INTERPRETATION AND ENFORCEMENT OF ARBITRATION AGREEMENTS UNDER ENGLISH AND U.S. LAW

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ABSTRACT

A valid arbitration agreement is based on the parties' consent. Whilst this proposition might at first sight seem rather straightforward, determining the question of whether the parties have consented to arbitrate a particular dispute generally proves difficult. In order to answer this question, a number of issues need to be clarified: Can the parties be deemed to have consented to arbitrate? What types of dispute are deemed to fall within the scope of the parties' arbitration agreement? By reference to what law are these issues determined? Do the courts or arbitrators have power to decide over these issues? This article will analyze the issues from the perspective of English and U.S. courts and will then discuss what parties should expect when agreeing to arbitrate.

INTRODUCTION

During contract negotiations, it is natural for parties to assume that the linguistic nuances between the forms of arbitration wording would not likely play a major role in deciding which disputes can be arbitrated. Hence, they could simply take the view that any dispute arising between them must be resolved through the arbitration proceedings by reason of the arbitration agreement or the arbitration clause stipulated in their main contract. On this basis, such parties could move to stay judicial proceedings pending in the United States or England, as the case may be, in favour of such agreements or provisions. From a similar perspective, those parties who seek to compel arbitration may wish to apply to English or U.S. courts in order to restrain a party from commencing or continuing foreign judicial proceedings in breach of an arbitration agreement.

Nonetheless, it is clear in both jurisdictions that the identified parties may not in all cases meet with success on the grounds that arbitration agreements may not have sufficient scope to embrace all kinds of disputes between the parties. On the question of the arbitrability of the disputes, it is therefore vital for the parties to be cognizant of how the arbitration wording is interpreted pursuant to the law applicable to these agreements. Consequently, not only in the contract drafting process, but also when seeking to compel or avoid the arbitration agreements, the parties have a stake in knowing the recognised canons of construction peculiar to the arbitration agreements and clauses.

In order to throw light on this issue, this paper will examine the widely used forms of arbitration wording and how they are interpreted under English and U.S. law. In particular, the paper explores arbitrability of the claims in tort, collateral issues and those disputes relating to invalidity of the main agreements *ab initio.* With a view to highlighting the practical significance of this issue, it initially examines what legal system is applicable to the arbitrability of disputes. Thereafter, the paper goes on to consider to what extent the scope of arbitration agreements is decisive for English and U.S. courts as to whether anti-suit injunctions should be

granted. In so doing, the first section focuses on the practical significance of this matter when the parties seek to avoid or compel arbitration agreements. In the second section, the interpretation of the common forms of arbitration wording adopted under English law will be evaluated. In this respect, the principal focus will be on the *Arbitration Act, 1996* and on the landmark judicial decisions, such as *Premium Nafta Products Ltd. v. Fili Shipping*[1] and *Harbour Assurance Co. v. Kansa General International Insurance*.[2] This section will also analyse the U.S. approach towards the interpretation of arbitration agreements and clauses particularly in light of the *Federal Arbitration Act* and the leading U.S. Supreme Court decisions in *Prima Paint Corporation v. Flood Conklin Manufacturing Co*.[3] and *Buckeye Check Cashing Inc. v. Cardegna*.[4]

In conclusion, the common peculiarities and differences between the U.S. and English approaches with regard to this issue will be underlined. The conclusion of this analysis will be that the courts in both jurisdictions have displayed a willingness to enforce arbitration agreements. The central premise of this paper will be that the semantic nuances between the forms of the arbitration clause are no longer given heavy weight, especially under English law, mainly on the grounds that when the contract contains an arbitration agreement, the parties are assumed to have agreed to arbitrate all the disputes arising between them. This assumption is rebutted only where the parties' contrary intention can objectively be discerned from the arbitration agreement.

Given this conclusion, parties do not need to draft their arbitration agreements with punctilious care, provided that the intention to arbitrate all kinds of disputes can reasonably be discerned from the arbitration wording. Another finding of great importance will be that even the claims pertaining to fraudulent inducement, misrepresentation, duress, or illegality of the main agreement, under which the arbitration clause is stipulated, could well come within the scope of the arbitration wording, and can therefore be arbitrated. In this context, it will also be argued that even if the main contract is tainted by undue process, this is not of itself sufficient to invalidate the arbitration clause. In order to support this proposition, the rule of severability of arbitration agreements under English and U.S. law will also be discussed, where appropriate.

1. [2008] 1 Lloyd's Rep. 254.
2. [1993] Q.B. 701.
3. 388 U.S. 395 (U.S. 1967).
4. 126 S.Ct. 1204 (U.S. 2006).

I. THE QUESTION OF ARBITRABILITY: PURSUANT TO WHAT LAW, WHERE AND WHEN IS IT RESOLVED?

A. Finding the law applicable to arbitration agreements

For those disputes between the parties which have connections with more than one state, it is imperative to raise the question of what law will be applied in order to resolve such disagreements. This proposition must be viewed in light of the fact that the rules of conflict of law applicable in the *fora* are at variance, and so are the legal systems around the globe. The practical consequence of this position is that jurisdictional issues have been critical to the parties as they seek to obtain a beneficial settlement.[5] Perhaps with a view to avoiding the battles over jurisdiction, parties usually insert arbitration clauses into their contracts. Given that enforcement of arbitration clauses and agreements naturally has the effect of depriving the parties of resorting to their national courts, English and U.S. courts have refused to decline jurisdiction without examining the scope and validity of these provisions.

For the purpose of addressing which disagreements are capable of settlement through arbitration proceedings, courts in both jurisdictions first ask what law must be applied to the question of which disputes can be arbitrated. While it is natural to assume that the law applicable to this issue is the same as that governing the main agreement, it is clear under both English and U.S. law that the applicable law of the arbitration agreements and clauses may well differ from the legal system applicable to the main agreement.[6] This proposition is best supported by the rule of severability of arbitration agreements, which dictates that arbitration agreements and clauses must be looked at in isolation when deciding their validity and enforceability. Since this rule will be analysed later in this paper, suffice it to say that the inquiry on the applicable law of the arbitration agreements and clauses must be made on its own.

In light of these observations, it is true that the issue of whether a particular dispute falls within the scope of an arbitration agreement is addressed by the court seized in light of the conflicts of law rules, which are considered to be applicable by this court.[7] On this basis, English

5. See, generally, A. Bell, *Forum Shopping and Venue in Transnational Litigation*, Oxford Private International Law Series, 2003.
6. For a similar view, see D.R. Bishop, "A Practical Guide for Drafting International Arbitration Clauses" (2000) *I.E.L.T.R.* 16, 35 quoting *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426-27 (2d Cir. 1974).
7. See A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 4th Ed., London, 2005 at para. 12-105.

courts have consistently adhered to the rule that English conflict of law rules must be applied when deciding the governing law question.[8] On the other side of the Atlantic, U.S. courts similarly resort to the U.S. conflict of law rules, as the law of the forum, when addressing this issue.[9]

The conflict of law rules in both jurisdictions suggest that, similar to other types of contracts, arbitration agreements and clauses should be governed by the legal system which is explicitly or impliedly chosen by the parties. Under U.S. law, this proposition draws support from numerous landmark U.S. judicial decisions. This includes the leading judgment of the Fourth Circuit in *Hawkspere Shipping Co. Ltd. v. Intamex S.A.*[10] There, the court held, *as obiter dictum,* that the choice of law clauses and agreements would be given effect, unless there is a persuasive reason for treating the choice as unreasonable.[11] In support of this view, the court therein referred to the leading U.S. Supreme Court decision in *Bremen v. Zapata Off-Shore,* where the forum selection clause requiring the parties to bring the dispute before London Courts of Justice was given effect.[12] Since the underpinning decision in *Bremen v. Zapata Off-Shore* was mainly based upon the fact that the forum selection clause was contained in a towage agreement which was freely negotiated between the parties, it is important to find the answer to one key question: Could the choice of law clause be enforceable even though the parties to the relevant agreement do not have equal bargaining powers?

In order to solve this problem, the leading U.S. Supreme Court decision in *Carnival Cruise Lines v. Shute*[13] is illustrative. In the instant case, the court was asked to decide whether the forum selection clause in cruise line's passenger contract ticket, whereby the parties were required to litigate all disputes in Florida, could be compelled against the ticket holder, who had no means of negotiating this clause with the carrier. The Supreme Court therein refused to limit enforceability of choice of law and forum selection clauses only to those cases where the parties can "freely negotiate". In so doing, they opined that lack of equal negotiating powers between the parties is not of itself sufficient to render the choice of law and forum selection agreements unenforceable. Accordingly, the U.S. Supreme Court upheld the view that these provisions could well be treated as reasonable and enforceable, even though they have not been "freely bargained". The reason for this liberal approach

8. See *The Star Texas*, [1993] 2 Lloyd's Rep. 445, 450.
9. See *Restatement (Second) On Conflict of Laws*, § 4(1) and § 6(1).
10. 2003 A.M.C 1374 (4th Cir. 2003).
11. *Ibid.* at 1382 (4th Cir. 2003).
12. 407 U.S. 1 (U.S. 1972).
13. 499 U.S. 585 (U.S. 1991).

was straightforward: Given that there are a number of potential *fora* available to resolve the disputes arising from the international cruise agreements, the carriers' aim to limit such *fora* is reasonable. When justifying this receptive approach towards these provisions on these grounds, the Supreme Court also drew support from the fact that enforcement of these provisions has the salutary effect of minimising the risks of parallel proceedings in different jurisdictions.

With these explanations in mind, it must therefore be concluded that, just as the forum selection agreements, U.S. courts have been inclined to enforce the express choice of law clauses, unless there is a countervailing reason for holding that such a choice is unreasonable.[14] In this respect, there is another important restriction to parties' freedom of choice under U.S. law: For U.S. courts to enforce the choice of law clause, the legal system of the country designated thereunder must have a "substantial connection" either with the parties or with the relevant transaction.[15] Accordingly, where there is an express statement as to the governing law of the arbitration clause or agreement, U.S. courts will resolve the arbitrability issue pursuant to the governing law as explicitly chosen, provided that none of these highlighted exceptions arise.

In practice, arbitration clauses and agreements do not usually contain an express statement as to the governing law of the arbitration agreement.[16] However, it is well settled under U.S. law that the courts may find an implied choice of law in the arbitration agreements and clauses. In this connection, it is possible for U.S. courts to take the view that the *situs* of arbitration stipulated in the arbitration provision indicates an intention to govern the arbitrability issue under the legal system applicable in that place.[17] Similarly, the courts may assume that parties have intended to govern both their main agreements and the respective arbitration clauses with the same legal system.[18]

The legal position under English law is also similar to that under U.S. law. Accordingly, English courts resolve this issue in accordance with the law which is explicitly selected by the parties under the arbitration provision. Hence, they give effect to the selected law unless there is

14. See *Bremen* and *Carnival Cruise Lines, above.*
15. See *Restatement (Second) On Conflict of Laws*, § 187(2) and § 188.
16. R.D. Bishop, "A practical guide for drafting international arbitration clause" (2000) *I.E.L.T.R.* 16, 36.
17. See *Splosna Plovba v. Agrelak S.S. Corp.*, 381 F.Supp. 1368, 1975 A.M.C. 146, 148 (S.D.N.Y. 1974).
18. See, Bishop, *supra* note 6.

a "strong reason" against the enforcement of the selected governing law.[19] Yet, unlike U.S. courts, English courts do not require any connection between the parties and the chosen legal system. The main authority for these propositions is the long-standing judgment in *Vita Food Products v. Unus Shipping Co*.[20] In this case, the court applied English law, which was expressly chosen by the parties, to the question of whether the shipowner could be exempted from liability in respect of damage to the goods. Thus, they settled the disputes pursuant to English law, irrespective of the fact that neither the parties nor the relevant contract had any relation with this jurisdiction. To support these findings, Lord Wright stated, *inter alia,* that:

> [...] Connection with English law is not as a matter of principle essential. The provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England...[21]

Leaving aside the express choice of law clauses, English courts could equally apply the legal system which the parties have impliedly selected in their arbitration provision. On the question of in what circumstances the courts may find such an implied choice, the main guidance can be drawn from the House of Lords judgment in *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation*.[22] The key argument raised by the Lords was that the arbitral forum designated by the parties could raise the "strong inference" that they have intended the national law of the chosen country to govern their disputes.[23] Hence, the court upheld the view that the *situs* of arbitration is compelling in determining the applicable law of the agreement.[24]

Where there is no implied or express choice as to the governing law of the arbitration provision, the conflict of law rules adopted under English and U.S. law suggest one solution: In the absence of parties' choice, the contract is governed by the national laws of the country with which the parties have the "closest connection".[25] While considering the highlighted judicial decisions under English law, it must be remembered that

19. *The Eleftheria,* [1969] 1 Lloyd's Rep. 237.
20. [1939] A.C. 277.
21. *Ibid.* at 290.
22. [1971] A.C. 572.
23. *Ibid.* at 604.
24. *Ibid.*
25. For English law, see *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, 219. For U.S law, see *Restatement (Second) On Conflict of Laws*, § 188.

English courts apply Rome I Regulation with a view to addressing the conflict of law issues in general contractual context. However, in the case of arbitration agreements, English common law comes into play, and the courts resort to the highlighted judicial decisions, particularly since these agreements are excluded from the scope of Rome I Regulation by reason of article 2(e) thereof. This does not, however, have any practical significance on the grounds that there is no material difference between Rome I Regulation and the common law position in that respect.

The highlighted solutions above are not, however, applicable to the disputes as to whether the parties have entered into an arbitration agreement at all. In such circumstances, English courts apply putative applicable law, which would govern the arbitration agreement or clause, if it were assumed that there was an existing and valid arbitration provision.[26] Unlike English courts, U.S. courts have repeatedly chosen a different route in tackling this particular conflict of law issue. As has been made clear with the leading U.S. Supreme Court judgment in *First Options of Chicago, Inc. v. Kaplan*,[27] U.S. courts tend to resort to "ordinary state-law principles that govern the formation of contracts". In light of these explanations, the issue of whether the courts or arbitral tribunals address the arbitrability of the disputes will now be analysed.

B. When the question of arbitrability arises, who decides the matter?

Having briefly analysed the conflict of law rules with regard to the governing law of arbitration provisions, it is necessary to consider at what stage the question of arbitrability usually arises and whether the court or the arbitral tribunal must decide this particular issue. From a purely practical perspective, U.S. and English courts may be asked to address the arbitrability issue by those defendants who argue that their respective claimants have pursued litigation in breach of a valid arbitration clause or agreement. On this basis, the defendants could move for a stay of legal proceedings in favour of the relevant arbitration provision.

Under English law, the main guidance is the ruling in *Birse Construction Ltd. v. St. David Ltd.,* where HHJ Humphrey Lloyd raised three different options for the courts to choose[28]: Firstly, when it is sufficiently

26. *The Atlantic Emperor*, [1989] 1 Lloyd's Rep. 548.
27. 514 U.S. 938 (U.S. 1995).
28. (1999) B.L.R. 194, *quoted* in H.R. Dundas and D. Altaras, "Bribery and separability: who decided, the tribunal or the courts? *Fiona Trust & Holding Corp. v. Yuri Privalov*" (2007) *Arbitration* 239, 245-256.

clear on evidence that there is an existing arbitration agreement, and the dispute falls within the scope of the relevant arbitration provision, the court can choose to stay the proceedings under article 9 of the *English Arbitration Act, 1996*. Where it is clear on such evidence that there is no existing arbitration agreement, the court would be entitled to dismiss the motion to stay proceedings. As a second option, the court could leave this issue to the decision of the courts in light of article 30 of the act. In such cases, arbitrators' decision on jurisdiction would be open to challenge pursuant to article 67 of the act. The third alternative for the courts is to order the trial of the issue pursuant to CPR Pt. 62.8 in order to decide whether there is actually an existing arbitration agreement between the parties.

These explanations underline the fact that, when article 30 of the *English Arbitration Act, 1996* finds room for application, the tribunal would be competent to rule its own jurisdiction. Accordingly, in such circumstances, they would be entitled to decide whether there is a valid arbitration agreement and whether the arbitration language has sufficient breadth to catch the dispute between the parties. Leaving aside those cases where article 30 of the act comes into play, it must be borne in mind that arbitral tribunals are equally entitled to assume jurisdiction even though the party, opposing arbitration, alleges that the main agreement is tainted with illegality *ab initio,* or fraud.

Hence in *Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd. and Others*,[29] the Court of Appeal stayed the judicial proceedings in favour of the arbitration agreement, holding that the initial illegality of the contract is not of itself sufficient to render the arbitration clause ineffective. As a justification for this decision, they opined that the arbitration clauses and agreements are collateral agreements. Consequently, the court ruled that the arbitral tribunal was competent to decide over initial illegality of the contract, *inter alia,* because this issue fell within the scope of the arbitration agreement. In other words, the tribunal was held to have jurisdiction to resolve the issues of illegality, provided that the alleged illegality does not directly impeach the arbitration agreement.[30]

The rule of severability was later extended with the landmark House of Lords decision in *Premium Nafta Products Ltd v. Fili Shipping*

29. [1993] Q.B. 701.
30. *Ibid.* at 709. See also, M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, New York, Cambridge University Press, 2008 at p. 90.

Co. Ltd.[31] In this case, a dispute arose out of eight charterparties each of which contained an arbitration clause. The vessel owners sought to rescind the charterparties on the basis that they were procured by bribery. With a view to challenging the rescission of the owners, the charterers initiated arbitration proceedings in London pursuant to the arbitration clause. Alleging that rescission of the charterparty brought the arbitration clause to an end, the vessel owners instituted proceedings before English courts for a declaration that they were not bound by the arbitration clause.

When the dispute was referred to the House of Lords, the Lords took the view that the arbitrators had jurisdiction by reason of article 7 of *Arbitration Act, 1996*. They further argued that even though the main contract was tainted with fraud, this is not of itself sufficient to render the arbitration clause voidable on the basis that the arbitration agreements are treated as separate from the main contract. The Lords thus upheld the charterers' argument that the parties would need to arbitrate their disputes with regard to rescission of the charterparties. However, they further added that arbitrators would not be entitled to assume jurisdiction for resolution of the disputes on whether there had been an arbitration agreement at all, unless this matter was left to the arbitrators' decision under Article 30 of *Arbitration Act, 1996*.[32]

Another underpinning reason for this finding was that the arbitration wording was held to be wide enough to cover the disputes on rescission, but this part of the judgment will be discussed later on. For present purposes it is sufficient to say that the doctrine of severability is adopted by article 7 of the *Arbitration Act, 1996* and it is further reflected by these key judicial decisions.

Under U.S. law, the U.S. Supreme Court judgment in *First Options of Chicago, Inc. v. Kaplan*[33] establishes the main solution for deciding to what extent the arbitrators could rule on their own jurisdiction. In the instant case, a dispute arose from a "workout" agreement made between First Options of Chicago and MK Investments, an investment company

31. See [2007] UKHL 40. For further discussions, see G. Willsher, "The doctrine of separability: the last stand of orthodoxy: Harbour v. Kansa and others" (1993) *Int. I.L.R.* 345; A. Trukhtanov, "Separability of arbitration clause and jurisdiction" (2008) *Int. A.L.R.* N6; S. Friel and C. Jones, "Construction and Severability of arbitration clauses" (2007) *Int. A.L.R.* N38; E. Snodgrass, "*Fiona Trust v. Privalov*: the Arbitration Act 1996 comes of age" (2007) *Int. A.L.R.* 27.
32. For a similar view, see *Law Debenture Trust Corp. Plc. v. Elektrim Finance BV.*, [2005] EWHC 1412 (Ch) and *Mackender v. Feldia AG*, [1967] 2 Q.B. 590.
33. 514 U.S. 938 (U.S. 1995).

wholly owned by Manuel Kaplan and his wife Carol Kaplan. For settlement of the dispute, First Option commenced arbitration proceedings in line with the arbitration clause in the said workout agreement. The Kaplans, however, refused to arbitrate, arguing that they neither personally signed the agreement, nor consented to the arbitration clause therein. Nonetheless, during arbitration proceedings, arbitrators decided that they had jurisdiction to deal with the merits of the dispute and they gave their decision accordingly. Thereafter, the Kaplans sought to vacate the award under 9 U.S.C. § 10, raising the argument that the dispute was not arbitrable. At a later stage, this was taken to the U.S. Supreme Court, and the court was asked to decide whether the courts would be entitled to review arbitrators' decision on jurisdiction. The Supreme Court gave a straightforward answer to this seemingly convoluted question. They suggested that:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, (citations omitted), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about that matter.

For the purposes of deciding whether parties have agreed that arbitrators must decide the arbitrability issue, the Supreme Court further added another threshold: "Courts should not assume that the parties agreed to arbitrate the arbitrability issue unless there is 'clear and unmistakable' evidence that they did so."[34] Consequently, the question of who must decide over arbitrability must be answered by the courts unless the parties have specifically consented to refer this issue to arbitration. This leading Supreme Court judgment further underpins the fact that in the case of any doubt as to the parties' consent with respect to submission to arbitration, the courts must decide against arbitration irrespective of the federal policy favouring arbitration.[35] On the contrary, it must be noted that where there is ambiguity as to the scope of the arbitration clause or agreement, U.S. courts are inclined to decide in favour of arbitration by reason of the highlighted federal policy.[36]

Very recently, the findings of this case were endorsed by the Supreme Court in *Granite Rock Company v. International Brotherhood of Teamsters*.[37] There, the Supreme Court reiterated the general rule:

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34. *Ibid*.
35. *Ibid.* See also, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (U.S. 2002) quoting *AT & T Technologies, Inc. v. Communications Workers*, 465 U.S. 643, 649 (U.S. 1986).
36. *Mitsubishi Motors Corporation v. Soler Chrysler*, 473 U.S. 614, 626 (U.S. 1985).
37. 130 S.Ct. 2847 (U.S. 2010).

Disputes with regard to formation of arbitration agreements entail "judicial determination".[38] Consequently, it is well established under U.S. law that the question of whether there is an existing arbitration agreement or clause must be decided by the courts. In other words, the courts may order arbitration of a specific dispute where the parties are not disputing over the formation of the arbitration provision.[39] On the contrary, the ruling further clarifies that scope of the arbitration clause or agreement, which is acknowledged to be valid, can be decided by the arbitrators, if there is a valid provision expressly delegating arbitrators to address this issue.[40]

In order to fully understand to what extent the competence-competence doctrine finds room for application under U.S. law, one further point must also be clarified: Who decides over the rescission of the main contract by reason of fraud, misrepresentation or initial illegality? Where the parties have a disagreement as to whether their main contract is valid and enforceable, the well-established approach of U.S. Courts has been to leave this issue to the determination of arbitrators, if they satisfied that three key conditions are met: Firstly, there must not be any conflict between the parties as to the formation of the arbitration provision. Secondly, the alleged illegality, fraud or misrepresentation must not directly impeach the said arbitration agreement or clause. Thirdly, the relevant arbitration language must have sufficient scope to catch the disputes on the highlighted matters.

These observations can be best supported by the leading U.S. Supreme Court judgment in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.[41] The case turned upon whether the parties should be compelled to arbitrate for settlement of the claim with respect to "fraud in the inducement" under a contract, where there is no showing that the parties sought to avoid arbitration of that particular issue and the arbitration wording was broad.[42] Taking the stance that the arbitration provision must be treated separately from the remainder of the contract, the court held that the arbitration clause would remain effective, particularly since the claim on fraud was not particularly directed to this provision.

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38. *Ibid.* at 2855.
39. *Ibid.* at 2857. For a similar view, see *Apollo Computer Inc. v. Berg,* 886 F.2d 469 (1st Cir. 1989); *Société Générale etc. v. Raytheon European Mgt and Systems Co*., 642 F.2d 863, 869 (1st Cir. 1989), *quoted in* G.B. Born, *International Commercial Arbitration*, Kluwer Law International, 2001 at 90.
40. *Ibid*.
41. 388 U.S. 395 (U.S. 1967).
42. For the description of "broad" arbitration clauses see, chapter II hereof.

To a similar effect was another U.S. Supreme Court decision in *Buckeye Check Cashing Inc. v. Cardegna*.[43] Taking the view that the claim of fraud in the inducement of the entire contract did not directly go to the making of the arbitration agreement, the court endorsed the reasoning in the *Prima Paint* case. Consequently, they held that the arbitral tribunal was competent to resolve the dispute, also because arbitration wording is broad enough to demonstrate the intention of the parties to that effect. Similar to the approach taken in the *Prima Paint* case, the court therein underpinned this finding by the rule of severability. They further added that the rule would find room for application, and these or similar claims would be arbitrated, regardless of the fact that the challenge to the validity of the main contract was bought in federal or state courts.[44]

While these observations reveal the extent to which the doctrines of severability and competence-competence find room for application, they also throw real light on the interplay between these doctrines. Nonetheless, it now remains to be seen whether there will, in the near future, be an exception to these highlighted rules. Such possibilities may arise with the enactment of the *Arbitration Fairness Act of 2009*, which has been introduced into Congress. If enacted, the proposed bill will amend section 2 of the *Federal Arbitration Act* and it will invalidate "pre-dispute arbitration clauses and agreements in consumer, employment and franchise contracts",[45] as well as the arbitration provisions requiring arbitration of a dispute arising under any statute intended to protect civil rights.[46] Most importantly, unlike the *Federal Arbitration Act*, which does not provide any answer to the question of who decides over the arbitrability issue, *Arbitration Fairness Act of 2009* seeks to diminish application of the competence-competence and severability doctrines. This is best supported by section 4 of the act which purports to bring two important changes to the current system: Firstly, the bill envisages that the question of whether this act applies to an arbitration clause or agreement will be governed by federal law. Secondly, and perhaps most importantly, the proposed section, *inter alia*, stipulates that:

> Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

43. 2006 A.M.C. 512 (U.S. 2006).
44. *Ibid.* at 517.
45. See s. 4 of *Arbitration Fairness Act* of 2009.
46. *Ibid.*

If the act is enacted, it will become difficult to consider arbitration as an independent dispute resolution system.[47] This is simply because the *Arbitration Fairness Act* manifestly expands the categories of situations where the courts are allowed to intervene and decide over the arbitrability issue. The expansion in the courts' authority could be justified on the grounds that application of the act is limited to those cases where the arbitration clause or agreement is contained in a contract made between the parties of unequal bargaining powers.[48] Given that the question of whether this proposed legislation is sufficient to bring fairness to the enforcement of arbitration clauses and agreements goes beyond the scope of this study. For present purposes, suffice it to say that enactment of this act would drastically change the current U.S. law position with regard to the allocation of authority between the courts and arbitral tribunals. Having examined the application and impact of the rules of severability and competence-competence on arbitrability of the disputes, one further question of great importance must also be explored: Does the arbitrability issue affect the decision of the courts as to whether an anti-suit injunction must be granted?

C. The practical impact of the question of arbitrability on anti-suit injunctions

In common law jurisdictions, the courts frequently issue anti-suit injunctions in order to prevent parties from commencing or continuing judicial proceedings in another jurisdiction. Grant of anti-suit injunctions could be justified on numerous grounds. These include concerns of the courts over the protection of their citizens' constitutional rights and over the safeguard of public policy.[49] However, it is also possible to see these drastic judiciary measures as "outrageous affront to sovereignty", particularly since anti-suit injunctions indirectly interfere with the jurisdiction of foreign courts.[50] For this very reason, anti-suit injunctions can also readily be treated as running counter to judicial comity between the states.[51]

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47. T. Dalton, "Will the Arbitration Fairness Act of 2007 make securities arbitration fair?" (2008) 15 *Fall PIABA B.J.* 57, 60.
48. *Ibid.* For further discussions, see Schwartz, "Mandatory Arbitration and Fairness" (2009) 84 *Notre Dame L. Rev.* 1247 and J.T. Mandelbaum, "Stuck in a bind: Can the Arbitration Fairness Act solve the problems of mandatory binding arbitration in the consumer context?" (2009) *I.L.R.* 1077.
49. M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, New York, Cambridge University Press, 2008 at p. 92.
50. N. Meeson, "Comparative Issues in Anti-Suit Injunctions" dans M. Davies, *Jurisdiction and Forum Selection in International Maritime Law*, Kluwer Law International, 2005 at pp. 59-60.
51. *Ibid.* See Tan D., "Anti-Suit Injunctions and the Vexing Problem of Comity" (2005) 45 *Va. J. Int'l L.* 283, 331-332.

Despite the sensitivity of this issue, there is no inflexible rule in both jurisdictions for the grant of anti-suit injunctions. Nonetheless, it is clear that both U.S. and English courts are entitled to make use of this measure against those parties who are subject to their jurisdiction.[52] Under U.S. law, absent any guidance from the Supreme Court, the circuit courts are divided on the conditions for issuing anti-suit injunctions. In this connection, two main conflicting approaches, namely liberal and conservative views, initially came into existence. According to the liberal view, which is supported by the Fifth, Seventh and Ninth Circuits,[53] anti-suit injunctions must be granted when there are parallel proceedings in different jurisdictions, and the relevant court is persuaded that multiplicity of the disputes and claims will prevent an efficient settlement of disputes.[54] On the other hand, the Third, Sixth, Second and DC Circuits have adopted a conservative approach when determining the grant of anti-suit injunctions.[55] In so doing, they upheld the view that anti-suit injunctions could be issued only where the foreign judicial court proceedings "imperils the jurisdiction of the forum or threatens some strong national policy".[56]

It is evident that the conservative approach is more aligned with judicial comity in the sense that it suggests a much higher threshold for anti-suit injunctions, which must be issued "only with care and great restraint".[57] Considering the advantages and disadvantages of these conflicting views, the First and Second Circuits have chosen to take the middle ground.[58] In so doing, they criticised the liberal view for undermin-

52. For U.S. law, see *Kaepa Inc. v. Achilles Corp*., 76 F.3d 624, 626 (5th Cir. 1996). For English law, see, *Société Aérospatiale v. Lee Kui Jak*, [1987] A.C. 871. See also, A. Ali *et al*., "Anti-suit injunctions in support of international arbitration in the United States and United Kingdom" (2008) *Int. A.L.R*. 12, 17.
53. See *Kaepa*, *supra* note 52 at 627; *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855-856 (9th Cir. 1981); *Philips Medical Systems International v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993), quoted in *Hans A Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (5th Cir. 2004). See also, Meeson, *supra* note 50 at 79.
54. See, *Hans*, *supra* note 53 at 17.
55. See *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products*, 310 F.3d 118, 126 (3d Cir. 2002); *General Electric Co. v. Deutz AG*, 270 F.3d 114, 161 (3d Cir. 2001); *Gau Shan Co. v. Bankers Trust Co*., 956 F.2d 1349, 1355 (6th Cir. 1992); *China Trade & Development Corp. v. M/V Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) quoted in *Hans*, *supra* note 53 and Meeson, *supra* note 50 at 79.
56. See *Hans*, *supra* note 53.
57. See *Canadian Filters (Harwich) Ltd. v. Lear-Siegler Inc*., 412 F.2d 577, 578 (1st Cir. 1969); *China Trade*, *supra* note 55 at 35-36.
58. See *Hans A Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (5th Cir. 2004), 16.

ing judicial comity and giving too low an importance to that matter.[59] While considering the conservative approach as better than the liberal one, these Circuits have nevertheless refused to follow the former view, arguing that it falls short of preserving jurisdiction and providing flexible rules in accordance with the "fact-specific nature of the inquiry".[60] Consequently, these courts adopted the middle view taken in the *Laker Airways v. Sabena,* which they regarded as seminal in this field.[61]

Regardless of these highlighted uncertainties, it must be concluded that the tendency of U.S. Courts has been to grant anti-suit injunctions against those parties who started foreign judicial proceedings in breach of an arbitration agreement.[62] Courts have therefore been inclined to compel parties to arbitrate pursuant to their respective arbitration agreements and clauses by reason of the federal policy favouring arbitration.[63] Hence, in *Ibeto Petrochemical Industries Limited v. M/T Beffen,*[64] Southern District Court of New York issued anti-suit injunction against the cargo owners who had brought proceedings in the courts of Nigeria against the carrier. Relying on validity of the arbitration clause in the relevant contract of carriage, and ordering the cargo interests to discontinue the proceedings in Nigeria, the court, *inter alia,* stated that: "Permitting the Nigerian litigation to continue may frustrate the general policy of promoting arbitration."[65]

Similar to U.S. law, English law does not take an inflexible solution to the question of under what circumstances anti-suit injunctions are granted. Even though English courts are not divided as to the legal standards of issuing anti-suit injunctions, they do not seem to provide a straightforward answer. Accordingly, English courts take this draconian remedy only in cases where "the ends of justice require it".[66] When using their discretionary powers, the courts have preferred to enforce valid

59. *Ibid.*
60. *Ibid.* at 18.
61. *Ibid.*
62. For a similar view, see A. Ali *et al.*, "Anti-suit injunctions in support of international arbitration in the United States and the United Kingdom" (2008) *Int. A.L.R.* 12, 16.
63. For a similar view, see *Ibeto Petrochemical Industries v. M/T Beffen*, 412 F.Supp. 2d. 285 (S.D.N.Y. 2005); *Paramedics Electromedicina Comercial, Ltd. v. GE Medical Systems Information Technologies*, 369 F.3d 645 (2d Cir. 2004); *LAIF X Sprl v. Axtel S.A., de CV*, 390 F.3d 194, 199-200 (2d Cir. 2004).
64. See *Ibeto*, *supra* note 63.
65. *Ibid.* at 292-293.
66. See *Société Aérospatiale v. Lee Kui Jak*, [1987] A.C. 871. See also C. Ambrose, "Can Anti-Suit Injunctions Survive European Community Law?" (2003) 52 *I.C.L.Q.* 401, 404; M. Black and R. Reece, "Anti-Suit injunctions and arbitration proceedings" (2006) *Arbitration* 207, 211.

arbitration agreements and clauses. Consequently, they have repeatedly issued anti-suit injunctions in support of arbitration, unless there is a "strong reason" for not so doing.[67]

Irrespective of this willingness to grant anti-suit injunctions in support of arbitration agreements and clauses, English courts' right to take such measures has now greatly diminished within the European Union. This can be best explained by Council Regulation (EC) No: 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "Judgments Regulation"), which regulates the jurisdictional issues arising between the courts of Member States pertaining to civil and commercial matters. Even though arbitration agreements fall outside the scope of the Judgments Regulation, it is clear that English courts may not issue an anti-suit injunction against a party who commenced judicial proceedings in the courts of another Member State in breach of an arbitration agreement.

The proposition above draws support from the leading European Court of Justice case in *The Front Comor,* which clarified in what circumstances English courts could issue anti-suit injunctions in favour of an arbitration clause or agreement.[68] Hence, it has now become clear that the decision of the court first seized as to the enforceability of an arbitration agreement or clause is binding upon the courts of another member state, where this issue is addressed by the court first seized as a preliminary issue and where the main dispute comes within the scope of the Judgments Regulation.[69] Consequently, *The Front Comor* has established the key rule that courts of other member states cannot, in such circumstances, issue anti-suit injunctions against the parties who have pursued litigation proceedings in the court first seized regardless of the arbitration clause or agreement.[70]

Leaving aside the situation where English courts are not permitted to use this draconian remedy, the highlighted English and U.S. law position with regard to anti-suit injunctions raises one key argument: Both English and U.S. courts will make use of this draconian measure in order to hold the parties to their bargain, if they are persuaded that the arbitration agreement is valid, and has sufficient ambit to catch the dispute. For the purposes of analysing how the courts interpret the arbitration language to determine arbitrability of the disputes, the remainder of this

67. See *The Angelic Grace*, [1995] 1 Lloyd's Rep. 87, 96 (C.A.); *Donohue v. Armco Inc.*, [2002] 1 Lloyd's Rep. 425.
68. [2009] 1 Lloyd's Rep. 413.
69. *Ibid.*
70. *Ibid.*

paper will examine the rules for the interpretation of arbitration clauses and agreements under English and U.S. law.

II. INTERPETATION METHODS FOR DETERMINING THE SCOPE OF ARBITRATION CLAUSES AND AGREEMENTS

The forms of arbitration wording have attracted a great amount of litigation both in England and in the United States. The reason for this is that those parties purporting to challenge the jurisdiction of arbitrators have frequently contended that the scope of the arbitration language is not sufficient to catch the relevant dispute. For the purposes of resolving this matter, the courts in both jurisdictions have usually discerned the intention of parties as to arbitration from the wording of the arbitration clause,[71] given that the parties cannot be compelled to arbitrate, if they have not consented to arbitrate their disputes.[72] In this connection, it is also true to say that both U.S. and English courts may adopt varying interpretations as to the scope of arbitration agreements and clauses by taking into account the factual circumstances of each case.[73] Nonetheless, for the purposes of promoting certainty, a number of key judicial decisions in both jurisdictions provide clear guidance as to how this matter must be resolved.

Perhaps the most striking guidance arising from U.S. case law is that where the courts are asked to determine the ambit of an arbitration provision, they proceed upon the well-recognised strong federal policy favouring arbitration.[74] In so doing, they tend to hold in favour of arbitration when there is a doubt as to whether the relevant dispute falls within the scope of the arbitration language.[75] Regardless of this strong federal policy, U.S. courts have not found all forms of arbitration wording sufficient to encompass any kind of disputes. In deciding this matter, many courts have, at the outset, preferred to categorise arbitration provisions, either as narrow or as broad.[76] On this basis, while the narrow arbitration language was not treated as capable of catching non-contractual,

71. For U.S. law, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627 (U.S. 1985). For English law, see *Premium Nafta Products Limited and Others v. Fili Shipping Company Limited and Others*, [2008] 1 Lloyd's Rep. 254 at para. 5.
72. For English law, see *ibid.*, and for U.S. law, see *F.D. Import & Export Corp. v. M/V Reefer Sun*, 2003 A.M.C. 60, 63-64 (S.D.N.Y. 2002); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (U.S. 1960).
73. For a similar view, see C. Ambrose and K. Maxwell, *London Maritime Arbitration*, London, LLP, 2002 at p. 36.
74. See *Mitsubishi Motors*, *supra* note 71.
75. *Ibid.*
76. *Mediterranean Enterprises Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983); *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983).

tortious, and collateral claims, arbitration wording of a broad type has repeatedly been held to comprise such claims. Thus, in *Re Kinoshita,* Judge Medina took the view that the arbitration provisions envisaging the disagreements "arising under" the main contract was narrower than those which contain phrases such as "arising out of or relating to".[77]

To a similar effect was the ruling of the U.S. Court of Appeals for the Ninth Circuit in *Mediterranean Enterprises Inc. v. Ssanyong Corp.*[78] There, the court was asked to decide whether the arbitration clause in the "Preliminary Agreement for Formation of a Joint Venture" ("the Agreement") was competent to encompass the claims on breach of contract, breach of fiduciary duty, inducing and conspiracy to induce breach of contract, and conversion. Reviewing the relevant judicial decision, the court held that this narrow form of arbitration wording was only sufficient to cover those disputes relating to "interpretation and performance" of the Agreement. That being the case, the court merely held in favour of arbitration of those claims pertaining to breach of the Agreement and breach of fiduciary duty envisaged under the Agreement.

On the question of what constitutes a broad form of arbitration wording, the ruling in *Michele Amoruso e Figli v. Fisheries Development Corp.* is illustrative.[79] The court therein raised the argument that those arbitration provisions containing phrases "arising out of or relating to this agreement" must be treated as "broad". A similar line was also taken by Supreme Court in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*[80] There, the question was whether the phrase "any controversy or claim arising out of or relating to this Agreement" covered the claims on fraudulent inducement to enter into the relevant agreement. Endorsing the principles established in *Re Kinoshita,* the Supreme Court labelled the arbitration provision, which contained the highlighted phrase, as "broad and comprehensive". In so doing, the court held that parties' dispute over fraudulent inducement must be arbitrated pursuant to the relevant arbitration provision.

These highlighted principles were then echoed by Court of Appeals for the Second Circuit in *Collins & Aikman Products Co. v. Building Systems Inc.*,[81] which addressed whether the phrase "arising out of or relating to" covered the tortious and collateral claims. The court raised the argument that broad arbitration clauses raise the presumption that all

77. 287 F.2d. 951, 953 (2d Cir. 1961).
78. See 708 F.2d 1458 (9th Cir. 1983).
79. 499 F.Supp. 1074, 1080 (S.D.N.Y. 1980).
80. 360 F.2d 315 (U.S. 1966).
81. 58 F.3d 16 (2d Cir. 1995).

the asserted claims are arbitrable. Nevertheless, they went on to hold that the collateral and tortious issues could only be arbitrated by reason of the broad arbitration wording if these claims are not "wholly independent of the contract".[82] Consequently, where the highlighted or similar claims are "somehow connected to the main agreement that contains the arbitration clause", and where the arbitration language is classified as broad, U.S. courts have repeatedly decided in favour of arbitration.[83]

Having examined U.S. law with respect to the interpretation of arbitration clauses and agreements, it is imperative to highlight the practical consequences of the legal position. It is evident that, due to the strong policy favouring arbitration, U.S. courts have been inclined to give a wide effect to the arbitration wording, so long as the intention of parties to limit the scope cannot be discerned from the language of the arbitration provision. Hence, for those parties who are seeking to arbitrate, they are not required to use a meticulous degree of care when drafting their respective arbitration provisions.

In order to throw light on the question of how English courts determine the scope of arbitration provisions, it is necessary to separate the current judicial approach, which is best reflected by the House of Lords judgment in *Premium Nafta Products Limited v. Fili Shipping*,[84] from that was previously adopted. The previous legal position, which is similar to U.S. law, could be best understood by the Court of Appeal judgment in *Fillite (Runcorn) Ltd. v. Aqua-Lift*, where the court construed the arbitration clause as falling short of covering the tortious claims and those relating to collateral issues. It is striking that, in support of this, the court relied on the arbitration wording which was referring to the disputes "arising under" the contract.[85] Where the arbitration language contained the phrases "arising out of or in relation to", English courts nevertheless took a different line and treated the tortious and collateral claims as arbitrable, provided that there was a "sufficiently close connection" between these claims and the agreement which contained the arbitration clause.[86] Thus, in *Harbour Assurance (UK) Ltd. v. Kansa General International Insurance*, the Court of Appeal held that the claims on invalidity of the

82. *Ibid.* at 22. For a similar view, see *Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd.*, 385 F.2d 158 (2d Cir. 1967); *Genesco Inc. v. T. Kakiuchi & Co. Ltd.*, 815 F.2d 840 (2d Cir. 1987).
83. See *Rochdale Vill. Inc. v. Public Services Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979).
84. See [2007] EWCA Civ. 20.
85. 45 B.L.R. 27 (C.A.).
86. See *The Angelic Grace*, [1995] 1 Lloyd's Rep. 87; *The Playa Larga*, [1983] 2 Lloyd's Rep. 171.

main contract *ab initio* was arbitrable on the grounds that the arbitration language which was referring to the "disputes arising out of" the said contract had sufficient breadth to encompass such claims.[87]

Recently, the House of Lords in *Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd.*, has suggested a more liberal interpretation method for arbitration provisions.[88] In so doing, the Lords have departed from the strict interpretation methods which were previously employed by the courts and which were based upon the linguistic nuances between the forms of arbitration wording. In this case, the arbitration language contained the phrase "arising under". On this basis, the case turned upon whether the arbitration clause in the relevant charterparty was sufficient to cover the disputes on rescission of the contract which was alleged to have been procured by bribery. Considering the "reasonable commercial expectations of the parties" the Lords underlined the fact that parties in practice use the phrases "arising under" and "arising out of or in relation to" interchangeably. Given that the courts' task is to give effect to the intentions of the parties as to the arbitration of their disputes, the Lords relied upon this fact in holding that the phrase "arising under" encompassed the claims on rescission of the contract. This liberal approach, therefore, has created an important presumption: When parties have consented to arbitrate their disputes, the courts will assume that they want to refer all their disputes to arbitration, unless there is an express provision which demonstrates a contrary intention.

CONCLUSION: What the Parties must Expect When Agreeing to Arbitrate

The examination of English and U.S law with regard to the interpretation of arbitration provisions clearly demonstrates that both jurisdictions offer nearly similar solutions to this issue. Accordingly, while U.S. courts lean towards arbitration by reason of the federal policy favouring arbitration, English courts adopt an even more receptive approach for one key reason: English courts rightly assume that when parties agree to arbitrate, they would naturally seek to settle all their disputes in one forum.

This presumption surely has the salutary effect of providing more efficiency in resolution of international disputes and minimising the risk of multiple proceedings in different jurisdictions. Also, the liberal approach adopted in *Premium Nafta* case is persuasive for another reason: Not

87. [1993] Q.B. 701.
88. [2007] UKHL 40.

giving effect to the linguistic nuances between the forms of arbitration wording is also commercially more sensible. This is simply because parties in most cases may not be aware of the long line of judicial decisions whereby varying legal effects were given on arbitration clauses and agreements depending upon their respective wordings. This practical solution prevents an overly technical interpretation of arbitration provisions, and better reflects the parties' intention on this matter.

Having analysed in detail why the parties have a stake in knowing the likely interpretation of arbitration provisions, the solution taken by the English courts appears to have more to commend it. This is simply because the English approach better reflects the intentions of commercial men and women who cannot be expected to exercise a meticulous degree of care when drafting their arbitration provisions. While English law can be justified on these grounds, it is questionable whether this liberal method could equally be applied to those arbitration provisions contained in consumer contracts. In such circumstances, the U.S. approach, which draws a line between the phrases "arising under" and "arising out of or in relation to", may be preferable in order to afford sufficient protection to the consumers who do not usually have any bargaining power. In this context, it must also be borne in mind that the proposed legislation, the *Arbitration Fairness Act*, may in the future trigger new construction methods in the United States, which will likely involve a stricter interpretative method than under English law. Hence, it remains to be seen whether U.S. and English courts will start to offer different interpretation methods for those arbitration provisions depending on whether they are stipulated in consumer or non-consumer agreements.