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NOTE ON CONFLICTING OR INCONSISTENT ARBITRATION OR JURISDICTION CLAUSES BETWEEN THE SAME PARTIES

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ENGLISH AUTHORITIES

(i) Competence of the Tribunal to rule on its own jurisdiction

2. The English Arbitration Act 1996 states:

> *"30(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to... (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."*
>
> *"31(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—*
>
> *(a) rule on the matter in an award as to jurisdiction, or*
>
> *(b) deal with the objection in its award on the merits.*
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> *If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly."*

3. The LCIA Arbitration Rules state:

> *"23.1 The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause.*
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> *23.3 The Arbitral Tribunal may determine the plea to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances."*

(ii) Related agreements with overlapping and inconsistent dispute resolution clauses

4. *Dicey, Morris & Collins* states:[1]

> *"The approach to construction of arbitration agreements, which must apply equally to jurisdiction clauses, and which has invited courts to pay close attention to earlier decisions on the distinction between the particular verbal formulae was strongly disapproved in* Comandate Marine Corp v Pan Australia Shipping Pty Limited *and in* Fiona Trust & Holding Corp v Privalov. *But* ***the decision in* Fiona Trust *has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in Contract A, even if***

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[1] *Dicey, Morris & Collins on the Conflict of Laws* (14th edition, 2006); 2010 Supplement, ¶ 12-094.

expressed in wide language, was intended to capture disputes arising under Contract B; the question is entirely one of construction: Satyam Computer Services Limited v Upaid Services Limited."

"In the final analysis, as the Court of Appeal has now made plain on several occasions (most recently in Sebastian Holdings Inc. v Deutsche Bank AG, *approving the version of this paragraph which appeared in the Third Cumulative Supplement),* ***the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes****, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes.* ***It may be necessary to enquire under which of a number of inter-related contractual agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity.****" (Emphasis added)*

5. Joseph on *Jurisdiction and Arbitration Agreements* states:[2]

"Further, in determining whether the legal proceedings brought fall within the scope of the Arbitration Agreement, it is suggested that ***the Court should consider the essential nature of the dispute. In an appropriate case this will lead to an examination of the claim and the defences to the claim and the subject of the underlying dispute.****" (Emphasis added)*

6. *Satyam Computer Services Limited v Upaid Systems Limited*[3] involved the construction of three agreements between the parties: an Assignment Agreement expressed to be governed by New York law (but without any jurisdiction clause); a Services Agreement governed by Virginia law (but without any jurisdiction clause); and a Settlement Agreement subject to English law and exclusive jurisdiction of the English Court. The first two agreements were made within a matter of days of each other. They were therefore regarded as part of the same business transaction and therefore read and construed together. It was held, as a matter of construction, that patent infringement claims brought in the courts of Texas could properly be made under the Assignment Agreement and did not "relate" to the Settlement Agreement.

7. In the course of his Judgment in *Satyam*, Collins LJ said:

"I do not consider that Premium NAFTA Products v Fili Shipping Company *is of assistance. Plainly it makes commercial sense for a dispute about the validity of the contract to be determined under an arbitration agreement (or a jurisdiction agreement).* ***Whether a dispute under a different contract is within a jurisdiction***

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2 Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edition, 2010) at ¶11.15.

3 [2008] EWCA Civ 487.

agreement depends upon the intention of the parties as revealed by the agreement."[4] *(Emphasis added)*

8. In *UBS Securities LLC v HSH Nordbank AG*[5] two banks entered into a series of agreements concerning complex collateralised debt obligations. A number of the agreements were expressly subject to New York law and jurisdiction of the New York courts; others were expressly subject to English law and jurisdiction of the English courts. HSH commenced an action against UBS in New York alleging various causes of action, including mis-selling, fraud and misrepresentation. UBS commenced an action in England seeking a declaration that HSH's claims were subject to the jurisdiction of the English courts.

9. In dismissing UBS's action for a declaration, the Court of Appeal held:

   (1) Where there is a series of agreements between the parties concerning a complex transaction or series of transactions, jurisdiction agreements must be considered *in the light of the transaction or transactions as a whole*;

   (2) Where a dispute falls within two sets of agreements, the parties must be taken to have intended that it should be governed by the jurisdiction clause in the contract which is *closer to the claim*: *CSFB v MLC Bermuda* (Rix J, 1999); and

   (3) Where parties enter into a complex transaction it is the jurisdiction clauses in the agreements *at the commercial centre of the transaction* which the parties must have intended to apply.

10. In *BVG v JP Morgan*[6], JPM brought claims in England under a credit default swap agreement providing for English law and jurisdiction. BVG defended on the basis that the decision of its board to enter into the agreement was *ultra vires*. BVG argued that the agreement providing for English jurisdiction was overridden by Article 22.2 of the Brussels Regulation[7], in that BVG had raised an issue as to its corporate authority and the German Courts had exclusive jurisdiction over proceedings which involved that issue.

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4 ¶ 93.

5 [2009] EWCA Civ 585.

6 [2010] EWCA Civ 390.

7 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

11. The Court of Appeal held:

(1) The essential question before it was whether the claims were *"principally concerned"* with an issue under Article 22.2;

(2) In deciding that question, the Court had to undertake an exercise in *"overall classification"* and to make an *"overall judgment"*, to see whether the proceedings were *"principally concerned"* with one of the matters set out in Article 22.2;[8]

(3) Even if an issue was within Article 22.2 and the resolution of that issue would dispose of the proceedings as a whole, this did not mean that the proceedings were *"principally concerned"* with an issue within Article 22.2.[9]

(4) The Court had to examine the issues raised in the proceedings carefully to see if they did *"principally concern"* or have *"as their subject matter"* something within the terms of Article 22.2. Just because the basis of an action was something which came within the relevant paragraph, it did not necessarily follow that the proceedings would fall within the relevant paragraph of Article 22. That would depend on how significant the issue was to the proceedings overall.[10]

12. In the course of his judgment, Aikens LJ said:

> *"Mance J held that Article 22.2 called for an exercise in "overall classification", and an "overall judgment" by which the court attempts to assess whether the proceedings are so closely connected with matters of local company law and internal corporate decision making that the proceedings should not be tried anywhere else but in the courts of the state of the company's seat. (*Grupo Torras *case.) The Court of Appeal in that case endorsed this overall approach.* ***It means that if a court is faced with a dispute on whether Article 22.2 applies, it has to decide on the principal concern of the proceedings overall.*** *"*[11] *(Emphasis added)*

13. A subsequent reference to the European Court of Justice in *BVG v JP Morgan* led to the same result, the European Court holding that for Article 22.2 to be engaged, the

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8 ¶ 87.

9 ¶ 81-5.

10 ¶ 79.

11 ¶ 86.

issue of local company law had to constitute the *"subject matter of the proceedings"* as opposed to being merely ancillary.[12]

14. In *Sebastian Holdings v Deutsche Bank*[13] the Court of Appeal was called upon to construe jurisdiction clauses in a series of agreements between a bank and its customer, several of which provided for jurisdiction of the English courts and one of which provided for jurisdiction of the courts of New York. The defendant in the English action submitted that the bank's claims had to be brought in New York. In rejecting that submission, Thomas LJ summarised the applicable principles:

(1) In construing a jurisdiction clause, a broad and purposive construction must be followed: *Fiona Trust v Privalov*;

(2) However, in construing an agreement which is part of a series of agreements, it is necessary to take into account the overall scheme of the agreements and to read sentences and phrases in the context of that overall scheme: *Re Sigma Finance Corporation*;

(3) Just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals;

(4) However, where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends upon the intention of the parties as revealed by the agreements against these general principles: *Satyam Computer Services v Upaid Systems*;

(5) As a matter of construction, the parties must be taken to have intended that, where a dispute falls within two sets of agreements, it should be governed by the jurisdiction clause in the contract which is closer to the claim: Rix J in *Credit Suisse v MLC*; Lord Collins in *UBS v HSH Nordbank*; and

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12 [2011] 2 All ER (Comm) 877.

13 [2010] EWCA Civ 998.

(6) Where the parties have entered into a complex transaction, it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply.[14]

15. *UBS v KWL*[15] was another case in which a defendant in English proceedings under swap contracts sought to argue that a German Court had exclusive jurisdiction under Article 22.2 of the Brussels Regulation. Following the Court of Appeal's Judgment in *BVG v JP Morgan, supra*, Gloster J noted that *"the Court should be alive to the risk of applicants displaying only part of their hand in order to wrest jurisdiction away from the contractually chosen forum in favour of their home court"* and that *"the Court's task is to assess as best it can on the material before it whether the proceedings are likely to be 'principally concerned' with an Article 22.2 issue"*.[16]

16. *PT Thiess v KPC*[17] was another case involving the construction of two agreements between the parties, namely (1) an Operating Agreement – Mining Services ("OAMS") subject to the laws of Queensland, Australia and arbitration in Singapore; and (2) a Cash Distribution Agreement ("CDA") subject to English law and the non-exclusive jurisdiction of the English Courts. Referring to the statement of principles in *Sebastian Holdings* referred to in paragraph 18 above, and quoting with approval the passage from *Dicey, Morris & Collins* cited in paragraph 10 above, Blair J construed the two agreements with a view to determining which was more closely connected with the claim and under which agreement the substance of the controversy arose. In the result, the claim was characterised as being more closely related to the payment mechanism under the CDA than to the pricing arrangements under the OAMS, and the claim was therefore subject to English jurisdiction. The learned judge said as follows:

"In my view, the claim in the English action is a claim under the CDA concerned with a procedure whereby the sums in dispute are to be satisfied until the dispute is determined. ***It raises a discrete claim related to but distinct from the underlying dispute arising from the OAMS*** *which is the subject of the arbitration. There is no reason why the parties cannot be taken to have intended that these claims are to be the subject of different jurisdiction clauses."*[18] *(Emphasis added)*

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14 ¶¶ 39-46.

15 [2010] EWHC 2566 (Gloster J).

16 ¶ 43.

17 [2011] EWHC 1842 (Blair J).

18 ¶ 43.

17. In *Deutsche Bank v Tongkah and Tungkum*,[19] Deutsche Bank and Tungkum entered into a Facility Agreement and an Export Contract on the same day. Also on the same day, Deutsche Bank obtained a parent company Guarantee from Tongkah. The Facility Agreement and Export Contract contained identical dispute resolution clauses, providing for English law and jurisdiction, but with an option for Deutsche Bank to refer disputes to LCIA Arbitration. The Guarantee provided for English law and jurisdiction, with no arbitration option. Deutsche Bank commenced an action in the English Court for payment under the Facility Agreement and Guarantee, and also commenced an arbitration for an early termination payment allegedly due under the Export Contract. Construing the three agreements in accordance with the principles described in *Sebastian Holdings*, Blair J held that although Deutsche Bank was entitled to proceed in the English Court with its claim under the Guarantee, its claim under the Facility Agreement would be stayed pending the arbitration, as both claims against Tungkum arose out of the same breach of the same contractual arrangements.

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19 [2011] EWHC 2251 (Blair J).