THE CHOICE OF LAW AGREEMENT AS A REASON FOR EXERCISING JURISDICTION

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Abstract This article examines the effect of choice of law agreements on the courts' exercise of jurisdiction. In particular, it considers whether English courts ought to exercise jurisdiction to uphold choice of law agreements that would otherwise be defeated in a competing forum. Two reasons have been advanced in support of this approach: that courts should prioritize the choice of law rules of the forum; and that the parties should be held to their agreement on the applicable law. This article argues that neither of these reasons is justifiable in principle.

Keywords: choice of law agreement, close connection, forum conveniens, governing law, jurisdiction, party autonomy.

I. INTRODUCTION

Party autonomy in choice of law is one of the central pillars of the English system of choice of law. Parties enjoy wide freedom to select the law governing their cross-border relations.[1] But the effectiveness of a choice of law agreement is controlled to a considerable degree by the party that is bringing the proceeding, because the applicable law is determined in accordance with the choice of law rules of the forum. Where choice of law rules differ, there is the risk that the applicable law—and ultimately the result of the case—may depend on the forum in which proceedings are brought. Does this mean that courts ought to exercise jurisdiction where choice of law agreements would otherwise be defeated in a competing forum? There is much case law to support such an approach. In one recent decision, *Navig8 Pte Ltd v Al-Riyadh Co ('The Lucky Lady')*,[2] the High Court permitted an application for a negative declaration to be served out of the jurisdiction, on the ground that the foreign court would not give effect to the parties' English choice of law agreement. Apart from the choice of English law, there was nothing to connect the dispute to England.

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[1] Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation), art 3; Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40, art 14; see also *Re Egerton's Will Trusts* [1956] Ch 593 (Ch) for matrimonial property contracts that do not fall under the Matrimonial Causes Act 1973.

[2] *Navig8 Pte Ltd v Al-Riyadh Co ('The Lucky Lady')* [2013] EWHC 328, [2013] 2 Lloyd's Rep 104 (Com Ct).

[*ICLQ* vol 63, October 2014 pp 963–975] doi:10.1017/S0020589314000451

This article argues that courts are wrong to take jurisdiction for the purpose of upholding choice of law agreements. Two separate reasons have been advanced why jurisdictional decisions ought to take account of choice of law agreements that would otherwise be defeated. The first reason, which is not particular to choice of law agreements but applies wherever there are differences in choice of law between competing fora, is that the forum's own choice of law rules are superior and should therefore be given preference (see Part II). The second reason is that the parties should be held to their agreement on choice of law (see Part III). One author has even gone so far as to argue that some choice of law agreements may be promissory in nature, because the parties must be taken to have agreed to refrain from bringing proceedings in jurisdictions that are unlikely to give effect to them.[3]

It is submitted that each of these grounds is at odds with competing policies of the conflict of laws, and that they must therefore be treated with caution. More specifically, this article argues that the practice of prioritizing local choice of law rules when determining the appropriate forum is inconsistent with the principle of close connection; and that the practice of upholding the parties' bargain on choice of law risks undermining the principles that shape the parties' freedom to select the applicable forum.

Because this article is concerned with the effect of choice of law agreements on jurisdictional discretion, it does not consider cases that fall within the Brussels I Regulation,[4] which confers international jurisdiction on the basis of fixed connecting factors.[5] Here, the fact that a foreign court would not uphold a choice of law agreement could not be a relevant jurisdictional consideration. The article focuses on the common law approach to jurisdiction, which continues to be applicable where the defendant is not domiciled in a Member State.[6]

II. THE RELATIONSHIP BETWEEN JURISDICTION AND CHOICE OF LAW: AN INTERNATIONALIST PERSPECTIVE

English courts commonly adopt a 'competing choice of law approach' to forum (non) conveniens analysis by treating differences between English and foreign choice of law rules as a factor pointing towards England as the appropriate forum. The purpose of this Part is to argue that differences in choice of law—and in the treatment of choice of law agreements in particular—should not affect jurisdictional decision-making where such an approach would be contrary to the principle of close connection. A competing choice of law approach to jurisdiction is particularly misguided where the main factor connecting the forum to the dispute is a choice of law agreement selecting the law of the forum.

[3] A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) paras 11.52–11.53.

[4] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[5] But see art 33 of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1 [Brussels I Recast], which introduces a discretion to decline jurisdiction for third state cases.

[6] Art 4. On the precise scope of the court's residual jurisdiction under art 4, see L Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 12-016 [*Dicey*].

A. A Competing Choice of Law Approach to Jurisdiction

Rules of jurisdiction limit the court's exercise of adjudicatory authority in cases with cross-border elements. The principal goal is to 'identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'.[7] Traditionally, English courts have relied on the doctrine of forum (non) conveniens to achieve this goal and to temper the reach of their wide jurisdictional powers.[8] Where proceedings are served on the defendant as of right, the court may grant a stay of proceedings on the basis that England is not the appropriate forum (forum non conveniens); conversely, where proceedings are served out of the jurisdiction, the court may assume jurisdiction only if it is satisfied that England is the proper place in which to bring the claim (forum conveniens).[9] Both of these processes will here be described as exercises of jurisdictional discretion.[10]

1. The governing law as a forum (non) conveniens factor

There are two main reasons why courts have treated the governing law as a relevant factor in this context. The first reason is that the governing law may indicate the natural forum of the dispute.[11] Provided it is determined objectively, the governing law is likely to be closely connected to the dispute. Courts are also best placed to apply their own law, because the application of foreign law may lead to procedural inefficiency and may increase the risk of an erroneous decision.[12] Thus, Lord Mance recently noted that 'it is generally preferable … that a case should be tried in the country whose law applies', and that this factor is particularly relevant where there is 'evidence of relevant differences in the legal principles or rules applicable to [issues of law] in the two countries in contention as the appropriate forum'.[13]

The other reason, which is the focus of this article, is that courts often prefer their own choice of law rules to those of foreign jurisdictions. Thus, insofar as choice of law agreements are concerned, a court might be persuaded to exercise jurisdiction where the competing forum does not give effect to party autonomy or requires the application of overriding mandatory rules or public policy—provided, of course, that the choice of law agreement is enforceable at home.

[7] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 (HL) 480. On the policies underlying the rules of jurisdiction generally, see J Hill, 'The Exercise of Jurisdiction in Private International Law' in P Capps, M Evans and S Konstadinidis (eds), *Asserting Jurisdiction* (Hart 2003) 39; JJ Fawcett, 'Trial in England or Abroad: The Underlying Policy Considerations' (1989) 9 OJLS 205.

[8] ibid.

[9] *Dicey* (n 6) para 12R-001.

[10] But note that jurisdiction as of right is not strictly a discretionary matter: *Dicey* (n 6) para 11-141. Rather, the court has a discretion to stay the action.

[11] *Spiliada Maritime Corporation v Cansulex Ltd* (n 7) 478.

[12] See eg: *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 (CA); *Tryg Baltica International v Boston Compania de Seguros SA* [2005] Lloyd's Rep IR 40 (Com Ct) [49]; *Dicey* (n 6) para 12-034.

[13] *VTB Capital v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 [46]. But the Court in *The Lucky Lady* (n 2) seemed to interpret Lord Mance's dictum as going to the superiority of local choice of law rules ([28]).

2. The competing choice of law approach in practice

The competing choice of law approach to jurisdiction is not a new development. Thirty years ago, in *Britannia Steamship Insurance Association v Ausonia Assicurazioni SpA*, the Court of Appeal considered that there was a legitimate juridical advantage in bringing proceedings in England because the Italian court would not resolve the parties' contractual dispute in accordance with English law, which was more favourable to the claimant's case.[14] A few years later, in *Banco Atlantico v British Bank of the Middle East*, the Court of Appeal refused to grant a stay of proceedings because the foreign court was likely to disregard the proper law.[15] Staughton LJ's judgment in *Irish Shipping Ltd v Commercial Union Co Plc* offers a succinct summary of the position:[16]

> So far as concerns domestic law, it would be wrong for us to suppose that our system is better than any other. But in the case of conflict rules, which ought to be but are not the same internationally, there is a case for saying that we should regard our rules as the most appropriate.

There have been a number of cases since where this approach was followed. The following three decisions are particularly good illustrations of the courts' reasoning in this regard.[17]

In *Tiernan v Magen Insurance Co Ltd*,[18] the claimant reinsurer sought declarations that it was not liable to an Israeli insurance company pursuant to their reinsurance contract (contained in a Lloyd's form). It claimed that the defendant had not provided timely notification of the insurance claims against it, and that the reinsurance contract had been repudiated for breach. The Israeli insurer sought an order that service out of the jurisdiction be set aside, on the basis that it was Israel, as the place where the defendant carried on business, that was the appropriate forum for the dispute. The Court rejected the application. It found that the reinsurance contract was governed by English law, whether by implied choice or objective connection, and that there was a risk that the Israeli court would apply Israeli law to determine the dispute. In these circumstances, clear preference had to be given to English choice of law rules:[19]

> English rules of conflicts of laws are now part of the Rome Convention and have commanded the assent of a number of nations. It would not be right for [the defendant] to be able to subvert the result of the Rome Convention by taking proceedings in a jurisdiction which will not come to the conclusion that the contract is governed by English law.

Although the reinsurer's claim was for a negative declaration, its conduct could not be described as forum shopping: in English eyes, the policy was made in England and governed by English law. The only way in which 'this matter of English law' could be determined was 'by the English court in proceedings for negative declaratory relief'.[20] Hence, England was the appropriate forum.

[14] *Britannia Steamship Assurance Association v Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98 (CA).

[15] *Banco Atlantico v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504 (CA).

[16] *Irish Shipping Ltd v Commercial Union Co Plc* [1991] 2 QB 206 (CA) 229–230.

[17] See also *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Com Ct); cf *Akers v Samba Financial Group* [2014] EWHC 540 (Ch) [82].

[18] *Tiernan v Magen Insurance Co Ltd* [2000] ILPr 517 (Com Ct).

[19] ibid [18].

[20] ibid [14].

Dornoch Ltd v Mauritius Union Assurance Co Ltd was another reinsurance case.[21] The two defendants were an insurance company and its insured. Both were based in Mauritius. The insured, a bank, had brought proceedings against the insurance company before the Supreme Court of Mauritius, claiming under its policies for losses arising from a large-scale fraud. The claimants were reinsurers for the bank's policies in the London market and had been joined to the Mauritian proceedings. They now sought a declaration in the English court that they were not liable to the defendants pursuant to the reinsurance policy, claiming that the reinsurance policy had been validly avoided for misrepresentation and non-disclosure, and that the insurance claims fell outside the scope of the reinsurance policy. They also claimed that the bank was liable for deceit or negligent misstatement. The defendants applied for a stay of the proceedings and for an order setting aside permission to serve the proceedings out of the jurisdiction.

The Court concluded that England was the appropriate forum for the proceedings because there was a risk that, if the reinsurers' claims were tried in Mauritius, 'then, in the eyes of English conflicts of laws rules, the wrong proper law and thereafter the wrong principles of law would be applied to all the issues that arise in this case'.[22] Pursuant to English choice of law rules, English law was likely to be the proper law of the reinsurers' claims. There was no choice of English law, but England was the place of characteristic performance of the reinsurance policy; and it was the place where the most significant element of the alleged torts had taken place, namely the reinsurers' reliance on the bank's untrue statements in the proposal form. It was, therefore, legitimate for the reinsurers to seek relief in the English court to ensure application of 'the correct proper law'.[23] The Court of Appeal upheld the decision, concluding that the Judge was 'entitled to take into account the juridical disadvantages to Reinsurers if the trial took place in Mauritius' and rejecting the submission that there was 'no justification for treating [English law principles] as being superior to those of any other country'.[24]

Finally, in *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd*,[25] the Court refused to set aside an order permitting service by the plaintiff on the defendants in Goa. The plaintiff, a Bermudan shipowner, claimed that a Singaporean charterer guaranteed by the Indian defendants had repudiated a charterparty agreement and sought to recover its losses under the guarantee. The charterparty, which had been negotiated through London brokers, contained an English choice of law clause. Christopher Clarke J concluded that there were two principal reasons why England was the appropriate forum: first, that the English court was better equipped to apply English legislation; and second, that there was evidence that the Indian court would apply Indian law to the guarantee, with the result that the guarantee would be unenforceable because it was in contravention of local exchange regulations.[26] While '[n]o party has an automatic right to have the English Court exercise jurisdiction over a foreign company just because in the courts of another State … the claimant would be likely to fail', the fact that the claim would fail on the grounds of local prohibitions or public policy was 'a powerful indicator' that England was the appropriate forum. It was in the interests

[21] *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887, [2006] Lloyd's Rep IR 127 (Com Ct). [22] ibid [79]. [23] ibid [79].
[24] *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389 [52]–[53].
[25] *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2011] EWHC 56, [2011] 1 WLR 2575 (Com Ct) (affirmed on other grounds). [26] ibid [141]–[142].

of the parties that the dispute 'be determined in accordance with the law applicable to the contract between the parties'.[27]

A. The Principle of Close Connection

The parochial ring to some of these dicta—that English courts should assume jurisdiction to ensure application of 'the correct proper law',[28] or that English choice of law rules are 'the most appropriate'[29]—is cause for concern.[30] Should differences in choice of law be a viable reason for exercising jurisdiction, in an age where commercial and private relationships are becoming more and more internationalised, and courts are asked to exercise jurisdiction over cases that may have significant territorial connections to other jurisdictions? This approach invites forum shopping for choice of law. It also creates an unduly biased perception of fairness. As Oliver LJ observed in *Spiliada Maritime Corporation v Cansulex Ltd* when discussing the relevance of juridical advantages to forum non conveniens reasoning, 'one man's advantage must be another's disadvantage'.[31]

It is submitted that prioritization of the forum's choice of law rules is inconsistent with one of the principal aims of the rules of discretionary jurisdiction: identification of the forum that is most closely connected to the dispute.[32] The principle of close connection is a cornerstone of the conflict of laws: it provides a universal reference point to resolve questions of jurisdiction and choice of law, which, by definition, cannot be determined fairly or appropriately by domestic notions of substantive justice.[33] Thus, pursuant to the House of Lords' decision in *Spiliada Maritime Corporation v Cansulex Ltd*, the 'natural' forum is the forum 'with which the action [has] the most real and substantial connection', based on territorial connecting factors as well as considerations of convenience and expense.[34]

Implicit in this principle is the recognition that the outcome of a case may vary across jurisdictions: if the laws and rules applied in every country were the same, jurisdiction would come down to a question of mere practical convenience.[35] Thus, if a dispute is more meaningfully connected to Australia than England, the fact that an Australian court would not resolve the dispute in the same manner as an English court should be all the more reason to decline jurisdiction. The effect of the competing choice of law approach is to disregard this self-limiting function of the rules of jurisdiction.[36]

[27] ibid [143].

[28] *Dornoch* (n 21) [79]; see also *Erste Group Bank AG v JSC 'VMZ Red October'* [2013] EWHC 2926 (Com Ct) [189]–[190].

[29] *Tiernan* (n 18) [18].

[30] cf '[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home': *Loucks v Standard Oil Co of New York* 120 NE 198 (1918) 201 per Cardozo; endorsed by Lord Parker CJ in *Phrantzes v Argenti* [1960] 2 QB 19 (QB) 33–34.

[31] *Spiliada Maritime Corporation v Cansulex Ltd* [1985] 2 Lloyd's Rep 116 (CA) 135; referred to by Lord Goff in the House of Lords, 482; see *Dicey* (n 6) [12-038].

[32] See Hill (n 7) 50.

[33] See *Dicey* (n 6) para 12-003: 'the concept of the "natural forum" … represents a principled and even-handed means of deciding whether or where jurisdiction should be exercised'.

[34] *Spiliada Maritime Corporation v Cansulex Ltd* (n 7) 477–478.

[35] See *Spiliada Maritime Corporation v Cansulex Ltd* (n 7) 474 and Hill (n 7) 45–6 for the point that jurisdiction should not, primarily, be a matter of convenience.

[36] cf A von Mehren *Adjudicatory Authority in Private International Law: A Comparative Study* (Martinus Nijhoff 2007) 30.

Differences in choice of law generally ought to have no relevance to the identification of the appropriate forum, other than to reinforce the conclusion that the appropriate forum is the forum that is most closely connected to the dispute. In none of the cases surveyed in the previous section was the weight of English choice of law clearly linked to the principle of close connection.

It follows that prioritization of forum choice of law rules ought to be the absolute exception. It is true that, where proceedings are served as of right and England is not the natural forum for the dispute, the court may nevertheless refuse to grant a stay if justice requires that the dispute be heard in England.[37] Similarly, where the claimant seeks service out of the jurisdiction, and the court must identify the forum in which the case could suitably be tried for the interests of all the parties and for the ends of justice,[38] the court is not confined to the consideration of 'connecting factors'.[39] But it would be wrong to conclude that substantive considerations can trump the principle of close connection as a matter of course. Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* was adamant that the natural forum could not be displaced simply because of juridical advantages available in England, such as higher damages or a more complete procedure of discovery. Rather, there had to be a risk that 'substantial justice' would not be done in the foreign court.[40] It follows that mere differences in choice of law should not be enough to justify the court's exercise of jurisdiction in place of the natural forum (or the forum that is more closely connected to the dispute).[41]

The problems created by the competing choice of law approach are particularly acute where the main factor connecting the dispute to England is an (alleged) English choice of law.[42] This is because, in the case of party choice, there may be no territorial connection with the forum at all (a less likely scenario if English law is the objective applicable law[43]). In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd*, for example, the only territorial connection to England was that the contract had been negotiated through London brokers—the plaintiff was Bermudan, the defendant Indian, and the charterer Singaporean. The Court assumed jurisdiction because local exchange regulations in India would override the parties' choice of English law, despite the fact that India's connection to the dispute was more significant than that of England.[44]

[37] *Spiliada Maritime Corporation v Cansulex Ltd* (n 7) 478; see *Dicey* (n 6) para 12-036.

[38] This is not strictly a two-stage enquiry*: Cherney v Deripaska* [2009] EWCA Civ 849, [2010] All ER (Comm) 456 [19]; *VTB Capital v Nutritek International Corp* (n 13) [44], [190].

[39] *Cherney v Deripaska* (n 38) [20]–[21]; see *Dicey* (n 6) para 12-054.

[40] *Spiliada Maritime Corporation v Cansulex Ltd* (n 7) 482; for service out cases, see the summary in *Cherney v Deripaska* (n 38) [20]–[21].

[41] For the point that differences in the applicable law are relevant to stage 2 of *Spiliada* and do not go to the identification of the natural forum, see *Lewis v King* [2004] EWCA Civ 1329 [38]–[39]; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 488.

[42] This may also be the sole ground for service out of the jurisdiction: CPR 6.36 and PD6B para 3.1(6)(c).

[43] cf *Re Harrods (Buenos Aires) Ltd (No 2)* [1992] Ch 72 (CA), where the Court of Appeal properly disregarded the fact that the foreign court would apply a different law to a minority shareholder's claim, because the law designated by English choice of law rules was the result of 'anomalous historical survival' of the company's incorporation in England: 125 per Bingham LJ.

[44] cf *Banco Atlantico v British Bank of Middle East* (n 15) 510, where the High Court had found that the connection of the dispute to England was 'fragile', but the Court of Appeal refused to grant a stay because the foreign court would not give effect to the Spanish choice of law agreement (holding that the defendants' connection with England was 'a solid one').

If the competing choice of law approach is taken to its logical conclusion, it is possible to imagine scenarios where the content of the applicable law would differ precisely because England has no real connection to the dispute. This could occur in the context of overriding mandatory rules or restrictions on party autonomy, whose application is often limited to cases which are in some way connected to the dispute. So even if England's exchange regulations had been the same as those of India, English law would still have conferred a juridical advantage on the claimant, because the regulations would not have applied to a transaction that had no effect on the local currency. Taken to the extreme, the competing choice of law approach has a potential anti-regulatory effect.

Finally, it is submitted that the competing choice of law approach is inappropriate not only where England has no real connection to the forum, but also where it is no more closely connected to the dispute than the alternative forum. The reasons are much the same. If the applicable law depends on the forum in which it is heard, it is important that the forum most closely connected to the dispute adjudicate it; if there is no obvious natural forum, as was arguably the case in *Dornoch Ltd v Mauritius Union Assurance Co Ltd* and *Tiernan v Magen Insurance Co Ltd*, an inquiry into choice of law differences ought to be entirely unnecessary (unless these differences give rise to matters of substantial justice): in such cases, the only rationale in support of a competing choice of law approach is the perceived superiority of English choice of law rules (along with a deep-seated London market bias in *Dornoch Ltd v Mauritius Union Assurance Co Ltd* and *Tiernan v Magen Insurance Co Ltd*[45]), which does nothing to advance 'conflicts justice'.[46] Limiting the relevance of the applicable law in this way will require a significant shift in thinking, but it is a shift that is consistent with the principles of forum (non) conveniens.

III. JURISDICTION VIA THE CHOICE OF LAW AGREEMENT: A SLIPPERY SLOPE

The competing choice of law approach is not the only rationale relied upon by courts to link the determination of the appropriate forum to the success of the parties' choice of law agreement. Predominantly, courts have relied on the principle of pacta sunt servanda[47] to justify their exercise of jurisdictional discretion in the face of choice-defeating foreign fora. But where the courts attach considerable weight to the survival of the choice of law agreement in determining the appropriate forum, the agreement comes close to being treated as an exclusionary jurisdiction agreement—an implied agreement to exclude the jurisdiction of the choice-defeating forum. The problem with this development is that it has proceeded without any consideration of the principles and rules that would usually govern an agreement of this kind. Exclusionary jurisdiction agreements that are inferred from choice of law agreements fall short of the standard ordinarily required of jurisdiction agreements.

[45] See *Dicey* (n 6) 557 for the point that 'there is a strong tendency for the court to consider England as the natural forum' in cases concerned with the London insurance market.

[46] See A Mills, *The Confluence of Public and Private International Law* (CUP 2009) 16ff for an analysis of the role of 'justice' in private international law.

[47] I use this term as shorthand to describe the general idea that parties ought to be held to their agreements. An important qualifier to this—which courts tend to neglect—is that all agreements must operate within the bounds of the law of contract (and, where applicable, of rules on the validity of choice of law/jurisdiction agreements).

A. Pacta Sunt Servanda

The practice of attaching jurisdictional weight to choice of law agreements dates back to the Court of Appeal's decision in *Seashell Shipping Corporation v Mutualidad de Seguros del Instituto Nacional de Industria ('The Magnum')*.[48] In that case, the Panamanian plaintiffs had chartered a ship from Spanish owners, which was insured by the Spanish defendant. The policy provided that the hull machinery cover was under the conditions of the Institute Time Clauses (ITC), except that the contract was subject to Spanish law instead of English law as stipulated in the ITC document. However, upon renewal of the policy by the plaintiffs, the defendant simply set out the details of the existing cover, but did not provide for modification of the applicable law. When the ship was damaged, the plaintiffs sought leave to serve proceedings outside the jurisdiction. It was common ground that the success of the plaintiffs' substantive claim depended on whether English or Spanish law would be applicable.

The Court of Appeal concluded that it was appropriate that the dispute be tried in England.[49] It found that there was no doubt that the contract was on unmodified ITC terms and thus expressly provided for English law as the proper law. There was a risk, however, that the plaintiffs would be held disentitled to recover on the grounds of public policy, whatever the true intent of the parties, if the issue went to Spain for determination.[50] The Court referred to its decision in *Coast Lines Ltd v Hudig & Veder NV*, where it had refused to set aside a writ for service out of the jurisdiction because the law with which the contract in question had its closest connection was English law.[51] It was accepted in that case that, if the claim was heard in the Netherlands, the Dutch courts would be required to apply the Netherlands Code, which would have afforded a complete defence to the plaintiffs' claim.

The Court noted that 'the theme running through all the judgments [in *Coast Lines*] is, in effect, that parties should be held to their bargain'.[52] It concluded accordingly that it would be unjust to the plaintiffs to force proceedings to be brought in Spain 'where the result would or might be that the defendants escaped from their bargain', instead of in England 'where the result of [the plaintiffs'] bargain would be to produce success'.[53]

The reasoning has since been followed in a number of cases.[54] A good example is a recent decision by the Commercial Court in *The Lucky Lady*.[55] Navig8, a Singaporean company, sought permission to serve Al-Riyadh, a Jordanian company, out of the jurisdiction, on the basis that proceedings brought by Al-Riyadh in Jordan were contrary to a choice of English law. Al-Riyadh claimed damages from Navig8 as the alleged

[48] *Seashell Shipping Corporation v Mutualidad de Seguros del Instituto Nacional de Industria* [1989] 1 Lloyd's Rep 47 (CA) [*The Magnum*]. [49] ibid 53. [50] ibid 51–3.
[51] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 1 Lloyd's Rep 53 (CA).
[52] *The Magnum* (n 48) 53. [53] ibid 53.
[54] In addition to the cases cited below, see also *Sawyer v Atari Interactive Inc* [2005] EWHC 2351, [2006] ILPr 129 (Ch) [59], [62]; *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm Ct) [33], [36], cf [44]; *Caresse Navigation Ltd v Office National de L'Electricité (The Channel Ranger)* [2013] EWHC 3081 (Com Ct) [57]–[65]; cf *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* (n 25) [143]; *Cadre SA v Astra Asigurari SA* [2005] EWHC 2626, [2006] 1 Lloyd's Rep 560 (Com Ct). For cases where the parties made a combined choice of law and jurisdiction, see: *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 (Com Ct); *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (Com Ct); *Horn Linie GmbH v Panamericana Formas e Impresos SA* [2006] EWHC 373, [2006] 2 Lloyd's Rep 44 (Com Ct).
[55] *The Lucky Lady* (n 2).

carrier of damaged cargo. The bill of lading provided for English law. Pursuant to Jordanian choice of law rules, however, the law governing the dispute was Jordanian law. In the English court, Navig8 sought an anti-suit injunction restraining the Jordanian proceedings, damages and a negative declaration that it was not a party to the contracts of carriage. It argued that, because English law contained certain protections that were not available to it under Jordanian law, the Jordanian proceedings were 'designed to defeat . . . their rights under English law'.[56]

The Court rejected the applications for an anti-suit injunction and damages, on the basis that, by bringing the Jordanian proceedings, Al-Riyadh did not contravene 'any (contractual or other) duty owed to Navig8'.[57] The Court found that, in effect, Navig8 was asserting:[58]

> a right, deriving apparently from the choice of English law, not to be sued in any jurisdiction that does not give effect to a choice of English law that is recognised by English private international law, at least unless the foreign jurisdiction recognises rights similar to those recognised by English law.

There was 'no proper basis for so wide a proposition'. Yet the Court was willing to grant permission for leave to serve out of the jurisdiction the claims for declaratory relief, concluding that England was the proper place for these claims because of the parties' choice of English law. The Court considered that the parties' choice brought 'into play "the fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply"', and that this permitted 'what would, in all probability, otherwise unacceptably defy comity'.[59] Moreover, the declaratory relief would assist Navig8 to resist enforcement of any Jordanian judgment in a third country, such as Singapore, and might also support an ancillary anti-suit order.[60]

B. The Choice of Law Agreement as an Exclusionary Jurisdiction Agreement

The courts' rationale is clear enough: that the choice of law agreement is a binding agreement which should not be defeated simply by a unilateral choice of jurisdiction. What is missing from the courts' analysis, however, is a clear distinction between the parties' intention on the applicable law and the jurisdictional function attached to it. Choice of law agreements are treated in effect as if they were exclusionary jurisdiction agreements. This approach risks undermining the principle of party autonomy.

1. Choice of law agreements as exclusionary jurisdiction agreements

The argument that is made here, that courts have been drawn into treating choice of law agreements as if they were exclusionary jurisdiction agreements, may seem far-fetched at first. The Court in *The Lucky Lady* was quick to reject a submission that the English choice of law agreement conferred a right on the applicant to be sued in a forum that

[56] ibid [16]. [57] ibid [22]. [58] ibid [22]. [59] ibid [35].
[60] ibid [36]–[38]. But cf *Howden North America Inc v ACE European Group Ltd* [2012] EWCA Civ 1624, [2013] Lloyd's Rep IR 512, concluding that it is not appropriate to grant a declaration that English law is applicable, in circumstances where foreign proceedings are afoot and the foreign court may ignore an express or implied choice of English law, in order to provide a potential defence for enforcement of the foreign judgment.

would give effect to it.[61] A similar submission also failed to find favour with the New South Wales Supreme Court. In *Ace Insurance Ltd v Moose Enterprise Pty Ltd*,[62] the plaintiff, an Australian insurance company, argued that the defendant insured, an Australian toy company, ought to be restrained from pursuing proceedings in the Californian courts based on an Australian choice of law clause contained in the policy. The aim of the Californian proceedings was to require the insurer to defend a class action brought against the insured in the US. The plaintiff submitted that the Californian court would apply Californian law to some of the issues in the proceeding, that Californian law was more favourable to the insured, and that the Californian proceedings had thus been brought in breach of the Australian choice of law agreement. Rejecting this submission, the New South Wales Supreme Court concluded obiter that an ordinary choice of law clause did not 'found implied negative stipulations' as to jurisdiction.[63]

The plaintiff relied on a proposition first made by Professor Briggs, that a choice of law agreement may found an implied stipulation not to sue in a jurisdiction that would not give effect to the agreement, based on the principle that a party will not do anything to deprive the other party of the benefit or efficiency of the contractual 'bargain'.[64] The Court's reluctance to expressly embrace this reasoning is well founded: for reasons further explored below, it is a bold claim to say that choice of law agreements may function as agreements to derogate from another country's jurisdiction.

But this is exactly the approach that the English courts have, in a very roundabout way, adopted. Courts have relied on the choice of law agreement as a bargain that imposes its own jurisdictional limitations. The reasoning goes that, by exercising jurisdiction where a choice of law agreement would otherwise be defeated, courts are merely giving effect to the parties' agreement. When the parties entered into the choice of law agreement, they intended it to be valid and enforceable, so parties are entitled to seek out available fora where this intention will be met; and parties have no grounds for complaint if the court exercises jurisdiction to ensure that they are held to their bargain on choice of law.

So while it is true that, on the face of it, the choice of law agreement is never more than a factor in the court's exercise of discretion, there has been a clear tendency to attach a jurisdictional function to choice of law agreements. In practice, a choice of law agreement that leads to the exclusion of jurisdiction has the same effect as an implied exclusionary jurisdiction agreement.

2. The parties' freedom to derogate from jurisdiction

So why is the courts' reliance on the principle of pacta sunt servanda so problematic? Why should courts not adopt an approach that comes close to enforcing choice of law agreements as exclusionary jurisdiction agreements? Under common law rules on implied terms, an intention may be imputed to the parties to a contract that they undertake not to incapacitate themselves from performing their contractual obligations: 'if I grant a man all the apples growing upon a certain tree, and I cut down the tree,

[61] *The Lucky Lady* (n 2) [22].
[62] *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724.
[63] ibid [53].
[64] ibid [42]–[46]; Briggs (n 3) paras 11.45–11.58.

I am guilty of a breach.'[65] Although, by bringing proceedings in Jordan, Al-Riyadh did not incapacitate itself from performing the choice of law contract—because it is the court, not the parties, which applies the chosen law—its actions were nonetheless inconsistent with the purpose of the choice of law contract and would have caused the choice of English law to fail.[66]

The Court in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* seemed to conclude that the choice of law agreement could not contain a promise as to jurisdiction because it was not a legally binding agreement.[67] This conclusion is doubtful. The choice of law agreement is based on a mutual intention to select the applicable law, which in turn is given effect by the court—it is difficult to reason that such an agreement is not legally binding.[68] Rather, the better view is that the principle of pacta sunt servanda is inapplicable because enforcement of an implied intention to derogate from the jurisdiction of choice-defeating courts is inconsistent with the principles and rules that govern party autonomy in jurisdiction more generally. In *New Hampshire Insurance Co v Strabag Bau AG*, the Court held that the requirements of Article 17 of the (then) Brussels Convention could only be met by a choice of jurisdiction clause,[69] and that the common law, too, required an express agreement on jurisdiction.[70] Parties must reach a real,[71] express agreement. It is not obvious why an agreement to *exclude* a forum should be any different. The underlying concerns must be the same: that, by excluding a forum, parties give up their right to access to justice in that particular forum, and that parties should be aware of their decision to do so.

An exclusionary jurisdiction agreement is neither express nor—in most cases—real. It is an implied term of the choice of law agreement that is based on the hypothetical or presumed intention of the parties: an agreement that the parties would have reasonably concluded if they had considered the matter.[72] It is very likely that the parties in *The Lucky Lady* did not, in fact, have a common objective intention to exclude the

[65] *McIntyre v Belcher* (1863) 14 CBNS 654, 664 per Willes J, cited by Lord Denning MR in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen* [1972] 2 QB 455 (CA) 492.

[66] cf Briggs (n 3) para 11.52; but see K Takashi, 'Damages for Breach of a Choice-of-Court Agreement: Remaining Issues' (2009) 11 YrbkPrivIntlL 73, 101.

[67] *Ace Insurance Ltd v Moose Enterprise Pty Ltd* (n 62) [47]–[53]: The Court rightly reasoned that choice of law agreements are primarily declaratory in character, but then suggested that declaratory agreements are in a different class to covenants or promises: [51]–[52].

[68] M Hook, 'The Choice of Law Contract' (PhD thesis, Victoria University of Wellington, 2014).

[69] *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361 (CA) 371–372. Art 23 of the Brussels I Regulation (n 4) provides that agreements on jurisdiction must be either 'in writing or evidenced in writing', or in a form which accords 'with practices which the parties have established between themselves' or with international trade usages.

[70] ibid 371–372; see *Dicey* (n 6) para 14-079.

[71] This follows logically from the requirement that the agreement be express; see also *Salotti v RUWA* [1976] ECR 1831.

[72] In the context of choice of law, too, a presumed intention is no longer sufficient to amount to a choice of law agreement (*Dicey* (n 6) paras 32-005–32-007). Nevertheless, courts continue to blur the lines between presumed intention and real implied intention. In *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd* [2013] EWCA Civ 365, [2013] 2 Lloyd's Rep 98, the Court of Appeal considered that it was necessary to draw a distinction between 'inferring an unexpressed intention and imputing an intention' ([29]), but then went on to contradict itself by accepting a 'tacit choice in circumstances which do not suggest that [the parties] gave actual thought to the matter' ([32]). Applying an objective standard of intent, the relevant question must

jurisdiction of the Jordanian court. If the parties had intended to exclude the court's jurisdiction, they would have made their intention express—at least there was no clear reason why they would not have made their intention express (such as a misconception that their choice of English law would also operate as a choice of England as the applicable forum).[73] Parties should not be deprived of the ability to litigate in available jurisdictions on the basis of an imputed intention.

The problem is only exacerbated when courts presume the existence or validity of the choice of law agreement that is then used to justify the exercise of jurisdiction. This occurs where the choice of law agreement is treated as 'separable' from the underlying substantive contract but the respondent's grounds of challenge logically affect both the choice of law agreement and the substantive contract. In *The Lucky Lady*, the claimant's application was for a negative declaration that it was not a party to the alleged bills of lading, which included the English choice of law. In essence, therefore, the effect of the Court's reasoning was to create an exclusionary jurisdiction agreement for the parties on the basis of a choice of law agreement which may never have come into existence.

Finally, it is curious that a court would be drawn into an (indirect) assessment of the parties' intention to *derogate* from a foreign country's jurisdiction, a matter that would best be determined by the court whose jurisdiction is excluded, based on the forum's choice of law rules! After all, the purported effect of the choice of law agreement is derogation, not prorogation. Like the competing choice of law approach criticized above, the pacta sunt servanda argument presupposes that the forum is best placed to determine the existence and validity of the choice of law agreement, as well as its implications for jurisdiction, regardless of the forum's objective connection to the dispute. Both in *The Lucky Lady* and in *The Magnum*, there were no objective elements connecting the dispute to England.

IV. CONCLUSION

There is a growing trend in English forum (non) conveniens jurisprudence to attach considerable weight to choice of law agreements that will not be effective or enforceable in the foreign court. Two rationales are usually advanced for this: that English choice of law rules ought to be given preference, and that it would be wrong to defeat the parties' intention on choice of law. This article has argued that neither rationale is justifiable in principle. Prioritizing English choice of law rules is inconsistent with the principle of close connection, and giving jurisdictional effect to a choice of law agreement is inconsistent with the principle of party autonomy. Both rationales are hopelessly parochial, at a time when the English conflict of laws is increasingly internationalist in character. A shift in thinking is needed, but the solution is straightforward: unless the court is faced with exceptional circumstances, differences in the enforcement of choice of law agreements ought to be taken out of the forum (non) conveniens equation.

be whether the parties could reasonably be understood to have made a choice. If there is no reason to explain why the parties did not bother to express their choice, there is no real agreement.

[73] In some ways, this approach recreates the fallacy of lex validitatis reasoning in choice of law, which is that the parties must have intended to choose the law under which their choice of law agreement—or their underlying contract—is valid and enforceable. If it were that easy, we could do away with much of the law of contract. For criticism of the rule of validation, see R Fentiman, *International Commercial Litigation* (OUP 2010) para 4.64.