

NEIL KAPLAN LECTURE
THE CENTRALITY OF CONTRACTUAL INTERPRETATION
A COMPARATIVE PERSPECTIVE
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One of the most appealing aspects of involvement in international commercial arbitration is the opportunity it gives participants to engage with legal systems different from their own. A common-law arbitrator will sit with co-arbitrators from different law systems, decide cases where the law of the contract is foreign to him or her and have the proceedings conducted and submissions made by counsel who practice in a quite different manner. Lawyers engaged in this area of dispute resolution have our minds broadened by this process.

THE SCOPE OF INTERPRETATION

In my experience, both as a judge and as an arbitrator, the majority of commercial disputes involve questions of contractual interpretation. Often, such questions are at the heart of the dispute. Some familiarity with the different approaches to the process of interpretation by different legal systems is an important part of the intellectual toolkit required for those involved in

international commercial arbitration. A comparative perspective will help us understand what is going on and what we have to do.

The process of interpretation, or construction as it is sometimes called, encompasses a range of frequently arising issues beyond dictionary definitions, including:

- Deciding whether to depart from the natural and ordinary meaning of words
- Deciding whether to read down general words
- Deciding whether the contractual definition of a word applies to its use in a particular clause
- Deciding whether to give qualificatory words an ambulatory meaning

I use the word “interpretation” to extend beyond simply determining the meaning of the words used in a particular contractual provision. Interpretation is also involved in the following kinds of issues:

*Determining the law applicable to the principal agreement and/or the arbitration clause, when there is no express choice of law clause.

*Identifying the parties.

*Determining the consequence when a condition precedent is not satisfied.

*Determining whether an arbitration clause in one agreement has been incorporated in a related agreement.

*Deciding whether terms should be implied in the contract.¹

*Applying the relevant doctrines of mistake, frustration or force majeure.

*Determining the severability of a provision tainted by illegality.²

*Determining whether termination or suspension of performance can be, or has been, validly made.³ (In common law terminology, deciding whether a promise is a condition or a warranty.)

As this list makes clear, I cannot possibly cover all these issues in a single lecture. I set it out in order to emphasise the centrality of interpretation in the tasks performed by those involved in international commercial arbitration - from drafting a contract, right through any dispute resolution process, to a final award and, then, to enforcement.

The law of contractual interpretation is part of the substantive law. It is not a matter of procedure which a tribunal is authorised to determine in its discretion. Accordingly, the law chosen to govern the contract or, if different, the arbitration clause, must be applied. In the case of the arbitration clause, which is jurisdictional in character, the importance of correctly applying the law is of central significance.

I recognise that there is considerable flexibility in any process of interpretation. There is even scope for reasonable divergence when determining the meaning of words in their context.⁴

The first requirement when interpreting any text is to understand, and give full weight, to the nature of the document. When interpreting a commercial document, in my opinion, a central consideration is to maximise the commercial certainty that the words permit. Certainty enhances the ability of commercial parties, perhaps with legal advice, to determine their rights, and assess their risks, including as soon as a dispute arises. The process of interpretation often involves the resolution of a tension between certainty or efficiency, on the one hand and accuracy or fairness, on the other.

By “accuracy” and “fairness”, I refer to the determination of what the actual intention of the parties was with respect to a contractual provision for other aspects of the contract, the subject of interpretation. This objective is often described in terms of the “reasonable expectations of the parties” or, even more dramatically, in terms of “justice”. However the weight given to this element, whether in a Court or in an arbitral tribunal, may undermine the certainty and predictability required in a commercial context and increase the transaction costs of the contractual relationship. As is so often the case, reasonable people can differ as to where the balance between such conflicting objectives should be drawn.

It is necessary for those involved in commercial arbitration to either develop familiarity with, or acquire ad hoc, the principles of interpretation applicable in legal systems with which they may not be familiar. There are significant differences between the approach of common-law systems on the one hand, and civil law systems on the other. However, there are also very significant differences between jurisdictions of each system. Lawyers in the United States and those in England do not approach questions of interpretation in the same way. Civil law nations that derive their codes from Germany are also not the same as those that derive their codes from the French or the Dutch.

I do not wish to exaggerate these differences. When it comes to determining the meaning of words, the principles of interpretation in different systems are similar and, often, the same. That is not necessarily the case for the other interpretive tasks I have listed. Further, there are relevant differences in the codes and statutory provisions.

The mode of proof of foreign law is a matter which has concerned me. I believe the use of expert evidence, as the mechanism for informing the court of foreign law, to be generally inadequate.⁵ The problems that can arise are highlighted by the *Dallah* litigation, to which I will refer again. For present purposes, it is sufficient to say that the English judges on an enforcement application applied French law and set aside the award on jurisdictional grounds. Subsequently, the French court came to the opposite conclusion and ordered enforcement.

As one commentator observed:

"The *Dallah* case shows that, even though the English courts honestly tried to follow the French approach to the problem, such approaches are so alien to the English way of reasoning that they simply could not overcome the fact

that, obviously, it had never been the intention of the government of Pakistan to be bound by the contract. And they did not refer to the objectivist trend of the French case law, the existence of which made it obvious, for a specialist of French arbitration law, that the award would *not* be set aside”.⁶

This is a good example of how difficult it is to adapt to, and apply, a different legal tradition.

JURISDICTION

The principle of Kompetenz – Kompetenz under which an arbitral Tribunal has power to determine its jurisdiction, is now validated by legislation and in institutional rules. However, unlike the German origins of the terminology, in international arbitration this is not an exclusive power. It only means that usually a court will allow the tribunal to determine the jurisdictional issue first.

Justice Frankfurter once described the idea of jurisdiction as “a verbal coat of too many colours”.⁷ On another occasion he referred to the “morass” in which

one can be led by “loose talk about jurisdiction” and concluded that “‘jurisdiction’ competes with ‘right’ as one of the most deceptive legal pitfalls.”⁸ We do not seem to have much trouble with deploying the word “rights” these days. In the arbitration context the concept of jurisdiction – or authority or mandate – is the legal manifestation of the autonomy of the parties. They have stated what they have agreed to submit to arbitration.⁹

Subject to differences in statutory regimes, the scope of the supervisory jurisdiction of courts does not extend to errors of law made by the Tribunal. Something more egregious is required. I prefer the terminology of “jurisdictional error”. This terminology has fallen into disuse in much of the common law world since the House of Lords abolished the distinction between jurisdictional and non-jurisdictional error for purposes of administrative law.¹⁰ The distinction remains at the heart of Australian administrative law.¹¹ I find the distinction useful and applicable in the context of the exercise by courts of their powers to set aside or enforce arbitral awards. I note that the Supreme Court of India has applied the terminology in a recent judgment on a domestic arbitration.¹²

I accept that there is no single test or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.¹³

However, as Murray Gleeson, a former Chief Justice of Australia, once pointed out “Twilight does not invalidate the distinction between night and day”¹⁴

Non-jurisdictional error is concerned with correctness. Jurisdictional error is concerned with integrity. The former is not relevant to review of arbitral awards.¹⁵ Integrity most definitely is. The idea of integrity is, in my view, a useful way of confining court intervention.

The principal purpose of the limited grounds upon which courts are empowered to set aside an award or refuse enforcement of an award is the maintenance of the institutional integrity of international commercial arbitration. The confidence of the commercial community in arbitration depends, in large measure, on the knowledge that the process will maintain a high degree of personal and of institutional integrity. The supervisory jurisdiction assists in maintaining such confidence by ensuring that, on those few occasions when that confidence may not be fulfilled, the failure is capable of correction.

An authoritative statement of the jurisdictional nature of judicial review under the New York Convention was set out by Sir Anthony Mason NPJ in his oft – quoted 1999 judgment in *Hebei Export & Import Corporation*¹⁶. His Honour’s analysis remains apt.

- (i) The primary supervisory function is with the court of the seat, as distinct from the enforcement court; (This is subject to supra national arrangements, as the English courts found in the *West Tankers* imbroglio – to use a term which, appropriately, means the same in English and Italian).
- (ii) The enforcement court will not necessarily defer to the court of supervisory jurisdiction;
- (iii) The Convention, by providing the specified grounds on which enforcement may be refused, recognises that refusal could occur even for an award that is valid by the law of the seat and, further, even if that court has refused to set aside the award.

In *Dallah*¹⁷ Lord Mance stated, concisely, that the Tribunal’s decision on its own jurisdiction is “of no legal or evidential value”. This renewed focus on jurisdiction was subsequently followed by the High Court of Australia in *TCL*¹⁸

and in Chief Justice Sundaresh Menon’s judgment for the Singapore Court of Appeal in *Astro*.¹⁹

The *Astro* decision culminates a Singapore development of which I first became aware when, at the invitation of former Chief Justice Chan Sek Keong, I attended the fourth Singapore Academy of Law Conference in 2011. The Conference commenced with two papers by lawyers who had played a substantial role in ensuring that Singapore was widely regarded as an “arbitration friendly” jurisdiction. Quentin Loh and Michael Hwang both delivered papers in which they suggested that the Singapore courts had been too reluctant to exercise their supervisory jurisdiction.

Quentin Loh repeated the analysis he had given in a case²⁰, which questioned a previous Singapore High Court judgment,²¹ on the basis that it had given excessive deference to the Tribunal's decision on jurisdiction. He relied on the decision in *Dallah*.²² Similarly, Michael Hwang in his paper developed the concept of “egregious errors” as a basis for intervention.²³ His paper was subtitled, provocatively, “Are the Singapore Courts too Arbitration Friendly?”

The limited grounds for refusing enforcement set out in Article V.I of the New York Convention are jurisdictional in character. The grounds in Article V.2 are of a different character. Article V.I is replicated in Article 36 of the UNCITRAL Model Law and adapted, in terms, by Article 34, to restrict the grounds for the exercise of the supervisory jurisdiction at the seat.

For purposes of the law of contractual interpretation, the key jurisdictional grounds are Article V.I(a) - the “agreement is not valid” - and Article V.I(c) - the award deals with a dispute not “within the terms of the submission to arbitration” or decides matters “beyond the scope of the submission to arbitration”.

Article V.I has been so widely adopted that its provisions constitute an international standard of grounds for jurisdictional review. Accordingly, in the recent *Astro* decision, the Singapore Court of Appeal applied these precise grounds to inform the exercise of the discretion to refuse to enforce a Singapore award under S 19 of the *International Arbitration Act*. It did so even though the Singapore legislation, which otherwise adopts the Model Law, expressly excluded those provisions of the Model Law.²⁴

The arbitration texts are full of examples where courts have rejected jurisdictional challenges. There are, however, recent decisions to the contrary.²⁵

The combined effect of *Dallah* and *Astro* will be significant throughout the common law world. The frequency with which Article V.I(a) and (c) will be invoked may change, particularly as the expansive use of the public policy ground has been discredited. The application of V.I(a) and (c) would be more orthodox and, if I may be permitted to observe, more honest.

The pro-arbitration policy of legislation adopting the Convention means that Article V.I(a) and (c) will be construed narrowly. However, they cannot be deprived of content, even where commercially inconvenient. It may well be that *Dallah* and *Astro* will take common law courts away from the stricter approach manifest in many civil law jurisdictions and some United States jurisdictions.

In his recent Freshfields Lecture Jan Paulsson addressed a proposition - with which I agree - that there should be a presumption that the arbitral tribunal should be the first to decide issue of parties to, and validity of, an arbitral clause. However, he added the following extract from his forthcoming book :²⁶

“Although judicial review may be plenary with respect to the validity of the arbitration agreement, arbitrators determination as to the *scope* and *timelines* of arbitrable claims should be presumed to be final.”

As to scope, this view will probably not prevail in all courts, especially in the light of *Dallah* and *Astro*. There is authority that an anti-arbitration injunction will be issued when there is a dispute about whether there was a valid arbitration agreement, but not if there is an issue about the existence of a dispute.²⁷ However, that reasoning turned on the legal rights created under the 1950 *Arbitration Act* (UK). There is support for the proposition in United States case law, but that also applied to a statutory context.²⁸

It is not apparent to me that the jurisdictional issue differs under paras (a) and (c) of Article V.I. The jurisdictional errors found in Article V.I, as adopted in most national legislation, are not differentiated in any way. It is hard to see why a court should exercise a judicial review function, as a rule, in one category but refuse to do so, as a rule, in another. On the test I propose, each of the grounds can affect the institutional integrity of an arbitration.

It is, of course, desirable that approaches to jurisdictional limits amongst the nations bound by the New York convention are harmonious. However, given differences in legal traditions, there can be no reasonable expectation of identity of result, even where there are no relevant statutory differences.²⁹

The great advance of the New York Convention was, subject to differences in legislation implementing the Convention, that the formulation of the scope of the supervisory jurisdiction is the same. That is worth a lot, even if differences in application are hard to eradicate.

I realise that some practitioners may regard *Dallah* and *Astro* as a partial retreat from an arbitration friendly approach. In my opinion, protecting the institutional integrity of arbitration is “arbitration friendly”. It may not be “arbitrator friendly”, but that is not the same thing. It may take food out of the mouths of the children of arbitration practitioners, but you will learn to cope.

A light-handed but effective supervisory jurisdiction does not interfere with the autonomy of the parties, which is the underlying rationale of commercial

arbitration. Unlike some of the grounds in Article V, the paragraphs relevant to interpretation are expressly concerned to enforce the parties' agreement.

CHOICE OF LAW

The focal point of any challenge for jurisdictional error is, of course, the arbitration clause. That is where the jurisdictional mandate is found. As is well known, the law of the arbitration clause may be different from the law chosen to govern the principal agreement.

It is rare for an arbitration clause to contain its own choice of law provision. Even where there is a choice of law clause in the relevant contract, if the seat differs from the law so chosen, an issue often arises as to whether the law of the seat should govern the arbitration clause. The cases and the considerable body of literature agonising about the relevant principles, suggest that an express choice is advisable in a case where the governing law of the agreement and the choice of the seat diverge.

Identifying the applicable law, in the absence of an express provision, involves a process of interpretation. The private international law rules for choice of law vary so much from one legal system to another, and the principles are so discretionary, that on many occasions different decision-makers quite reasonably, reach divergent conclusions.

In common law jurisdictions there have been periods when it was rare for the law of the arbitration clause to be found to differ from the governing law of contract. However, more recently English courts appear to proceed on the opposite basis. Subject to certain nudges in one direction or another, involving a number of criteria and matters of judgment, the law of the seat is more often chosen than it used to be.³⁰ This may involve a cognate analysis, albeit on different principles, to the “common intention of the parties” test applied elsewhere.³¹ Although the recent English application of the law of the seat will be influential, it will not be followed in all civil law or other common law systems.

What the position might be if enforcement comes to be sought in another jurisdiction is by no means certain. In some jurisdictions the presumption that

the law of the contract applies to the arbitration clause is stronger than in others. Some prefer the seat.³²

The absence of an express choice of law clause will lead to legitimate differences of opinion about what the applicable law is. Such variation, in the case of an arbitration clause, is potentially of great significance, by reason of its jurisdictional nature. The arbitral tribunal, the supervisory court and a court of enforcement could reach different views on the governing law. The absence of a choice of law provision, for the substantive provisions of the agreement, does not lead to such potential difficulties with enforcement.

Accordingly, the common failure to include an express choice of law provision in an arbitration clause can lead to uncertainty about the efficacy of the arbitration. As I will show below, this choice can have significant practical consequences. The choice deserves more attention than it usually receives.³³

It is unfortunate that many model arbitration clauses of arbitral institutions do not make any provision in their model clauses for choice of law. Some incorporate a reference, but just leave a blank. It may focus attention if a model

clause provided words to the effect that the law applicable to the clause will be the law of the seat, or the law of the contract - the most common alternatives - with an indication that one should be struck out.

I am aware that many arbitral tribunals, in the absence of an express choice of law provision, proceed on the basis that, in an international arbitration, the applicable law should not be national, but “transnational”. French courts validate this approach. However, as *Dallah* and *Astro* suggest, there are dangers in doing so if enforcement is sought in other jurisdictions which do not accept the concept of a de-localised arbitral system.³⁴

However desirable it may be to encourage express choice of law in an arbitration clause, it is unlikely to become common practice soon. The range of differences on critical aspects of a tribunal’s jurisdiction, which I will outline below, also suggest that a tribunal should be informed about, and consider, where an award may have to be enforced. Often that is obvious. Perhaps more often it is unpredictable. However, in my, albeit limited, experience, it is not done at all.

A primary duty of a tribunal is to produce an enforceable award. Arbitrators need more help in fulfilling that duty. If a Claimant's counsel is aware that enforcement may be restricted to particular jurisdictions, attention should be given to the distinctive requirements for enforcement in those places. Arbitrators may need to adapt their decisions and procedures to those requirements.

CONDITIONS PRECEDENT

There are significant differences in the interpretation of provisions establishing multi-tiered dispute resolution clauses. These extend to requirements for mediation prior to the commencement of litigation or arbitration and escalation clauses, requiring differences to be referred up through the levels of management within each corporation. Traditionally, such provisions were characterised by common lawyers as no more than agreements to agree and, accordingly, were unenforceable because of a lack of certainty.³⁵ Sometimes the requirements of certainty were satisfied.³⁶

English courts continue to require a considerable degree of detail about the specific steps each party is required to take, the process for selection of the mediator, the identification of the procedure to be adopted and how the process will end.³⁷ Hong Kong courts have followed this approach.³⁸ So have courts in Australia.³⁹ However, this may be changing. Recently, an obligation to “undertake genuine and good faith negotiations” has been held to be sufficiently certain and enforceable.⁴⁰

Singapore courts have also taken a different approach. The cultural significance of mediation in Asia, as compared with European cultures, has been emphasised in Singapore case law as a basis for giving greater weight to a provision for negotiation in good faith (which the court said was no different to an obligation to mediate). This was held to be an enforceable precondition, even though the agreement lacked the degree of detail required in other jurisdictions.⁴¹

Similarly, in another Singapore case, it was held that failure to comply with an escalation clause prior to arbitration would result in the arbitral tribunal not having jurisdiction.⁴²

Such differences in approach to the enforcement of preconditions to arbitration , is the first of a number of reasons why an express choice of law clause in the dispute resolution provision is advisable.

SCOPE

There are now numerous model arbitration clauses available, not least from the different arbitral institutions, that seek to overcome the perceived narrow interpretations of scope in past cases. I am not saying we can be complacent about the drafting, but there are fewer cases that fail by reason of a narrow interpretation of a clause.⁴³

By reason of changes in the judicial approach to interpretation, at least in the jurisdictions with which I am most familiar, the literal approach of past cases is no longer applied. For example, the words “arising under” are no longer interpreted to be narrower than “in connection with”.⁴⁴ This has long been the case in many European courts, and in the majority of United States’ jurisdictions. The approach has now spread throughout the common law world.

This is only one manifestation of the movement from text to context as the principal approach to contractual interpretation over the last few decades.⁴⁵ The law, one must always bear in mind, is a fashion industry. I detect some drift back from context to text, at least in a cognate oscillation in statutory interpretation. That is a topic for another day.

The liberal approach to construing arbitration clauses in a commercial context, particularly an international commercial context, is based on the presumption against multiplicity of proceedings. Commercial parties do not intend to have disputes arising from their relationship to be heard in more than one tribunal.⁴⁶ Of particular influence throughout the common law world is the strong presumption to this effect accepted by the House of Lords in *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40. This approach had been adopted by many courts, even before this judgment, as acknowledged in *Fiona Trust* itself.⁴⁷ Statutory causes of action and tort claims will now more frequently be found to fall within the terms of a provision which, ostensibly, is concerned only with contractual causes of action.

Nevertheless, there is considerable scope for judicial discretion in the application of what purports to be a liberal approach to interpretation. The

distinction between “literalism” and “liberalism” involves a continuum. It is not an on/off switch.

In my own former court, two recent cases indicate a different approach to the application of *Fiona Trust*.⁴⁸ There is a similar conflict in other courts.⁴⁹

There seems to be a significantly different approach adopted in the United States by the Federal Courts of the 9th Circuit, when compared with those of other Federal Circuits. Judges in the former appear to take a restrictive approach to interpreting scope.⁵⁰ I pause to point out that the 9th Circuit is more likely than any other Circuit to have its decisions overturned by the Supreme Court of the United States.

There remain jurisdictions which still take a literal approach, for example China.⁵¹ In 2006 the Supreme Peoples’ Court issued an Interpretation concerning the Application of the Arbitration Law which included an expansive application to all aspects of the contract, but not beyond. When considering the overlap between an arbitration clause and a cause of action in tort, the Supreme People’s Court applied the principle against multiplicity of proceedings *against*

arbitration. It held that both the contractual and the tortious aspects of a dispute (involving non-signatories,) should be heard by a court, and even the former should not be heard by the arbitral tribunal.⁵²

There are circumstances in which English and Australian courts will reach a similar conclusion.⁵³ One Australian court read down an arbitration clause to avoid multiplicity of proceedings on the same issue.⁵⁴ However, the general approach in England, Hong Kong and Canada is to allow the arbitration proceeding to proceed with respect to matters that do fall within the arbitration clause, even if that meant multiplicity of proceedings.⁵⁵ Indeed, the Supreme Court of the United Kingdom has enforced an arbitration clause by ordering a stay of court proceedings, even in a case where neither party had any intention of initiating an arbitration.⁵⁶

INTERRELATED AGREEMENTS

Difficult issues of interpretation can arise when an arbitration clause is contained in one of a number of interrelated agreements. There is a wide spectrum of such documentation: from clearly separate agreements on the one

hand (sometimes referred to as a “two contract case”), to a series of interrelated contracts amongst multiple parties, on the other (sometimes referred to as a “composite agreement”).

Nations which have adopted the Model Law, in whole or in part, have almost universally enacted Article 7 (6), affirming an arbitration agreement exists where there is a “reference” in one document to another containing an arbitration clause “provided that the reference is such as to make that clause part of the contract”. Those words involve a process of reasoning, and contractual interpretation, on which reasonable minds can differ.⁵⁷ The decision will turn on the terminology of the incorporation clause and of the arbitration clause in their broader context and, in some jurisdictions, by application of the requirements of good faith.

This issue often arises in the context of bills of lading, which incorporate and, theoretically annex, a charter party containing an arbitration clause. The negotiability of the bill of lading has frequently given rise to disputes as to whether the holder for the time being is bound by the arbitration clause. Suffice it to say, for present purposes, that there do appear to be significant differences between courts, indeed between judges, on this issue.

United States courts, generally, adopt a liberal and pro-arbitration approach to construing related documents: when determining whether a bill of lading refers to the charter party; whether it did so to the knowledge of the holder and whether the scope of the arbitration clause is sufficiently wide to cover non-parties to the charter party.

Traditionally, English courts have taken a much stricter approach to resolving each of these aspects of the issue of incorporation. General words have not been regarded as sufficient. Usually there must be an express reference to the arbitration clause.⁵⁸

Another context in which incorporation by reference is common is construction contracts, for example, where a head contract and a sub-contract are entered into on “back-to-back basis”. In such cases the interpretive task is often whether to read the words “employer” and “contractor” in the arbitration clause of the principal contract, as encompassing “contractor” and “sub-contractor” in the subordinate agreement.

Under the twin influences of the *Investors Compensation* approach to contextual contractual interpretation and the *Fiona Trust* approach to interpretation of arbitration clauses, in England there appears to be a shift from an earlier requirement of express reference and rejection of the efficacy of general incorporating references, at least in the building and construction context.⁵⁹ Not yet, it appears, in the bill of lading context.⁶⁰

A third context in which this issue often arises, leading to similar divergence of views, is reinsurance. The different approaches taken by United States and English courts in bills of lading cases has been carried over into this context.⁶¹

It appears that some Chinese courts adopt an approach similar to the United States, and others similar to England.⁶² A liberal approach to incorporation by general language is also taken by the courts of Switzerland and France. However, a restrictive approach is taken in Germany.⁶³ In Hong Kong something more than a general reference appears to be required, but not an express reference.⁶⁴

The choice of the law applicable to an arbitration clause has real, practical consequences in this respect also.

NON SIGNATORIES

One of the most contentious areas of interpretation of an arbitration clause with jurisdictional implications is the issue of whether, and in what circumstances, a non-signatory can be found to be bound to arbitrate. There are major differences between jurisdictions about when a corporation which is not, quite often by express design, a party to a particular contract can be treated as if it were a party.

Setting aside well-established principles such as agency, subrogation, succession or assignment, the issue is one of implied consent to arbitration. The objective of minimising multiplicity of legal proceedings, particularly when identical or overlapping issues have to be decided, often inform this process. However, what is involved in binding non-signatories is jurisprudentially quite different to interpreting the words of a contract between acknowledged parties in a liberal manner, as occurs in the *Fiona Trust* line of cases.

The principle of French law, accepted on the expert evidence, by the English courts in *Dallah*, was that an arbitration clause is “extended to parties directly implicated in the performance of the contract and in any disputes arising out of the contract.”⁶⁵ No common law jurisdiction accepts a principle remotely like that. There are other civil law systems which have similar principles, for example Switzerland, but not Germany. Under S 1031 of the German Civil Code of Procedure, a requirement of writing is strictly required.⁶⁶

Where there is such a clear code provision, a tribunal or a court in a different jurisdiction, will have little difficulty in applying that law, if faced with a case where the law of the arbitration clause is, say, German. The position will not be as clear if one is asked to apply a test like the “principle of interpretation in good faith” (to be discussed below) or whether a party is “directly implicated in the performance of a contract”. It is not predictable how that matter will be resolved in an enforcement court asked to apply French or Swiss law. Implied consent by conduct is a standard of considerable flexibility which will necessarily be affected by the jurisprudential traditions of the lawyers who have to decide it.

There are three bases upon which the joinder of non signatories can be reviewed for jurisdictional error under the New York Convention and Model Law standard.

1. First, there is no arbitration “agreement” within Article II of the Convention. The Victorian Court of Appeal approached the matter in this way in *IMC Aviation Solutions P/L v Altain Khander LLC* [2011] VSCA 248.⁶⁷ The existence of such an agreement, the Court held, is a precondition antecedent to the application of the Article V (or Articles 34 and 36 of the Model Law).⁶⁸
2. Secondly, the agreement is not “valid” under Article V.I (a) or Article 36(1)(a)(i) or 34(2)(i). The validity basis is referred to in *Dallah* (as common ground between the parties) and adopted in *Astro* in the formulation: “valid in the sense it was even formed”.⁶⁹ This basis is often referred to in texts. This seems a strained concept of “validity” to me.
3. Thirdly, under Article V.I (c) and Article 34(2)(iii) or Article 36(1)(a)(iii), the matter is not within the “dispute contemplated” or does

not fall “within the terms of the submission to arbitration” or contains decisions “beyond the scope of the submission to arbitration”.

In my view, which I acknowledge is not widely shared, the issue appears to fit more naturally within the language of the third basis. There may be a limited practical difference. Article V.I(a) has its own default choice of law rule i.e. the seat. Article V.I(c) has no such rule and this may pose problems when the law of the arbitration clause is not express. Subject to such considerations, it makes little difference as to which of the three approaches is adopted. Each is jurisdictional.

There is a significant literature on the application by arbitral tribunals of principles which enable persons who control actual signatories to be joined as if they were signatories. In many European nations and in many United States jurisdictions, the application of good faith, as a freestanding principle, leads to related parties being bound by agreements even when, perhaps especially when, they had done everything possible to avoid being parties. (As Pakistan did in *Dallah*.)

In the context of corporations, this is sometimes described by the metaphor of “lifting the corporate veil”, to bind parent corporations or shareholders. In the arbitration literature there is a distinct “group of companies doctrine” and an “alter ego” theory. These are different, albeit overlapping, jurisprudential approaches which turn on interpretation in the broad context of the relevant contract and conduct.⁷⁰

There is a dispute as to whether a “group of companies” doctrine adds anything to the principles on which consent will be implied.⁷¹ As a separate “doctrine” it is hard for common lawyers to accept. *Peterson Farms*, the English case that rejected the “group of companies doctrine” in an arbitral context, remains the basic authority.⁷² The Indian Supreme Court referred to the “group of companies” doctrine with approval.⁷³ As far as I am aware, it is the only common law jurisdiction to do so.

The Supreme Court of the United Kingdom has recently affirmed that in English law the circumstances in which the corporate veil can be lifted are very restrictive.⁷⁴ Most common law jurisdictions with which I am familiar adopt a similarly strict approach. Its recent reaffirmation by the Supreme Court of the United Kingdom will prove influential.

Many in the arbitral community have advocated that common law jurisdictions should follow the European approach, at least in the arbitration context.⁷⁵

Notwithstanding the frequently expressed pro-arbitration presumptions adopted by courts, binding non parties will often prove to be a bridge too far. There are limits to the extent to which the desire to avoid multiplicity of proceedings can be taken.

If the governing law of the arbitration clause is French or Swiss, or another civil law nation which adopts their approach, non-signatories will readily be joined, as in the foundational *Dow Chemical* case of the Paris Cour d'Appel. However, if the governing law is German, or another civil law nation that has adopted the relevant provisions of the German Civil Code, then they may not be. In the United States, it appears to depend on which jurisdiction, including which Circuit of the Federal Court, is considering the matter. In China, the courts do not extend arbitration clauses to non parties.⁷⁶

Any lawyer drafting an arbitration clause in a contract for a subsidiary of a corporate group would be well advised to expressly choose the governing law of the arbitration clause. If the law of the seat, or the governing law of the

contract, is of a jurisdiction which readily lifts the corporate veil – especially on unpredictable good faith grounds or on the “group of companies” basis – liability may unexpectedly be found to extend to a parent corporation or to controlling shareholders.

It appears that many international arbitral tribunals have tended to adopt a broad view of their jurisdiction to lift the corporate veil in the interests of avoiding multiplicity of proceedings and to ensure the practical efficacy of the award. That proclivity, however, increases the risk of jurisdictional challenge. At the very least, the end result, in the range of possible courts of enforcement, is often unpredictable.⁷⁷

It does not appear to me that, at least in common law jurisdictions, the Rules of arbitral institutions can resolve the issue. In *Astro* one issue turned on the interpretation of the SIAC Rule permitting joinder, as it was in the 2007 SIAC Rules, (Rule 24 (b)). It is one thing to say that, by adopting institutional rules, the parties are contractually bound by them. It is quite another thing to extend the application of such a rule to a person who cannot be treated as a party on any other basis.

As the Singapore Court of Appeal held in *Astro*, it is the “arbitration agreement that sets the parameters of the jurisdiction and, accordingly, a Rule cannot be used to go beyond the submission to arbitration.” [181] – [182] and [185]. In that case, the Court of Appeal interpreted the arbitration clause to apply only to the signatories to the Shareholders Agreement and emphasised that forced joinder of non signatories would be “a major derogation from the principle of party autonomy”. [188]

Arbitral institution Rules vary in their provision for third party claims.⁷⁸ If an arbitral tribunal is to assume a jurisdiction which binds strangers to a contract against their will, such powers must be found in a statute, not in the contractual adoption of institutional rules by the parties to the contract.

I realise multiparty disputes have caused much angst in the arbitral community. No one is in favour of multiple proceedings unless, after the dispute arises, they see practical advantage in complexity and delay or in forum shopping. However, there are limits to which fragmentation can be avoided.

PATHOLOGICAL CLAUSES

Like any other contractual provision, arbitration clauses will sometimes contain verbal and grammatical errors which require interpretation. These defects come in all shapes and sizes: the parties may use permissive language such as “may”, qualifying the reference to arbitration; they may refer to facts, such as organisations which simply do not exist, or contain other mistakes of fact or of language.

It becomes necessary to apply the principle of interpretation which, as far as I am aware, exists in all systems, that a decision maker should strive to give meaning to each provision, sometimes referred to as the principle of effective interpretation. It is only in the context of commercial arbitration that such a contractual defect is referred to as “pathological clause”. This appears to me to be rather self-absorbed terminology.

A pro-arbitration interpretation is often adopted in the case of clear mistakes of facts, such as the nonexistence of the chosen arbitral institution. So, in Germany, the Federal Supreme Court decided that when reference was made to

a non-existent tribunal an ad hoc tribunal could be appointed.⁷⁹ Other courts have adopted a similar approach.⁸⁰ Somewhat more controversially, the courts of Singapore have allowed SIAC to conduct arbitrations under ICC Rules, even though the agreement referred to a non-existing Singapore-based arbitral institution.⁸¹

In a number of Chinese cases, permissive language – “may refer to arbitration” – was interpreted as enabling either party to do so and, accordingly, the courts stayed litigation. However, in the case of reference to an arbitral institution that did not exist, the clause was found to be inoperative.⁸² In France, a unilateral right to refer to arbitration was declared invalid as “potestative” by the Cour de Cassation. An English court expressly refused to follow it, when applying Mauritian law, adding that English law was clearly to the contrary.⁸³

Where superior courts of the law of the arbitration clause have ruled on such a matter, an enforcement court would no doubt apply that ruling. More often than not, however, there is no such precedent or scholarly treatment on which to rely. Inevitably, the decision maker will bring to the problem his or her own approach to the application of the principle of effective interpretation. That will differ from jurisdiction to jurisdiction and, indeed, from judge to judge.

APPROACHES TO INTERPRETATION

I have written a number of articles on contractual interpretation.⁸⁴ One article was an exercise in comparative law, surveying the different approaches in England, Australia, Hong Kong, Singapore, India, Malaysia and China, although the section on China was not included in the published version, but is available online.⁸⁵

Time does not permit me to summarise or duplicate this analysis here. I note that the contextual approach, often associated with the judgments of Lord Hoffmann, has continued to be upheld by the Hong Kong Court of Final Appeal.⁸⁶ The contextual approach in Singapore has recently received detailed guidance in *Sembcorp*, which qualifies some of my earlier analysis about the law in Singapore.⁸⁷

It is, of course, a longstanding principle – even in the days of literalism – that a commercial document must be read in a business-like manner.⁸⁸ The focal point of my earlier articles was to set out the spectrum of judicial approaches now

deployed to determine the scope of the relevant context, particularly in common law jurisdictions.

On the one hand, there is the highly influential approach of Lord Hoffmann—the relevant background extends to “absolutely anything which a reasonable observer would have regarded as relevant to the interpretive task”.⁸⁹ On the other hand, is the position of the High Court of Australia which continues to require a finding of ambiguity prior to delving into background beyond the document and immediate context, to require any background knowledge to be known to both parties - not simply to be “reasonably available” to them - and to determine the admissibility of evidence by the traditional parol evidence rule.⁹⁰

Since my earlier articles a new, and fundamental, division between the Supreme Court of the United Kingdom and the High Court of Australia has emerged as a result of the judgement of the former in *Rainy Sky*.⁹¹ I note that the Hong Kong Court of Final Appeal has referred to this judgement with approval.⁹² I do not have time to analyse the full implications of the “iterative” approach to contractual interpretation adopted in that case. It is in some respects an attractive proposition.⁹³

The new area of substantive difference in legal principle is the adoption of a test of interpreting a document in accordance with “business commonsense”. This involves the rejection of the previous principle that a business-like interpretation to a commercial document requires no more than the rejection of an interpretation that “flouts common sense”⁹⁴ or leads to an “absurd” result or “illusory” benefits. I have earlier expressed my fear as to the implications of this approach for commercial certainty.⁹⁵

As the High Court once put it in a joint judgement:

“‘Business common sense’ is something on which reasonable minds may differ and in respect of which an imputed consensus of an objective character is simply impossible.”⁹⁶

In an intriguing address by Lord Mance to a joint conference of the Chancery Bar and the Singapore Academy of Law in April of this year, his Lordship suggested that the origins of this difference may be found in the different traditions in London of the Chancery bar and the Commercial Court bar: the latter being much more content than the former to make findings as to what businessman would regard as sensible.⁹⁷ In turn, the Australian position may be significantly influenced by our tradition of Equity exceptionalism – which a

Restitution scholar would call evangelical - particularly in my own State of New South Wales.

In this context there are significant practical consequences arising from, first, the difference between subjective and objective approaches to contractual interpretation and, secondly, the role played by the concept of good faith in the interpretative process.

As one civil lawyer put it in the context of discussing “consent”, in language which would never be accepted by a common lawyer:

“The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith; and this rule of interpretation means that the parties true intention should always prevail over its declared intention – when the two are not the same”.⁹⁸

The critical role that the notion of good faith plays in the process of interpretation has been emphasised by other scholars.⁹⁹ Few common law jurisdictions deploy such a principle in this process, either directly or indirectly.

It is over-simplified, but useful, to state the differences between common law and civil law approaches in broad terms. The common law has an objective concept of contractual obligation, with a number of subjective exceptions. The basic approach in civil law systems is subjective, with some objective exceptions. In the common law tradition, the basal question is “What is the meaning of the words used?” In the civil law tradition the basal question is “What was the intention of the parties?” These are different starting points.

Common law judges often use the language of “intention”. However, in substance, this is not an independent test. Wherever it appears in the reasoning, it is really a mode of expressing a conclusion.

In many civil law systems, notably under the French Code (and in the CISG), the subjective intention of the parties is the first approach when interpreting a contract but, if the decision maker is not able to determine the common intention, then the matter must be determined on an objective basis from the words of the agreement. This objective alternative is frequently the basis on

which decision makers in fact decide an issue of interpretation. The principal reason is the restrictions on the availability of evidence of common intention.¹⁰⁰

In some civil law systems, e.g. Germany and China, the subjective and objective are applied simultaneously in a dialectic manner. That is why scholars disagree as to whether China has an objective or subjective theory of contract.¹⁰¹

A basic theme of comparative law scholars over recent decades has been the convergence between common law and civil law. Numerous commentators note that the end result in cases requiring interpretation of contracts is often the same in common law and civil law system, notwithstanding the fundamental difference in approach.

Commercial litigation is an area in which there is a considerable element of convergence in practice between the two systems. Contract disputes in many civil law jurisdictions, unlike other areas of litigation, are often adversarial in the sense that the collection of evidence is made by the parties. Nevertheless, the traditions do differ.

When assessing the degree to which principles of contractual interpretation have moved from text to context, as discussed above, we should bear in mind the well known dictum of Sir Henry Maine: “Substantive law is secreted within the interstices of procedure”.

The fact that the result is often the same in the two kinds of system is, in my opinion, determined by differences in procedure, particularly with respect to the gathering of evidence. Common law procedure controls the *admissibility* of *available* evidence. Civil law procedure controls the *availability* of *admissible* evidence.

AVAILABILITY OF EVIDENCE

Of particular significance for my comparative analysis in the context of international commercial arbitration is the existence of different approaches to the scope of evidence, especially documentary evidence, available for purposes of interpretation. This is especially so in the case of an arbitration clause, where the implications are jurisdictional. However, it is also significant for interpreting substantive provisions of the contract, where a tribunal is required to apply a governing law with which it may not be familiar.

The exclusion of pure statements of subjective intention is a manifestation of the objective theory of contract which remains dominant throughout the common law world. However, in England, and jurisdictions influenced by its jurisprudence, the last remnant of the traditional parol evidence rule is the exclusion of evidence of pre-contractual negotiations, accepted to be an anomaly.¹⁰²

The parol evidence rule remains a fundamental principle in Australian jurisprudence.¹⁰³ However, even in Australia the application of the rule can vary from a judge to judge, and court to court, by reason of the flexibility inherent in various aspects of the rule, notably when it is contested whether the whole of the agreement was in fact in writing.

United States literature distinguishes between jurisdictions which apply a “hard parol evidence rule” and those which apply a “soft parol evidence rule”. In the former, like the New York or Delaware courts, there is a strong presumption that a contract which appears to be final and complete on its face should be accepted as such. In the “soft” rule jurisdictions, which needless to say include California, the presumption is more readily overridden.

Of particular interest is the adaptation to the English contextual approach by common law courts which have a statutory enactment of the parol evidence rule in the form of Sir James Fitzjames Stephens' *Evidence Act* in India (other than Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Myanmar, Malaysia and Singapore, as well as a number of nations in Africa and the West Indies. I will update my earlier analysis¹⁰⁴ by reference to two recent cases.

The Supreme Court of India has affirmed that the parol evidence rule does not apply to determination of jurisdiction under an arbitration clause “because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract”.¹⁰⁵ It may be that this takes severability too far.

Secondly, the wide scope for introducing extrinsic evidence by reason of exceptions to the parol evidence rule has been identified in a recent judgment of the Court of Appeal for Malaya.¹⁰⁶

Most significant is the detailed analysis by the Court of Appeal of Singapore in *Sembcorp*, to which I refer with some hesitation because of its references to my own writings.¹⁰⁷ In the judgement of Chief Justice Sundaresh Menon, the Court lays down some innovative requirements of a procedural character which will, if adopted, go a long way to limit the adverse consequences on commercial certainty of the attenuation of the parol evidence rule.

His Honour outlined four new requirements of civil procedure, which could well be adopted by arbitral tribunals. These are:

- (a) First, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
- (b) Second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;
- (c) Third, parties should in their pleading specify the effect which such facts will have on their contended construction; and

(d) Fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).¹⁰⁸

All common law systems struggle to control the volume of documentation on which parties seek to have access and rely in the course of the dispute resolution process. Except in United States' jurisdictions, wide spread discovery is a thing of the past in commercial litigation. Nevertheless, access to the documents of the other side is still more readily available in common-law jurisdictions than it is in civil law jurisdictions.

As a matter of practice, rather than law, it appears that many civil jurisdictions operate under a functional equivalent to a "hard" parol evidence rule. Unlike the common law, in theory all relevant materials are admissible in civil law jurisdictions, including statements of subjective intention, pre-contractual negotiations and subsequent conduct. In practice, there are significant difficulties in the proof of such matters.¹⁰⁹

The very concept of discovery, let alone the American practice, is regarded with considerable hostility by many civil law practitioners. A party initiating

proceedings is expected to be able to prove its case without the assistance of the documents of the other side.

The history of trial by jury is the origins of the fact that common law pre-trial procedure is directed to resolving all matters in a single, continuous trial. In contrast, the investigatory tradition, allows evidence gathering to occur in distinct bites. This structural difference enables the judge to control the process in a manner only recently adopted by common law judges in commercial cases. The fact that the process of obtaining evidence is an episodic process, results in a higher standard of relevance being applied before a court, or tribunal of civil law practitioners, will order the production of documents.

In Germany, for example, when a party requests documents from the other side or a non-party, the judge must be convinced that interference with the privacy of others is justified. The judge will apply a test of materiality, in both the sense of relevance and of a requirement of substantiation, i.e. a party must be able to generally describe the facts the evidence is intended to prove and to establish relevance. This is a much higher test than anything which applies in common law jurisdictions when a party seeks discovery or subpoenas.¹¹⁰

Similar restrictions apply under the French Code of Civil Procedure. The conditions for disclosure of documents are also restrictive. The applicant must identify the document and establish why s/he has been unable to obtain it. In the event, the documents available to the ultimate decision maker tend to be those which have been exchanged between the parties, not extending to internal communications which may reveal attitudes or record oral statements.¹¹¹

There are a number of other specific rules in civil law systems, varying from one jurisdiction to another, which limit the capacity to obtain evidence to an even greater degree than common law exclusionary rules.

The principles of legal professional privilege, are in some jurisdictions, more stringent than anything found in common law jurisdictions. In France the doctrine of *secret professionnel* cannot be waived, even by the clients, and the privilege is not lost even if the material becomes known to third parties.¹¹²

Similarly, German and Italian lawyers have an obligation of professional secrecy, breach of which is a criminal offence, although clients can waive the privilege.¹¹³ In Switzerland violation of professional secrecy is also a criminal offence and lawyers cannot be compelled to give evidence or produce documents, even if the client waives the privilege.¹¹⁴

Many civil law jurisdictions contain other forms of privilege which are not known to the common law. For example, in some jurisdictions a witness may refuse to testify if the testimony could dishonour him or her or a relative, or even if it is likely to cause direct pecuniary damage. (Try that excuse in an American court).

In Germany, for example, information which may bring dishonour or direct economic loss to a witness is privileged, as is a wide range of private business information.¹¹⁵ Of particular significance for commercial litigation is that the production of confidential business information is sometimes not capable of being compelled by a court at all, as distinct from being compellable, subject to nondisclosure orders.¹¹⁶

These restrictions on the availability of documents have added significance because of the different approach, which some observers have identified, to oral evidence. There appears to be a higher level of scepticism amongst civil law judges about oral evidence, particularly when given by parties. Obviously, oral evidence is an important part of the process, perhaps more so in jurisdictions influenced by German, rather than by French, procedure. Nevertheless, it appears such evidence is often given less weight than in common law jurisdictions, where cross examination is the norm.¹¹⁷

One of the most debated rules for exclusion of evidence in common law jurisdictions is the application of the hearsay rule. There is no equivalent rule in civil law jurisdictions. Nevertheless, there are other legal principles in those jurisdictions which have similar, albeit not identical, consequences.

What is referred to as “derivative evidence” has traditionally been regarded in civil law jurisdictions as inferior to primary evidence. Of particular relevance for the circumstances in which the hearsay principle would apply in a common law jurisdiction is the doctrine of “immediacy”, which requires direct contact between the judicial decision-maker and the source of the proof. The practice of requiring the presentation of primary evidence, where that is possible, varies considerably from one civil law jurisdiction to another.¹¹⁸ Further, appellate review of fact finding, which shows little deference to factual findings at first instance, often recognises the use of derivative evidence as a source of relevant error.¹¹⁹

ARBITRAL PRACTICE

I realise that in the arbitration context these kinds of differences have been attenuated by the development of a common approach. For example, the

process of gathering documents often applied is that found in the IBA Rules on the Taking of Evidence. The continuing interaction over a long period of time, between counsel and arbitrators, has developed a hybrid approach to collection of evidence. Nevertheless, in a context where a very broad discretion is given to arbitrators to make decisions on procedural matters – even under the IBA Rules - the legal cultures from which arbitrators and counsel come will have an influence on their general approach. This is a matter of which all involved from different traditions need to be aware.¹²⁰

There is a real sense that arbitral practice has developed as a fusion of the two systems.¹²¹ My experience is not extensive. Such as it is, it suggests that the common law practice with respect to the gathering of documents is more prevalent than it should be.

We seem to have grafted common law availability of evidence onto a civil law admissibility regime. From the point of view of commercial certainty and procedural efficiency, that is the worst of both worlds. Of course, as I must point out, if you chose the laws of Australia as the governing law of the arbitration clause, or of a particular reference, that does not happen.

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¹ In most civil law systems this is determined by the application of the principle of good faith. The common law has long had specific, restrictive rules and the suggestion that the rules should be subsumed by general principles of interpretation has not been adopted. See the careful analysis of *Attorney General Belize v Belize Telecom Ltd* (2009) 1 WLR 1988 in *Sembcorp Marine Ltd v PPL Holdings* [2013] SGCA 43 at [24] – [26], [76] – [101].

² See e.g., *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm.).

³ See Joshua Kerton “Contract Law in International Commercial Arbitration: The Case of Suspension of Performance” (2009) 58 *International & Comparative Law Quarterly* 863.

⁴ See my observations in “Words, Words, Words” (2007) 81 *Australian Law Journal* 601 esp at 601-602.

⁵ JJ Spigelman “Proof of Foreign Law by Reference to the Foreign Court” (2011) 127 *Law Quarterly Review* 208.

⁶ Pierre Mayer “The Extension of the Arbitration Clause to Non-signatories—the Irreconcilable Positions of French and English Courts” [2011-2012] 27 *American Uni. International Law Review* 831 at 836.

⁷ *United States v LA Tucker Truck Lines* 344 US 33 (1952) at 39.

⁸ *City of Yonkers v United States* 320 US 685 8695 (1944).

⁹ See e.g., Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (5th ed) Oxford Uni. P., Oxford 2009 esp at [5.85] ff.

¹⁰ *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147 8171; *Page v Hull University Visitor* 1993 AC 682.

¹¹ J J Spigelman “The Centrality of Jurisdictional Error” (2010) *Public Law Review* 77.

¹² *M/s MSK Projects (I) (JV) Ltd v State of Rajasthan* [2011] INSC 635 at [8].

¹³ See E G P Craig “Administrative Law” (6th ed) Sweet and Maxwell, 2008, chapter 14.

¹⁴ A M Gleeson “Judicial legitimacy” (2000) 20 *Australian Bar Review* 4 at 11.

¹⁵ See the analysis in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court* [2013] HCA 50 at [36] – [39], [83] – [87], [90] – [99].

¹⁶ See *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at [83] – [86].

¹⁷ *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [30].

¹⁸ *TCL Air Conditioner* above at [12], [53], [76].

¹⁹ *Astro RT. First Media TBK v Astra Nusantara International BVC* [2013] SGCA 57 at [162] – [164].

²⁰ *Strandore Invest AS v Soh Kim Wat* [2010] SGHC 151.

²¹ *Aloe Vera of America Inc v Asianic Food Pte Ltd* [2006] SGHC 78.

²² Quentin Loh “Recent Singapore Decisions and Trends in the Arbitration World” in Yeoh Tion Min et al *SAL Conference 2011: Developments in Singapore law between 2006 and 2010* Academy Publishing, Singapore, 2011.

²³ Michael Hwang “Egregious Errors and Public Policy: Are the Singapore Courts too Arbitration Friendly?” in *ibid.*

²⁴ *Astro* supra at [18], [84], [99].

²⁵ See e.g., The US Court of Appeal for the Second Circuit in *Thai Lao Lignite* 2012 US App. Lexis 14340 and Supreme Court of British Columbia *CE International Resources Holdings LLC v SA Minerals Ltd Partnership*.

²⁶ See Jan Paulsson “Metaphor, Maxims and Other Mischief” [October 2013].

²⁷ *Bremer Vulkan v South India* 1981 AC 909 at 981 per Lord Diplock.

²⁸ *Parsons & Whittemore Overseas Co v Society General de L’Industrie du Papier* 508 Fd 969 (US Court of Appeals for 2nd Circuit 1974).

²⁹ See e.g., Vaishnavi Chillakuru “The Rule of Competence – Competence: A Comparative Analysis of Indian and English Law” [2013] 6 *Contemporary Law Arbitration Journal* 133.

³⁰ See *Sulamerica CIA National de Seguros v Enesa Engeharia SA* [2012] EWCA Civ. 638 esp at [25] – [32], [55] – [61]; *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

³¹ See *Redfern and Hunter* above para [3.30] – [3.31].

³² See *Redfern and Hunter* above paras [3.11] – [3.29], Poon “Choice of Law” above esp at [15] – [17], [24] – [33].

- ³³ See generally Nicholas Poon "Choice of Law for Enforcement of Arbitral Awards" (2012) 24 *Singapore Academy of Law Journal* 113.
- ³⁴ See Poon "Choice of Law" above at [41] – [48].
- ³⁵ See *Walford v Miles* [1992] 2 AC 128 at [91].
- ³⁶ See *Cable & Wireless Pty Ltd v IBM UK Ltd* 2003 BLR 89 and see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* 1992 28 NSWLR 194.
- ³⁷ See *Wah (aka Tang) v Grant Thornton International (GTIL) Ltd* [2012] EWHC 3198 (Ch) at [56] – [60]; *Sulamerica CIA Nacional Seugros SA v Enesa Enenharia SA* [2012] EWCA Civ 638 at [33] – [36].
- ³⁸ See *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKCA 64.
- ³⁹ See e.g. *Aiton Australia P/L v Transfield P/L* [1999] SCNSW 237.
- ⁴⁰ *United Group Retail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177.
- ⁴¹ See *HSBC Institutional Trust Services Singapore Ltd v Toshin Development Singapore Pty Ltd* [2012] SGCA 48.
- ⁴² See *International Research Corp PLC v Lufthansa Systems Asia Pacific Pty Ltd* [2012] SGHC 226; and on appeal [2013] SGCA 55.
- ⁴³ For a comprehensive overview see Malcolm Holmes "Drafting an Effective Arbitration Clause" (2009) 83 *Australian Law Journal* 305.
- ⁴⁴ See e.g., *Redfern and Hunter* above at [2.57] - [2.62].
- ⁴⁵ See JJ Spigelman "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 *Australian Law Journal* 322; also accessible at www.lawlink.gov.au/sc under "Speeches".
- ⁴⁶ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, especially at para 165.
- ⁴⁷ For example, *Francis Travel Marketing v Virgin Atlantic Airways Ltd* 1996 39 NSWLR 160, which was not acknowledged, and *Comandate* above, which was.
- ⁴⁸ Compare the differently constituted Courts of Appeal in *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 at [6-9] and *Rinehart v Welker* [2012] NSWCA 95 at [115]-[124] and note the critique of the latter in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66 at [56]-[63].
- ⁴⁹ Contrast *Comandate* supra with *Seely International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29.
- ⁵⁰ See, for example, *Cape Flattery Ltd v Titan Maritime, LLC* (US Court of Appeal, 9th Circuit, 2011).
- ⁵¹ Lin Yifei "Judicial Review of Arbitration Agreements in China" (2012) 28 *Arbitration International* 243 at 288 - 289.
- ⁵² *Harry Liu et al* "Circumventing an Arbitration Clause Through a Joint Tort Claim" (2013) 18 *Arbitration Newsletter* (IBA) 28.
- ⁵³ *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); *Rinehart v Welker* [2012] NSWCA 95 at [189] – [190].
- ⁵⁴ *Paharpure Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110; see analysis in Peter Giles "Arbitration and Fragmentation of the Dispute Resolution Process into Competing Arbitral and Judicial Proceedings – the Court's Role" (2013) 16 *International Trade and Business Law Review* 397 at 404 – 407.
- ⁵⁵ "Circumventing an Arbitration Clause" *Liu* above at pp 29 - 30.
- ⁵⁶ *UST-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.
- ⁵⁷ The differences are set out with numerous examples in Stavros L. Brekoulakis *Third Parties in International Commercial Arbitration* Oxford Uni. Press, Oxford, 2010 at [2.181] – [2.227].
- ⁵⁸ See Ling Li "Binding Effect of Arbitration Clauses on Holders of Bills of Lading as Non-original Parties" (2012), 37 *Tulane Maritime Law Journal* 107; David Joseph *Jurisdiction and Arbitration Agreements and Their Enforcement* (2nd ed) Sweet & Maxwell, London 2010 at [5.15] – [5.21].
- ⁵⁹ See *Interservice Industrial Services Ltd v ZRE Katowice SA* [2012] EWHC 3205 (TCC).
- ⁶⁰ *Habas Sinai v Teibbi Gazlar Ishtisal Endustri AS v Sal* [2010] EWHC (Comm) 29.
- ⁶¹ See Andrea Marco Steingruber *Consent in International Arbitration* Oxford University Press, Oxford 2012 at pp 140 – 141.
- ⁶² See Li above 117-120.
- ⁶³ See Steingruber above at pp 134 - 141.
- ⁶⁴ See Anselmo Reyes *How to be an Arbitrator: a Personal View* HKMLA Lectures, Hong Kong, 2012 at pp 22 – 24; Joseph *Jurisdiction* above at [5.22].
- ⁶⁵ *Dallah* above at [18] and [120].
- ⁶⁶ See Bernard Hanotiau "Consent to Arbitration: Do We Share a Common Vision?" (2011) 27 *Arbitration International* 539, especially at 547 - 549.
- ⁶⁷ For a detailed analysis of this judgment see Sirko Hander "Enforcing Foreign Arbitral Awards in Australia against Non-Signatories of the Arbitration Agreement" (2012) 8 *Asian International Arbitration Journal* 131.

⁶⁸ This was left open in *Astro* at [150].

⁶⁹ At [158].

⁷⁰ See Brekoulakis above at [5.71] – [5.90].

⁷¹ See Hanotiau “Consent to Arbitration” above; Bernard Hanotiau and Barbara Den Tandt “Back to Basics: Or Why the so-called ‘Group of Companies Doctrine Should be Abandoned Once and For All” in Patrick Wautulet et al *The Practice of Arbitration* Hart Publishing, Oxford and Portland, 2012.

⁷² *Peterson Farms Inc v C & M Farming Ltd* [2004]EWHC 121 (Comm).

⁷³ See *Chloro Controls P. Ltd v Severn Treat Water Puritfication Inc* [2012] INSC 561 at [65].

⁷⁴ See *Prest v Petrodel Resources Ltd* 2013 UKSC 34 and *UTB Capital P/L v Nutrick International Corp* [2013] UKSC 5 approving the approach in *Hasham v Shayif* [2008] EWHC 2380 and, implicitly, restricting the approach reflected in *Antonio Gramsci Shipping Corporation v Stepanous* [2011] EWHC 333 (Comm).

⁷⁵ See, for example, Simon Greenberg, Christopher Kee and J. Romesh Weereamantry *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge University Press, Cambridge, 2011 at part 4. 1. 1.

⁷⁶ See Friven Yeok and Yu Fu “A Snapshot of Recent Attitudes on Arbitrability and Enforcement” (2007) 24 *Journal of International Arbitration* 635, notably on the *Jilin Chemical* and *Yangbo Bao* cases.

⁷⁷ See Bernard Honatiau “Consent to Arbitration ...” above; Yarslau Kryvoi “Piecing the Corporate Veil in International Arbitration” [2011] 1 *Global Business Law Review* 169; Rimantaa Daujotas “Non-signatories and Abuse of Corporate Structure in International Commercial Arbitration”, www.ssrn.com/abstract=2148900, *Redfern and Hunter* above at paras 2.40 – 2.46.

⁷⁸ See Brekoulakis above at [3.53] – [3.105].

⁷⁹ Judgment of 14 July 2011.

⁸⁰ See e.g., *Redfern and Hunter* above para 2.59, 106 n.

⁸¹ See *Insigma Technology: Limited v Alstom Technology Ltd* [2009] 3 SLR (R0 936; *HKL Group Co Ltd v Risq International Holdings Pty Ltd* [2013] SGHCR 5.

⁸² See Lin Yifei above at pp 281-283.

⁸³ *Société Banque privée Edmond de Rothschild Europe v Mme X Spouse Y, No 11-26.022 Cour de Cassation* 26 September 2012; *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328(Comm) at [34] – [36]; see also Richard Fentiman “Universal Jurisdiction Agreements in Europe” (2013) 72 *Cambridge Law Journal* 24.

⁸⁴ “From Text to Context: Contemporary Contractual Interpretation” (2007) 81 *Australian Law Journal* 322; “Contractual Interpretation: A Comparative Perspective” (2011) 85 *Australian Law Journal* 412; “Extrinsic Material and the Interpretation of Insurance Contracts” (2011) 22 *Insurance Law Journal* 143.

⁸⁵ www.lawlink.nsw.gov.au/SC under Speeches, Spigelman, March 2011.

⁸⁶ See *New World Harbour View Hotel Co Ltd v Ace Insurance Ltd* [2012] HKCFA 21 at [34]; *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] HKCFA 40 at [15].

⁸⁷ *Sembcorp Marine Ltd v PPL Holdings Pty Ltd* [2013] SGCA 43.

⁸⁸ For a recent application of this approach which, correctly in my opinion, adopted a strained construction of the text see *Lloyds TSB Foundation for Scotland v Lloyds Banking Group P/L* [2013] UKSC 3.

⁸⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 – 913, as modified in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 at [36].

⁹⁰ As reaffirmed in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; See Derek Wong and Brent Michael “Western Export Services v Jireh International : Ambiguity as the gateway to surrounding circumstances?” (2012) 86 *Australian Law Journal* 57.

⁹¹ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

⁹² *Sinoearn International Ltd v Hyundai-CCECC Joint Adventure* (Affirm) [2013] HKCFA 84 at [74]- [79]

⁹³ See Lord Grabiner QC “The Iterative Process of Contractual Interpretation” (2012) 128 *Law Quarterly Review* 41.

⁹⁴ See the hitherto frequently cited judgment of Lord Diplock in *The Antios* [1985] AC 191 at 201.

⁹⁵ See e.g., Spigelman “Extrinsic Material and the Interpretation of Insurance Contracts” above at pp 149 to 152.

⁹⁶ *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70 at [11].

⁹⁷ See Lord Mance “Talk to Chancery Bar - Singapore Academy of Law Conference (April 2013)”. His Lordship also detected a similar division of approach in *Re Sigma* [2009] UKSC 50.

⁹⁸ Steingruber above p128 at para 7.38.

⁹⁹ See e.g. Catherine Valake “Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric” in J. Neyers (ed) *Exploring Contract Law* Hart Publishing, Oxford, 2008, also available at ssrn.com/abstract=1132364.

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- ¹⁰⁰ See Jonas Rosengreen “Contract Interpretation in International Arbitration” (2013) 30 *Journal of International Arbitration* esp at 2 - 6
- ¹⁰¹ See Mo Zhang *Chinese Contract Law: Theory and Practice* Martinus Nijhoff, Leiden, 2006 at 127 131, 137; Bin Ling *Contract Law in China* Sweet & Maxwell, Hong Kong, 2002 at pp 226 – 227, 229 - 231.
- ¹⁰² *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
- ¹⁰³ See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004 HCA 55 and the analysis in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].
- ¹⁰⁴ Spigelman “Contractual Interpretation: a Comparative Perspective” above.
- ¹⁰⁵ *MSK Projects* above [8].
- ¹⁰⁶ *Quality Concrete Holdings Berhad v Classic Gypsum Manufacturing Sdn Bhd* [2011] MYCA 147
- ¹⁰⁷ *Sembcorp Marine Ltd v PPL Holdings Ltd* [2013] SGCA 43 especially at [53] to [75]. This case explains the earlier judgments of *Zürich Insurance (Singapore) Pty Ltd v B-Gold Interior Design and Construction Pty Ltd* [2008] SGCA 27, *Smile Inc Dental Surgeons Pty Ltd v Lui Andrew Stewart* [2012] SGCA 39 and *Master Marines AS v Labroy Offshore Ltd* [2012] SGCA 27.
- ¹⁰⁸ *Sembcorp* above at [73].
- ¹⁰⁹ See Stefan Vogenauer "Interpretation of Contracts: Concluding Comparative Observations" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* Oxford Uni P., Oxford, 2007; Valcke “Contractual Interpretation: above pp 87 – 91.
- ¹¹⁰ See e.g., C. Reymond "Civil Law and Common Law Procedures: Which is the More Inquisitorial?" (1989) *Arbitration International* 357@360-361; Jolowicz JA, “Civil Procedure in the Common and Civil Law” in Doeker-Mach G and Ziegert KA (eds), *Law, Legal Culture and Politics in the Twenty First Century* (Franz Steiner Verlag, Stuttgart, 2004); see e.g., Beardsley J, “Proof of Fact in French Civil Procedure” (1986) 34 *American Journal of Comparative Law* 459 esp at 474-475; Gerber D, “Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States” (1986) 34 *American Journal of Comparative Law* 745 esp at 753-757; Damaska M, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments” (1997) 45 *American Journal of Comparative Law* 839 at 848 - 849.
- ¹¹¹ See James Beardsley, “Proof of Fact in French Civil Procedure” (1986) 34 *American Journal of Comparative Law* 459 esp at 461, 464, 474 and 475; J A Jolowicz, “Civil Procedure in the Common and Civil Law” in Guenther Doeker-Mach and Klaus A Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart, 2004, n 27, pp 68-69.
- ¹¹² See J McComish “Foreign Legal Privilege: A New Problem for Australian International Law” (2006) 28 *Sydney Law Review* 297 at 303 - 304.
- ¹¹³ McComish at 304 - 305.
- ¹¹⁴ McComish at 306 - 308.
- ¹¹⁵ See Mirjan Damaska, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments” (1997) 45 *American Journal of Comparative Law* 839 at 842; David J Gerber, “Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States” (1986) 34 *American Journal of Comparative Law* 745 at 764-766; B Kaplan, A von Mehren and R Schaefer, “Phases of German Civil Procedure” (1958) 71 *Harvard Law Review* 1199 at 1237-1238.
- ¹¹⁶ Gerber at 764 – 767.
- ¹¹⁷ See Beardsley, supra at 459, 470, 476-477; Gerber, supra at 759-760. See also Kaplan B, von Mehran A, Schaefer R, “Phases of German Civil Procedure” (1958) 71 *Harvard Law Review* 1193 at 1237, 1241-1242; Damaska, supra at 842-843.
- ¹¹⁸ See Bloomenthal JA, “Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective” (2001) 13 *Pace International L Rev* 93 at 100; Krongold HL, “A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions” (2003) 12 *Dalhousie Journal of Legal Studies* 97 at 109-110.
- ¹¹⁹ See Krongold, *ibid* at 110.
- ¹²⁰ For some practical suggestions see Rosengreen “Contract Interpretation” above at pp 14 – 16.
- ¹²¹ See Julian DM Lew QC “Fusion of Common Law and Civil Law Tradition in International Arbitration” in Wautelet and Ors, *The Practice of Arbitration* above.