judge regarded the proportionality test as satisfied in any event. Lady Hale apparently (and contestably) thought the "accordance with the law" requirement secondary even if probably met. The solicitors' letters did not meet the "unequivocal" test for immediate return (under the sixth principle above) either because they indicated that the parents were reluctantly prepared to delegate their PR until Hackney felt able to return the children, and "that delegation was never unequivocally withdrawn" (at [59]). There was thus no Article 8 breach because the accommodation had a lawful basis, even if proportionality could have been further explored below.

While the Supreme Court expressed *some* admirable concern about the potential over-use of section 20, it flitted between family-oriented and council-oriented interpretations and one is left with considerable sympathy for the claimants. If they had more forcefully (or "unequivocally") demanded the return of their children or signalled an unwillingness to cooperate with Hackney, they risked such conduct being used "against them" in subsequent care proceedings. Like social workers (see Bainham, [2011] C.L.J 312), then, there are also circumstances in which vulnerable and suggestible *parents* are "damned if they do and damned if they do not".

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JURISDICTION AGREEMENTS – SCOPE AND PRECEDENCE

INTERNATIONAL contracts normally contain jurisdiction or arbitration agreements. Especially in financing transactions they often provide that any disputes should be litigated in the English courts. Well-drafted provisions seldom cause uncertainty and the effect of commonly used clauses is settled. In practice, however, commercial transactions often comprise several related contracts, each containing competing provisions for resolving disputes. In such cases the scope of each agreement and the precedence between them can be problematic, creating uncertainty and spawning the jurisdictional disputes that such agreements are intended to avoid. The possibility that both agreements have a role also threatens parallel proceedings in different courts, with the attendant inefficiency and risk of conflicting judgments. In response the English courts have consistently fashioned solutions which reflect the commercial logic of a transaction, either by precisely defining the respective scope of each agreement or establishing the precedence of one over the other. Two recent decisions in the Court of Appeal further develop this approach: *BNP Paribas S.A. v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768 ("*BNP*") and *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805 ("*Airbus*").

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In *BNP*, the court accepted jurisdiction based on an English jurisdiction agreement by concluding that the competing Italian jurisdiction agreement in a related contract was irrelevant because it governed a separate legal relationship. In *Airbus*, an English jurisdiction agreement similarly prevailed, giving the English court jurisdiction and making parallel Italian proceedings illegitimate. This time the clause superseded a clause in an earlier related contract which provided for arbitration in Geneva. In both cases the English court's jurisdiction derived from Article 25 of the Brussels 1bis Regulation (Regulation (EU) No 1215/2012) but national law governs the interpretation of Article 25 agreements (Case C-214/89, *Powell Duffryn Plc. v Petereit* [1992] ECR 1-1745). In *Airbus*, this required consideration of English law and, in *BNP*, of both English law and Italian law.

BNP concerned a common situation in which a party seeking finance is required to enter into a hedging arrangement such as an interest rate swap in addition to the underlying finance agreement. In such cases the hedging arrangement and finance agreement may contain conflicting jurisdiction provisions. In *BNP* a syndicate of banks led by BNP provided finance to an Italian company. To hedge against the effect of the floating interest rate provided for in the finance agreement the parties also executed a swap agreement documented by an ISDA Master Agreement, the industry-standard structure in such cases. The finance agreement provided that the Italian courts should have exclusive jurisdiction but under the ISDA Agreement the parties accepted the exclusive jurisdiction of the English courts. The ISDA Agreement provided that in any conflict between its provisions and the finance agreement, the latter should prevail "*as appropriate*". Following a breakdown in the parties' relations BNP applied in English proceedings for a declaration that it had no liability in connection with the interest rate swap. The defendant responded by suing BNP in Italy and by challenging the jurisdiction of the English court.

In approaching whether it had jurisdiction under the clause in the ISDA Agreement the Court of Appeal, confirming its position in *Deutsche Bank AG v Comune di Savona* [2018] EWCA Civ 1740, adopted three broad principles. First, there is a presumption that each jurisdiction agreement applies exclusively to the legal relationship arising from the contract which contains it. Second, in the absence of contrary indications commercial parties would not contemplate that similar claims should fall within different jurisdiction agreements. Third, any issue of construction should be approached in its commercial context in the light of the transaction as a whole. Application of these principles led readily to the conclusion that the jurisdiction clause in the finance agreement concerned disputes arising from the underlying provision of finance, while that in the ISDA Agreement governed those concerning the interest rate swap regulated by that agreement. That being so, the arguments advanced by the defendant

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fell away. The provision in the ISDA Agreement giving precedence to the finance agreement was not engaged because the two clauses were complimentary not conflicting. It was also irrelevant that claims under each of the agreements might be factually related because they arose nonetheless from distinct legal relationships. The court's conclusion also accorded with the principles of certainty and predictability underlying the Brussels 1bis Regulation, although it did not depend on those principles.

Airbus concerned a complex sale and leaseback transaction common in the aircraft industry. An Italian company, Air One, having purchased an aircraft from Airbus, assigned its rights under the purchase agreement to an aircraft leasing company, which then sold and leased back the aircraft before subleasing it to Alitalia, the Italian airline. The purchase agreement provided that disputes should be submitted to ICC arbitration in Geneva. Pursuant to the terms of the sublease the leasing company, Airbus and Alitalia sought to confirm their respective positions (in particular the warranties by Airbus for Alitalia's benefit) by concluding a "warranties agreement" which contained an exclusive jurisdiction agreement in favour of the English courts. When the aircraft was damaged after a forced landing, Generali Italia SpA, Alitalia's insurers, indemnified Alitalia and subsequently sought to recover their loss by suing Airbus in Italy. Generali sued both as subrogated insurers and independently in tort. Airbus responded by seeking in the English courts a declaration that any issue of liability, under the warranties agreement or in tort, was subject to the English jurisdiction clause. On that basis the English court would have exclusive jurisdiction and the Italian proceedings would be inconsistent with the jurisdiction agreement. In reply, Generali maintained that any claim for breach of warranty derived by assignment from the purchase agreement and should therefore be submitted to arbitration in Geneva, and that its claim in tort was not subject to the English jurisdiction agreement.

Giving the court's judgment, Males L.J., relying on Thomas L.J.'s analysis in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998, concluded that the claims under the warranties agreement were subject to the English jurisdiction agreement it contained, and that a good arguable case existed that Generali's claims in tort also fell within that agreement's scope. Reflecting the English courts' habitually pragmatic approach he declined to rely on a "minute analysis" of the clause but on "the bigger picture". The mere fact that the choice of English jurisdiction in the later warranties agreement might suggest a change in the parties' approach to jurisdiction was inconclusive. More significant was the fact that the later agreement was the only one of the several agreements involved to which all those who were or might become interested in the warranties were parties. It stood alone in seeking to crystallise each of the parties' respective positions. Another consideration was the width of the clause, suggesting

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that it embraced all claims related to the agreement. Again, there was nothing to suggest that the parties intended a narrower construction, or that, contrary to normal practice, they intended that jurisdiction in any dispute should be fragmented, or that they intended the Geneva arbitration clause to be incorporated in a document which already contained a clear, comprehensive jurisdiction agreement.

The decisions in *BNP* and *Airbus* are unsurprising given the principles articulated in earlier cases. But they are important for three particular reasons. First, they highlight clearly the commercial approach of the English courts in seeking to give effect to the apparent and intended purpose of industry-standard documentation. Second, they reaffirm the courts' commitment to avoiding the fragmentation of disputes. Third, they underscore a practical lesson for those who draft complex cross-border agreements. It may be possible to ensure that previous jurisdiction agreements will not be superseded, or that an arbitration agreement should be incorporated where none exists, or that disputes should be fragmented. But nothing less than the clearest wording will do.

A final question remains, however. If a claim is subject to an exclusive English jurisdiction agreement the English court has jurisdiction, but what if a party has breached the agreement by suing elsewhere? Against a contracting party an action for damages may lie, or the foreign proceedings may be restrained by injunction (cases under Brussels 1bis aside). Non-parties who encourage breach of an agreement, such as a party's lawyers, may also be liable in tort for inducing breach of contract (though such claims face jurisdictional obstacles). But what of non-party claimants who sue in breach of an agreement, such as the subrogated insurers in *Airbus*? In an important restatement of the position (restoring to prominence Colman J.'s analysis in *West Tankers Inc v Ras Riunione Adriatica SpA* [2005] EWHC 454 Comm), Males L.J. concluded that such proceedings infringe the equitable right of a contracting party to enforcement of the clause. A declaration is therefore available and (at least in relation to infringing proceedings outside Brussels 1bis) an anti-suit injunction. As this suggests, English courts are ready to complement their commercial approach to jurisdiction agreements with effective remedies to enforce them.

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THE PLACE OF COMITY IN THE DISCLOSURE OF DOCUMENTS

IN the *Bank Mellat v H.M. Treasury* litigation, the claimant Bank brought an action in the English High Court against HM Treasury claiming $1.7

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