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Choice of Court Agreements: Selected Common-Law Jurisdictions and Indian Laws Compared - Time for the Convention of 30 June 2005 on Choice of Court Agreements?

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CHOICE OF COURT AGREEMENTS: SELECTED COMMON-LAW JURISDICTIONS AND INDIAN LAWS COMPARED— TIME FOR THE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS?

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I. INTRODUCTION

A jurisdiction clause or agreement (sometimes called a forum selection clause or a choice of court agreement) is a commonplace

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feature in international commercial contracts and dealings. One of the reasons why parties agree to such a clause is to eliminate or contain a "venue risk"—a risk that a claimant may be prevented from suing in its favorable forum or that a defendant is sued in an unfavorable forum.[1] Legal issues surrounding a jurisdiction clause, however, are complex because of a need to identify the particular type of the concerned jurisdiction clause, as each type confers different rights and obligations to the parties.[2] This has led to a trend that has since shifted the focus of case laws and commentaries on private international law from that of the choice of law.[3] A jurisdiction clause can be either an exclusive jurisdiction clause, a nonexclusive jurisdiction clause, or a "submission to suit" clause.[4] In the spectrum between exclusive and nonexclusive jurisdiction clauses, there are also myriad variants of asymmetric jurisdiction clauses.[5] Identifying and distinguishing between different types of these jurisdiction clauses therefore becomes crucial in the context of the domestic private international law system of each country. Toward this, in Part I of this research, the authors will explore different types of jurisdiction agreements and the techniques employed to distinguish between them. In doing so, the focus will be on the private international law systems of common-law countries with mature developments of the law in this field. As such, the law of the United Kingdom comes to the forefront since it is where common-law authorities originated. With the same root, in Australia, where one of the authors is based, courts have since taken their own pace and path in developing a body of case laws and jurisprudence in this field. Thus, Australian authorities will likewise be explored. References will also be made to case law from Canada and Singapore insofar as they are relevant, given voluminous case laws with opinions and observations from judges in these jurisdictions. The laws of the United States,

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1. RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION para. 2.03 (2010).
2. ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW para. 4.09 (2008).
3. Mary Keyes, *Optional Choice of Court Agreements in Private International Law: General Report*, *in* OPTIONAL CHOICE OF COURT AGREEMENTS IN PRIVATE INTERNATIONAL LAW 5 (Mary Keyes ed., 2020).
4. MARTIN DAVIES, ANDREW BELL, PAUL LE GAY BRERETON & MICHAEL DOUGLAS, NYGH'S CONFLICT OF LAWS IN AUSTRALIA para. 7.1 (2020).
5. *See generally* Brooke Marshall, *Australia: Inconsistencies in the Treatment of Optional Choice of Court Agreements*, *in* OPTIONAL CHOICE OF COURT AGREEMENTS IN PRIVATE INTERNATIONAL LAW, *supra* note 3, at 78–82. *See also* Louise Merrett, *The Future of Asymmetric Jurisdiction Agreements*, 67(1) INT. COMP. LAW Q. 37, 40–43.

however, will be excluded from consideration due to the serious lack of uniformity from different practices in state and federal courts.[6]

In contrast, while India inherited the common-law system and its private international law developments could be traced back to its colonial legacy,[7] there has been a serious lack of comprehensive law on cross-border commercial matters. Notably, the position concerning forum selection clauses remains unclear, nor can clarity be gleaned from judicial precedents there. Therefore, the focus of Part II of this research will be specific to the context of India and how its legal system deals with jurisdiction clauses, taking a comparative approach to the laws of those more mature legal systems examined in Part I.

Notwithstanding problems pertaining to the laws relating to jurisdiction clauses in common-law countries, the Convention of June 30, 2005 on Choice of Court Agreements (hereinafter HCCCA) has become increasingly relevant. In Singapore, it came into force on October 1, 2016.[8] In Australia, the preparation for the enactment of an "International Civil Law Act" to give effect to the HCCCA is reportedly underway.[9] Following some confusions caused by the Brexit developments, on September 28, 2020, the United Kingdom ratified thye HCCCA.[10] Within the context of the HCCCA, at first sight, the need to distinguish between different types of jurisdiction agreements appears less relevant. Despite its primary application to the "exclusive jurisdiction agreement," there exists a presumptive mechanism in Article 3(b) that provides that "a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise."[11] However, this highlights the fine line between the task of a court to construe a jurisdiction clause and the readiness of a court to resort to the presumption. In the end, the question becomes when or under what circumstances

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6. *See generally* Hannah L. Buxbaum, *United States: The Interpretation and Effect of Permissive Forum Selection Clauses*, in OPTIONAL CHOICE OF COURT AGREEMENTS IN PRIVATE INTERNATIONAL LAW, *supra note* 3, at 501.

7. Sai Ramani Garimella, *India*, *in* RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 292–93 (Anselmo Reyes ed., 2019).

8. Singapore enacted the Choice of Court Agreements Act (Chapter 39A) to give effect to the HCCCA.

9. Parliament of Australia, Choice of Court Agreements—Accession (2016), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ChoiceofCourts/Report_166/section?id=committees%2Freportjnt%2F024013%2F24043. *See also* Michael Douglas, *Choice of Court Agreements under an International Civil Law Act*, 34(3) J.C.L. 186 (2018).

10. The Hague Conference on Private International Law, Status Table: 37: Convention of June 30, 2005 on Choice of Court Agreements, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

11. It can be applicable to the nonexclusive jurisdiction agreement by the declaration mechanism in Article 22.

the presumption should be invoked.[12] The overall framework of the HCCCA and the presumptive mechanism will be analyzed in Part III.

Finally, in Part IV, the present authors will offer their analysis as to whether India could benefit from acceding to the HCCCA. Otherwise, what lessons can India take from experiences from its more mature common-law counterparts? And what lessons can it take from the HCCCA?

II. COMMON-LAW APPROACHES TO CHOICE OF COURT AGREEMENTS: VARIETY AND VEXED PROBLEMS OF DISTINCTION

In this part, different types of choice of court agreements or jurisdiction agreements will be examined. It will (a) explore a distinction between an exclusive and a nonexclusive jurisdiction agreement, (b) consider the nature of a "submission to suit" clause, then (c) consider variants of asymmetric clauses and the status of each.

A. Exclusive vs Nonexclusive Jurisdiction Clauses: A Distinction

An exclusive jurisdiction clause is explained as "an agreement that the nominated court, and only the nominated court, will be seised with jurisdiction by whichever party takes the role of claimant."[13] In other words, by this agreement, parties are bound to litigate only in the nominated forum.[14] Conversely, a nonexclusive jurisdiction clause (sometimes known as either an optional choice of court agreement, a nonexclusive choice of court clause, a forum selection clause, a permissive forum selection clause, or an "imperfect" choice of court agreement[15]) is one to which the parties agree that "the nominated court may be seised with jurisdiction by whichever party is claimant, but does not necessarily involve an immediate promise that no other court will be asked to exercise jurisdiction."[16] A question of distinction between these two types of jurisdiction clauses becomes complicated because, as shall be seen,

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12. Poomintr Sooksripaisarnkit, *The Hague Convention on Choice of Court Agreements – Should the European Union's Footsteps be Followed?*, *in* PRIVATE INTERNATIONAL LAW: SOUTH ASIAN STATES' PRACTICE 44 (Sai Ramani Garimella & Stellina Jolly eds., 2017).

13. BRIGGS, *supra* note 2, at para. 4.09.

14. REID MORTENSEN, RICHARD GARNETT & MARY KEYES, PRIVATE INTERNATIONAL LAW IN AUSTRALIA para. 4.15 (4th ed., 2019).

15. Keyes, *supra* note 3, at 5.

16. BRIGGS, *supra* note 2, at para. 4.09.

they can appear very similar in form. Authorities in common-law jurisdictions appear to agree that distinguishing between them requires probes into parties' intentions.[17] Such intentions can be gleaned as a matter of contract interpretation.[18] However, within common-law jurisdictions, authorities remain unsettled as to whether construing a jurisdiction agreement depends on the governing law of the contract to which such an agreement forms part (bearing in mind that, most of the time, this is the same governing law of the jurisdiction agreement itself) or the law of the forum (lex fori).[19]

The abovementioned dichotomy is addressed in this part in four sections. In the first section, the choice of law governing the question of distinction will be discussed. In the second section, the general rules of construction adopted among common-law jurisdictions that provide the framework for such distinction will be laid out. In the third section, case laws that address such distinction will be explored. Lastly, in the fourth section, a distinction in terms of legal consequences will be discussed.

1. Choice of Law Governing the Question of Distinction

Merrett and Carruthers have maintained that the legal position in the United Kingdom is relatively settled and that the distinction shall be addressed as this a matter of law governing the contract,[20] referring to *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd.*[21] In this case, Justice Popplewell stated, albeit obiter, that "[t]he governing law of a jurisdiction agreement is . . . to be determined by the parties' express choice . . . and in general the parties' intention will be taken to be that it is to be governed by the law applicable to the contract of which it forms part."[22] However, the main issue Justice Popplewell had to consider was whether the parties can agree to subsequently change the proper law of the contract.[23] He did not (and indeed, he did not need to) elaborate why

17. FAI General Insurance Co. v. Ocean Marine Mutual Protection & Indemnity Ass'n [1997] 41 NSWLR 117, 126. (Austl.). *See also* YEO TIONG MIN, *The Contractual Basis of the Enforcement of Exclusive and Non-exclusive Choice of Court Agreements*, 17 S.Ac.L.J. 306, para. 20 (2015).

18. YEO, *supra* note 17. *See also* DAVIES, BELL, BRERETON & DOUGLAS, *supra* note 4, at para. 7.62.

19. *See* DAVIES, BELL, BRERETON & DOUGLAS, *supra* note 4, at para. 7.63.

20. Louise Merrett & Janeen M. Carruthers, *United Kingdom: Giving Effect to Optional Choice of Court Agreements—Interpretation, Operation and Enforcement*, *in* OPTIONAL CHOICE OF COURT AGREEMENTS IN PRIVATE INTERNATIONAL LAW, *supra* note 3, at 450.

21. Mauritius Commercial Bank Ltd. V. Hestia Holdings Ltd. [2013] EWHC 1328 (Comm), [2013] 2 Lloyd's Rep. 121.

22. *Id.* at [19], [2013] 2 Lloyd's Rep. at [19].

23. *Id.* at [30]–[32], [2013] 2 Lloyd's Rep. [30]–[32].

it should be the governing law of the contract, as opposed to the lex fori, that applies. To the extent that Merrett and Carruthers regarded the position in the United Kingdom as settled, this has to be read with caution. Garnett, on the other hand, suggested that courts "have almost always applied the law of the forum" to the interpretation question of whether a jurisdiction agreement is an exclusive one.[24] Among English cases Garnett cited in support were *Sinochem International Oil (London) v. Mobil Sales and Supply Corp.*[25] and *Middle Eastern Oil Co. v. National Bank of Abu Dhabi.*[26] In the *Sinochem* case, Justice Rix (as he then was) was tasked with construing a clause stipulated to be governed by Hong Kong law and which stipulated a jurisdiction nominating the Hong Kong courts.[27] Justice Rix proceeded to construe whether the part of the clause stipulating the jurisdiction was meant to be exclusive.[28] He did not explain to which law he referred in approaching the issue of construction of the clause in this case.It does appear, however, that he construed it from English legal senses. It may not be apparent in this case that Justice Rix chose to apply the lex fori, bearing in mind that the laws of Hong Kong are not different from those of the United Kingdom.[29] Differently, in the *Middle Eastern Oil Co.* case, the contract in question was governed by the law of the United Arab Emirates.[30] Justice Teare had to consider whether a jurisdiction clause designating the courts of the United Arab Emirates was an exclusive one. Once again, he did not address the law he chose for interpretation of such a jurisdiction agreement, and it was not apparent why he approached this question as though the clause were governed by the English law.[31] The practice is not any more consistent in Australia.

Marshall attributed the application of the lex fori to the interpretation of the jurisdiction agreement to be a matter of

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24. RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW para. 4.55 (2012).

25. Sinochem International Oil (London) v. Mobil Saless and Supply Corp. [2000] 1 Lloyd's Rep. 670.

26. Middle Eastern Oil Co. v. National Bank of Abu Dhabi [2008] EWHC 2895 (Comm)., [2009] 1 Lloyd's Rep. 251.

27. Sinochem International Oil (London), [2000] 1 Lloyd's Rep. 670, [8].

28. *Id.* at [31]–[34].

29. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on Apr. 4, 1990 Promulgated by Order No. 26 of the President of the People's Republic of China on Apr. 4, 1990 Effective as of 1 July 1997) provides, in Article 8: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

30. Middle Eastern Oil Co. [2008] EWHC 2895 (Comm) at [2].

31. *Id.* at [8].

history.[32] Conversely, Garnett noted some courts in Australia approached the matter using the lex fori.[33] Marshall referred to the judgment of the Federal Court of Australia in *Faxtech Pty. Ltd. v. ITL Optronics Ltd.*[34] and that of the Supreme Court of New South Wales in *Parnell Manufacturing Pty. Ltd. v. Lonza Ltd.*[35] In the *Faxtech* case, Justice Middleton had to consider whether the proceedings should be stayed in light of the respondents' argument that the jurisdiction clause designating the courts in England was exclusive in nature.[36] With no authority referred to in support, Justice Middleton explained "[w]hether this jurisdiction clause is 'exclusive' needs to be determined according to the proper law of the contract."[37] It is not apparent why this had to be so. In the *Parnell* case, Justice Ball had to consider whether injunctions restraining one of the parties from continuing the proceedings in the United States (Delaware) should be continued.[38] Justice Ball approached the question of interpretation using the laws of New South Wales. Yet, the judge did so on the assumption that the foreign law was the same as the lex fori.[39] Essentially, the judge resorted to the law governing the contract. Once again, no reason was proffered as to the basis for making such a choice. It is rather unsatisfactory that judges tend to approach the choice of law matters in automatic ways—behaving more like automated machines in technical operations—without enquiring into the rationale underpinning such selections. As shall be discussed, there indeed may be rationale in support of applying the lex fori to the interpretation of the jurisdiction clause. In the *Parnell* case, it was not apparent why Justice Ball did not refer to the earlier case of the Supreme Court of New South Wales in *McGuid v. Office De Commercialisation et D'Exportation,*[40] cited by Garnett.[41] It might be that he was convinced by the approach taken by the Federal Court of Australia in the *Faxtech* case, yet that case was not mentioned in his judgment. In the *McGuid* case, Justice Einstein, in construing a translated jurisdiction clause (from French) designated the courts in Casablanca,[42] took reference from Australian case laws, and approached the construction from

32. Marshall, *supra* note 5, at 60. *See especially* n.64.
33. GARNETT, *supra* note 24, at para. 4.55.
34. Marshall, *supra* note 5, at 60. *See especially* n.64.
35. *Id.*
36. Faxtech Pty Ltd v ITL Optronics Ltd [2011] FCA 1320, [2].
37. *Id.* at [5].
38. Parnell Manufacturing Pty Ltd v Lonza Ltd [2017] NSWSCR (Eq) 562,[3]-[5].
39. *Id.* at [21].
40. McGuid v. Office De Commercialisation et D'Exportation, NSWSCR (Eq) 931 (1999).
41. GARNETT, *supra* note 24.
42. McGuid, NSWSC (Eq) 931 at [40]-[44].

Australian legal senses.[43] This was despite his subsequent analysis that the proper law of the contract was that of Morocco.[44] An observation can be made here. He came to determine the proper law of the contract as part of the consideration whether he should exercise discretion not to grant the stay of the Australian proceedings in light of the jurisdiction clause, which he had determined earlier to be of an exclusive nature.[45] This meant he saw no connection between the law governing the interpretation of the jurisdiction agreement and the law governing the contract; otherwise, he would have approached the matter differently. Again, no reason was given as to why he resorted to the lex fori.

It appears that Canada also applies the lex fori to the question of construction of the jurisdiction agreement. As Saumier described, "Canadian common law courts assess choice of court agreements as if they raise no choice of law issue, even where the contract containing them also includes a choice of law clause."[46] In stating this position, she referred to the work of Oppong and Gibbs,[47] who observed that courts in Canada habitually apply the lex fori, and there has been no authority addressing the question of law applicable to the interpretation of jurisdiction clauses in Canada.[48] Differently, in Singapore, Justice Lai Siu Chiu, in *PT Jaya Putra Kundur Indah v. Guthrie Overseas Investments Pte. Ltd.*,[49] cited by Chong,[50] took as "settled" that it is the proper law of the contract that is applied in determining the question of construction of the jurisdiction agreement.[51] With respect, it is unclear from where the judge formed an impression that the legal position in Singapore is settled, as no case was cited in support. Neither was the rationale in referring to the proper law of the contract discussed. Looking more broadly to authorities from other common-law jurisdictions, the matter is far from settled. With no final words from the Supreme Court of Singapore on the issue as yet, the present authors are reluctant to consider the matter settled. Even if it were the proper law of contract that determines the question of construction, the matter can always come down to

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43. *Id.* at [49]–[64].
44. *Id.* at [98].
45. *See id.* at [95].
46. SAUMIER, *Choice of Court Agreements in Common Law Canadasupra* note 3, at 140.
47. *Id.* (See especially n.9 citing Richard Frimpong Oppong & Shannon Kathleen Clark Gibbs, *Damages for Breach and Interpretation of Jurisdiction Agreements in Common Law in Canada*, 95 CAN. BAR. REV. 384 at 401 (2017)).
48. OPPONG & GIBBS, *supra* note 47, at 400–01.
49. PT Jaya Putra Kundur Indah v. Guthrie Overseas Investments Pte. Ltd., SGHC 285 (1996).
50. CHONG, Singapore: A Mix of Traditional and New Rules, *supra* note 3, at 327 (See especially n.8).
51. PT Jaya Putra Kundur Indah, SGHC 285 at [62].

the lex fori with a presumptive canon that, in the absence of satisfactory proof, the foreign law is the same as the forum law.[52]

There is much to be said for the view that the proper law of contract governs the question of interpretation and distinction between types of jurisdiction clauses. As a starting point, as Ahmed argues, the broader function of private international law must be understood. Private international law can be perceived as "secondary legal norms concerned with the allocation of regulatory authority between states."[53] In describing private international law as secondary norms, Ahmed borrowed a distinction between primary and secondary norms from the work of H.L.A. Hart.[54] Primary norms impose duties on individuals to do or refrain from doing something.[55] Secondary norms, by contrast, deal with identifying and managing primary norms.[56] Ahmed gave an example of a property dispute where a law of one country conferred the title to one of the parties, while the law of the other country conferred the title to the other. It is the substance of such law that is regarded as a primary norm. Conversely, "[t]he decision whether it is the law of country X or the law of country Y which should determine title is a secondary legal norm."[57] While this example concerns the choice of law question, the same can be seen in the context of jurisdiction. In this sense, determining whether a court has or should exercise jurisdiction is, in itself, a secondary norm because such consideration "does not have an impact on the substantive outcome of the case."[58] It is the function of private international law in allocating regulatory authority between countries that demonstrates that this branch of law contains "inherent public law nature," and it should not be viewed only from a private law perspective.[59] This consideration is relevant to the issue of jurisdiction agreements under discussion to the extent that common-law jurisdictions have been wrong in perceiving jurisdiction clauses purely as contracts dealing with the rights and obligations of parties to sue or not to sue.[60] Instead, each jurisdiction agreement has implications on the powers of the courts to adjudicate the matter. As noted by Justices Karakatsanis, Wagner, and Gascon

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52. YEO, *supra* note 17, at para. 96.
53. MUKARAM AHMED, THE NATURE AND ENFORCEMENT OF CHOICE OF COURT AGREEMENTS: A COMPARATIVE ANALYSIS 19 (2017).
54. See *id.* at 18 (See especially n.21 citing H.L.A. HART, THE CONCEPT OF LAW (2nd ed., 1994)).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 15.
60. *Id.* at 56.

of the Supreme Court of Canada in *Douez v. Facebook Inc.*,[61] "forum selection clauses *divert public adjudication* of matters out of the provinces, and court adjudication in each province is a public good."[62] Jurisdiction clauses "implicate the court"[63] and "*encroach on the public sphere* of adjudication."[64] Courts, in exercising their judicial powers, necessarily retain discretion whether to give effect to privately agreed jurisdiction agreements. As observed by Ho:

> Just because one of the bases of adjudicatory jurisdiction is consent, it by no means follows that the existence of a choice of forum clause by itself requires the selected court to hear the case; nor does it by itself preclude another court from hearing the action, when that court would, absent the clause, have jurisdiction over the parties and the controversy.
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> In other words, a forum selection clause is only a statement of consent . . . which happens to be a basis of adjudicatory jurisdiction which the selected forum may or may not exercise. This is not to suggest that the court should not be influenced by the consent . . . . In fact the reason why a court's adjudicatory jurisdiction can be grounded in consent is the respect for party autonomy. But for a court to respect a statement of consent which forms one of the bases of jurisdiction is one thing. For a court to play a strong role in the fact that a statement of consent constituting a jurisdictional basis is also an independently enforceable obligation is a very different matter.[65]

Hence, as shall be seen in Section IV below, courts retain discretion in considering whether to enforce a jurisdiction clause—being exclusive or nonexclusive. It suffices to state at this point that courts, in construing a jurisdiction clause to determine whether it is exclusive or nonexclusive, do not only engage in contractual interpretation as a matter of private law. Instead, such work of interpretation forms part of the process of the courts in determining whether to exercise their judicial powers. Therefore, it is argued here that the question of distinction

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61. Douez v. Facebook Inc., [2017] SCC 33.
62. *Id.* at para. 25 (emphasis added).
63. *Id.* at para. 26.
64. *Id.* at para. 27 (emphasis added).
65. Look Chan Ho, *Anti-suit Injunctions in Cross-border Insolvency: A Restatement*, 52(3) INT. COMP. LAW Q. 708 (2003). This view is not entirely without support. As noted by Ahmed, in the context of the German legal system, a jurisdiction agreement is viewed as a "procedural contract" whereby such clause "is merely a 'joint statement of consent' by the parties to the jurisdiction of the selected court which may or may not be conclusive in determining the question of jurisdiction." AHMED, *supra* note 53, at 54.

should be a matter for the lex fori. For similar reasons, the authors tentatively submit that the scope of a jurisdiction agreement should be ascertained by the rules of interpretation applying the same law.

2. General Rules of Construction

With the exception of Canada, where Oppong and Gibbs noted that the courts "have not developed specific rules for the interpretation of jurisdiction agreements"[66] on the basis of either the proper law of the contract or the lex fori, the rules of construction for interpreting jurisdiction clauses in the United Kingdom and Australia are identical. The approach laid down by Chief Justice Giles in the Commercial Division of the Supreme Court of New South Wales in *FAI General Insurance Co. v. Ocean Marine Mutual Protection & Indemnity Ass'n*,[67] in which the judge also made references to English case laws, may be taken as a succinct summary. First, in considering the question of construction, the court is allowed to take into account "circumstances surrounding the entry into the contract."[68] This is typical in any general interpretation and it is in line with what the House of Lords, in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*,[69] referred to as a "a matrix of fact."[70] Second, and adding to the complication, there is no need for a clause to contain the word "exclusive" to be recognized as being an exclusive jurisdiction clause.[71] Third, the fact that there exists a mutuality in the sense that "both parties agree to the relevant jurisdiction" does not automatically make a jurisdiction clause an exclusive one either.[72] "[M]utuality is consistent with no more than submission to the jurisdiction."[73] The combination of mutuality with other factors may indicate an intention of the parties to agree to an exclusive jurisdiction clause.[74] Fourth, the court may glean from other language used in the clause to ascertain the parties' intention.[75] In this respect, it has been observed that the use of the word "shall" hints that the parties agree to an exclusive

66. OPPONG & GIBBS, *supra* note 47, at 399.
67. FAI General Insurance Co v Ocean Marine Mutual Protection & Indemnity Ass'n [1997] 41 NSWLR 117.
68. *Id.* at 126.
69. Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1997] UKHL 28, [1998] 1 WLR 896.
70. *Id.* at 912.
71. FAI General Insurance Co, [1997] 41 NSWLR 117 at 126.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

jurisdiction clause.[76] Likewise, when the parties indicate in their agreement that they agree to submit "all" disputes or "any" dispute to a particular court, this suggests that they opt for an exclusive jurisdiction clause.[77] The same can be said when the parties agree that the courts in a particular country "are to have jurisdiction" or that the parties "irrevocably" agree for the courts in a particular country to have jurisdiction.[78] Fifth, the existence of the jurisdiction clause nominating the courts in one country despite those courts having jurisdiction, even in the absence of the jurisdiction clause, indicates the parties' intention for the clause to be an exclusive one.[79] Chief Justice Giles could only state these rules of construction in broad manner, the application of which, as shall be seen in next section increases complexity. A similar approach to construction can be observed in Singapore.[80]

3. Exploration of Case Laws

This exploration started with an oft-cited case of *Sohio Supply Co. v. Gatoil (USA) Inc.*[81] The Court of Appeal in this case had to deal with a clause stating for the English law to govern the contract, with the part on jurisdiction reading, "[u]nder the jurisdiction of the English Court without recourse to arbitration."[82] While Lord Justice Staughton accepted that this was purely a question of construction, no attention was given to the wording. In fact, the first and foremost question that should be asked was whether the language of the clause was apt to indicate any obligation to sue before the courts of a particular country.[83] Instead, the sole focus was placed on the surrounding circumstances. He relied heavily on the fact that the concerned parties were businessmen:

> To my mind, it is manifest that these business men intended that clause to apply to all disputes that should arise between them. I can think of no reason at all why they should choose to go to the trouble of saying that the English courts should have non-exclusive jurisdiction. I can think of every reason why they should choose that some Court, in this case

76. James Fawcett, *Non-exclusive Jurisdiction Agreement in Private International Law*, 1-176 Lloyd's Mar. Com. L.Q. 234, 237 (2001).
77. *Id.*
78. *Id.*
79. FAI General Insurance Co, [1997] 41 NSWLR 117 at 127.
80. *See generally* Yeo, *supra* note 17, at 315-16.
81. Sohio Supply Co. v. Gatoil (USA) Inc. [1989] 1 Lloyd's Rep. 588.
82. *Id.* at 590.
83. S & W Berisford plc v. New Hampshire Ins. Co. [1990] 1 Lloyd's Rep. 454 at 457.

> the English courts, should have exclusive jurisdiction. Then, both sides would know where all cases were to be tried.[84]

With respect, it is doubtful whether, in looking at the circumstances, the fact that both parties were businessmen would suffice. In this case, the dispute was between a company registered in Delaware operating out of Ohio and a company registered in Delaware operating out of Texas (with a possible control from Geneva).[85] Why should one not consider that parties may want to maintain flexibility? There was no trace into the parties' communications or negotiations of this clause. What Lord Justice Staughton purported to be what the parties would have intended was a mere guessing exercise. Briggs observed that, in fact, in this case, the court adopted this presumption since the English court would have had jurisdiction even in the absence of such clause.[86] This is, however, not apparent from the reasoning in the judgment. Nevertheless, the same observation was made by Justice Waller in *British Aerospace Plc. v. Dee Howard Co.*[87]

If there was indeed a presumption in favor of exclusivity because the designated court would have had jurisdiction in any event, this is not what Justice Hobhouse, in *S & W Berisford plc v. New Hampshire Insurance*, prepared to adopt. In that case, the clause that the judge had to construe was contained in a standard form for (marine) cargo insurance. The clause read, "This insurance is subject to English jurisdiction."[88] While admitting that English courts would have jurisdiction in any event,[89] Justice Hobhouse shifted the focus to the wording of the clause which, he found, "are inapt to create any obligation."[90] To construe otherwise "is to go beyond the natural meaning of the words actually used."[91] Justice Hobhouse also appeared to be convinced by a seeming lack of mutuality of the parties in coming to the agreement. As he observed, "[t]he provision appears in the underwriter's printed form of policy which is issued to the assured. The mutuality of the clause must in practice be very limited."[92] It is questionable to what extent, in

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84. Sohio Supply Co. [1989] 1 Lloyd's Rep. at 592.
85. *Id.* at 589.
86. BRIGGS, *supra* note 2, at para. 4.13. *See especially* n.21. The English Court would have had jurisdiction on the basis of the English law, which governed the contract. This is pursuant to the then-equivalent provision of what has now become para. 3.1 of the Practice Direction 6B, that a service out of jurisdiction of the court can be made with the court's permission for a claim where the contract is governed by English law.
87. British Aerospace Plc v. Dee Howard Co. [1993] 1 Lloyd's Rep. 368 at 374.
88. S & W Berisford plc [1990] 1 Lloyd's Rep. 454 at 456.
89. *Id.* at 457.
90. *Id.* at 458.
91. *Id.*
92. *Id.*

modern days, the weight should be placed on the fact that a jurisdiction clause is contained in a printed standard form as opposed to a negotiated agreement. Most, if not all, commercial contracts are concluded on the basis of the boilerplate forms used by one of the parties. Of note, Justice Hobhouse was not concerned with the fact that both parties in the case before him were businessmen.

It was Justice Waller in *British Aerospace* who again resorted to the presumption of exclusivity when the courts would have jurisdiction in any event, even though he could have dealt with the case easily by focusing on the wordings of the clause itself. In the present authors' respectful opinion, this should not have been the case for the judge to decide in the first place. The clause in question was rather clear. It provided:

> This agreement shall be governed by and be construed and take effect according to English law and the parties hereto agree that the courts of law in England shall have jurisdiction to entertain any action in respect hereof and that in the event of such proceedings being commenced each party shall forthwith notify to the other an address in England for the service of documents.[93]

Concerning the use of wordings, Justice Waller had no reluctance to accept that the word "any action" was equivalent to "all actions,"[94] and he found the clause to contain "the language of obligation" from the word "shall."[95] Yet, he also observed:

> In the instance case the parties have expressly agreed English law and there would be no need to expressly agree that the English Court should have jurisdiction for the English Court to have non-exclusive jurisdiction. The English Court would in any event have such jurisdiction and by expressly agreeing to English jurisdiction they must be seeking to add something, i.e. that England should have exclusive jurisdiction.[96]

Justice Waller also compared the clause in this case with the clause in an unreported judgment of Justice Hobhouse in *Cannon Screen Entertainment Ltd. v. Handmade Films (Distributors) Ltd.*[97] The clause in that case provided:

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93. British Aerospace Plc [1993] 1 Lloyd's Rep. 368 at 370.
94. *Id.* at 375.
95. *Id.*
96. *Id.* at 374.
97. *Id.*

> This agreement shall be construed and interpreted pursuant to laws of England and the parties hereby consent and submit to the jurisdiction of the Courts of England in connection with any dispute arising hereunder. The parties further agree that process in any such action may be served upon either of them by registered or certified mail at the address of first above given or such other address as the party being served may from time to time have specified to the other party by previous written notice.[98]

Again, with the emphasis on the natural meaning of the words used, Justice Hobhouse considered the clause to be a nonexclusive jurisdiction one. He drew a fine distinction when he said of the clause in the case, "the sense is that the parties submit themselves to the jurisdiction of the court not that the parties submit disputes."[99] Continuing to focus on the language, Justice Hobhouse resumed to observe that the parties "have used words which are apt to demonstrate an intention to agree to submit to the jurisdiction of the English Courts and not there should be a contractual obligation not to have any recourse to any other court."[100] One would observe a similarity between jurisdiction clauses in the *British Aerospace* case and the *Cannon Screen* case, and at first glance, any distinction between them is not at all apparent. Nonetheless, Justice Waller drew a distinction from the address given for the service of process in both cases. He suggested that the U.K. address given in the clause in *Brtish Aerospace* reinforced the interpretation of the clause as an exclusive one.[101]

Different from the approach of Justice Hobhouse, Lord Justice Staughton was once again did not concern himself with the language of the clause. In *A/S D/S Svendborg v. Wansa,*[102] the jurisdiction clause contained in the bill of lading provided:

> Wherever the Carriage of Goods by Sea Act 1936 (COGSA) of the United States of America applies . . . this contract is to be governed by United States law and the United States Federal Court Southern District of New York is to have exclusive jurisdiction to hear all disputes hereunder. In all other cases, this Bill of Lading is subject to English law and jurisdiction.[103]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 375.
102. A/S D/S Svendborg v. Wansa [1997] 2 Lloyd's Rep. 183.
103. *Id.* at 185.

It is not apparent from the judgment whether the clause quoted above was a negotiated one. Most terms and conditions contained in bills of lading are often preprinted. Lord Justice Staughton reiterated his view in the *Sohio* case in assuming the intention of businessmen.[104] He also added that, from the second part of the clause, the parties intended for English law to govern the bill of lading in the event that the relevant law of the United States would not be applicable. From this, the presumption could be made that the parties "must have intended English jurisdiction likewise to be mandatory in that event."[105] With respect, nowhere in his judgment did Lord Justice Staughton consider a similar clause in *S & W Berisford* and one would doubt whether a presumption drawn from the choice of English law is of much relevance. In this context, it should be noted that, in *S & W Berisford*, the insurance contract was likewise governed by English law because it was concluded in England (and not because the parties expressly made such choice).[106]

Nevertheless, Justice Rix (as he then was), in *Sinochem*,[107] drew support from the choice of law made by the parties when he had to construe the clause:

> This contract shall be governed by and construed in accordance with the laws of Hong Kong. The parties hereto irrevocably agree that the courts of Hong Kong are to have jurisdiction to settle any disputes which may arise out of or in connection with this contract and submit to the jurisdiction of those courts.[108]

He was right in his consideration that the wordings in this clause had all indications that the clause was an exclusive jurisdiction clause. Phrases including "are to have jurisdiction to settle any disputes" and "submit to the jurisdiction of those courts" are the language of obligation. The term "any disputes" is also synonymous with "all disputes."[109] More noticeably, he proceeded to say:

> although a choice of law clause may well exist without any jurisdiction clause to accompany it, nevertheless . . . there is not much point in choosing a specific law to

104. *Id.* at 186.
105. *Id.* (italics per the original text).
106. S & W Berisford plc [1990] 1 Lloyd's Rep. 454 at 457.
107. Sinochem International Oil (London), [2000] 1 Lloyd's Rep. 670.
108. *Id.* at 672.
109. *Id.* at 676.

> accompany a jurisdiction clause unless the intention is to make the courts where such law operates exclusive.[110]

The authors respectfully submit that this observation may not always hold true. Speaking in the context of *Svendborg*, English law is always considered a lingua franca in the fields of shipping law and alike. In modern days, where legal treatises and case law databases are easily accessible, courts are equipped with the means to understand and apply English law. There has been no evidence that courts in other countries are by any means less competent in applying English law. To what extent this observation is correct remains at least doubtful.

Nevertheless, Justice Colman, in *Konkola Copper Mines plc v. Coromin Ltd. (No.2)*,[111] again heavily relied on the parties' choice of law. In this case, an insurance cover note provided by insurers in Zambia simply provided, "Local Law and Jurisdiction Clause."[112] Justice Colman was satisfied that the cover note had to be read with reference to a contract concluded with the insurers in Zambia, whereby a "Zambian Law and Jurisdiction clause" could be found.[113] Yet, neither the clause in the contract nor the clause in the cover note provided sufficient clarity that the parties agreed to the exclusive jurisdiction of the courts in Zambia. Justice Colman proceeded to explain:

> the expression . . . referable to the Zambian contract is sufficiently certain to mean that the policy is to be governed by Zambian law and that all disputes arising under it are to be determined by the Zambian courts . . . . An underwriter or a placing broker confronted with these words . . . would have understood them as a mutual transitive reference of such disputes to the Zambian courts and not as a mutual promise not to object to the jurisdiction of the Zambian courts if that were invoked.[114]

The present authors fail to understand how Justice Colman could presume the parties' intention in such circumstances. Had the authors been the underwriters or the placing brokers in this transaction, they would have been dumbfounded by such brevity of the clause. Nevertheless, Justice Colman went further to suggest that the parties had in mind the application of a local Zambian

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110. *Id.*

111. Konkola Copper Mines plc v. Coromin Ltd. [2006] EWHC 1093 (Comm), [2006] 2 Lloyd's Rep. 446.

112. *Id.* at [15], [2006] 2 Lloyd's Rep. 446 at [15].

113. *Id.* at [1], [2006] 2 Lloyd's Rep. 446 at [1].

114. *Id.* at [22], [2006] 2 Lloyd's Rep. 446 at [22].

statute.[115] However, nowhere in the language of that statute was there an imposition upon the parties to agree to the exclusive jurisdiction of the courts in Zambia.

However, in *Sea Trade Maritime Corp. v. Hellenic Mutual War Risks Ass'n (Bermuda) Ltd. (The Athena (No.2))*,[116] Justice Langley was not convinced by the choice of law when he had to consider a jurisdiction clause in the rules of a mutual association. It was clear that the rules were governed by the English law.[117] The jurisdiction clause in point provided:

> The Association and each Owner hereby submits to the jurisdiction of the High Court of Justice of England in respect of any dispute or difference between the Owner and the Association arising out of or in connection with these Rules or out of or in connection with any contract between the Owner and the Association.[118]

The judge found the clause to be of "the same substantial and grammatical effect" as the clause Justice Hobhouse considered in an unreported judgment in *Pathé Screen Entertainment v. Handmade Films (Distributors) Ltd.*[119] That clause stated, "The parties hereby [consent and] submit to the jurisdiction of the Court of England in connection with any dispute arising hereunder."[120] Without departing from what Hobhouse J. held, the judge found the clause in this case to be nonexclusive.[121] Of note, however, the judge went on to observe that a choice of law did not carry much weight such that it can support a presumption in favor of exclusivity: "[E]ven a nonexclusive jurisdiction clause does have a purpose. It makes it difficult, if not impossible, to argue that the chosen forum is not an appropriate one for the resolution of the dispute."[122] The legal

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115. He quoted s.79 of the Zambian Insurance Act, The Insurance Act, Cap. 392 § 79 (Zam)., which provided:
(1) The holder of a policy shall, notwithstanding any contrary provision in the policy, be entitled to enforce his rights under the policy against the insurer named in the policy in any competent court in Zambia.
(2) Any question of law arising in any action under a policy may validly provide that the amount of any liability under the policy shall be determined by arbitration and any such abritraiton shall be held in Zambia in accordance with the Arbitration Act.

116. Sea Trade Martitime Corporation v. Hellenic Mutual War Risks Ass'n (Bermuda) Ltd. [2006] EWHC (Comm) 2530 [30] (Eng).

117. Per Clause 46 of the rules of the mutual association: "These rules and any contract of insurance between the Association and an Owner shall be governed by and construed in accordance with English Law." *Id.* at [28].

118. *Id.* at [7].

119. *Id.* at [101]. Justice Langley noted that this case came to be reported as the attachment to Tonicstar Ltd. v. American Home Insurance Co., [2005] EWHC 1234 (Comm). See *id.* at [98].

120. *Id.* at [99].

121. *Id.* at [101], [106].

122. *Id.* at [103].

consequences of the nonexclusive jurisdiction clause will be discussed further in Section 4 below.

A different conclusion was reached with respect to a similar jurisdiction clause, albeit obiter, by the Federal Court of Australia in *Armacel Pty. Ltd. v. Smurfit Stone Container Corp.*[123] The clause in this case was:

> This Agreement must be read and construed according to the laws of the State of New South Wales, Australia and *the parties submit to* the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia.[124]

Justice Jacobson found he was bound by the decision of the courts in the United States, which determined that the clause was nonexclusive on the basis of the issue estoppel,[125] yet he proceeded to say:

> [The clause] falls to be construed against the background that this was a contract made between business people negotiating at arms' length who must be presumed to have intended some certainty as to where their disputes would be litigated. The relevant courts . . . would have jurisdiction by [the] reason of the choice of law clause. The parties agreed to mediate in Sydney. It is therefore difficult to see why they would not have intended that all their disputes be resolved in New South Wales.[126]

With respect, the authors cannot see the difference between the clause in this case and that in *The Athena (No.2)* nor should the choice of law render much weight in the consideration. A reference to the place wherein the parties agreed to mediate is irrelevant. Designating a place for a meditation to take place is analogous to indicating a seat in an arbitration.

Again, a jurisdiction clause that was not much different in language was considered by the Supreme Court of New South Wales in *Ace Insurance Ltd. v. Moose Enterprise Pty. Ltd.*[127] The clause in issue was:

> Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of

123. Armacel Pty Ltd v Smurfit Stone Container Corp [2008] FCA 592 [82] (Austl).
124. *Id.* at [29] (italics per the original text, emphasis added).
125. *Id.* at [6], [83].
126. *Id.* at [88].
127. Ace Insurance Ltd v Moose Enterprise Pty Ltd [2009] NSWSC 724.

> Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia.[128]
>
> There was also a subsequent endorsement which provided:
>
> Provided that all claims which fall under the terms of this endorsement, it is agreed:
>
> (i) . . . .
>
> (ii) that should any dispute arise between the insured and ACE over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia.[129]

An attempt was made in the course of the argument to use the endorsement in support of the interpretation of the jurisdiction clause in favor of exclusivity.[130] This was rejected by Justice Brereton as irrelevant.[131] First, if anything, the endorsement indicated a choice of law.[132] Second, the term "practice" referred to insurance practice.[133] Yet Justice Brereton was convinced the jurisdiction clause in question was exclusive.[134] First, the use of the word "any such dispute" can be read as "all such disputes."[135] Second, since the parties were both companies in Australia, the courts in Australia would be the natural forum and would have jurisdiction in any event: "The commercially sensible interpretation is that it was intended to require the parties to litigate in and only in Australia."[136] Regrettably, the judge did not really discuss the phrase "the parties agree to submit to the jurisdiction," which has caused much confusion as can be observed from case laws explored thus far.

In *Starlight Shipping Co. v. Allianz Marine & Aviation Versicherungs AG (The Alexandros T),*[137] Justice Buxton had to consider a jurisdiction clause similar to the clause found in *Svendborg*. The clause in a settlement agreement simply provided: "This agreement is subject to English law and the jurisdiction of the

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128. *Id.* at [11].
129. *Id.* at [12].
130. *Id.* at [34].
131. *Id.*
132. *Id.*
133. *Id.* at [35].
134. *Id.* at [36].
135. *Id.*
136. *Id.*
137. Starlight Shipping Co. v. Alliznaz Marine & Aviation Versicherungs [2011] EWHC 3381 (Comm), [2012] 1 Lloyd's Rep. 162.

High Court of London."[138] It did not take much effort on the part of Justice Buxton to find the clause to be an exclusive jurisdiction clause. First, the insurance contract in this case contained "an exclusive jurisdiction clause providing for English law and the jurisdiction of the courts of England and Wales."[139] Since the settlement agreement related to this insurance, the jurisdiction clause in that insurance "would have applied to the settlement of a dispute about [a] policy," even if the settlement agreement contained no jurisdiction clause.[140] Second, the courts granted the "Tomlin orders" pertaining to the settlement agreement;[141] thus, the settlement agreement must be enforced by the courts in England pursuant to these orders.[142] As such, the judge did not have to engage much on the point of interpretation.

Differently, the Court of Appeal in *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Ltd.*[143] engaged in indepth reasoning to justify its conclusion that the jurisdiction clause was an exclusive one. The jurisdiction clause in point provided:

> This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such disputes and proceedings shall be referred to the Chilean Ordinary Courts.[144]

Of note, the Court of Appeal pointed out that the fact that the choice of law was the English law does not always lead to the presumption in favor of exclusivity.[145] However, the phrase "shall be subject to" in this clause suggested an obligation. This was fortified by the preceding phrase "any claim or dispute arising hereunder shall be." Reading these phrases together, the clause is transitive, as it effectively means "the parties agree to submit all disputes to the English court, rather than submitting themselves

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138. *Id.* at [10], [2012] 1 Lloyd's Rep. 162 at [10].

139. *Id.* at [1], [2012] 1 Lloyd's Rep. 162 at [1].

140. *Id.* at [23], [2012] 1 Lloyd's Rep. 162 at [23] (citing DSM Anti-Infectives BV v. SmithKline Beecham plc [2004] EWCA (Civ) 1199).

141. *Id.* at [8], [2012] 1 Lloyd's Rep. 162 at [8].

142. *Id.* at [23], [2012] 1 Lloyd's Rep. 162 at [23].

143. Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Ltd.,[2015] EWCA (Civ) 401, [2015] 2 Lloyd's Rep. 1.

144. *Id.* at [4], [2015] 2 Lloyd's Rep. 1 at [4].

145. *Id.* at [59], [2015] 2 Lloyd's Rep. 1 at [59].

to its jurisdiction if that jurisdiction is invoked."[146] Moreover, the phrase "shall be subject to" has the effect of mandating English law to govern this contract.[147] Likewise, in using this phrase also with the choice of jurisdiction, "the parties must . . . be taken to have intended (absent any convincing reason to the contrary) that the same should apply to English jurisdiction."[148] The Court of Appeal then addressed the issue of the foreign courts applying English law, which the authors observed earlier. The Court maintained "England is the best forum for the application of its own law."[149] If foreign courts are located in common-law jurisdictions, which inherit English legal methods and concepts, then the present authors fail to understand why they are not found to be equally competent to apply English law. As for courts in other jurisdictions, as argued earlier, globalization makes it easy for the position of English law to be ascertained, and London's influence in the field of shipping means that its legal position in that field is widely known to courts and practitioners around the world. Hence, this consideration may not be particularly strong. The Court of Appeal drew further support from the opening word in the second sentence of the clause: "If the first sentence made English jurisdiction optional, the phrase 'notwithstanding the foregoing' would be unnecessary."[150] Moreover, the Court of Appeal found the purpose of the second and third sentences were to provide fallback positions if the first sentence happened to be rendered of no effect.[151] The Court of Appeal proceeded to reject the argument that the jurisdiction clause should be read bearing in mind the *contra proferentem* rules, which are less relevant in commercial agreements.[152] In any event, the rules are to be used when the language of the clause is not clear. However, in light of all the analysis, the Court of Appeal found the clause to be sufficiently clear.[153] Lastly, the Court of Appeal, in relying on earlier authorities including *The Alexandros T*, found that "the tenor of English authorities is that an agreement to English law and jurisdiction in this form is likely to be interpreted . . . as involving both the mandatory application of English law and the exclusive jurisdiction of the English court."[154] The Court of Appeal should be praised on its detailed and cogent analysis. For the sake of completeness, the

146. *Id.* at [61], [2015] 2 Lloyd's Rep. 1 at [61].
147. *Id.*
148. *Id.* at [63], [2015] 2 Lloyd's Rep. 1 at [63].
149. *Id.* at [66], [2015] 2 Lloyd's Rep. 1 at [66].
150. *Id.* at [67], [2015] 2 Lloyd's Rep. 1 at [67].
151. *Id.* at [68], [2015] 2 Lloyd's Rep. 1 at [68].
152. *Id.* at [69], [2015] 2 Lloyd's Rep. 1 at [69].
153. *Id.* at [73], [2015] 2 Lloyd's Rep. 1 at [73].
154. *Id.* at [77], [2015] 2 Lloyd's Rep. 1 at [77].

litigation concerning the parties in this case was also raised in the People's Republic of China, whereby the courts found this same jurisdiction clause to be null and void.[155]

A brief exploration of case law reveals that courts do not always engage in linguistic analysis to construe the meaning of jurisdiction clauses. Different presumption techniques have been employed, such as a reliance on the agreed choice of law, a reference to the fact that the courts in particular country have jurisdiction over the case in any event, or a purported finding of the common intention of the parties for certainty. With the doctrine of precedents employed by the courts in common-law jurisdictions, judges seek guidance from earlier judgments where a similar jurisdiction clause received interpretation; otherwise, an earlier decision, even of the courts of other countries, may be persuasive. Assuming the court that is tasked with construing a jurisdiction clause is one in a state party to the HCCCA, the question is, can the court say it has overwhelming guidance from previous authorities to determine whether the jurisdiction clause in question is an exclusive one or not, and hence there is no need to resort to the presumption in Article 3(b) of the HCCCA? Or, should the judge simply say, "Since there is an argument on how the jurisdiction clause is to be interpreted, the court is bound by Article 3(b) of the HCCCA. Since there is no clear language indicative of nonexclusivity, the court concludes the jurisdiction clause in this case is an exclusive one"? These questions will be addressed in Part III of this article.

4. Legal Consequences

As mentioned before, no court *blindly* enforces jurisdiction agreements, even exclusive ones. The consideration in this section will only focus on how a party can seek to sue in a non-nominated forum. Where a case is brought before a court in a country other than the one designated in an exclusive jurisdiction agreement, a court has discretion whether to continue the proceedings or to grant

155. The reason was quoted in the judgment of the Court of Final Appeal in Hong Kong. The court in the People's Republic of China found:
the place where the Defendant has its domicile, the place where the contract is performed or signed, the place where the subject matter is located, all do not fall within the UK, therefore, the place where the competent court is located agreed in the said jurisdiction clause has no actual connection with the subject dispute and the jurisdiction thus agreed shall be determined as null and void. Since the loading port of the cargo concerned was Ningbo Port, China, Ningbo was the place where the carriage commenced; and as it fell within the jurisdiction of this Court and, therefore, this Court shall have jurisdiction over the subject case.
Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Ltd. [2016] H.K.C.F.A. 79, (2016) 19 H.K.C.F.A.R. 586, FACV 1/2016.

a stay.[156] Such consideration is based on a set of guiding criteria that have come to be known as the "strong cause" test, well established in a classic authority of Justice Brandon (as he then was) in *The Eleftheria*[157]:

> [1]Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay, but has a discretion whether to do so or not.
>
> [2]The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
>
> [3]The burden of proving such strong cause is on the plaintiffs.
>
> [4]In exercising [its] discretion, the court should take into account all the circumstances of the particular case.
>
> [5][In particular, but without prejudice to (4), the following matters, where they arise,] may properly be regarded: [a] In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and the foreign courts; [b] whether the law of the foreign court applied and, if so, whether it differs from English law in any material respects; [c] with what country either party is connected, and how closely; [d] whether [the] defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; [e] whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would, [i] be deprived of security for the claim, [ii] be unable to enforce any judgment [obtained], [iii] [be faced with a time-bar not applicable in England], or [iv] for political, racial, religious or other reasons be unlikely to get a fair trial.[158]

In Australia, while *The Eleftheria* has been followed,[159] the High Court of Australia in *Akai Pty. Ltd. v. People's Insurance Co.*[160] attached significant weight to local legislative intent. This could be viewed either as an additional criterion in itself or as a mere

156. DAVIES, BELL, BRERETON & DOUGLAS, supra note 4, at para. 7.61.

157. *The Eleftheria* [1970] P 94, [1969] 1 Lloyd's Rep. 237.

158. *Id.* at 242, [1969] 1 Lloyd's Rep. 237 at 242.

159. Justice Allsop affirmed that The Eleftheria "can be taken as the law in Australia." Incitec Ltd. v. Alkimos Shipping Corp., [2004] FCR 348.

160. Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418, [13]-[14].

illustration of Criterion 5(b) in *The Eleftheria* quoted above. The *Akai* case involved a credit insurance entered into between a company in New South Wales and an insurer in Singapore.[161] The policy contained a choice of English law and a jurisdiction clause designating the courts in England.[162] However, under the scheme of the *Insurance Contracts Act 1984* (Cth) of Australia,[163] an insurance contract falls within the scope of this piece of legislation if, irrespective of the express or implied choice of law, the objective proper law of the insurance contract is that of Australia.[164] Determining that the policy in this case would have fallen within the ambit of this piece of legislation, the High Court of Australia proceeded to refuse the stay of the New South Wales proceedings in favor of the courts in England, despite the jurisdiction clause stated in the policy. The reason was that the English courts were unlikely to adopt the *Insurance Contracts Act 1984* (Cth) as the *lex causae*.[165] According to the High Court of Australia:

> The grant of a stay would involve the State court so exercising its discretion as to stay its process in favour of an action in a court where the statute would not be enforced . . . To grant a stay . . . would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay.[166]

For the sake of completeness, it should be noted that there was also a parallel *Akai* litigation brought before Justice Thomas in the Queen's Bench Division.[167] The judgment was handed down subsequent to the decision of the High Court of Australia. Justice Thomas unhesitatingly granted an anti-suit injunction restraining Akai from continuing with the New South Wales proceedings because he did not think the English proceedings should be stayed.[168] He considered that the decision of the High

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161. *Id.* at 429, [1].

162. *Id.* at 430, [3].

163. *Insurance Contracts Act 1984* (Cth) s 8 (Austl.):

(1) Subject to section 9, the application of this Act extends to contracts of insurance and the proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or in which this Act extends.

(2) For the purposes of subsection (1), where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.

164. Akai Pty Ltd, (1996) 188 CLR 418 at 432-34, [45].

165. *Id.* at 447, [93].

166. *Id.*

167. Akai Pty. Ltd. v. People's Insurance Co. Ltd., [1998] 1 Lloyd's Rep. 90.

168. *Id.* at 108, [1998] 1 Lloyd's Rep. 90 at 108.

Court of Australia to retain jurisdiction did not rest on any basis familiar to the courts in England—rather, it was on "the application of Australian public policy set out in an Australian statute regulating insurance contracts."[169] Such public policy reflected in this Australian domestic statute was not a type that can be used against party autonomy in respect of the choice of law and choice of jurisdiction.[170] A significant lesson that can be taken from the *Akai* litigation is that a state, by its legislative powers, can always limit, exclude, or set conditions to the enforcement of jurisdiction clauses. Hence, different from other contracts, this is not purely a matter of party autonomy.

In Canada, the Supreme Court of Canada in the *Douez* case unanimously affirmed its earlier decision in *Z.I. Pompey Industrie v. ECU-Line NV.*[171] It explained that the *Z.I. Pompey* case established a two-step process in determining the enforceability of an exclusive jurisdiction clause. The first step involves a party, who maintains the proceedings have been commenced in breach of the exclusive jurisdiction clause, proving that the exclusive jurisdiction clause is effective in the sense that it is not tainted by any vitiating factors and that its scope is wide enough to encompass the subject matter of the dispute.[172] Once this is proved, it then becomes the task of the party who initiated the proceedings to demonstrate the fulfillment of the "strong cause" test laid down in *The Eleftheria.*[173] The fact of the *Douez* case involved a resident of British Columbia alleging that Facebook, without her consent, used her photo. This act of Facebook was, she maintained, in breach of a local statute of British Columbia.[174] The problem was that, at the time she registered for the service, she clicked to accept the terms and conditions, which included a term nominating exclusively the courts in California.[175] The Supreme Court of Canada, by majority, refused to enforce the exclusive jurisdiction clause with different reasons. For Justice

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169. *Id.* at 99, [1998] 1 Lloyd's Rep. 90 at 99.

170. To constitute the public policy that the courts will give effect to, regardless of the choice of law and the choice of jurisdiction stipulated by the parties, Justice Thomas quoted, with approval, the passage of Lord Halsbury in re Missouri Steamship Co., (1889) 42 Ch.D 321, 336, to the effect that such public policy must be one that renders a contract void "on the ground of immorality" or that the public policy goes to the extent of forbidding the making or entering into such a contract from the first place. *See* Akai Pty. Ltd. at 99–100.

171. Douez v. Facebook, Inc., [2017] 1 S.C.R. 751 at para. 17 (Can.) (Karakatsanis, Wagner & Gascon, JJ.); *Id.* at para. 93–94 (Abella, J.); *Id.* at para. 126 (McLachlin, C.J. and Moldaver & Côté, JJ.) (citing Z.I Pompey Industrie v. ECU-Line NV, 2003 SCC 27, [2003] 1 S.C.R. 450).

172. *Id.* at para. 28.

173. *Id.* at para. 29.

174. *Id.* at para. 5–7.

175. *Id.* at para. 8.

Abella, the clause simply did not pass the first step because the clause was not in line with public policy.[176] Moreover, the clause was also tainted by unconscionability, given the discrepancy in negotiating powers.[177] For Justices Karakatsanis, Wagner, and Gascon, the clause could not pass the "strong cause" test. In holding so, however, the judges did not quite place emphasis on the criteria laid down in *The Eleftheria*. They instead found those criteria to be open-ended, and they maintained that, in deciding whether to uphold the exclusive jurisdiction clause, "all the circumstances of the particular case" must be taken into account.[178] Based upon this, they chose to add another factor:

> When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross in equality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.[179]

Since Justice Abella and minority judges did not take the same approach, this purported criterion should not be taken as an established legal position, even within Canada itself. Considering that the rules laid down in *The Eleftheria* have stood the test of time for over half a century, the present authors think that, for clarity and certainty, the courts should be very cautious in trying to add or adjust the criteria therein.

Nevertheless, the Court of Appeal of the Republic of Singapore in *Vinmar Overseas (Singapore) Pte. Ltd. v. PTT International Trading Pte. Ltd.* came to adjust Criterion 5(d) of *The Eleftheria* on "[w]hether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages."[180] It observed that this criterion necessitated a trace into the subjective mind of the party who comes to ask the court to stay or dismiss the proceedings in favor of the court nominated in the exclusive jurisdiction agreement. In fact, this consideration of such subjective desire is out of context.[181] Second, there is nothing wrong in one seeking procedural advantages.[182] As the Court observed, "what is a

176. *Id.* at para. 104–10.
177. *Id.* at para. 111–16.
178. *Id.* at para. 30.
179. *Id.* at para. 38.
180. Vinmar Overseas (Singapore) Pte. Ltd. v. PTT Int'l Trading Pte Ltd., [2018] SGCA 65.
181. *Id.* at [130].
182. *Id.*

procedural advantage for one party is necessarily a procedural disadvantage for the other party, and vice versa."[183] Hence, the Court proceeded to reformulate Criterion 5(d) as "*is the applicant acting abusively in applying for a stay of proceedings?*"[184] One would readily realize that it will only be in rare circumstances that the applicant can be said to be acting abusively in seeking a stay in favor of the foreign designated forum. One example given is in the case the applicant does not deny both liability and quantum yet tries to obtain a stay because of "its alleged inability to pay."[185] However, it is doubtful whether this suggested scenario is fanciful. It is not understandable why an applicant who may be unable to pay wants to seek a stay in one jurisdiction just so that the case can be decided in the foreign designated forum in which the applicant will ultimately incur costs and expenses and may have to pay if that court finds the applicant to be liable and determines the quantum. Another given example is if the applicant has already used media propaganda in the country of the foreign designated forum so as to defame the other party with the aim of impacting "the prospect of a fair trial" in that country.[186] On this, it is questionable whether such a scenario actually goes to the consideration under Criterion 5(e)(iv) of *The Eleftheria*: namely, whether the other party would be prejudiced in having to sue in the foreign designated forum due to racial, political, or other reasons that may have a bearing upon the fair trial.

Aside from this purported reformulation of Criterion 5(d), the Court in the *Vinmar* case also sought to add another factor—which does not exist in *The Eleftheria*—for the courts' consideration whether to deny a stay in favor of the foreign designated forum. This is when pursuing the case in a foreign forum would amount to a "denial of justice."[187] Extreme examples given by the Court in respect of this criterion included the dissolution of the designated court by the time the dispute arises or war involving that foreign country impeding proceedings.[188] It remains to be seen whether courts in other common-law jurisdictions will embrace this additional criteria.

Turning now to the opposite scenario, when a court is the one designated in the exclusive jurisdiction agreement, yet the applicant seeks the stay or dismissal of proceedings in favor of the foreign non-designated court. Under the common-law position, it appears

183. *Id.* at [122].
184. *Id.* at [130] (italics per the original text).
185. *Id.* at [131].
186. *Id.*
187. *Id.* at [133].
188. *Id.*

that the courts would be guided in its discretion by the doctrine of *forum non conveniens*.[189] Broadly speaking, a personal jurisdiction of the courts in common-law jurisdictions can be established by either submission or service.[190] The mere existence of an exclusive jurisdiction agreement alone does not amount to a submission. Where the defendant is within the geographical jurisdiction of the courts, "the jurisdiction agreement . . . will influence the question of whether the court will stay the proceedings pursuant to the doctrine of *forum non conveniens*."[191] Where the defendant is not within the courts' geographical jurisdiction, there will be a process of seeking a service out of jurisdiction whereby one condition, of which the courts need to be satisfied to allow such service, is that the courts are *forum conveniens*.[192] However, Marshall, referring to the decision of the House of Lords in *Donohue v. Armco Inc.*,[193] maintained that the defendant still needed to establish strong reasons.[194] Lord Bingham of Cornhill in *Donohue* had in mind those criteria in *The Eleftheria*, for he said:

> If contracting parties agree to give a particular court exclusive jurisdiction ... and a claim falling within the scope of the agreement ... the English court will ordinarily exercise its discretion ... to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. . . . In the course of his judgment in *The Eleftheria* . . . Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion . . . Brandon J did not intend his list to be comprehensive.[195]

While the "strong cause" criteria laid down in *The Eleftheria* may be similar to the concept of *forum non conveniens*, they are, in fact, not the same. The difference lies in the weight placed upon the jurisdiction clause whereby, under the doctrine of *forum non conveniens*, this is reduced to just one of the factors under the courts' consideration.[196]

Legal consequences from nonexclusive jurisdiction agreements are even more complex. The Singapore Court of Appeal discussed

189. ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 142 (2018).
190. *See generally* MORTENSEN, GARNETT & KEYES, *supra* note 14, at para. 2.4.
191. MILLS, *supra* note 182, at 141–42.
192. *Id.* at 142.
193. Donohue v. Armco Inc. [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425.
194. Marshall, *supra* note 5, at 75.
195. Donohue [2001] UKHL 64 at [24].
196. Douez, 2017 SCC 33 at para. 130 (Can.).

these in *Orchard Capital I Ltd. v. Jhunjhunwala.*[197] In this case, a clause in a settlement agreement provided:

> This Agreement is **governed by and construed** in accordance with the laws of Hong Kong, SAR. **The Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong, SAR**. The parties hereby knowingly, voluntarily and intentionally **waive** to the fullest extent permitted by law any rights they may have to **trial by jury** in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement.[198]

One of the parties sued under this agreement in Singapore. The Court of Appeal referred to an article by Yeo[199] observing that there are two ways to analyze the effect of the nonexclusive jurisdiction clause. The first is a contractual analysis, which depends on the interpretation of the nonexclusive jurisdiction clause itself. At the highest level, it might be akin to the exclusive jurisdiction clause, "in which case strong cause would be required to be demonstrated by the party seeking to sue in a jurisdiction other than that stated in the relevant clause itself."[200] This contractual analysis was subsequently adopted by Justice Woo Bih Li in *Abdul Rashid bin Abdul Manaf v. Hii Yii Ann.*[201] According to the judge, in between an exclusive and nonexclusive jurisdiction clause, there is a "most appropriate jurisdiction" clause (which the judge called shortly a "MAJ" clause).[202] This opened up a new level of complexity, as the judge attempted to distinguish a clause by which the parties agreed to "an" appropriate forum from a clause by which parties agreed to "the" appropriate forum. The judge then went on to observe, "Depending on the context and the rest of the terms in [a nonexclusive jurisdiction] clause, the clause could mean something more than was apparent from its literal phrasing, and amount to an MAJ clause."[203] Thus, if what appears at first sight to be a nonexclusive jurisdiction clause is interpreted to be a MAJ clause, then the party that seeks to sue in a non-designated forum has "to show strong cause as to why he should be permitted to do so."[204] Adopting this analysis, a distinction between this extreme type of nonexclusive jurisdiction clause—a MAJ clause—and an exclusive

197. Orchard Capital I Ltd. v. Jhunjhunwala [2012] SGCA 16.
198. *Id.* at [8] (italics and emphasis per the original text).
199. *Id.* at [3] (citing Yeo, supra note 17).
200. *Id.* at [24].
201. Abdul Rashid bin Abdul Manaf v. Hii Yii Ann [2014] SGHC 194.
202. *Id.* at [13].
203. *Id.* at [53].
204. *Id.* at [54].

jurisdiction clause is blurred.[205] Another method of analysis, which is simpler, is based simply on the usual *forum non conveniens* doctrine. Under this analysis, a nonexclusive jurisdiction clause is reduced to just one factor for the court to take into consideration when deciding whether to grant a stay. Nevertheless, its weight as a factor varies according to the circumstances of each case.[206] The Court of Appeal in this case adopted this latter approach. However, it observed that, even in the context of this latter approach, a complication may arise whereby the weight of the nonexclusive jurisdiction clause is such that it goes "beyond that of just a factor to be considered" under the *forum non conveniens* doctrine.[207] Within the context of the *Orchard Capital* case, the Court of Appeal found the intention of the parties in entering into the settlement agreement was to facilitate the respondents in discharging their obligations.[208] The jurisdiction clause also had to be interpreted in such light.[209] Therefore, the clause was found not to weigh so strongly so as to suggest that Hong Kong was "a clearly or distinctly more appropriate forum to hear the case."[210] In Australia, the determination of the effect of the nonexclusive jurisdiction clause is also based on the *forum non conveniens* doctrine.[211] This in fact proves even more onerous than the "strong cause" test in *The Eleftheria* for the party that seeks to sue in the non-nominated court (being Australia or otherwise). This is because the doctrine of *forum non conveniens* in Australia is that of a "clearly inappropriate forum" test.[212] For an Australian court nominated in a nonexclusive jurisdiction clause to stay or dismiss its proceedings, it must be satisfied that it is "a *clearly* inappropriate forum."[213] The same is true in a situation in which a foreign court is the one nominated in a nonexclusive jurisdiction clause but a party decides to bring proceedings in Australia. As Marshall explained:

> As with optional agreements in favour of forum courts, whether [the] proceedings in the forum are brought first or after proceedings have already been initiated in the foreign nominated court between the same parties on the same issues or even if no proceedings have been initiated in the

205. *Id.*; Orchard Capital I Ltd. [2012] SGCA 16 at [24].
206. Orchard Capital I Ltd. [2012] SGCA 16 at [25].
207. *Id.* at [31].
208. *Id.* at [27], [35].
209. *Id.*
210. *Id.* at [35].
211. Marshall, *supra* note 5, at 62–66.
212. This is laid down in Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 (Austl.) (affirming Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197).
213. Marshall, *supra* note 5, at 63.

> foreign nominated court at all, the forum court will assess whether it is a clearly inappropriate forum.[214]

Historically, no challenge has successfully been made for the courts in Australia to stay or dismiss its proceedings in favor of the foreign nominated court.[215]

In Canada, when there is a nonexclusive jurisdiction clause nominating a foreign court, and one of the parties sues in Canada, then, like other common-law jurisdictions, the clause becomes just one factor in the *forum non conveniens* consideration.[216] Where a court in Canada is one nominated in the nonexclusive jurisdiction clause, however, practices among common-law courts in Canada remain unclear whether the *forum non conveniens* test or the "strong cause" test is to be used.[217]

B. "Submission to Suit" Clause

This part can be dealt with briefly, as cases involved the "submission to suit" clause were reviewed in the course of discussing the interpretation of exclusive or nonexclusive jurisdiction clauses. Case laws appear to suggest that such a clause is nonexclusive in nature. However, Briggs observed that, depending upon the construction, such a clause can be either "non-exclusive" or "not-yet-inclusive."[218] As he put it:

> the question is whether the clause means "the claimant is entitled to sue, the defendant promises not to object, but the defendant can still bring proceedings in some other court at the same time", or "the claimant is entitled to sue, the defendant promises not to object, and to defend (and counterclaim, if so advised) in that court alone."[219]

There has been no case law that analyzes the "submission to suit" clause in great detail. This should be left for common-law courts to develop.

C. Asymmetric Jurisdiction Clause

This type of jurisdiction clause has led to complex arguments as to whether it fits or falls within the ambit of European instruments

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214. *Id.* at 65.
215. *Id.* at 66.
216. Saumier, *supra* note 46, at 146.
217. *Id.*
218. Briggs, *supra* note 2, at para. 4.50.
219. *Id.* at para. 4.52.

relating to the jurisdiction and enforcement of judgments.[220] There has also been some doubt whether the asymmetric jurisdiction clause falls within the ambit of the HCCCA, and this point will be reverted to in Part III below. The common-law position has been somewhat simpler because courts approach it as a matter of construction.[221] The asymmetric jurisdiction clause is seen most commonly in banking and financial contract arrangements. The most common type of such a clause can be found, for example, in *Continental Bank v. Aeakos Compania*.[222] The clause provided:

> Each of the Borrowers . . . hereby irrevocably submits to the jurisdiction of the English Courts and hereby irrevocably nominates Messrs. AEGIS (LONDON) Ltd., of 197 Knightsbridge, London S.W 7, England to receive service of proceedings in such Courts on its behalf but the Bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof.[223]

In this case, the borrowers commenced proceedings in Greece.[224] Thus, only the first part of the clause had to be addressed. Lord Justice Steyn was satisfied that the first part of the clause clearly stipulated that only the borrowers would be obliged "to submit disputes . . . to . . . the English Courts."[225] In other words, this part was considered an exclusive jurisdiction clause. The same consideration can also be found in *Reinsurance Australia Corp. Ltd. v. HIH Casualty and General Insurance (in liquidation)*[226] where, in short, the clause provided:

> Each of the insurers hereby irrevocably submits itself to the jurisdiction of the United States District Court for the Southern District of New York (or in the event the District Court does not have jurisdiction or does not exercise jurisdiction for any reason whatsoever, to the State courts of the State of New York), for the purposes of any suit, action or other proceeding arising out of or based upon this policy or the subject matter hereof brought by the insured or any of its successors or assigns in either of the above-referenced forums . . . provided, however, that the insured may at its

220. *E.g.*, Etihad Airways PJSC v. Flöther, [2019] EWHC (Comm) 3107 (Eng.).
221. *See* Merrett, supra note 5, at 40–43.
222. Continental Bank N.A. v. Aeakos Compania Naviera S.A. [1994] 1 Lloyd's Rep. 505.
223. *Id.* at 507.
224. *Id.*
225. *Id.* at 509.
226. Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance Ltd [2003] FCA 56.

> option bring suit, or institute other judicial proceedings against the insurers or any of their respective assets in any State or Federal Court of the United States or of any country or place where such insurer or such assets may be found.
>
> This policy has been delivered in the State of New York and shall in all respects be construed in accordance with and governed by the laws of such State applicable to contracts made and to be performed wholly within such State (without giving effect to its choice of law rules).[227]

Justice Jacobson maintained no doubt that this clause required the insurer to "submit to the exclusive jurisdiction of the New York courts."[228] Two observations can be made here. First, the judge approached the issue of construction on the basis of the lex fori, despite the choice of law stating to be that of the State of New York. This might be correct following the present authors' analysis above. Second, as referred to in the previous two sections, the court should not be too ready to treat the phrase "submits itself to the jurisdiction" as indicating exclusivity. In *Venter v Ilona MY Ltd*[229] the court had to deal with a jurisdiction clause that was drafted in a different manner. The clause provided:

> Insofar as the Customer is a merchant who has been entered as such in the commercial register, then Bochum shall be the place of jurisdiction. However, MD engineering shall be entitled to also take legal action against the Customer in the court which is competent for their commercial residence.[230]

Justice Rein considered the first part of the clause on the basis that it was an exclusive jurisdiction clause.[231] Therefore, the question of whether the New South Wales proceedings should be stayed was approached on the basis of the "strong cause" test.[232] This appears justifiable, since the word "shall" usually connotes exclusivity.

Differently, in *Telesto Investments Ltd v UBS AG,*[233] the clause provided:

> 19.1 In relation to any Account or Services, the Account Agreement and any Security Document shall be governed by

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227. *Id.* at [339] (italics and emphasis per the original text).
228. *Id.* at [343].
229. Venter v Iiona MY Ltd [2012] NSWSC 1029.
230. *Id.* at [28].
231. *Id.* at [29].
232. *See Id.* at [33]-[46].
233. Telesto Investments Ltd v UBS AG [2013] NSWSC 503 (Austl.).

> and construed in accordance with the law of the country in which the relevant Account is booked and the Client irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of such country, unless otherwise specified. In the case of UBS e-banking Services and the use of unsecured email, the place of performance of all obligations by the Client and the Bank and the exclusive place of jurisdiction for any disputes arising out of or in connection with that Service shall be the jurisdiction in which the Account is booked. Notwithstanding this, the Bank shall have the right, but not the duty or obligation, to take legal action against the Client in the jurisdiction in which UBS e-banking Services is offered, in the Client's place of residence or domicile or any other jurisdiction, subject always to the foregoing choice of law.[234]

There was no dispute in this case that necessitated Justice Sackar to touch upon the issue of construction. Marshall stated the obvious, and the present authors agree that the first part of the clause is to be treated just as a nonexclusive jurisdiction clause.[235] The parties, however, agreed to craft out disputes relating to UBS e-banking services and unsecured email, in which case, the second part of the clause appears to be exclusive, and the client is bound to sue in the country in which the account is booked. Provided that the client sues there, any argument on behalf of the bank for the dispute to be heard elsewhere must be then considered on the "strong cause" basis. However, the last part of the clause is nonexclusive to the extent that it allows the bank to sue the client on disputes concerning e-banking services and unsecured email in any other jurisdiction. The clause appears, at first sight, complicated. However, the interpretation in the end is straightforward.

In *Marks v ANZ Banking Group Ltd*,[236] the clause provided:

> 22. This Guarantee is governed by, and shall be construed in accordance with, the laws of Singapore. The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts of Singapore or of any other court as the Bank may elect, waives any objection on the ground of venue or forum non conveniens or any similar grounds and consents to service of process by mail or in any other manner permitted by relevant law.[237]

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234. *Id.* at [5].
235. Marshall, *supra* note 5, at 79.
236. Marks v ANZ Banking Group Ltd (2014) QCA 102 (Austl.).
237. *Id.* at [31].

Justice of Appeal Gleeson construed and explained the effect of this clause at some length:

> The first limb is a submission by the Guarantor to the non-exclusive jurisdiction of the courts of Singapore and the second limb is a submission by the Guarantor to the non-exclusive jurisdiction of any other court as [the bank] may elect ... the expression "as the Bank elects" is a composite part of the second limb, and not an expression which qualifies the whole of the submission to jurisdiction provision. In context, the word "or" at the commencement of the second limb has a conjunctive rather than disjunctive connotation. Thus, even if [the bank] had made an election by commencing the recovery of possession proceedings first, that step would have had no impact upon the submission to the non-exclusive jurisdiction of the courts of Singapore effected by the first limb.
>
> . . . and in any event, [the clause] does not, of itself, operate in a way to deprive of jurisdiction every other court which might have jurisdiction to entertain proceedings on the guarantee when [the bank] makes an election by commencing proceedings on it in a specific court. Under the clause, the submission is to the non-exclusive jurisdiction of the courts under both limbs, not to the exclusive jurisdiction of one court or of the courts of one country. Had the latter been the case, it would have been arguable that an election under the clause by commencing proceedings in the court of one country impliedly precluded [the bank] from commencing proceedings in the courts of other countries by reason of the guarantor's submission to the exclusive jurisdiction of the originating court. However, such an argument is simply not open given the language and structure.[238]

This depends on the particular language of the clause. However, as a matter of drafting, it is not clear why the first limb is needed at all, since the language in the second limb is broad enough to cover the situation in which the bank elects the courts in Singapore. Moreover, as Marshall quite rightly observed, the bank's choice does not have much bearing in terms of the effect of the clause.[239]

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238. *Id.* at [34]-[35].
239. Marshall, *supra* note 5, at 80.

The last type of asymmetric clause is what can be seen in *Valve Corp. v. Australian Competition & Consumer Commission.*[240] The clause provided:

> You agree that this Agreement shall be deemed to have been made and executed in the State of Washington, and any dispute arising hereunder shall be resolved in accordance with the law of Washington. You agree that any claim asserted in any legal proceeding by you against Valve shall be commenced and maintained exclusively in any state or federal court located in King County, Washington, having subject matter jurisdiction with respect to the dispute between the parties and you hereby consent to the exclusive jurisdiction of such courts. In any dispute arising under this Agreement, the prevailing party will be entitled to attorneys' fees and expenses.[241]

No question has turned on the question of construction, and the language of the clause is sufficiently clear. There is no mention of the obligations of the other party. In the particular context of this case, an absence of such should not raise any concern, as *Valve* was based in the State of Washington.[242] The clause is provided here for convenience.

Overall, asymmetric jurisdiction clauses can be complex due to the drafting, which requires consideration on a case-by-case basis. Otherwise, its effect on the strict common-law position appears straightforward. Some clauses may appear one-sided and imbalanced. However, as Merrett observed, "a mere imbalance between the parties will make no difference to enforcement."[243]

II. INDIAN APPROACHES TO CHOICE OF COURT AGREEMENTS

Turning the focus to India, Section (a) will lay down an overview of the private international law rules in India. Then, the jurisdiction of the Indian courts will be briefly described in the Section (b). Subsequently, how the courts in India deal with choice of court agreements will be discussed: judicial examination and the validity of jurisdiction clauses in the Section (c) and the presumption of exclusivity of jurisdiction clauses in Section (d).

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240. Valve Corp v Australian Competition & Consumer Commission, (2017) FCAFC 224 (Austl.).

241. *Id.* at [53].

242. *Id.* at [1].

243. Merrett, *supra* note 5, at 44.

A. Overview of the Private International Law Rules in India

Modern private international law rules in India (since India became independent in 1947) have their origin in colonial history and law. Jurisdiction has been the terrain on which the notion of British imperial sovereignty was understood and interpreted. The political conception of India encompassed British India (the areas within the jurisdiction of the Presidency towns)[244] and the territories that were ruled by the princely states (at the time of independence, their count stood at more than 560).

Key sources of Indian private international law are the principles of equity, justice, and good conscience. Their application has been marked by two features. First, the application of personal laws to Hindus and Muslims has been limited to certain areas of the law, namely, inheritance, succession, marriage, and religious usages and institutions. Still, other cases have been decided according to the customs of the community to which the parties belong. Second, practices followed by the British courts and those of the East India Company's courts were not identical. Though both courts applied personal laws to Hindus and Muslims, the former judged all persons other than Hindus and Muslims in accordance with English law—applying the law of the Presidency towns. By contrast, the latter's courts decided cases of persons other than Hindus and Muslims in accordance with the customs and usages of the community to which those persons belonged.[245] The cumulative effect of these features was the development of law, including private international law, through judicial activism. This situation was unique to the Indian subcontinent and remains valid today.[246] Modern private international law rules are thus largely to be discerned from judicial opinions and are woven around the principle of party autonomy in choice of forum and governing law, the use of domicile and habitual residence as connecting factors, and the maintenance of comity. Jurisdiction based upon a cause of action is not a feature of Indian law. Instead, all jurisdiction is territorial. There are, however, a few instances where Indian courts have refused to recognize foreign judgments as a matter of public policy because the rendering courts did not apply Indian law; this is despite the fact that jurisdiction was properly founded on the basis of the parties' domicile.[247]

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244. These included the *mofussil*: areas outside the Presidency towns, but within their jurisdiction.

245. Garimella, *supra* note 7, at 291.

246. M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 16 (1985).

247. *See* Narasimha Rao v. Venkata Lakshmi, (1991) 3 SCC 451, at para 12-13 (India).

The earliest pronouncement on the jurisdiction of courts documented in the context of Indian territory was with regard to the rule of indirect jurisdiction. The principle guiding indirect jurisdiction was articulated by Lord Selborne in *Gurdyal Singh v. The Rajah of Faridkote*[248] to the effect that "[i]n a personal action . . . a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the [d]efendant has not in any way submitted himself, is by international law an absolute nullity."[249]

B. Jurisdiction of the Indian Courts

Like in other common-law jurisdictions that apply the *Moçambique* rule,[250] it is a general rule of private international law rules in India that courts do not assume jurisdiction over foreign immovables. The Supreme Court, in *CtA.Ct. Nachiappa Chettiar v. CtA.Ct. Subramama Chettiar*,[251] concerning the division of certain immovable properties situated in Burma (Myanmar), reiterated its engagement with this general rule and held against the Indian courts' jurisdiction for determining questions of title in respect of immovable properties in foreign countries or to direct division thereof. It observed: "where a Court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immovable property it has no jurisdiction to refer it for the determination of the arbitrators."[252]

Other than this, the inbound jurisdiction of the civil courts in India is specified in the Code of Civil Procedure, 1908 (hereinafter the CPC). Section 9 provides:

> Courts to try all civil suits unless barred.
>
> The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> 1 [Explanation I]. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

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248. Gurdyal Singh v. The Rajah of Faridkote, (1894) IA 670 (India).

249. *Id.* at 684.

250. The name is derived from British South Africa Co. v. Compania de Moçambique, [1893] AC 602.

251. Ct. A. Ct. Nachiappa Chettiar v. Ct. A. Ct. Subramama Chettiar, AIR 1960 SC 307 (India).

252. *Id.* at 312.

> 2 [Explanation II]. For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

This jurisdiction is normally subject to territorial and pecuniary limitations further set out in the Code and the concerned state law creating the civil court. Section 20 of the CPC specifies that a suit may be instituted either at the place where the defendant ordinarily resides or carries on business or where any part of the cause of action arises. Thus, the CPC notes the possibility of more than one court possessing the jurisdiction to decide upon a suit; for example, a cause of action could arise partially in a territory other than where the defendant ordinarily resides or carries on business. There may also be situations where the cause of action arises in multiple places over which different courts have jurisdiction.

When the jurisdiction of the Indian courts is invoked, relevant provisions of the Indian Contract Act, 1872 must also be taken into account. Two of them in particular have been referred to by the courts in India when the courts have had to determine the validity of choice of court clauses. Section 23 mandates that parties cannot contract in a manner that is forbidden by or defeats any provision of law.[253] Section 28 makes an absolute restraint on a legal recourse or ability to enforce rights under a contract void.[254]

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253. Indian Contract Act, No. 9 of 1872, INDIA CODE (1872), Section 23.
Quote:
What considerations and objects are lawful and what not.
The consideration of an object or an agreement is lawful, unless –
- it is forbidden by law; or
- is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
- involves or implies, injury to the person or property of another; or
- the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

254. Indian Contract Act, No. 9 of 1872, INDIA CODE (1872), Section 28 (slight alteration of format) (emphasis omitted).
Quote:
Agreements in restraint of legal proceedings, void.
[Every agreement,
a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,
is void to the extent.]
Exception 1. – Saving of contract to refer to arbitration dispute that may arise.
This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be

In cases of inbound jurisdiction when a contract involved an Indian element, the courts in India, as the forum, have found a role for themselves despite the presence of a jurisdiction clause designating a choice for the forum in another country. They have done so through a conjoint reading of Section 20 of the CPC and Sections 23 and 28 of the Indian Contract Act, 1872, which allow for a partial restriction by limiting parties' recourse to one forum. Jurisdiction clauses occupy this space between an absolute restraint and convenience-based forum shopping. The following narrative elaborates upon this aspect below.

C. Judicial Examination and Validity of Jurisdiction Clauses

Indian law considers every jurisdiction clause—exclusive or nonexclusive—to be primarily a subject of scrutiny. Courts in India have indulged in a freehold examination of jurisdiction clauses. Such examination has been founded upon a variety of techniques including reading the choice of forum clause, either exclusively or along with the provisions of the law on contracts, to identify the applicable law clause and in turn examining the validity of such a choice of jurisdiction clause as per the applicable law. Further, courts have also attempted to base such examination upon the applicability of Indian law. The following narrative travels through the judicial trail to understand the methodology of such a judicial examination of jurisdiction clauses.

In one of the earliest decisions regarding jurisdiction clauses, the Madras High Court found expediency as a reason to rule against the enforcement of a jurisdiction clause that explicitly identified a foreign jurisdiction for dispute resolution. In *Black Sea State Steamship Line v. Minerals & Metals Trading Corp. of India Ltd.*,[255] the Court heard a dispute arising from a contract regarding an international shipment through a bill of lading. The petitioner objected to the jurisdiction of the Court of Small Causes in Madras to try the suit brought by the respondent regarding damages incurred due to short delivery. The bill of lading contained the following stipulations:

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referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. – Saving of contract to refer questions that have already arisen.

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

255. Black Sea State Steamship Line v. Minerals & Metals Trading Corp. of India Ltd., (1970) 1 MLJ 548 (India).

> 26. All claims and disputes arising under and in connection with this bill of lading shall be judged in the U.S.S.R.
>
> 27. All questions and disputes not mentioned in this bill of lading shall be determined according to the Merchant Shipping Code of the U.S.S.R.[256]

The Court stated, with approval, the guidance derived from common-law authorities on the jurisdiction clauses.

> The parties who make their choice of the Tribunal should normally be bound by their contract. That should especially be the case as to the choice of the law applicable to the contract. But it seems to me that enforcement by the Indian Courts of the choice of a foreign tribunal cannot be ruled as imperative; but it should depend on the balance of convenience in particular circumstances and the exigencies of justice. The law has been fairly accurately stated by Cheshire in his Private International law, 6th edition, page 222:
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> As distinct from the express or implied choice of the proper law, the express choice of a foreign tribunal is not absolutely binding. In accordance with the excellent principle that a contractual undertaking should be honoured there is indeed, a prima facie rule that an action brought in England in defiance of an agreement to submit to arbitration abroad will be stayed *The Cap Blanco* [(1913) P. 130.], *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.* [L.R. (1903) 1 K.B. 249.], but nevertheless the Court has a discretion in the matter and where the parties are amenable to the jurisdiction, as for example, where the defendant is present in England, it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country [(*The Athanes case, The Fehmarn, Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.*)].[257]

The Court, drawing extensively from common-law guidance,[258] held that, in a case of foreign jurisdiction clause, the question was

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256. *Id.* at 549.

257. *Id.* (emphasis omitted).

258. *Id.*; The Court referred to The Fehmarn, [1958] 1 WLR 159:

The Fehmarn case (1958) 1 W.L.R. 159, is near to this case, for, it was concerned with a foreign jurisdiction clause identical to what appears in this case. It applied the rule of ends of justice to sustain an English action notwithstanding the foreign jurisdiction clause

not so much one of freedom of contract and the parties being bound by their choice, but one of expediency in light of what may be called the rule of balance of convenience and the ends of justice in the case at hand.[259] Dismissing the petition of the plaintiff, the Court held that the balance of convenience as well as the ends of justice tended toward sustaining the jurisdiction of the Court of Small Causes to entertain and dispose of the suit. It explained that the claim was so small that it would be unrealistic and unfair to drive the respondent to resort to the Russian courts.[260]

Differently in *Hakam Singh v. Gammon (India) Ltd.*[261] the Supreme Court took a conjoint reading of the legislative provisions of the Indian Contract Act, 1872 and the CPC to determine the validity of the jurisdiction clause. In this case, while the contract contained a jurisdiction clause that clearly identified a certain court,[262] the Supreme Court used the opportunity upon hearing the appeal to clarify the interpretation to be made from this conjoint reading. Hearing the appeal from the trial court order—which specified that the entire cause of action had arisen at Varanasi, and the parties could not, by agreement, confer jurisdiction on the courts at Bombay (which did not otherwise possess jurisdiction)—the Supreme Court stated that, when two courts had the jurisdiction to entertain a dispute, a choice of one by agreement would not amount to restraint of legal proceedings, nor violate public policy, under Sections 28 and 23 of the Indian Contract Act, 1872. However, the parties could not, by agreement, confer jurisdiction on a court that would otherwise not have had jurisdiction in law to adjudicate the dispute in question.

In *British India Steam Navigation Co. v. Shanmughavilas Cashew Industries*,[263] the Court extensively examined the

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binding between the parties to the dispute. The view was also based on the balance of convenience . . . Lord Denning, M.R. [in Mackender v. Feldia AG, (1967) 2 QB 590], however, recognised: 'although there is jurisdiction to give leave, it is a matter of discretionwhether it should be granted.' He also says later on in his judgment: 'The foreign jurisdiction clause is a positive agreement by the underwriters that policy is governed exclusively by Belgian law. Any dispute under it is to be exclusively subject to Belgian jurisdiction. That clause still stands and is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction.'

259. Black Sea State Steamship Line, 1 MLJ 548 at 549.

260. *Id.*

261. Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286. (India); *See* Globe Transport Corp. v. Triveni Engineering Works, (1983) 4 SCC 707 (India).

262. Hakam Singh, 1 SCC 286 at 287. The contract's dispute resolution clause partially reads as follows:

13. Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this Contract shall be deemed to have been entered into by the parties concerned in the City of G Bombay and the Court of law in the City of Bombay alone shall have jurisdiction to adjudicate thereon.

263. British India Steam Navigation Co. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481 (India).

jurisdiction clause by contextualizing it within the contract and the private international law rules applicable to the contract. Hearing the appeal against the decision of the Kerala High Court, which found the appellant, a carrier, had submitted to the jurisdiction of the local courts in India, the Supreme Court held in the negative. Noting the presence of the jurisdiction clause in the bill of lading,[264] the Court held that the first respondent, being the consignee and holder of the bills of lading, was ex facie bound by this clause. The Court further discussed the applicability of the Indian law related to international carriage of goods to decide upon the enforceability of the jurisdiction clause. Inspired by Dicey and Morris,[265] the Court further articulated upon the jurisdiction clause:

> According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.[266]

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264. The appellant's submission that the courts at Cochin had no jurisdiction is based on Clause 3 of the bills of lading, which reads as follows:
3. JURISDICTION: The contract evidence by this bill of lading shall be governed by English law and disputes deter- mined in England or, at the option of the Carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the Courts of any other country.

265. *Id.* at para. 18. The Court extensively referred to the General Principles on jurisdiction in actions in personam, especially Rule 34.; *See.* LAWRENCE COLLINS WITH SPECIALIST EDITORS, DICEY AND MORRIS'S CONFLICT OF LAWS (11th ed., 1987).

266. British India Stream Navigation Co., 3 SCC 481 at [17]. The Court made an extensive examination of the applicability of the Indian law based on the private international law rule related to the defendant's presence/appearance before the court/submission to the jurisdiction as well as the Indian Carriage of Goods Act, 1925 which specified that, for the law to be applicable, the port of origin has to be an Indian port. Since the port of origin in the instant case was in Africa, the law was held inapplicable, and the Supreme Court allowed the appeal and remanded the case to the trial court for disposal according to law.

The Court further inquired into the maintainability of a suit and the jurisdiction of the Indian court in contracts with a jurisdiction clause:

> In the instant case the question is of initial jurisdiction on the basis of clause 3 of the bills of lading. We have to ask the question whether the shipper could or could not have the right to sue at Cochin under the bills of lading. If he could not have done so, the appellant's appearance to protest about jurisdiction would not cure that defect of jurisdiction. However, we find that in the Memo. of appeal before the lower appellate court no specific ground as to jurisdiction was taken though there were grounds on non-maintainability of the suit. Even in the Special Leave Petition before this Court no ground of lack of jurisdiction of the courts below has been taken. We are, therefore, of the view that the appellant has to be held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction in the facts and circumstances of the case. The defence that the suit was not maintainable in the absence of the owner of the ship could in a sense be said to have been on the merits of the case. The submission as to lack of jurisdiction is, therefore, rejected.[267]

It held that, pursuant to the jurisdiction clause contained in the bills of lading, only the English court had jurisdiction. Finding fault with the High Court's decision to apply the Indian law on the carriage of goods to the dispute, the Court held that English law—the chosen law—was not proved before the court according to the law. It therefore admitted the appeal and set aside the impugned decision. The case was remanded to the trial court for disposal according to law, after giving opportunity to the parties to amend their pleadings and adduce additional evidence, if they were so advised.[268]

Speaking to the appropriateness of a forum for applying for injunctory relief in *Modi Entertainment Network v. WSG Cricket Pte. Ltd.*,[269] the Supreme Court discussed the guidelines to be followed for examining and enforcing jurisdiction clauses that identified a foreign court. The Court found inspiration in the English court's decision in *Spiliada Maritime Corp. v. Cansulex Ltd.*,[270] summarized here in its words:

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267. *Id.* at 898–99.
268. *Id.* at 908.
269. Modi Entm't Network v. W.S.G. Cricket Pte. Ltd., AIR 2003 SC 1177 (India).
270. Spiliada Maritime Corp. v. Cansulex Ltd. [1987] AC 460 (HL).

> In Spiliada Maritime's case (supra), the House of Lords laid down the following principle: "The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice."[271]

The Court quoted, with affirmation, Harris, regarding the determinations related to the appropriateness of the forum for anti-suit injunctions when a non-chosen court is approached[272]:

> The focus [here] is on the interests of the parties not just the appropriateness of the forum. Injunctions will henceforth be available only on a more limited basis; but that basis expressly balances both the fairness to the parties and the naturalness of the forum.[273]

The Court further articulated on the grant of injunctory relief, drawing inspiration from common law and the principles formulated by Dicey and Morris with regard to jurisdiction, specifically Rules 31(5) and 32(4):

> (2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens;
>
> (3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;
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> . . .

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271. Modi Ent*m't* Network, AIR 2003 SC 1177 at para. 18.

272. Jonathan Harris, *Recognition of Foreign Judgments at Common Law—The Anti-Suit Injunction Link*, 17 OXFORD J. LEGAL STUD. 477, 486 (1997).

273. Modi *Entm't* Network, AIR 2003 SC 1177 at para. 17 (citing Harris, *supra* note 265, at 486).

> (6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and
>
> (7) the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.[274]

As a non-chosen court exercising its discretion to grant anti-suit injunction, the Court ought to examine and determine the appropriate forum (*forum conveniens*), and may grant an anti-suit injunction only in regard to proceedings that are oppressive, vexatious, or in a *forum non conveniens*; in the instant case, following an extensive examination of the pleaded facts, the Court found no valid reasons to grant anti-suit injunction in favour of the appellants, disregarding the jurisdiction clause to restrain the respondent from prosecuting the case in the foreign forum of the choice of the parties - the English Court.[275]

Examination of jurisdiction clauses by non-chosen courts in India has also been pursued for identifying the overarching jurisdiction of the Indian courts, notwithstanding a choice of court clause ousting the jurisdiction of all courts except the chosen one. In *Kumarina Investment Ltd. v. Digital Media Convergence Ltd.*,[276] the Court identified a few situations when a non-chosen court could exercise jurisdiction:

> the [contracting parties being subject to the municipal law] of the country with which the case has the connection or where the cause of action may have arisen;
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> . . . the governing law clause of the contract [is violative of] the public policy of the country and [such clause does not] confer exclusive jurisdiction on the forum chosen, or

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274. *Id.* at para. 23 (referring to LAWRENCE COLLINS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 349–50 (13th ed. 2000)).

275. *Id.* at para. 27.

276. Kumarina Investment Ltd. v. Digital Media Convergence Ltd. (2010) SCC Online TDSAT 641 (India).

> . . . it [is possible according to the chosen applicable law] to override the forum chosen.[277]

In *Rhodia Ltd. v. Neon Laboratories Ltd.*,[278] the Bombay High Court elucidated upon the reasons for the examination of a jurisdiction clause that identified a forum located outside India. A brief trail of the case facts is stated here. The dispute related to a distribution agreement between an English company and an Indian company, which retained the right to distribute the former's products in India and Sri Lanka. The governing law of the contract was agreed to be English law, and the choice of forum for dispute resolution was agreed to be the English courts. The Indian company approached the trial court for relief against the English company. In its reply to the interim application, the English company, inter alia, stated that the trial court had no territorial jurisdiction to entertain the suit for the reason that the parties to the agreement had agreed by choice to be governed by English law and had submitted themselves to the jurisdiction of English courts alone. The trial court held that, as the Indian company's plant was situated within its jurisdiction, then under Section 20(c) of the CPC, the suit could be filed in that court. On appeal, the pleadings at the Bombay High Court addressed the following aspects related to enforcement of a choice of court clause:

> (I)validity of contracts with a foreign choice of law clause within the Indian law, and whether foreign law can be relied upon to assess whether an Indian court has jurisdiction in the matter
>
> (II)jurisdiction of Indian courts to entertain a suit arising out of an agreement specifying a foreign court as having exclusive jurisdiction, were the cause of action to arise in India.

The Court relied upon the Supreme Court of India's guidance in *National Thermal Power Corp. v. Singer Co.*[279] that parties could decisively determine the proper law of the contract but that such a choice had to be bona fide and not opposed to public policy. Since *Rhodia* involved an interpretation founded upon foreign law, the Bombay High Court, referring to a Supreme Court decision in *Harishankar Jain v. Gandhi,*[280] explained the necessity of proving foreign law as a question of fact before the Indian court and ordered that the trial court ensure that evidence is adduced in the

277. *Id.* at para 98.
278. Rhodia Ltd. v. Neon Laboratories Ltd., AIR 2002 Bombay 502 (India).
279. Nat'l Thermal Power Corp. v. Singer Co., AIR 1993 SC 998, para. 14 (India).
280. Jain v. Gandhi, AIR 2001 SC 3689 (India).

same manner. The Court also referred to *British India Steam Navigation*,wherein the Supreme Court of India had held that foreign law can be relied upon to assess whether an Indian court has jurisdiction in a particular case.[281] Having thus laid the foundation for a role for the Indian courts, the *Rhodia* case moved toward explaining the nature of a jurisdiction clause. Similar to other decisions narrated earlier, the Court read Sections 9 and 20 of the CPC and Section 28 of the Indian Contract Act, 1872. Nevertheless, it held that, were two or more courts to possess jurisdiction, and the parties agreed to vest the same to one of them, then such vesting, prima facie, would not be considered an ouster of jurisdiction. Returning the application to the trial court, the High Court ordered that evidence be adduced with regard to the choice of (a) a foreign law as the proper law of the contract and (b) whether the provisions in the contract, read as per the chosen foreign law, clearly made a decision vesting the English courts with exclusive jurisdiction on the subject matter.[282]

Following the examination of the adduced evidence by the trial court and the above questions answered in the affirmative, the exclusive jurisdiction clause would become operational to declare Indian courts forum non conveniens.

The Delhi High Court, in *Moser Baer India Ltd. v. Koninklijke Philips Electronics NV*[283] held that, notwithstanding the existence of a jurisdiction clause identifying a forum outside India, it had jurisdiction to determine if such foreign court proceedings were oppressive and vexatious. The Court was hearing a dispute related to an international commercial contract reflected through Disc Patent License Agreements, pertaining to the licensing of patents, and the consequent amount of royalty to be paid by the plaintiffs to the defendants. The Court dismissed the proceedings initiated by the plaintiff on account of the parties' exclusive choice of court agreement, which conferred jurisdiction on the courts of the Hague, the Netherlands. Justice Badar Durrez Ahmed reaffirmed that, even though the grant of exclusive jurisdiction in a choice of court agreement was not a "determinative," but "relevant factor" as to the nature of jurisdiction, the court would normally dismiss the proceedings before it, "save in an exceptional case for good and sufficient reasons."[284] The expense incurred in connection with the continuation of the proceedings in the chosen international forum

281. British India Steam Navigation Co., 3 SCC 481 (India).
282. Rhodia Ltd. v. Neon Laboratories Ltd., AIR 2002 Bombay 502, para. 19 (India).
283. Moser Baer India Ltd. v. Koninklijke Philips Elecs., 2008 (1) CTLJ 421 Del. (India).
284. *Id.* at para. 3–4.

did not in itself imply that it was oppressive or vexatious to the parties.[285]

In *Emmsons International Ltd. v. Metal Distributors (U.K.),*[286] the Delhi High Court used the criteria of public policy within the contract law to rule against the enforcement of the jurisdiction clause. The Court heard the defendant's application, filed under Order VII Rule 11 and read with Section 151 of the CPC, praying for rejection of the plaint or for its return to the plaintiff for presentation in the Court of competent jurisdiction (i.e., English courts). The parties agreed that the contract shall be governed by English law, and only the courts of that country were competent to try disputes arising from the said agreement. The plaintiff argued that Clause 13 of the agreement, "Governing Law and Forum for Resolution of Disputes," was out of context and further argued that jurisdiction cannot be conferred or vested upon or in a court of law merely by agreement between parties where such a court lacked inherent jurisdiction in the matter. The Court held that Clause 13, being a unilateral covenant, was opposed to public policy and deprived the plaintiff the right to initiate proceedings under ordinary tribunals or through other dispute resolution mechanisms. It was held that it contravened Section 28 of the Indian Contract Act, 1872 and was thus void.[287]

While it could be derived from the above narrative that Indian courts attempted an extensive examination of the jurisdiction clauses—both exclusive and nonexclusive—there are, however, a few instances where the courts have interpreted presumptive exclusivity to them. The following narrative explains the Indian position regarding this.

D. Presumptive Validity of the Choice of Court Clause

Indian law allows presumptive validity to be attributed to exclusive jurisdiction clauses if such exclusivity was expressly agreed upon by the contracting parties. Such clauses remain valid unless it is proven that they are not founded upon a consensus ad idem of the said parties. In *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies,*[288] the Court held:

> From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is

285. *Id.* at para. 13.
286. Emmsons Int'l Ltd. v. Metal Distribs. (2005) 116 DLT 559 (India).
287. *Id.* at para. 15.
288. A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, AIR 1989 SC 1239 (India).

> pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty.[289]

When a contract has included a jurisdiction clause and identified courts in that jurisdiction to deal with disputes arising from the contract, the courts shall draw an inference that parties intended to exclude all other courts. In *Swastik Gases Pvt. Ltd. v. Indian Oil Corp. Ltd.*,[290] the Supreme Court of India held that the absence of the words "only," "alone," and the like is neither decisive nor does it have any role in deciding the jurisdiction of a court:

> It is a fact that whilst providing for jurisdiction clause in the agreement the words like alone, only, exclusive or exclusive jurisdiction have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.[291]
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> . . . .

289. *Id.* at para. 21.
290. Swastik Gases Ltd. v. Indian Oil Corp., (2013) 9 SCC 32 (India).
291. *Id.* at para. 31.

> [T]he very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement.[292]

The Delhi High Court, in *Spentex Industries Ltd. v. Louis Dreyfus Commodities India Pvt. Ltd.*[293] speaking in the context of a chosen supervisory jurisdiction for arbitration-related matters, held that the presence of a jurisdiction clause in a contract is a reflection of parties' intention to identify a jurisdiction for their contract. The contract clearly expressed the intention of the parties to vest exclusive jurisdiction in Delhi courts for any issues arising out of the arbitration proceedings or the award. The arbitration clause specified that the arbitration proceedings would be held under the auspices of the Cotton Association of India through their Arbitration Rules, with proceedings to be held in the association's office in Mumbai. The petitioner challenged the arbitral award in the Delhi High Court, whereas the respondent objected on grounds of maintainability, as the arbitration was held in Mumbai and courts thence alone had jurisdiction. The Delhi High Court's judgment addressed this preliminary objection. The Court held that the clause in point had no ambiguity or vagueness. Thus, unlike a court jurisdiction clause, the parties clearly vested the courts in Delhi with supervisory jurisdiction over the arbitral proceedings. The venue of arbitration (i.e., the location of the tribunal's proceedings) cannot change the intention of the parties to vest the courts in Delhi with exclusive supervisory jurisdiction.[294]

The law on forum selection clauses, therefore, remains hazy, and when a contracting party approaches a non-chosen forum located in India, the other party is exposed to legal proceedings that could very well address issues beyond the dispute, including the validity of the contract itself.

III. OVERALL FRAMEWORK OF THE HCCCA AND THE PRESUMPTIVE MECHANISM

Given problems surrounding the interpretation of jurisdiction clauses in more well advanced common-law countries and uncertainties in the India's approach toward jurisdiction clauses,

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292. *Id.* at para. 38.

293. Spentex Indus. Ltd. v. Louis Dreyfus Commodities India Pvt. Ltd., (2019) 258 DLT 138 (India).

294. *Id.* at para. 21

the question is to what extent the HCCCA will help solve these problems, assuming these countries all agree to ratify. On this, it is necessary to examine how Subarticles (a) and (b) of Article 3 interact. To facilitate further discussion, one must be reminded of the language of these subarticles:

> For the purpose of this Convention –
>
> a) "exclusive choice of court agreement" means an agreement conducted by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
>
> b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.[295]

The language at the end of Subarticle (b) suggests a jurisdiction clause that the parties provide as "non-exclusive" will not fall within the scope of the HCCCA. Suppose a country in one of the common-law jurisdictions has just ratified the HCCCA. Up until that point, the courts there have adopted the English line of authorities, and now a court in that country is faced with a dispute concerning a jurisdiction clause similar to that in the case of *S & W Berisford* discussed in Part I(a).3 above: how should the court respond? Should the court say that the law is clear, based on the authority of *S & W Berisford,* that the parties did not designate the courts of a state to the exclusion of the jurisdiction of any other courts? Or should the court say this is a question of interpretation and deem the clause exclusive by Article 3(b) of the HCCCA? In what situation, or under what circumstance, is this presumption of exclusivity to be invoked? The answer cannot be found in the explanatory report.[296] Settling all doubts on the meaning of a jurisdiction clause by means of the presumption appears to create a degree of certainty. Conversely, as one of the authors has argued elsewhere, resorting to the presumption mechanism unsparingly may lead to judicial inactiveness and may deprive the parties of

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295. Hague Convention on Choice of Court Agreements, art. 3(a)-(b), June 30, 2005, 44 I.L.M. 1294.

296. *See generally* TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON THE 2005 CHOICE OF COURT AGREEMENTS CONVENTION paras. 93–115 (2005).

their intention to be probed.[297] This is crucial, as arguably the contract interpretation process is an attempt by the courts to ascertain the intention of the parties.[298] Subarticle (b) of Article 3 of the HCCCA seems to set a dangerous precedent if it is understood as bypassing or altogether ignoring the contract interpretation process. Moreover, this subarticle was drafted in so broad a manner that it does not provide any indication or list out any factor upon which the presumption can be based. This is different from the approaches taken in mature common-law jurisdictions explored in Part I(a)(iii), by which courts would attempt to find a factor or a combination of factors upon which to base their presumption, such as the contract being agreed upon among businessmen or the choice of law being aligned with the designated court. While it is true that the presumption in Article 3(b) appears to be a rebuttable one, it does not admit of any evidence of background negotiations between the parties (if any). The only basis to rebut the presumption is the express language in the clause itself. Unless the language of the clause is so clear that it is "nonexclusive" or it "does not exclude the jurisdiction of any other court" or the like, then the jurisdiction clause will, in all certainty, be taken as an exclusive one. In this way, most ill-drafted jurisdiction agreements, which are prone to interpretation, will mostly fall within the ambit of the HCCCA. This is unlikely a desirable outcome. The present authors are of the view that Subarticle (b) cannot be read in isolation. Instead, Subarticle (a) must be read in conjunction, and indeed, this subarticle should take precedence. The court should conduct the interpretation exercise to ascertain whether the parties, by their jurisdiction agreement, purported to nominate a court or courts in one country "to the exclusion of the jurisdiction of any other courts."

This returns to a point that the first author has brought up elsewhere. The HCCCA does not provide guidance on the method of interpretation of the jurisdiction clause, nor does it indicate the law that shall govern such a question.[299] Marshall is of the view that the overall scheme of the HCCCA is such that "the definition of exclusivity [is] complete and autonomous."[300] She further argues:

> The fact that the Convention contains a deeming rule strongly suggests that characterisation on the question of exclusivity is regulated wholly by the Convention itself: the

297. Sooksripaisarnkit, supra note 12, at 44.

298. *See id.*

299. *See id.* at 50.

300. Brooke Marshall, *The 2005 Hague Convention: A Panacea for Non-exclusive and Asymmetric Jurisdiction Agreements too?*, *in* COMMERCIAL ISSUES IN PRIVATE INTERNATIONAL LAW: A COMMON LAW PERSPECTIVE 151 (Michael Douglas, Vivienne Bath, Mary Keyes & Andrew Dickinson eds., 2019).

> parties have either expressly provided that their agreement is otherwise than exclusive or they have not and no reference to a governing national law is needed.[301]

To the extent that this understanding meant inadequate regard to or even ignorance of the parties' intention, for the reasons given above, the authors do not agree. As one of the authors pointed out elsewhere, hints can be taken from Articles 5 and 6 of the HCCCA, which give primacy to the law of the designated court.[302] Above all, there is no reason for the law governing the question of interpretation to be different from the law governing the question of material validity. Within the context of the HCCCA, by referring to the law of the designated forum, it seems that this includes that forum's rules on conflict of law.[303] The presumption in Subarticle (b) should be left as a very last resort after the court has failed to ascertain the meaning of the jurisdiction clause after applying the interpretation method pursuant to the law of the designated forum, including the conflict of law rules. This will provide a better balance between respecting party autonomy and ensuring the functionality of presumptive exclusivity.

Before this part ends, one issue which should also be mentioned is how an asymmetric jurisdiction clause should be dealt with in the context of the HCCCA. In the United Kingdom, Justice Cranston stated obiter that the definition of the exclusive jurisdiction clause in Article 3(a) encompassed asymmetric jurisdiction clauses.[304] This opinion runs counter to the explanatory report,[305] which the authors agree with Chong that this "ought to be considered authoritative in relation to the interpretation of the HCCCA to ensure a degree of uniformity of application amongst Contracting States."[306]

IV. CONCLUSION

The foregoing narrative is an attempt to present the law on recognition and enforcement of jurisdiction clauses in international commercial contracts—the position in common-law systems and in harmonized international law. The position in common-law countries has some similarities; however, the level of development

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301. *Id.* at 151.

302. Sooksripaisarnkit, *supra* note 12, at 50.

303. Sai Ramani Garimella & Poomintr Sooksripaisarnkit, *Jurisdiction Under the Hague Convention on Choice of Court Agreements: A Critique*, 57(3–4) INDIAN J. INT'L. L. 309, 327 (2017).

304. Commerzbank Aktiengesellschaft v. Liquimar Tankers Mgmt. Inc. [2017] EWHC (Comm) 161 [74].

305. HARTLEY & DOGAUCHI, *supra* note 287, at para. 105.

306. Chong, *supra* note 50, at 345.

of law in these jurisdictions has not been uniform. Rather, it remains disparate and is found in the form of elementary rules that are insufficient to address the complexities that could arise from the presence of these clauses, like identifying the jurisdiction clause, its distinction from a choice of law clause, distinguishing between an exclusive and nonexclusive jurisdiction clause, the interaction between contractual freedom and optional jurisdiction clauses, asymmetric jurisdiction clauses, and the like.

The mapping of the Indian law on jurisdiction clauses, as discussed in the latter part of Section II, shows that the contractual basis of a jurisdiction clause is subject to judicial examination by courts of lex fori—irrespective of the exclusive or nonexclusive nature of the clause itself—wherein parties shall adduce evidence to the existence and validity of such a clause, following which the court shall recuse itself from exercising jurisdiction. As was seen in *Modi Entertainment Network*, while the Court held that jurisdiction clauses were enforceable, it did not assure that the Indian law recognized presumptive exclusivity, thus providing neither clarity nor standardized criteria for judicial examination of the nature of any jurisdiction clause, nor whether the choice of law shall have any bearing on the decisions of the court related to enforcement of such clauses. Indian law has another flaw: it requires that courts shall adduce evidence with regard to the validity of such jurisdiction clauses. The concern with such a position is that validity is very likely to be determined according to Indian law and not the governing law of the contract.

The authors suggest a twin course action for India to help move toward an improved regime on recognition and enforcement of jurisdiction clauses: accession to the harmonized law, the HCCCA, and drawing gainful insights with regard to interpretation of these clauses from the shared experience of common-law regimes that have adapted their normative structure to the Convention. Engaging with the harmonized law would help India step out of its primitive systems wherein the judges, guided by a sense of handing out justice, indulge in parsing the jurisdiction clause in an unstructured manner with content borrowed from common-law antecedents but also construing it on domestic law content, as exemplified in *Emmsons International Ltd.* and *Black Sea State Steamship Line*. While the decisions in *A.B.C. Laminart* and *Swastik Gases* struck a positive note on the enforcement of jurisdiction clauses, irrespective of the drafting of the same, it is not clear whether they hold precedent on presumptive exclusivity, as the court did not engage with the diversity that exists within these clauses and restricted their ratio to comment upon ouster clauses

alone. Accession to HCCCA would ensure clarity with regard to exclusive jurisdiction clauses—a deconstructed reading of Article 3(b) allows a derivation that the Convention validates party autonomy in presuming exclusivity for a choice of court agreement "unless the parties have expressly provided otherwise."[307] Parties to a contract with a jurisdiction clause designating a court in a contracting state would invariably have their dispute heard and resolved by that court. The rather simple format of the Convention—the court specified by an exclusive and valid choice of court agreement must hear the case (Article 5); pursuant to limited exceptions, all other courts must suspend or dismiss the case (Article 6); the resulting judgment of the chosen court must generally be enforced by courts in other contracting states (Article 8)—ensures that there is a commitment to presumptive exclusivity, provided the court has exhausted all interpretative means to ascertain the true characterization of the clause.

Importantly for India, the gainful insights on enforcing jurisdiction clauses in other common-law jurisdictions could help while it considers accession. One of the main issues on which India needs to focus, while deliberating upon accession, is the characterization of exclusive or nonexclusive jurisdiction clauses. It is an axiomatic position that courts receive pleas for enforcing jurisdiction clauses that have nominated foreign courts and also hear challenges to such enforcement. As discussed above, this applies to exclusive jurisdiction clauses as well. Decisions regarding the same ought to be based on criteria that echo similarly in other jurisdictions, ensuring that contracting parties in a transnational scenario are not visited with strange and uncertain consequences in their dispute resolution. The 1969 decision in *The Eleftheria* remains, as of today, the classical authority on how non-nominated courts shall handle pleas related to jurisdiction clauses and has gained much support in other common-law jurisdictions, as seen in the Australian High Court's decision in *Akai Pty. Ltd.* and the Canadian Supreme Court's decision in *Douez*. The criteria specified in *The Eleftheria*, known as a "strong cause" test, could hold important insights on the exercise of discretion to allow pleas before the non-nominated court in the cause of ends of justice, a plea taken often before Indian courts, as seen in *Black Sea Steamship Line* and *Modi Entertainment Network*. The content of Criterion 5 in *Eleftheria* could be of immense help in identifying the situations that could allow an exercise of jurisdiction by Indian courts not nominated in an agreement. Further, the decision of Singapore's

307. Hague Convention on Choice of Court Agreements, art. 3(b), June 30, 2005, 44 I.L.M. 1294.

Court of Appeal in *Vinmar* enhanced the explanation of *The Eleftheria*'s Criterion 5(d) for identifying, illustratively, the situations when approaching a foreign forum could result in a denial of justice. The Court's observation that "what is a procedural advantage for one party is necessarily a procedural disadvantage for the other party, and vice versa," and that there is nothing wrong with seeking such procedural advantages, is an important insight worth noting when confronted with deciding upon the relative positions of the parties bringing competing pleas with regard to jurisdiction clauses before a non-nominated forum.