vexatious and oppressive because they were in substance an attempt to enforce the contract between the owners and the P&I Club whilst ignoring the arbitration clause contained in that contract. Teare J also emphasised that there was a real risk that the Turkish proceedings would deprive the P&I Club of the effect of the paid to be paid clause in the contract (which the Turkish court was likely to disregard).
6. However, *Golden Endurance Shipping SA v RMA Watnaya SA and others* (*The Golden Endurance)*[[60]](#footnote-60) demonstrates the difficulties that can be faced by a party seeking to obtain an anti-suit injunction in the absence of an exclusive forum clause. In that case, the claimant shipowner, Golden Endurance, shipped a cargo of wheat bran pellets from Gabon, Ghana and Togo to Morocco. The cargo was damaged during the voyage due to insects and mould. The insurers of the defendant consignee brought a claim in Morocco against Golden Endurance seeking damages.
7. Golden Endurance brought a claim in England seeking a declaration of non-liability and an anti-suit injunction to restrain the pursuit of the Moroccan proceedings. If the claim had proceeded in Morocco, the Moroccan courts would have applied the Hamburg Rules whereas the English court would apply the Hague Rules, which were more favourable to Golden Endurance.
8. An interim anti-suit injunction was granted in respect of one of the bills of lading on the basis that it incorporated both an English law clause and a London arbitration clause. The two other bills of lading were held to incorporate an English law clause but no arbitration clause or jurisdiction clause.
9. Burton J held that England was clearly the appropriate forum for the resolution of the dispute concerning those two bills of lading on the basis that the contracts were governed by English law. He referred to Lord Mance’s judgment in *VTB Capital Plc v Nutritek International Corp.*, where the latter said that “*other things being equal, a case should be tried in the country whose law applies*”.[[61]](#footnote-61) Burton J emphasised that Golden Endurance would lose significant advantages if the claim proceeded in Morocco and the Hamburg Rules were to be applied.
10. However, Burton J refused to grant an anti-suit injunction in respect of the contracts evidenced by these two bills of lading. Whilst England was the natural forum for the dispute and refusing an injunction would give rise to parallel proceedings in England and Morocco concerning the same issues, there was no basis for saying that the Moroccan proceedings were vexatious or oppressive. Burton J emphasised that in *Deutsche Bank v Highland Crusader Offshore Partners*, Toulson LJ had clearly stated that: “*it does not follow that because parallel proceedings are undesirable they are necessarily oppressive*”.[[62]](#footnote-62) The fact that the Moroccan courts would not apply the Hague Rules did not render the Moroccan proceedings vexatious or oppressive.
11. Post *Gazprom*, it is likely that there will be an increase in anti-suit injunctions sought from and/or granted by English tribunals rather than the commercial court, at least where there is a European element. As with anti-suit injunctions, there is the prospect at least in theory of different tribunals being asked to issue anti-arbitration injunctions against each other.
12. The Cross Border Insolvency Rules are playing an increasingly prominent role in maritime disputes. Their scope and applicability are beyond the scope of this talk but they may have the effect of staying English court proceedings or arbitrations which are otherwise well founded. Where a foreign party is insolvent there may be a dispute as to whether certain actions are by their nature concerned with contractual claims or insolvency. The bankruptcy of the Danish bunker supplier O.W. Supply & Trading is currently giving rise to much litigation in numerous jurisdictions. In *Swissmarine v O.W. Supply & Trading* [2015] EWHC 1571 (Comm) the claimant sought an anti-suit injunction to restrain Danish proceedings relying on an English jurisdiction clause in an underlying ISDA Master Agreement. The application failed, primarily on the basis that the Danish claim was concerned with insolvency and not contractual claims.

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1. For a recent example see *Wah v Grant Thornton International Ltd* [2013] 1 Lloyd's Rep. 11 [↑](#footnote-ref-1)
2. For a recent example see *Toyota Tsusho Sugar Trading Ltd v Prolat S.R.L* [2014] EWHC 3649 [↑](#footnote-ref-2)
3. [2010] 2 Lloyd's Rep. 691 [↑](#footnote-ref-3)
4. On 17 February 2011 the Paris Court of Appeal concluded that under French law the Government of Pakistan was bound by the arbitration clause. [↑](#footnote-ref-4)
5. Where the courts have referred to such a concept it is usually with disfavour: *Naviera Amazonica Peruana SA v Compania Internacionale De Seguros Del Peru* [1988] 1 Lloyds Rep 116 [↑](#footnote-ref-5)
6. [2007] 2 Lloyd's Rep. 56 [↑](#footnote-ref-6)
7. [2007] 1 Lloyd's Rep. 193 [↑](#footnote-ref-7)
8. 30 **Competence of tribunal to rule on its own jurisdiction**.**E+W+N.I.**

   (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to— (a) whether there is a valid arbitration agreement... [↑](#footnote-ref-8)
9. 32 **Determination of preliminary point of jurisdiction**.**E+W+N.I.**

   (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal... (2) An application under this section shall not be considered unless (a) it is made with the agreement in writing of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal... [↑](#footnote-ref-9)
10. [2000] 2 Lloyd's Rep. 1 [↑](#footnote-ref-10)
11. [2011] 2 Lloyd's Rep. 233 paras 99-105, holding that there was generally jurisdiction vested in the court to rule on such matters but leaving it unclear as to when it might be appropriate to exercise its discretion to assume that jurisdiction [↑](#footnote-ref-11)
12. [2013] UKSC 35 [↑](#footnote-ref-12)
13. See eg CGU v Astrazenca [2006] 1 C.L.C. 162 [↑](#footnote-ref-13)
14. [2009] 1 Lloyd's Rep. 414 [↑](#footnote-ref-14)
15. [2012] 1 Lloyd's Rep. 671 [↑](#footnote-ref-15)
16. [2008] 1 Lloyd's Rep. 254. For recent examples of the application of this doctrine in the context of respectively illegality and bribery see *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd and Others* [2013] EWHC 10 *Y v Y* [2015] EWHC 395 [↑](#footnote-ref-16)
17. A question discussed in some detail in Chapter 1 of “*Bills of Lading incorporating charterparties*” Melis Özdel, Hart 2015 [↑](#footnote-ref-17)
18. [2004] 2 Lloyd's Rep. 287 [↑](#footnote-ref-18)
19. [2009] 1 Lloyd's Rep. 666 [↑](#footnote-ref-19)
20. [2012] 1 Lloyd's Rep. 304 [↑](#footnote-ref-20)
21. [2002] 2 Lloyd's Rep. 701, [2003] 2 Lloyd's Rep. 509 [↑](#footnote-ref-21)
22. [1985] QB 931 [↑](#footnote-ref-22)
23. See “*Should third parties be bound by arbitration clauses in bills of lading ?*” Baatz [2015] LCMLQ 86, “*Bills of Lading incorporating charterparties*” Melis Özdel, Hart 2015, [*Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts*](http://feedproxy.google.com/~r/KluwerArbitrationBlogFull/~3/Y26PlPo98vY/?utm_source=feedburner&utm_medium=email), <http://kluwerarbitrationblog.com/blog/2015/03/03/arbitration-clauses-incorporated-by-reference-an-overview-of-the-pragmatic-approach-developed-by-european-courts/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29> , *The Channel Ranger* [2015] QB 366 – discussed below [↑](#footnote-ref-23)
24. [2009] 1 Lloyd's Rep. 666, [2010] 1 Lloyd's Rep. 193. The resulting position has now been reversed by Reg 1215/2012, with effect from 10 January 2015, as discussed below [↑](#footnote-ref-24)
25. [2012] 2 Lloyd's Rep. 208 [↑](#footnote-ref-25)
26. [2011] 2 Lloyd's Rep. 320 [↑](#footnote-ref-26)
27. [2012] 1 Lloyd's Rep. 519 [↑](#footnote-ref-27)
28. [2012] SGHCR 2 [↑](#footnote-ref-28)
29. 32 Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes. **E+W+S+N.I.** (1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if— (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country.... [See also now Reg 1215/2012] [↑](#footnote-ref-29)
30. See also *Joint Stock Company Aeroflot v Berezovsky* [2013] EWCA 784, paragraphs 70-82 per Aikens L.J. [↑](#footnote-ref-30)
31. [2003] 2 Lloyd's Rep. 430. See also *Hussmann v Pharaon* [2003] EWCA Civ. 266 [↑](#footnote-ref-31)
32. [2003] EWCA Civ. 266, and see *The Eleni P* [2014] EWHC 4202 (Comm) para 38 [↑](#footnote-ref-32)
33. [2012] 1 Lloyd's Rep. 275, affd. [2012] 1 Lloyd's Rep. 671 [↑](#footnote-ref-33)
34. [2012] 1 Lloyd's Rep. 519 [↑](#footnote-ref-34)
35. [2012] 1 Lloyd's Rep. 662 [↑](#footnote-ref-35)
36. [2012] SGHCR 10 [↑](#footnote-ref-36)
37. Including *The Front Comor* [2009] 1 AC 1138, *The Wadi Sudr* [2010] 1 Lloyd's Rep. 193**, *Marc Rich & Co AG v Societa Italiana Impianti SpA*** [[1992] 1 Lloyd's Rep. 342](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=21&crumb-action=replace&docguid=IEE0BF730E42711DA8FC2A0F0355337E9), *The Ivan Zubanski* [2002] 1 Lloyd's Rep. 106 and the cases cited therein [↑](#footnote-ref-37)
38. *Donohue v Armco* [2002] 1 Lloyd’s rep. 425 para. 24, per Lord Bingham. [↑](#footnote-ref-38)
39. *Angeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd’s Rep. 87 at 96. [↑](#footnote-ref-39)
40. See *Deutsche Bank AG and another v Highland Crusader Offshore Partners LP* [2010] 1 W.L.R. 1023 at para. 50, per Toulson LJ. [↑](#footnote-ref-40)
41. ibid. [↑](#footnote-ref-41)
42. Regulation (EU) No. 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 (recast). [↑](#footnote-ref-42)
43. Case C-159/02 *Turner v Grovit and others* EU:C:2004:228; [2005] 1 A.C. 101. [↑](#footnote-ref-43)
44. This is despite the fact that Art. 1(2)(d) of the Recast Brussels I Regulation provides that the regulation does not apply to arbitration. [↑](#footnote-ref-44)
45. Case C-185/07 *Allianz SpA v West Tankers Inc* EU:C:2009:69; [2009] 1 A.C. 1138. [↑](#footnote-ref-45)
46. See Case C-536/13 *Gazprom OAO* EU:C:2015:2414. [↑](#footnote-ref-46)
47. Recital 12 provides, *inter alia*, that: “*A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question*”. Advocate-General Wathelet stated that this passage shows that “*the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of the Brussels I Regulation (recast)*” (para. 127). [↑](#footnote-ref-47)
48. [2015] EWCA Civ 401. [↑](#footnote-ref-48)
49. [2014] EWHC 3632 (Comm). [↑](#footnote-ref-49)
50. ibid at para. 26. [↑](#footnote-ref-50)
51. ibid. para. 24. [↑](#footnote-ref-51)
52. Ibid. para 38. [↑](#footnote-ref-52)
53. [2015] EWCA Civ 401 para. 63. [↑](#footnote-ref-53)
54. [2015] Q.B. 366. [↑](#footnote-ref-54)
55. [2014] 1 Lloyd’s Rep. 337. [↑](#footnote-ref-55)
56. See e.g. *Thomas & Co. Ltd v Portsea Steamship Co. Ltd (The Portsmouth)* [1912] A.C. 1. [↑](#footnote-ref-56)
57. [2015] Q.B. 366 at para. 15. [↑](#footnote-ref-57)
58. [2015] EWHC 258 (Comm). [↑](#footnote-ref-58)
59. Following *Schiffahrtgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd’s Rep. 279. [↑](#footnote-ref-59)
60. [2015] 1 Lloyd’s Rep. 266. [↑](#footnote-ref-60)
61. [2013] 2 A.C. 337, para. 46.. [↑](#footnote-ref-61)
62. [2010] 1 W.L.R. 1023, para. 110. [↑](#footnote-ref-62)