DETERMINING THE SEAT OF AN INTERNATIONAL ARBITRATION: PARTY AUTONOMY AND THE INTERPRETATION OF ARBITRATION AGREEMENTS

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Abstract The seat of arbitration is fundamental to defining the legal framework for international arbitral proceedings. Although parties are able to select the arbitral seat, arbitration clauses are frequently 'pathological', failing to designate the seat or failing to do so clearly. If the seat is not clearly identified by the parties' agreement, the court may be called upon to decide which country is the seat (typically, in order to determine whether or not it has jurisdiction to entertain certain types of arbitration application). The simplest situations are 'uni-directional' cases in which, in procedural terms, the parties' agreement points expressly or impliedly towards a single location. More difficult are 'pluri-directional' cases in which the agreement refers to more than one possible location. While certain scenarios are relatively straightforward, what constitutes a choice by the parties is more complicated if the parties' agreement contains signposts pointing in different directions. In 'uni-directional' cases, the English courts have developed a series of interpretative guidelines which solve most of the problems posed by potentially ambiguous clauses. However, in 'pluri-directional' situations, the English case law is less convincing. In such cases, the courts have not approached the identification of the arbitral seat in a consistent way; they have not laid down a clear doctrinal framework; and they may be legitimately criticized for displaying a measure of 'forum preference'.

Keywords: forum preference, international commercial arbitration, pathological clauses, procedural law, seat.

I. INTRODUCTION

It is almost universally acknowledged that, as regards an international arbitration, the seat (or place) of arbitration has an important role to play.[1] In the words of one leading commentator:

> A concept of central importance to the international arbitral process is that of the arbitral seat. . . . The location of the arbitral seat is fundamental to defining the

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[1] See, generally, G Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) ch 2 and 3.

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المنارة للاستشارات

> legal framework for international arbitral proceedings and can have profound legal and practical consequences in an international arbitration.[2]

Similar statements can be found in most accounts of the law of international arbitration.[3] Although the courts of other countries may become involved in one way or another at various stages of an arbitration,[4] the courts of the seat play the predominant role in terms of supervision of the arbitral process.[5] As a general rule, the courts of the seat are the only judicial authority able to remove an arbitrator (for example, for lack of independence or impartiality)[6] and proceedings for the setting aside of an arbitral award on the basis of lack of jurisdiction or some procedural defect will almost invariably be brought before the courts at the seat of arbitration.[7]

The importance accorded to the principle of party autonomy in the field of international arbitration means that parties to an arbitration agreement are able to select the arbitral seat.[8] Given the potential significance of the seat being one country rather than another, it might reasonably be expected that contracting parties would seek to ensure that their arbitration agreement clearly identifies the seat of arbitration.[9] However, the decided cases reveal the extent to which the drafting of arbitration clauses leaves much to be

[2] GB Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 105.

[3] See, for example, N Blackaby et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) para 3.51; Lord Collins et al (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 16–036; G Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration' in AJ van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (1998) 9 ICCA Congress Series 336.

[4] For example, by referring parties to arbitration where court proceedings on the merits are brought in breach of the arbitration agreement (New York Convention, art II.3; UNCITRAL Model Law, art 8; Arbitration Act 1996, section 9), ordering interim measures of protection (UNCITRAL Model Law, arts 1.2, 9, 17H–J; Arbitration Act 1996, sections 2(3), 44) or deciding whether an arbitral award made in another country should be recognized or enforced (New York Convention, arts V–VI; UNCITRAL Model Law, arts 35–36; Arbitration Act 1996, Pt III).

[5] The legal system of the seat 'has materially greater legal significance for and control over a locally-seated arbitration than other legal systems': GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1542. See also *ICC Case No 5029, Interim Award* (1987) XII YBCA 113 at [3] (arbitral procedure 'is governed by the mandatory provisions of the arbitration law of the place of arbitration'); *C v D* [2007] 2 CLC 230 at [16] ('by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law').

[6] UNCITRAL Model Law, art 13.3; Arbitration Act 1996, section 24.

[7] UNCITRAL Model Law, art 34; Arbitration Act 1996, sections 67–68.

[8] See UNCITRAL Model Law, art 20.1; Arbitration Act 1996, section 3(a).

[9] In the absence of party choice, the arbitral institution (in the case of institutional arbitration) or the arbitral tribunal, if so authorized, may determine the seat: see UNCITRAL Model Law, art 20.1; Arbitration Act 1996, section 3(b)(c). Under section 3 of the 1996 Act, it is provided that, in the absence of any such designation, the seat is to be determined 'having regard to the parties' agreement and all the relevant circumstances'. For the operation of section 3 where there has been no designation by the parties or the institution/tribunal, see *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep 65, discussed by G Petrochilos, 'On the Juridical Character of the Seat in the Arbitration Act 1996' [2002] LMCLQ 66.

المنارة للاستشارات

desired.[10] In situations involving a 'pathological'[11] arbitration clause, a national court may have to decide which country is the seat of arbitration (typically, in order to determine whether or not it has jurisdiction to entertain certain types of arbitration application). In such cases, the courts are faced with a problem of contractual interpretation: from the words used in the agreement, what did the parties intend? The purpose of the discussion which follows is to evaluate the English case law and assess whether the courts have approached the identification of the arbitral seat in a consistent way.

The simplest situations are 'uni-directional' cases in which, in procedural terms, the parties' agreement points expressly or impliedly towards a single location (III). More difficult are 'pluri-directional' cases in which the agreement refers to more than one possible location (IV). As will be seen, while many scenarios are relatively straightforward, what constitutes a choice by the parties is much more complicated if the parties' agreement contains conflicting signposts. Before the discussion turns to a consideration of these issues, a few words on questions of terminology are appropriate (II).

II. CONCEPTS AND TERMINOLOGY

The first point to note is that terminology in this area is inconsistent. As a general rule, the phrases 'seat of arbitration' and 'place of arbitration' are regarded as synonymous.[12] Whereas the UNCITRAL Model Law and some of the best-known sets of arbitration rules use the word 'place',[13] the term 'seat' is employed by the English Arbitration Act 1996[14] and also by some arbitral institutions.[15] However, nothing is thought to turn on this different usage: the 'seat' or 'place' of arbitration is the country to which an arbitration is 'legally attached'[16] and which establishes a link between an arbitration and a system of arbitration law (the *lex arbitri* or curial law of the arbitration). An arbitration which has its seat in England is subject to the mandatory provisions of the Arbitration Act 1996[17] and, unless and to the extent that parties have made alternative arrangements (whether by the adoption of a set of arbitration

[10] Research into ICC arbitrations in the 1980s found that, in two years (1987 and 1989), the proportion of arbitration clauses expressly designating the seat was only 57 per cent and 68 per cent respectively: S Bond, 'How to Draft an Arbitration Clause (Revisited)' (1990) I(2) ICC Ct Bull 14, 18.

[11] It has been noted that the notion of a 'pathological' arbitration clause goes back to a seminal article by F Eisemann, 'La clause d'arbitrage pathologique' in E Minoli, *Arbitrage Commercial: Essais in memoriam Eugenio Minoli* (Unione Tipografico-Editrice Torinese 1974) 128 : JDM Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 7.71, n 105.

[12] Some authorities use the expression 'situs' or 'forum': Born (n 5) 1540.

[13] UNCITRAL Model Law, art 20; UNCITRAL Arbitration Rules, art 18; ICC Rules, art 18.

[14] Arbitration Act 1996, section 3.

[15] See, for example, SCC Rules, art 20; SIAC Arbitration Rules, art 18.

[16] DStJ Sutton, J Gill and M Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) para 2–100.

[17] Arbitration Act 1996, section 4(1), sch 1.

المنارة للاستشارات

rules or of the arbitration law of another country or otherwise), is subject to the non-mandatory provisions of the 1996 Act as well.[18]

Notwithstanding the use of the word 'place' to refer to an arbitration's legal domicile, it is generally understood that an arbitration, to the extent that it can be said to take place anywhere, does not physically have to be conducted at the seat. This is made clear by both the UNCITRAL Model Law[19] and the Arbitration Act 1996, which 'assumes that there is no necessary connection between the seat and the location of the proceedings from time to time'.[20] It is well established that an arbitral tribunal can hold hearings or meetings anywhere it considers convenient[21] and that the seat of an arbitration does not change simply by virtue of the tribunal holding hearings or other meetings at a location other than the seat.[22] In *PT Garuda Indonesia v Birgen Air*[23] the parties' arbitration agreement had expressly designated Indonesia as the seat of arbitration. It was subsequently agreed that, as a result of political unrest in Indonesia, Jakarta was an inappropriate place for the arbitral hearings and that those hearings should be conducted in Singapore. The Singapore Court of Appeal held that Indonesia had remained the seat of arbitration throughout the arbitration; as a result, the Singapore courts did not have jurisdiction to entertain an application to have the award set aside under Article 34 of the Model Law (as implemented in Singapore).[24] In the words of Chao Hick Tin JA:

> there is a distinction between 'place of arbitration' and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the 'venue of hearing'. The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at a location other than the place of arbitration.[25]

There is no universally accepted vocabulary to describe the *physical* location of an arbitration as opposed to its juridical home. Indeed, the LCIA Rules, potentially confusingly, use the term 'seat' to refer to the juridical centre of an arbitration, and contrast that with 'place' to describe the physical location of

[18] Arbitration Act 1996, section 4(2), (3), (5). See also LCIA Rules, art 16.3.
[19] Art 20.
[20] RM Merkin, *Arbitration Act 1996: An Annotated Guide* (LLP 1996) 18.
[21] See, for example, UNCITRAL Model Law, art 20.2; UNCITRAL Arbitration Rules, art 18; ICC Rules, art 18.
[22] See, for example, *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34 (seat in the Turks and Caicos Islands; hearing in Florida).
[23] [2002] 5 LRC 560.
[24] This does not mean that parties are not free to change the seat; it just means that a change of the seat has to take the form of a clear designation or decision (either by the parties or the tribunal). See *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 (in which the parties, having originally agreed to arbitration in Singapore, subsequently agreed to arbitration in accordance with the LCIA Rules in London).
[25] [2002] 5 LRC 560 at [24]. See also *Raguz v Sullivan* [2000] NSWCA 240.

المنارة للاستشارات

hearings.[26] Equally unhelpfully, the UNCITRAL Model Law uses 'place' in the context of both the juridical seat and the physical location: Article 20.1 provides that the parties 'are free to agree on the *place* of arbitration' (meaning the juridical seat) and then goes on to add in the following paragraph that 'the arbitral tribunal may . . .. , meet at any *place* it considers appropriate' (meaning physical location). Against this background, it is perhaps not altogether surprising that those who draft arbitration clauses do not always pick their words as carefully as they might. When the parties' arbitration clause refers to a geographical location, a question may arise whether the identified location is intended as 'a designation of the place where the hearings are to be held' or as 'a determination of the place of arbitration'.[27] As will be seen, a variety of interpretational problems can be caused by a combination of terminological inexactness and drafting inconsistency.

III. 'UNI-DIRECTIONAL' CASES

In many aspects of arbitration, the guiding principle is party autonomy. Parties are able to select the law that governs the arbitration agreement and/or the rules of law that govern the merits of their dispute; by the same token, they may agree on the seat of arbitration, thereby indirectly choosing the law that will govern the process of arbitration (*lex arbitri*). It seems obvious, therefore, that '[a]ny properly drafted arbitration clause should . . . consider explicitly including the place of arbitration'.[28] If the seat of arbitration is chosen, this choice will be conclusive.[29] As no special form of words is required, the choice of a seat of arbitration is simple to achieve.[30] Although it is common for parties to choose the seat directly, they may do so indirectly: an arbitration agreement may, without identifying a place, adopt institutional rules which incorporate a default rule designating the seat. For example, Article 18.1 of the SIAC Arbitration Rules provides that, failing agreement of the parties, 'the seat of arbitration shall be Singapore'; the LCIA rules contain a similar default rule in favour of England as the seat.[31]

As far as English law is concerned, even if the clause does not use the word 'seat' or 'place', the 'seat is in most cases indicated by the country chosen as the place [ie, the physical location] of the arbitration'.[32] It has been observed

[26] LCIA Rules, art 16.

[27] *ICC Case No 11869, Award* (2011) XXXVI YBCA 47 at [26].

[28] F De Ly. 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 Northwestern Journal of International Law & Business 48, 56.

[29] UNCITRAL Model Law, art 20; Arbitration Act 1996, section 3; UNCITRAL Arbitration Rules, art 18; ICC Rules, art 18; LCIA Rules, art 16.

[30] Arbitral institutions recommend model clauses indicating phrases that will be effective. The UNCITRAL Arbitration Rules suggest that parties should consider adding, *inter alia* 'The place of arbitration shall be . . . [town and country].'

[31] LCIA Rules, art 16.

[32] *Dicey Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 16-035.

المنارة للاستشارات

that '[i]n the absence of a clear indication to the contrary, there is a strong presumption that the place where the arbitration is to take place will constitute its seat'.[33] In *Sumitomo Heavy Industries Inc v Oil and Natural Gas Commission*,[34] for example, the parties' contract referred disputes to arbitration and, without expressly designating the seat, provided that 'the proceedings . . . shall be held in London'. Potter J had no hesitation in deciding that England was the seat of arbitration.

The approach adopted in the *Sumitomo* case is, to a significant extent, based on the idea (which had developed prior to the adoption of the 'seat' as a concept in English law) of treating the physical location of an arbitration as necessarily its legal domicile.[35] In *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd*, for example, the court implicitly treated the arbitration's *lex fori* as equivalent to the law of 'the place where the arbitration was carried out'.[36] The inclination to regard an arbitration as situated (in legal terms) at its physical location is also reflected in the classic texts of the mid-twentieth century: in the seventh edition of *Dicey and Morris* (published in 1958), there is no suggestion that an arbitration has a 'seat'; the only connecting factor used to localize an arbitration is the 'county where the arbitration is held'.[37] In terms of the decided cases in England, the 'seat' seems to appear as a concept for the first time in the late 1960s,[38] although the phrase 'seat of the arbitration' can be found in the Scottish jurisprudence of the late nineteenth century.[39]

A more recent illustration of the principle exemplified by the *Sumitomo* case is *Shashoua v Sharma*,[40] a case in which the parties' agreement failed to refer to a 'seat' or 'place' of arbitration, but provided that 'the venue of arbitration shall be London, United Kingdom'. Both parties were Indian entities and Indian law governed the contract between them. The parties had agreed to refer disputes relating to the contract to arbitration under the ICC Rules. In the context of a dispute over whether the English court should grant an anti-suit injunction to restrain legal proceedings outside England, the defendant had argued that, given that the parties and their contract were overwhelmingly connected with India, the seat of arbitration was India.

Whereas, in the context of an arbitration clause, the word 'seat' is a legal term of art, the word 'venue' is not. The express choice of 'venue' does not necessarily indicate a choice of the place or seat of arbitration; indeed, the word 'venue' is more likely to 'imply that the designated location will be where

[33] *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) para 2-100.
[34] [1994] 1 Lloyd's Rep 45.
[35] See, for example, *L Oppenheimer & Co v Haneef* [1922] 1 AC 482.
[36] MacKinnon J at (1927) 28 Ll L Rep 104, 107.
[37] Dicey and Morris, *The Conflict of Laws* (7th edn, Sweet & Maxwell 1958) 1062.
[38] See the judgment of Salmon LJ in *Tzortzis v Monarch Line A/B* [1968] 1 WLR 406, 414.
[39] See Lord Kinnear in *Talisker Distillery v Hamlyn & Co* (1983) 21 R 204, 212.
[40] [2009] 2 All ER (Comm) 477.

المنارة للاستشارات

meetings or hearings must be conducted'.[41] In the passage quoted above from the *PT Garuda* case, the Singapore court contrasted 'the place of arbitration' with the 'venue of hearing'. Similarly, Clarke J's judgment in *ABB Lummus Global Ltd v Keppel Fels Ltd* draws a distinction between, on the one hand, 'the legal or juridical place of the arbitration' and, on the other, 'the venue or place of the arbitration from time to time'.[42]

Nevertheless, in the *Shashoua* case, although the parties had chosen Indian law to govern the substance of the contract, the choice of England as the 'venue' was, in terms of procedure, the only territorial signpost in the arbitration agreement itself. In these circumstances, the argument that England was intended to be merely the physical location of the arbitration, rather than its seat, was not terribly convincing. The normal expectation would be that, if parties agree on a physical venue for arbitration hearings, they would choose a convenient location. In the *Shashoua* case, however, because both parties were Indian entities and the dispute arose out of the alleged breach of obligations to be performed in India, England was not a convenient location at all. It was more plausible to interpret the express choice of 'venue' as a choice of the legal place of the arbitration.[43]

In 'uni-directional' cases, English practice goes even further in accepting terse verbal formulations as indicating a choice of England as the seat.[44] There is, for example, no doubt that England is the seat if the parties agree to 'arbitration in London'.[45] The words 'Arbitration – London' are regarded as having the same effect.[46] However, if the parties choose to adopt this type of

[41] Born (n 5) 1540.

[42] [1999] 2 Lloyd's Rep 24, 35.

[43] See Christopher Clarke J, [2009] 2 All ER (Comm) 477 at [27] ('provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat').

[44] In *Arab-African Energy Corp v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419 it seems to have been assumed that a clause which comprised the words 'English law – arbitration, if any, London according ICC Rules' was a binding arbitration clause. In *Mangistaumunaigaz Oil Production Association v United World Trade Inc* [1995] 1 Lloyd's Rep 617, Potter J held that a very similar clause ('Arbitration, if any, by ICC rules in London.') was a valid and binding arbitration clause with England as the seat.

[45] See, for example, *The Ioanna* [1978] 1 Lloyd's Rep 238; *Verity Shipping SA v NV Norexa* [2008] 1 CLC 45. See also *Tritonia Shipping Inc v South Nelson Forest Products Corporation* [1966] 1 Lloyd's Rep 114 ('Arbitration to be settled in London') and, to a similar effect, *ICC Case No. 11869, Award* (2011) XXXVI YBCA 47 ('arbitration in Vienna, Austria in accordance to the rules of arbitration': seat—Austria).

[46] A practitioner, speaking at a conference in the 1990s and reflecting upon the drafting of arbitration clauses for inclusion in maritime contracts, had this to say: 'When I first started in practice, I spent most of my time dealing with disputes arising out of charterparties. Almost without exception they contained an arbitration clause. In some cases they were part of the printed text but frequently the arbitration clause was one of the additional clauses specifically agreed by the parties. They were usually terse and to the point and on many occasions were confined to the two words '*Arbitration–London*': B Drewitt and G Wingate-Saul, 'Drafting Arbitration Clauses' (1996) 62 Arbitration 39. It is worth noting that the speaker goes on to display the sort of terminological inconsistency noted in section II (above) by adding that the two words 'Arbitration – London' are effective because 'they specify the *venue*'. Surely, the word 'seat' or 'place' would have conveyed better what the speaker meant.

المنارة للاستشارات

formula, it is significant that their agreement does not contain potentially confusing or ambiguous signposts pointing in different directions: in the context of a 'uni-directional' clause which provides 'Arbitration – London', either the words used are meaningless (a conclusion that the courts will normally try to avoid) or the parties intended to refer their disputes to arbitration with England as the place of arbitration. What else could the words conceivably mean?

If the parties do not make an express designation of the seat, they may be regarded as having done so impliedly.[47] The two main ways in which, under English law, contracting parties may be held to have made an implied choice are through selection of the *lex arbitri* or by the adoption of a jurisdiction clause allocating exclusive jurisdiction to the courts of a particular country.

As already noted, there is an intimate connection between the seat of arbitration and the *lex arbitri*. This link is a two-way street: just as the designation of the seat imports the procedural law of that country, a choice of the law to govern the arbitration implies the seat of arbitration.[48] In the words of Kerr LJ in *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru* (also known as the *Peruvian Insurance* case):

> in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration . . . A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X.[49]

In the *Peruvian Insurance* case, the parties had included in their contract a Peruvian jurisdiction clause[50] and an English arbitration clause.[51] One of the questions facing the court was whether Lima or London was the seat of arbitration. The Court of Appeal decided that, by virtue of the parties' choice of English law as the curial law, England was the seat. Because the contract expressly provided that, in the event of conflict, the typewritten terms (which included the English arbitration clause) were to prevail over the printed conditions (which included the Peruvian jurisdiction clause), the jurisdiction clause was simply overridden by the arbitration clause.

The approach adopted in the *Peruvian Insurance* case was applied in the rather different circumstances which arose in *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd*.[52] The arbitration involved a dispute arising

[47] This methodology for identifying the seat parallels that formulated under the common law for determining the proper law of an international contract. See Dicey and Morris, *The Conflict of Laws* (11th edn, Stevens 1987) ch 32 and 33.

[48] See FA Mann, 'Lex facit arbitrum' (1986) 2 ArbInt 241. See also A Hirsch, 'The Place of Arbitration and the *Lex Arbitri*' (1979) 34 ArbJ 43, 46.

[49] [1988] 1 Lloyd's Rep 116, 119–20.

[50] 'Whatever the domicile of the Insured, in the event of judicial dispute he accepts … the jurisdiction and competence of the City of Lima.'

[51] 'Arbitration under the Law and Conditions of London.'

[52] [2001] UKPC 34.

المنارة للاستشارات

from a construction project in the Turks and Caicos Islands, but arbitral proceedings had taken place in Florida. Which country was the seat of arbitration? The Privy Council decided that the wording of the parties' choice of law ('Disputes shall be resolved according to the laws of Turks and Caicos Islands.') was apt to cover not only the law governing the merits, but also the procedural law of the arbitration: the parties' agreement was interpreted as amounting to 'an express choice of the same curial law as the proper law'.[53] As a result, the seat of arbitration was the Turks and Caicos Islands.

As illustrated by the *Peruvian Insurance* case, a contractual document may include (apparently) inconsistent arbitration and jurisdiction clauses. How such clauses are to be interpreted depends on their precise wording and the surrounding circumstances.[54] Unless both clauses are treated as void (on the basis that they cancel each other out), there are, broadly speaking, four main options. First, one of the clauses may prevail over the other (as in the *Peruvian Insurance* case). Secondly, the claimant may have a choice between either referring a dispute to arbitration or litigating in a particular forum.[55] Thirdly, the material scope of the two clauses may differ, so that certain types of dispute have to be referred to arbitration whereas others are within the jurisdiction of the chosen court.[56] Fourthly, and most importantly in the context of the current discussion, where the parties' contract includes side-by-side an arbitration clause (which fails to designate the seat of arbitration) and an exclusive jurisdiction clause (referring disputes to the courts of a particular country), the court may interpret the two clauses together as providing for disputes to be arbitrated in the country whose courts are the agreed judicial forum. The foundation of such an interpretation is the idea that, if the parties have agreed to refer substantive disputes to arbitration, the choice of judicial forum equates to selecting the court with supervisory jurisdiction over the arbitration, rather than a forum with jurisdiction over the substance of the parties' disputes.

The leading English case illustrating this fourth option is *Paul Smith Ltd v H&S International Holding Ltd*.[57] Clause 13 of the parties' agreement referred disputes to ICC arbitration; clause 14 stated that English law was the governing law and that the English courts were to have exclusive jurisdiction. Steyn J reconciled the two clauses by holding that clause 13 was 'a self-contained agreement providing for the resolution of disputes by arbitration'; clause 14 'specifie[d] the lex arbitri, the curial law or the procedural law governing the

[53] Lord Cooke at [37].

[54] See R Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9 JPrivIntL 361; A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 137–9.

[55] *The Messiniaki Bergen* [1983] 1 All ER 382; *William Co v Chu Kong Agency Co Ltd* [1993] 2 HKC 377 (High Ct, HK).

[56] *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 (substantive disputes within the scope of the arbitration clause; disputes 'about the proper law' within the scope of the jurisdiction clause).

[57] [1991] 2 Lloyd's Rep 127. See also *The Nerano* [1996] 1 Lloyd's Rep 1, *Axa Re v Ace Global Markets Ltd* [2006] EWHC 216 (Comm) and the discussion by Garnett (n 54) 361, 373–9.

المنارة للاستشارات

arbitration'.[58] In the judge's view, if clause 14 were read as specifying the law governing the arbitration, there was no inconsistency between the two clauses. Although Steyn J's judgment does not spell this out in so many words, the English jurisdiction clause in *Paul Smith* not only selected the curial law, but also—on the authority of the *Peruvian Insurance* case (which was not cited)—impliedly designated the seat of arbitration.

The analysis adopted in the *Paul Smith* case was followed by the Singapore High Court in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd*.[59] The parties had agreed to refer disputes to ICC arbitration, but did not explicitly identify the seat. However, the contract also provided for the courts of Singapore to have exclusive jurisdiction. The court decided that, reading the contract as a whole, the combined effect of the apparently inconsistent arbitration and jurisdiction clauses, was an agreement to refer disputes to arbitration with Singapore as the seat of arbitration and the Singapore courts having supervisory jurisdiction over any arbitration under the contract.

Although the interpretation of the language of the contract in these cases displays a degree of creativity, it seems likely that the court's solution gave effect to the parties' intentions. The conclusion in the *PT Tri-MG Intra Asia Airlines* case that Singapore was intended to be the seat of arbitration and that Singapore law was the *lex arbitri* enabled the court to give a plausible meaning to the jurisdiction clause as well as the arbitration clause, rather than treating one of the clauses as *pro non scripto*.[60] It also made practical and commercial sense.

If at all possible, the court seeks to identify the seat by reference to what the parties agreed—even if this means working from very thin materials. In essence, the court is looking for a relevant factor in the parties' agreement from which an intention to localize the arbitration may be gleaned. In 'uni-directional' situations, the English cases reveal a hierarchy of connecting factors: first, the court looks for a clear choice of the legal domicile ('seat' or 'place'); secondly, the seat will be determined by agreement on the physical location of arbitral hearings ('venue'); thirdly, the seat is impliedly identified from a choice of the procedural law or of the courts having supervisory jurisdiction over the arbitration. Within a framework which starts from the principle of party autonomy, this approach is entirely defensible—even though, unless the parties expressly choose the legal place of arbitration, it seems highly unlikely that they consciously apply their minds, at the time of

[58] [1991] 2 Lloyd's Rep 127, 129.

[59] (2009) XXXIV YBCA 758.

[60] It is a well-established principle that '[i]n construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus': K Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) section 7.03. As Moore-Bick LJ pointed out in *Dwr Cymru Cyfyngedig v Corus UK Ltd* [2007] EWCA 285 Civ at [13], 'it is unusual for parties to include . . . a whole clause which is not intended to have contractual effect of any kind'.

المنارة للاستشارات

contracting, to the question of where any arbitration under the contract will be seated.

IV. 'PLURI-DIRECTIONAL' CASES

Much more problematical are situations where the parties' agreement includes signposts pointing in different directions. The cases reveal two different situations. The first scenario is where the parties sever the link between the seat of arbitration and the procedural law, by choosing State A as the seat and the law of State B as the *lex arbitri*. The second—potentially a more extreme version of the same phenomenon—arises when the parties' agreement includes not only an arbitration clause referring disputes to arbitration in State A, but also a jurisdiction clause purporting to confer exclusive jurisdiction on the courts of State B.[61] As will be seen, the English cases addressing these scenarios expose inconsistency in doctrinal terms; moreover, a legitimate criticism of the cases is that they show a degree of forum preference.

As noted above, the seat of arbitration and the procedural law governing an arbitration are normally two sides of the same coin. However, the operation of the principle of party autonomy means that parties are free to choose country A as the seat and the law of country B as the *lex arbitri*. The possibility of severing the link between the seat and the *lex arbitri* is acknowledged by the New York Convention, according to which the courts of a non-seat country may refuse to recognize or enforce an award made in another country if the award 'has been set aside or suspended by a competent authority of the country *in which*, or *under the law of which*, that award was made'.[62] The country 'in which' an award is made is the seat of arbitration; the law 'under which' the award was made is the *lex arbitri* (which will, in almost every case, be the law of the seat).[63] It has been pointed out not only that cases in which parties decide

[61] This second scenario is the situation which would have arisen in the *Peruvian Insurance* case had the contract not provided a clear solution to the apparent conflict between the printed and typewritten clauses.

[62] Art V(1)(e) (emphasis added).

[63] The courts of some countries have interpreted the law 'under which' the award was made as referring to the law governing the arbitration agreement and/or the law governing the merits of the parties' dispute: see, for example, decisions of the courts of (or cases involving the setting aside of foreign awards by the courts of) Pakistan (*Hitachi Ltd v Rupali Polyester* 1998 SCMR 1618; *American Construction Machinery & Equipment Corp v Mechanised Construction of Pakistan Ltd*, 659 F Supp 426 (SDNY, 1987), India (*National Thermal Corp v The Singer Corp* [1991] 3 SCC 551; *Venture Global Engineering v Satyam Computer Services Ltd* [2008] 4 SCC 190), Indonesia (*Karaha Bodas Co LLC* v *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 (5th cir, 2004)), the Philippines (*Steel Corporation of Philippines v International Steel Services Inc* 354 Fed Appx 689 (3rd cir, 2009)) and Qatar (*International Trading and Industrial Investment Co v DynCorp Aerospace Technology* 763 F Supp 2d 12 (DDC, 2011)). The Supreme Court of India, which had previously subscribed to such an interpretation, which is almost universally regarded as erroneous, recently overruled its earlier decisions and accepted that, for the purposes of art V(1)(e) of the New York Convention, the law 'under which' an award was made is the procedural law of the arbitration: *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc* (2012) XXXVII YBCA 244.

المنارة للاستشارات

to sever the link between the seat and the *lex arbitri* are extremely rare, but also that there is little to be gained from seeking to subject an arbitration seated in one country to the procedural law of another.[64]

Nevertheless, situations do arise in which the various connecting factors in the dispute-resolution clauses agreed by the parties—in terms of the place or venue of the arbitration, the procedural law and the exclusive jurisdiction of the courts—do not all point to the same country. The English cases which address this scenario are not easy to reconcile, other than by invocation of the truism that each case turns on its own particular facts.

The obvious starting point is *Union of India v McDonnell Douglas Corporation*.[65] In this case, the parties had expressly agreed that London was the seat of the arbitration and that the arbitration was to be 'conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940'. In view the parties' express choice, Saville J acknowledged that England was the seat. But, what was the significance of the choice of the procedural law of India?

Saville J, whose analysis was shaped in part by the earlier decision of the Court of Appeal in the *Peruvian Insurance* case,[66] accepted the idea that, as regards the external supervision of the arbitration, the choice of England as the seat necessarily involved the exclusive jurisdiction of the English court applying English law. If, after the award had been rendered, one of the parties had wanted to apply to have the award set aside, the English court would have had exclusive jurisdiction and the application would have been determined solely by English law. However, the parties' choice of Indian procedural norms meant that, as regards the internal conduct of the arbitration, Indian law prevailed over the law of the seat.[67]

The *Peruvian Insurance* and *Union of India* cases form part of the background to the drafting of the Arbitration Act 1996. The Act essentially adopts a territorial criterion: Part I of the Act applies if England is the seat of arbitration.[68] But, the Act draws a distinction between mandatory and non-mandatory provisions. The mandatory provisions (which are listed in Schedule 1) cannot be excluded by the parties: if England is the seat, the mandatory provisions (which are mainly concerned with the court's supervisory jurisdiction) apply.[69] As regards the non-mandatory provisions, however, the 1996 Act endorses the principle of party autonomy; they apply only to the extent that the parties have not excluded them by agreement. If, for example, the parties have adopted institutional rules, those rules displace the

[64] See, for example, Kerr LJ in *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, 120; Clarke J in *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24, 34.

[65] [1993] 2 Lloyd's Rep 48.

[66] [1988] 1 Lloyd's Rep 866.

[67] See also *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 in which the parties had chosen London as the seat and the law of Singapore as the procedural law.

[68] Arbitration Act 1996, section 2(1).

[69] ibid section 4(1).

المنارة للاستشارات

equivalent non-mandatory provisions of the 1996 Act.[70] The choice of the *lex arbitri* of a foreign country has a similar effect.[71]

This background leads naturally to consideration of three recent cases—*Enercon GmbH v Enercon (India) Ltd*,[72] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*[73] and *U&M Mining Zambia Ltd v Konkola Copper Mines plc*[74]—in which the parties disagreed over whether the arbitration in question had its seat in England. It is doubtful whether, in doctrinal terms, the court applied the earlier authorities accurately and whether the results are consistent with each other.

In *Enercon GmbH v Enercon (India) Ltd*[75] the parties' contract contained an arbitration clause which provided that the 'venue of the arbitration proceedings shall be London', but went on to say that the 'provisions of the Indian Arbitration and Conciliation Act 1996 shall apply'. Was the seat of arbitration England or India? There are two relevant strands in the earlier case law, albeit in the context of 'uni-directional' situations. On the one hand, the *Peruvian Insurance* case stands as authority for the proposition that an agreement to arbitrate in accordance with the arbitration law of State X should, without more, be regarded as involving an implied choice of State X as the seat. On the other, in *Shashoua v Sharma* the court had decided that, in the absence of 'significant contrary indicia',[76] England was the seat on the basis of the parties' agreement that England was the 'venue' for the arbitration. Eder J relied on *Shashoua v Sharma* and adopted the analysis of Saville J in the *Union of India* case; notwithstanding the parties' choice of Indian law as the *lex arbitri*, England had been chosen as the seat of arbitration. The judge's decision is not convincing, however.

The *Shashoua* case, which involved a 'uni-directional' arbitration clause, was clearly distinguishable: in *Enercon* the parties had chosen England as the 'venue', but Indian law as the curial law. The significance of the *Shashoua* case is that, *in the absence of contrary indications*, a choice of 'venue' normally equates to a choice of legal domicile. But, in *Enercon*, there were contrary indications—notably, the choice of Indian law as the *lex arbitri*; accordingly, *Shashoua v Sharma* did not provide the solution. Moreover, the analogy with *Union of India* was false; in *Union of India* the parties had employed the term 'seat', which is a legal term of art, whereas in *Enercon*, the parties had referred to the 'venue of the arbitration proceedings', which could have signified either legal domicile or physical location. The factor which should have been given greatest weight is the parties' express choice of the procedural law. If, in the *Peruvian Insurance* case, a clause which stated 'Arbitration under the Law and Conditions of London' impliedly chose England as the seat of arbitration, there

[70] ibid section 4(3).
[71] ibid section 4(5).
[72] [2012] 1 Lloyd's Rep 519.
[73] [2008] 1 CLC 487.
[74] [2013] 1 CLC 456.
[75] [2012] 1 Lloyd's Rep 519.
[76] [2009] 2 All ER (Comm) 477 at [34].

المنارة للاستشارات

is no good reason why, in the absence of an explicit designation of the seat by the parties, a clause providing for the application of the Indian Arbitration and Conciliation Act 1996 should not have been regarded as an implied choice of India as the seat. Although the case was, as the judge noted, 'finely balanced',[77] the weight of authority pointed towards India, rather than England, being the seat.[78]

Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd[79] is another case in which the court appeared to strain to reach the conclusion that the parties had chosen England as the juridical seat. The parties' contract included a collection of potentially inconsistent dispute-resolution clauses, which appeared deliberately to have severed the link between the seat of arbitration and the *lex arbitri*. On the one hand, the parties agreed to refer their disputes to arbitration and expressly provided that 'the seat of the arbitration shall be Glasgow, Scotland'. On the other hand, it was provided that, subject to the arbitration clause, 'the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract'. The contract also stated that any arbitration should be 'conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition'. The adoption of these rules, coupled with the English jurisdiction clause, suggests that the parties' intended that English law should be the procedural law of the arbitration.[80] The main question raised by the legal proceedings was whether the English court had jurisdiction to entertain the applicant's appeal against an arbitral award under section 69 of the Arbitration Act 1996; this question turned on whether or not England was the seat of arbitration.

The defendant's position was simple: the parties' agreement that Scotland was the 'seat' meant what it said and, as a result, the claimant's application should be dismissed *in limine*. Akenhead J, however, decided that, properly interpreted, the parties' agreement had designated England as the juridical seat; the clause expressly identifying Scotland as the 'seat' was interpreted as indicating the physical location or venue of the arbitration, not its legal domicile. While there can be little doubt that the parties had not thought through the implications of the various elements of their dispute-resolution architecture, the judge's decision is controversial.

There seems to be no prior authority to suggest that an express choice of the 'seat' by the parties can be disregarded or reinterpreted in the light of other provisions of their agreement. On the authority of the *Union of India* case, the judge should have held, as argued by the defendant, that the parties' chosen

[77] [2012] 1 Lloyd's Rep 519 at [61].

[78] Not surprisingly, in subsequent proceedings in India, the Indian Supreme Court held that India was the seat of arbitration: *Enercon (India) Ltd v Enercon Gmbh*, Civil Appeal No 2086 of 2014, dated 14 February 2014.

[79] [2008] 1 CLC 487.

[80] For example, art 1.1 of the CIMA rules states: 'These Rules are to be read consistently with the Arbitration Act 1996 (the Act), with common expressions having the same meaning.'

المنارة للاستشارات

'seat' was, indeed, the legal domicile of the arbitration. In view of the parties' adoption of the Construction Industry Model Arbitration Rules, it seems highly likely that the parties had intended to choose English law as the curial law of the arbitration—just as the parties had chosen Indian law as the curial law in the *Union of India* case. However, as the *Union of India* case shows, such a choice operates only to displace the non-mandatory provisions of the law of the designated seat. The analogy with the *Union of India* case and section 4 of the Arbitration Act 1996 suggests that the proper interpretation of the parties' choice of Scotland as the seat and English law as the curial law was that the arbitration was subject to the mandatory provisions of Scots law but that non-mandatory provisions of the law of the seat would be displaced by the equivalent provisions of the arbitration rules chosen by the parties or, if the rules were silent, by the relevant provisions of the Arbitration Act 1996.

This alternative view still leaves a question surrounding the significance of the English jurisdiction clause. As Steyn J decided in the *Paul Smith* case (which was not cited in *Braes of Doune*), Akenhead J thought that the jurisdiction clause should be regarded as evincing an intention that the English court was to have supervisory jurisdiction over the arbitration; and that, as a consequence, England was the seat of arbitration. This interpretation is, however, not convincing. The *Paul Smith* case was not a 'pluri-directional' situation: the parties had not chosen the seat and the only signpost in the parties' agreement (the choice-of-law and jurisdiction clause) pointed to England. It is worth noting that the Singapore court in the *PT Tri-MG Intra Asia Airlines* case (which followed and applied *Paul Smith*) rightly pointed out that the approach adopted in the *Paul Smith* case 'would not have been possible if the parties had, in their arbitration agreement, expressly stipulated a third country as the seat or place of arbitration'.[81] As Garnett observes, 'had the parties chosen a seat of arbitration *outside* Singapore, the court would not have been able to draw the inference that the Singapore exclusive jurisdiction clause provided the procedural law of that arbitration'.[82]

It is one thing for the courts to interpret a non-technical term as referring to a particular legal concept; it is quite another to regard a legal term of art as signifying something other than the term's legal meaning. Whereas it is legitimate in a case like *Shashoua* to regard the 'venue' as an arbitration's legal seat, it is not appropriate to interpret 'seat' to signify merely the physical location of arbitration hearings. To interpret the English jurisdiction clause in the *Braes of Doune* case as an *implied* choice of England as the seat which prevailed over the *express* designation of Scotland involves too much

[81] (2009) XXXIV YBCA 758, 777.

[82] 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9 JPrivIntL 361, 379.

المنارة للاستشارات

distortion of what the parties actually agreed. Given that the jurisdiction clause in *Braes of Doune* was stated to be 'subject to' the arbitration clause (under which any disputes 'arising out of or in connection with' the contract were to be referred to arbitration), a more plausible interpretation would have been to regard the English jurisdiction clause as being no more than a longstop, according to which the English courts were to have substantive jurisdiction over any dispute between the parties which fell outside the material scope of the arbitration clause, rather than as a clause selecting the courts with supervisory jurisdiction over any arbitration. Properly understood, the *Braes of Doune* case was the mirror image of *Union of India*: if England, rather than India, was the seat of arbitration in *Union of India*, in *Braes of Doune* the seat should have been Scotland, rather than England.

Similar questions of interpretation arose in *U&M Mining Zambia Ltd v Konkola Copper Mines plc*.[83] The parties, both of which were Zambian entities, entered a contract which, like in the *Braes of Doune* case, included potentially inconsistent arbitration and jurisdiction clauses. Whereas the contract provided that England was the place of arbitration, the parties had included a choice of Zambian law and agreed that the Zambian courts were to have exclusive jurisdiction.

On the basis that the parties had expressly chosen England as the 'place' of arbitration, Blair J decided that England was the legal domicile. The contrast with the *Braes of Doune* case is striking. If, in *Braes of Doune*, the parties' choice of Glasgow as the *seat* yielded to the parties' agreement that the English courts should have exclusive jurisdiction, parity of reasoning should have led to the conclusion that the choice of England as the *place* yielded to the inference that, by conferring exclusive jurisdiction on the Zambian courts, Zambian law was the *lex arbitri* and Zambia was the seat. Whereas, in *U&M Mining*, the identification of England as the seat of the arbitration required the Zambian jurisdiction clause to be ignored completely, in *Braes of Doune* Akenhead J treated the English jurisdiction clause as crucial to the identification of England as the seat. The conclusion in *U&M Mining* that England was the seat can only possibly be correct if, as argued above, the decision that England was the seat of arbitration in *Braes of Doune* was wrong.[84]

[83] [2013] 1 CLC 456.

[84] See also *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm); affirmed [2013] 1 WLR 102 in which the parties' contract included not only a Brazilian choice-of-law and exclusive jurisdiction clause but also a conflicting arbitration clause designating England as the seat. The reasoning in *Braes of Doune* would have led to the conclusion that Brazil was the seat—on the basis of the Brazilian jurisdiction clause—notwithstanding the parties' express designation of England as the seat. There is, however, nothing in the *Sul America* case to suggest that the seat might have been anywhere other than England. If the Brazilian jurisdiction clause had no impact on determining the seat in the *Sul America* case, why should an implication from the English jurisdiction clause have prevailed over the parties' express designation of Scotland as the seat in *Braes of Doune*?

المنارة للاستشارات

V. CONCLUSION

Legal advisers who draft contracts do not always use the most appropriate words to indicate what they mean. Problems caused by poor drafting seem to be particularly evident in the context of arbitration clauses:

> [Arbitration] clauses are often 'midnight clauses', ie the last clauses to be considered in contract negotiations, sometimes late at night or in the early hours of the morning. Insufficient thought is given as to how disputes are to be resolved (possibly because the parties are reluctant to contemplate falling into dispute) and an inappropriate and unwieldy compromise is often adopted.[85]

Notwithstanding the huge volume of case law and literature addressing problems caused by badly drafted arbitration agreements, the incidence of pathological clauses does not look like abating. As a result, courts will continue to be bedevilled by dispute-resolution clauses which are incomplete, internally inconsistent or otherwise opaque.

In the context of the current discussion, relatively few problems of interpretation would arise if arbitration clauses used terminology consistently to make a clear distinction between the legal domicile of an arbitration ('seat' or 'place') and the physical place ('venue' or 'location'). As regards a clause which states that the 'place' of arbitration is State X, but that the 'venue' shall be State Y, the only plausible interpretation of the clause is that the parties agreed that State X was the juridical seat and that State Y was to be the physical location of any arbitral hearings. However, as has been seen, cases are often not this simple in practice.

In most of the cases considered in the foregoing discussion, the process of contractual interpretation is, to a certain extent, a creative exercise. Unless it is decided that the dispute-resolution provisions are ineffective and meaningless, making sense of badly-drafted clauses is almost bound to involve some element of creativity. If the drafting lacks clarity, the preferred solution of arbitral tribunals and courts is to try to give a plausible meaning to the contractual words—in the belief that this will most likely reflect the parties' true intentions.

As regards the identification of the seat of arbitration, the English courts have developed a series of interpretative guidelines which go a long way towards solving the problems posed by potentially ambiguous clauses—at least, in 'uni-directional' cases. The seat may be chosen expressly (even by a very simple form of words) or impliedly by a choice of the procedural law (as in the *Peruvian Insurance* case) or of the courts with supervisory jurisdiction over the arbitration (as in *Paul Smith*).

The English case law is, however, less convincing in 'pluri-directional' situations—where contractual clauses dealing with dispute-resolution issues

[85] *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) para 2.04.

المنارة للاستشارات

point in different directions. It has been decided that the word 'seat' may mean juridical seat, even in the face of a choice of the procedural law of another country (*Union of India*), or may be interpreted to mean no more than the physical location of an arbitration on the basis that the parties really intended that the seat should be a country on whose courts they had purported to confer exclusive jurisdiction (*Braes of Doune*). In cases where the parties have expressly chosen the 'seat' or 'place' of arbitration, a clause conferring exclusive jurisdiction on the courts of another country may be thought to be wholly irrelevant (*U&M Mining*) or the clause may be conclusive (in terms of designating the seat) and override the parties express choice (*Braes of Doune*). Choice of the curial law may have the effect of impliedly selecting the seat (*Peruvian Insurance, The Bay Hotel*) or such a choice may be regarded as being of less significance than the parties' choice of 'venue' (*Enercon*). In short, the courts have not laid down a clear doctrinal framework for dealing with 'pluri-directional' situations; each case turns on its own particular facts.

Commentators in the field of private international law have often drawn attention to a phenomenon known as 'forum preference'.[86] In cases where the arguments seem finely balanced between the forum and another country, the court is likely to lean in favour of its own jurisdiction and the application of its own law. This would appear to be a significant factor in the court holding that England was the seat of arbitration in the *Enercon* and *Braes of Doune* cases. It is reasonable to conclude that the English courts do not approach 'pluri-directional' cases in a doctrinally consistent way and that they are too easily persuaded that England is the seat of arbitration.

[86] See, for example, CMV Clarkson and J Hill, *The Conflict of Laws* (4th edn, OUP 2011) 365. See also R Sedler, 'Interest Analysis and Forum Preference in the Conflict of Law: A Reply to the "New Critics"' (1983) 34 MercerLRev 593.

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