Hilary Term

[2016] UKPC 5

Privy Council Appeal No 0048 of 2014

JUDGMENT

Vizcaya Partners Limited (Appellant) v Picard and another (Respondents) (Gibraltar)

From the Court of Appeal of Gibraltar

before

Lord Neuberger

Lord Mance

Lord Clarke

Lord Sumption

Lord Collins

JUDGMENT GIVEN ON

3 February 2016

Heard on 14 December 2015

Appellant	Respondent (Irving Picard)
Michael Driscoll QC	Pushpinder Saini QC
	Keith Azopardi QC
	Shaheed Fatima
(Instructed by Katten Muchin Rosenman UK LLP)	(Instructed by Browne Jacobson LLP)

LORD COLLINS:

I Introduction

1.
This appeal arises out of the fraudulent Ponzi scheme operated by Bernard Madoff, through his company Bernard L Madoff Investment Securities LLC ("BLMIS"), a New York corporation. After Madoff's fraud came to light in 2008, Irving Picard ("the trustee") was appointed as trustee in BLMIS's liquidation in the US Bankruptcy Court for the Southern District of New York ("the New York Bankruptcy Court"). The trustee commenced proceedings under the anti-avoidance provisions of the US Bankruptcy Code against investors who had been repaid before the fraud was discovered, including the appellant, Vizcaya Partners Limited ("Vizcaya"), a BVI company which carried on

business as an investment fund, and which invested about US$328m with BLMIS between January 2002 and December 2008, but was repaid US$180m before the fraud was discovered.

2.
In New York the trustee obtained a judgment in default of appearance against Vizcaya and its shareholders. The judgment against Vizcaya was for US$180m, and US$74m of the funds transferred to Vizcaya was in Gibraltar. Because of his concern to enforce the judgment against Vizcaya (and others) abroad, the trustee sought (in his capacity as a party to proceedings in Gibraltar, including these proceedings, and in the Cayman Islands), and was given permission to intervene in the appeal in the UK Supreme Court in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236. That appeal concerned the enforceability in England of an unrelated default judgment in the New York Bankruptcy Court. In that decision the UK Supreme Court held, in summary, that at common law a foreign judgment in personam would be enforced in England only if the judgment debtor had been present in the foreign country when the proceedings had been commenced, or if it had submitted to its jurisdiction; and that, as a matter of policy, the court would not adopt a more liberal rule in respect of the enforcement of judgments in insolvency cases in the interests of the universality of bankruptcy, any change in the settled law of the recognition and enforcement of judgments being a matter for the legislature.

3.
This appeal concerns primarily the content and scope of the rule that a foreign default judgment is enforceable against a judgment debtor who has made a prior submission to the jurisdiction of the foreign court (as distinct from a submission by appearance in the proceedings). The principle is set out in Dicey, Morris & Collins, Conflict of Laws, 15th ed, 2012 ("Dicey"), para 14R-054 ("Dicey's Fourth Case"):

"… a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given …

…

Fourth Case - If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the court or of the courts of that country."

4.
An important and controversial question which has been debated on this appeal is whether the agreement to submit must be express, or can also be implied or inferred.

5.
The conditions for the enforcement of foreign judgments at common law remain an important practical question, notwithstanding the fact that in the United Kingdom much of the ground is covered by statute and by European Union legislation, for these reasons: first, the common law rules continue to apply in the United Kingdom to the many countries, some of them of great trading importance (such as the United States, China and Japan), with which there are no treaties or other arrangements for the reciprocal enforcement of judgments; second, the statutory schemes in the Administration of Justice Act 1920 (which applies to many Commonwealth countries) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which still applies to several foreign countries, to some British dependencies, and to some Commonwealth countries including Australia, Canada and India), and their equivalents in the Commonwealth, are based on the common law and fall to be interpreted in

accordance with the common law; and third, the common law rules continue to apply in many parts of the Commonwealth.

6.
The common law rules which identified those foreign courts which were to be regarded as having jurisdiction for the purpose of the recognition and enforcement of judgments were developed in the 19th century, and had largely (though not entirely) been settled by the time of the great decisions of the Court of Appeal in Schibsby v Westenholz (1870-1871) LR 6 QB 155 and Copin v Adamson (1875) 1 Ex D 17, so that when Fry J came to give his summary of the principles in Rousillon v Rousillon (1880) 14 Ch D 351, 371, he was able to say that having regard to those decisions: "The Courts of this country consider the defendant bound … where he has contracted to submit himself to the forum in which the judgment was obtained."

7.
Jurisdiction clauses were not then the everyday occurrence they now are today, but there are early cases on enforcement of foreign judgments applying the principle, such as Feyerick v Hubbard (1902) 71 LJKB 509 (Walton J: "All disputes … shall be submitted to the Belgian jurisdiction"); Jeannot v Fuerst (1909) 25 TLR 424 (Bray J: "the French Tribunals of Commerce alone to have jurisdiction").

8.
The common law principles were reflected in the legislation governing recognition and enforcement of foreign judgments. The Administration of Justice Act 1920, section 9(2)(b), provides that no judgment is to be enforced under the section if "the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court". The Foreign Judgments (Reciprocal Enforcement) Act 1933, section 4(2), provides, so far as material, that the foreign court would be regarded as having jurisdiction "(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court".

9.
After the hearing of the appeal but before the advice was tendered, the Board was informed by the parties that the litigation had been settled, subject to the approval of the New York Bankruptcy Court. Where an appeal raises issues which are of general importance (as opposed to being of significance only to the parties), and full argument has been heard, a court may deliver judgment notwithstanding any settlement. This is a case which raises issues which are not only of general importance, but which are of international importance in other common law countries. The Board indicated to the parties that it retained the power to deliver its advice, but that the advice would not be delivered until the settlement was approved by the New York Bankruptcy Court.

II Background

10.
The contractual documents which governed Vizcaya's investment with BLMIS were entered into on Vizcaya's behalf by a custodian bank (originally Bank Safra (France) and then Bank Safra (Gibraltar)) on behalf of Vizcaya. Those which were in force in 2008 were those dated March 23, 2005. There were three contractual documents, namely: (1) a Trading Authorization, (2) an Option Agreement, and (3) a Customer Agreement ("the Account Management Documents").

11.
The Trading Authorization authorised Madoff to act as Vizcaya's "agent and attorney in fact to buy, sell and trade in stocks, bonds, options and any other securities", until such authorisation was revoked in writing. The Option Agreement anticipated the opening of an option account with BLMIS.

12.
The Customer Agreement, on BLMIS headed note paper, was signed by Bank Safra (Gibraltar) as the custodian for and on behalf of Vizcaya on March 23, 2005. BLMIS is defined in the Customer Agreement as the "Broker".

13.
The Customer Agreement provided:

"10. CHOICE OF LAWS

THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN MADE IN THE STATE OF NEW YORK AND SHALL BE CONSTRUED, AND THE RIGHTS AND LIABILITIES OF THE PARTIES DETERMINED, IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

…

12. ARBITRATION DISCLOSURES

*ARBITRATION IS FINAL AND BINDING ON THE PARTIES.

*THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

…

13. ARBITRATION

THE CUSTOMER AGREES, AND BY CARRYING AN ACCOUNT FOR THE CUSTOMER THE BROKER AGREES THAT ALL CONTROVERSIES WHICH MAY ARISE BETWEEN US CONCERNING ANY TRANSACTION OR THE CONSTRUCTION, PERFORMANCE, OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US PERTAINING TO SECURITIES AND OTHER PROPERTY, WHETHER ENTERED INTO PRIOR, ON OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION UNDER THIS AGREEMENT [AND] SHALL BE CONDUCTED PURSUANT TO THE FEDERAL ARBITRATION ACT AND THE LAWS OF THE STATE DESIGNATED IN PARA 10, BEFORE THE AMERICAN ARBITRATION ASSOCIATION, OR AN ARBITRATION FACILITY PROVIDED BY ANY EXCHANGE OF WHICH THE BROKER IS A MEMBER, OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC AND IN ACCORDANCE WITH THE RULES PERTAINING TO THE SELECTED ORGANISATION. THE CUSTOMER MAY ELECT IN THE FIRST INSTANCE WHETHER ARBITRATION SHALL BE BY THE AMERICAN ARBITRATION ASSOCIATION, OR BY AN EXCHANGE OR SELF-REGULATORY ORGANIZATION OF WHICH THE BROKER IS A MEMBER, BUT IF THE CUSTOMER FAILS TO MAKE SUCH ELECTION, BY REGISTERED LETTER ADDRESSED TO THE BROKER AT THE BROKER'S MAIN OFFICE, BEFORE THE EXPIRATION OF TEN DAYS AFTER RECEIPT OF A WRITTEN REQUEST FROM THE BROKER TO MAKE SUCH ELECTION, THEN THE BROKER MAY MAKE SUCH ELECTION, THE AWARD OF THE ARBITRATORS, OR OF THE MAJORITY OF THEM SHALL BE FINAL, AND JUDGMENT UPON THE AWARD RENDERED MAY BE ENTERED IN ANY COURT, STATE OR FEDERAL, HAVING JURISDICTION."

14.
The funds invested by the custodian on behalf of Vizcaya were allocated by BLMIS, but BLMIS purchased no securities, options, or treasury bills or entered into any transactions in securities on behalf of Vizcaya.

15.
Bank Safra (Gibraltar), as custodian for Vizcaya, instructed BLMIS to make transfers to Vizcaya of US$180m in August and October 2008. The funds were then credited to Vizcaya's account with Bank Safra (Gibraltar) in Gibraltar. Part of the funds were subsequently transferred on to Vizcaya's own shareholders and then to their own respective shareholders, and some of the funds (about US$74m) remained in bank accounts in Gibraltar.

16.
None of BLMIS's customers' money was used on transactions relating to securities. BLMIS used the funds deposited by new customers to meet requests for withdrawals by old customers. The number and amount of requests for withdrawals in 2008 left BLMIS with insufficient funds to meet requests for redemptions and the fraud was exposed. BLMIS did not maintain segregated accounts for its customers; moneys invested by customers were paid into and commingled in a single BLMIS bank account at JP Morgan Chase in New York.

17.
In April 2009, the trustee commenced a civil action in the New York Bankruptcy Court against Bank Safra (Gibraltar) and Vizcaya, the purpose of which was to avoid and recover the transfers to Vizcaya. On August 6, 2010 the New York Bankruptcy Court entered a judgment in default of appearance in the sum of US$180m against Vizcaya (and for other sums against other related defendants) ("the New York default judgment").

18.
The New York proceedings were based upon the exercise of statutory avoidance powers conferred on a trustee in bankruptcy by the US Bankruptcy Code: Chapter 5, sections 547 (avoidance of preferences), 548 (avoidance of fraudulent transfers) and 550 (liability of transferee of avoided transfer). These are powers conferred on a trustee in bankruptcy, who may avoid and recover transfers of an interest of the debtor in property when certain statutory requirements are satisfied. The debtor for this purpose and in this case is BLMIS.

19.
The New York default judgment recognized that the New York Bankruptcy Court had determined that the trustee had made a proper prima facie showing of personal jurisdiction over the defaulting defendants.

Legal proceedings in Gibraltar

20.
By amendment in February 2011 to existing proceedings in Gibraltar (which are not material on this appeal) following the New York default judgment, the trustee made a claim for the enforcement of the judgment against Vizcaya.

21.

After the decision of the UK Supreme Court in Rubin v Eurofinance SA, the trustee pursued the claim against Vizcaya on the grounds that either (1) Vizcaya was present in New York when the proceedings against it were commenced or (2) it had agreed to submit to the jurisdiction of the New York courts.

22.
On June 19, 2013, Dudley CJ dismissed an application by Vizcaya for summary judgment on its defence, holding that the trustee had a reasonable prospect of success so far as both grounds were concerned.

23.
On February 7, 2014, on Vizcaya's appeal from the judgment of Dudley CJ, the Gibraltar Court of Appeal (Sir Paul Kennedy P, Sir William Aldous JA and Sir Mark Potter JA) dismissed the trustee's claim to enforce the New York default judgment in reliance on the presence in New York of Vizcaya on the ground that the trustee had no reasonable prospect of success, but held that the trustee's claim to do so in reliance on an agreement to submit had a reasonable prospect of success.

24.
Vizcaya applied to the Judicial Committee for special leave to appeal against the judgment of the Gibraltar Court of Appeal. On October 8, 2014 the Judicial Committee gave leave to appeal in relation to the submission issue alone. Consequently, the issue on this appeal is whether the trustee has a real prospect of succeeding on the claim that the New York default judgment for US$180m should be enforced in Gibraltar against Vizcaya on the basis that Vizcaya had agreed to submit to the jurisdiction of the New York Bankruptcy Court before that court entered the New York default judgment against Vizcaya.

III The judgments of the Chief Justice and the Court of Appeal and the arguments on this appeal

25.
So far as is relevant to the issue on this appeal the reasoning of the courts below was as follows. Dudley CJ considered that the trustee could reasonably argue that New York law governed the jurisdiction agreement, and could rely on the expert evidence of Mr Zeballos that under New York law Vizcaya agreed to the jurisdiction of the New York courts because it explicitly agreed to a choice of New York law involving the transaction of business in New York. The point was not suitable for summary determination in favour of Vizcaya because the trustee had a prospect of succeeding on the submission issue in the light of further argument and investigation of the evidence.

26.
Potter JA's reasoning was as follows: (1) whether clause 10 of the Customer Agreement amounted to an agreement to submit depended on the governing law which was expressly chosen, namely New York law; (2) it was necessary to look to New York law, in the light of the provision that the agreement was deemed to be made in New York, to determine whether clause 10 amounted, not simply to an express choice of governing law, but by implication or importation, to an agreement as to jurisdiction; (3) there was uncontradicted (but untested) expert evidence from Mr Zeballos for the trustee to the effect that, by agreeing to a contract governed by New York law and involving the transaction of business by an agent (BLMIS), a party (Vizcaya) submits to the specific jurisdiction of the New York courts for adjudication of matters arising out of that contract; (4) Vizcaya had not made good its argument that the jurisdictional test was that of the English (Gibraltar) common law even if the governing foreign law had a different jurisdictional test which, unlike the common law, would treat the parties as having agreed to submit to the jurisdiction of the foreign court. His conclusion was that (1)

the trustee could reasonably argue (a) that New York law governed the Customer Agreement; (b) that under the terms of the Customer Agreement construed according to New York law, Vizcaya had agreed to submit to the jurisdiction of the New York courts; and (c) that upon that basis the New York default judgments were enforceable against Vizcaya in Gibraltar; but (2) the issues were not suitable for final determination.

Vizcaya's argument

27.
On this appeal, in summary Vizcaya's argument is that the question whether there is a jurisdiction agreement in the contract is a question of contractual interpretation. An agreement to submit must be express or at any rate is not to be implied from any or all of the following, namely, that the contract is governed by a foreign law, the contract is to be performed in a foreign country, the contract is made in a foreign country, and/or that the foreign law confers jurisdiction on the foreign court. There is no evidence that the rules of construction applied by a New York court are materially different from those of an English court.

28.
The decision of the Court of Appeal was wrong because: (1) Potter JA did not deal at all with the point that, even had there been an agreement as to jurisdiction, it could only have been intended to relate to contractual disputes between the parties and not to statutory avoidance claims made in insolvency proceedings by the trustee in bankruptcy of one of them; (2) he thought wrongly that the words "This agreement shall be deemed to have been made in the State of New York …" amounted to an implied agreement to submit to the jurisdiction of a New York court; (3) he was wrong to accept the trustee's argument that whether the contract amounted to a submission is a matter for the foreign law; (4) he was wrong to decide that it was arguable that where the foreign law expressly governing the contract had a different test for determining the jurisdiction of the foreign court, the English court had to apply the foreign law test and not the English law test.

The trustee's argument

29.
New York law governs the construction of clause 10 and the question whether, by that clause, Vizcaya agreed to submit to the jurisdiction of the New York Bankruptcy Court.

30.
Full resolution of the trustee's claim, at trial, will require detailed evidence on the content of New York law, and in particular whether clause 10 includes a choice of jurisdiction agreement. The trustee has a real prospect of success in showing that Vizcaya did agree to submit.

31.
The trustee accepts that, where it is sought to extrapolate from the facts an agreement to submit to the jurisdiction of the foreign court, it is unclear whether an agreement can be implied (as well as being express) and there is inconsistent case law on that issue. But in this case the agreement to submit to the jurisdiction of the foreign court is extrapolated from the foreign applicable law of the contract between the parties (not from a simple equation of choice of law with choice of jurisdiction) because of the proper construction of the contract, pursuant to an application of the substantive foreign law. Potter JA was right to reject Vizcaya's assertion that the question of whether there is a jurisdiction agreement is to be determined by reference to English law and not by reference to the governing/applicable law of the (putative) jurisdiction agreement; and Potter JA was right to place

emphasis on the provision in clause 10 that the agreement was deemed to have been made in the state of New York.

IV Was there a submission?

32.
There has been a division of authority on the question whether at common law an agreement or consent to submit to the jurisdiction of the foreign court can be implied or inferred, and, if so, how the implication or inference can arise. In Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670, 686, Lord Selborne LC, speaking for the Privy Council, said that "such obligation, unless expressed, could not be implied". Nearly 70 years later, however, Diplock J said (at 123) that it was "clear law that the contract …, to submit to the forum in which the judgment was obtained, may be express or implied": Blohn v Desser [1962] 2 QB 116, 123.

33.
Dicey, in his first edition of Conflict of Laws, 1896, wrote that the judgment debtor would have submitted by expressly or implicitly contracting to submit to the jurisdiction of the foreign court (at pp 370, 377), whereas since 1973 (Dicey and Morris, 9th ed 1973, p 999) successive editions have said that an agreement to submit to the jurisdiction of a foreign court must be express, and cannot be implied. So also early editions of Cheshire, Private International Law, said that the agreement might be implied (1st ed 1935, p 492) or "less explicit" (5th ed 1956, p 612), but ultimately accepted (Cheshire and North, 9th ed 1974, p 636) that the weight of authority was that the agreement could not be implied.

34.
The Report of the Foreign Judgments (Reciprocal Enforcement) Committee, 1932 (Cmd 4213), under the chairmanship of Greer LJ, proceeded on the basis that the common law was that there could be a submission to the jurisdiction of the foreign court "by virtue of a contract (express or implied) under which such party had, before the commencement of the proceedings in the foreign court, agreed that the courts of such country should deal with the dispute in question …" (para 7). The result included a recommendation that the proposed Conventions and the 1933 Act should contain the provision which emerged as section 4(2) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, the material provision of which is set out above.

The Dicey Rule

35.
The case law which is referred to below has been markedly influenced by the Dicey Rule. What is now Dicey's Fourth Case was part of Rule 80 in the first edition, Dicey, Conflict of Laws, 1896, pp 369-370, which dealt in Case 3 with three situations in which a party objecting to the jurisdiction of a foreign court had, by his own conduct, precluded himself from objecting thereto. The first was appearance as plaintiff. The second was voluntary appearance as a defendant, and the third was "by having expressly or implicitly contracted to submit to the jurisdiction" (emphasis added) of the foreign court.

36.
The comment on this Rule stated (377): "The parties to a contract may make it one of the express or implied terms of the contract that they will submit in respect of any alleged breach thereof, or any matter having relation thereto, to the jurisdiction of a foreign court, and a person who has thus contracted is clearly bound by his own submission."

37.
The principle was stated as a separate Case only in the 8th edition, 1967, which also dropped the reference to implicit agreement in the Rule (p 974). It said (at 979): “Although it has been said that an agreement to submit to the jurisdiction of a foreign court may be express or implied [citing Blohn v Desser [1962] 2 QB 116, 123; Sfeir & Co v National Insurance Co of New Zealand [1964] 1 Lloyd’s Rep 330, 339-340], English judges have generally been reluctant to imply such an agreement. If the parties agree, expressly or by implication, that their contract shall be governed by a particular foreign law, it by no means follows that they agree to submit to the jurisdiction of the courts which apply it. Nor can any such agreement be implied from the fact that the cause of action arose within a foreign country or from the additional fact that the defendant was present there when the cause of action arose.” It then went on to criticise Blohn v Desser, noting that it had also been criticised by eminent academic writers, including Professor Cheshire, Dr Cohn, and Mr Peter Carter.

38.
But by the 9th edition, 1973, p 999 (after the decision in Vogel v RA Kohnstamm Ltd [1973] QB 133) it was said (now in 15th ed 2012, para 14-079): “It may be laid down as a general rule that an agreement to submit to the jurisdiction of a foreign court must be express: it cannot be implied.”

Membership of foreign companies and partnerships

39.
The authorities cited in successive editions of Dicey for the proposition that submission would occur where the judgment debtor had “expressly or implicitly contracted to submit to the jurisdiction” of the foreign court were Vallée v Dumergue (1849) 4 Ex 290; Bank of Australasia v Harding (1850) 9 CB 661; Bank of Australasia v Nias (1851) 16 QB 717; and Copin v Adamson (1875) 1 Ex D 17. Each of these decisions concerned the enforcement of foreign default judgments against shareholders of foreign companies or partnerships and turned on questions of sufficiency of pleading.

40.
The actual decision (as distinct from the argument) in Vallée v Dumergue was not about the jurisdiction of the foreign court, but was an early case on the requirement of natural justice. It concerned the effect of a provision in the constitution of a company regulating proceedings against shareholders. The plaintiff liquidators sought enforcement in England of a French judgment against a shareholder for his contribution to the debts of the company. The judgment debtor was resident in England. It was pleaded by the liquidators that under French law it was necessary for a shareholder to elect a domicile in France, at which the directors of the company might notify him of all proceedings relative to the company, or to the defendant as such shareholder; and that the defendant made election of domicile at a place in Paris, and gave notice thereof to the plaintiffs. It was held in the Court of Exchequer (Alderson, B) that it was not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.

41.
In Bank of Australasia v Harding the defendant was a member, resident in England, of an unincorporated company (the Bank of Australia, which was treated as a partnership) in New South Wales. The colonial legislature enacted legislation (“a statute which may be assumed to have been obtained at the request of the parties”, per Wilde CJ at 685) which authorised actions against (inter alios) members of the bank naming the chairman as defendant. It was held by the Court of Common

Pleas that the judgment was enforceable against the defendant. The defendant, being a member of a company who must be taken to have been a consenting party to the passing of the colonial act, had to be regarded as having agreed that suits upon contracts entered into by the company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions: Cresswell J at 687.

42.
Bank of Australasia v Nias involved a judgment against another shareholder of the bank. It was held by the Court of Queen's Bench that the judgment was enforceable against him. The Act was passed for the benefit of the bank, and he was a shareholder in the bank when the Act was passed and when the promises were made by the bank (per Lord Campbell CJ at 733), on which the action against the chairman was commenced. There was nothing repugnant to English law, or to the principles of natural justice, in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them.

43.
In Copin v Adamson the judgment debt was for unpaid calls on shares in a bankrupt French company. A default judgment was entered for amounts unpaid on the judgment debtor's shares. In answer to the judgment debtor's plea that he was not resident in France or otherwise subject to French jurisdiction the judgment creditor replied that (1) the defendant was subject to the conditions contained in the statutes of the company, by which "it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, & c, should be validly served at the domicile formally or impliedly chosen" and (2) the judgment debtor had been validly served under provisions of French law to the same effect as those contained in the statutes. In the Court of Exchequer it was held that the first plea was a good one, but that (by a majority, Kelly CB dissenting) the second plea, which did not rely on the agreement in the statutes, was a bad one. There was no appeal on the second ground and the appeal on the first ground was dismissed. It was held that the plea that the judgment debtor was bound by the judgment was sufficient, even though it did not allege express knowledge of the statutes of the company. Lord Cairns LC said (at 18-19):

"It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant; and that, if it were necessary to bring an action against him on the part of the company, the service of the proceedings at the office of the imperial procurator, if no other place were pointed out, would be good service. Therefore, the appeal from the judgment of the court below on the demurrer must fail."

44.
The effect of these cases is that a partner or shareholder in a foreign partnership or corporation, who consents, expressly or impliedly, to being sued in the foreign country is subject to the jurisdiction of that country for the purposes of the enforcement of foreign judgments. Consent may be by the election of domicile for the purposes of suit (as in Vallée v Dumergue) or by the promotion of legislation allowing for suit in that country (as in Bank of Australasia v Harding and Bank of

Australasia v Nias), or by being a shareholder pursuant to company statutes which provide for suit in that country even if the judgment debtor is not aware of their provisions (as in Copin v Adamson).

45.
But mere membership of a foreign partnership was held in Emanuel v Symon [1908] 1 KB 302 not to be sufficient. The judgment debtor was a partner in a partnership in Western Australia. The other partners obtained a default judgment there against him for an account of profits, and sought to recover in England the share of the amount due from him. The Court of Appeal refused to recognise the Australian judgment against Mr Symon. The headnote stated that the foreign court did not have jurisdiction where the judgment debtor "has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign court".

46.
Lord Alverstone CJ said (307-309): "The second ground of the decision under appeal … was that the fact of entering into a contract of partnership in a foreign country involves an irrevocable agreement that all matters and disputes arising in connection with the partnership shall be submitted to, and therefore lie within, the jurisdiction of the courts of that country. In my opinion this question … has been concluded by authority of great weight which this court cannot disregard. … I think the conclusion from these authorities is that, to make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction of that country, there must be something more than a mere contract made or the possession of property in the foreign country." See also Buckley LJ at 311-312 and Kennedy LJ at 314 ("Such an obligation may exist by express agreement, as in the case of Copin v Adamson, and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals …").

47.
In Blohn v Desser [1962] 2 QB 116 the plaintiff had obtained a default judgment in Austria against an Austrian partnership, and sought to enforce it in England against an English resident who was a sleeping partner in the firm. Her name was registered as a partner in the commercial register in Vienna. It was held that the defendant, as a partner in the firm, must be regarded as having carried on business in Vienna through an agent resident there and that, having permitted those matters to be notified to persons dealing with the firm by registration in a public register, she had impliedly agreed with those persons to submit to the jurisdiction of the court of Vienna, and that, therefore, the English courts would recognise the judgment. But she succeeded because the judgment against the partnership firm was not enforceable against the defendant as either it was not a judgment against her personally or, if it was, by reason of the defences which would be available to her in Vienna it was not a final and conclusive judgment. After referring to Emanuel v Symon and Buckley LJ's fifth case ("where he has contracted to submit himself to the forum in which the judgment was obtained") in which an English court would enforce a foreign judgment Diplock J said (at 123) that it was "clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied".

48.
Diplock J went on (at 123-124):

"It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public

register, he does impliedly agree with all persons to whom such a notification is made - that is to say, the public - to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent."

49.
It is understandable why Diplock J took the view that it was clear law that the agreement to submit could be express or implied, since that view had been expressed in seven editions of Dicey and by the Greer committee. But on the facts Diplock J did not refer to Copin v Adamson, in which the Court of Appeal had left open the question whether mere membership of a foreign entity was an implied submission, and in which the majority in the Court of Exchequer expressed a view which was inconsistent with that of Diplock J; and he referred to Emanuel v Symon only for the general principles, without considering why the judgment was not enforceable in that case, which was because mere membership of a partnership in a foreign country was not to be regarded as an agreement to submit to the jurisdiction of the courts of that country.

Other authorities

50.
It has already been seen that in Rousillon v Rousillon (1880) 14 Ch D 351, 371, Fry J considered Copin v Adamson as authority for the view that the foreign court would have jurisdiction where the judgment debtor "has contracted to submit himself to the forum in which the judgment was obtained".

51.
In Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670, PC, the Rajah of Faridkote obtained in the Civil Court of Faridkote (a native state) ex parte judgments against Singh (his former treasurer), which he sought to enforce in Lahore, in British India. Singh was not then resident in Faridkote and did not appear in the actions or otherwise submit to the jurisdiction. It was argued, for the Rajah, that the Faridkote court had jurisdiction over Singh because, "[b]y becoming state treasurer, [he] submitted himself to the jurisdiction of the Faridkote Court, for where a man takes office in a state he must be deemed to have agreed to be bound by the jurisdiction of that state as accounting for money due from him to that state in respect of that office. In any case, where an office is accepted in that way, and the whole cause of action arises in that state, there is jurisdiction which is obligatory on the acceptor" (at 680). The argument was rejected.

52.
The advice given by the Privy Council through Lord Selborne LC was (at 686):

"... Upon the question itself, which was determined in Schibsby v Westenholz, Blackburn J, had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied."

53.
In Emanuel v Symon [1908] 1 KB 302, at 314, Kennedy LJ underlined the point that the Faridkote case had decided that "the obligation [to submit to the foreign jurisdiction] was not to be implied from the mere fact of entering into a contract in a foreign country".

54.
There are several later relevant decisions in the United Kingdom and the Commonwealth on the enforcement of foreign judgments, some of which accept that a contractual submission or consent must be express and not implied, and others of which accept, sometimes purely for the purposes of argument, that the submission or consent can be implied, but in none of the latter group of cases (apart from Blohn v Desser) was there found on the facts to be an implied submission:

(1)
In Mattar and Saba v Public Trustee [1952] 3 DLR 399, 401 (NS) the Alberta Appellate Division applied Sirdar Gurdyal Singh v Rajah of Faridkote and Emanuel v Symon to deny enforcement of a Quebec judgment on promissory notes, and held that an agreement to submit to the jurisdiction of a foreign court is not to be implied from the fact that the defendant has entered into a contract in the foreign country or to be performed there. [1]

(2)
Sfeir & Co v National Insurance Co of New Zealand [1964] 1 Lloyd's Rep 330 was decided after Blohn v Desser, but does not refer to that decision. It concerned the enforceability of a Ghanaian judgment on a marine insurance contract under the Administration of Justice Act 1920. Mocatta J accepted (at 339-340) that "an implied submission or agreement to submit can satisfy the words of [section 9(2)(b)]". But it was not enough that it should be reasonable to find the implied submission or agreement: it must be a necessary one. It could not be implied from a choice of the governing law nor from the fact that claims were payable in Ghana.

(3)
In Dunbee Ltd v Gilman & Co, (Australia) Pty Ltd (1968) 70 SR (NSW) 219, [1968] 2 Lloyd's Rep 394 the question of law for the New South Wales Court of Appeal was whether, for the purposes of the enforcement of an English default judgment under the Australian equivalent of the Administration of Justice Act 1920, the judgment debtor had "agree[d] to submit to the jurisdiction" of the English court by virtue of a contractual provision that the agreement was "governed by and construed under the Laws of England". Walsh J referred to the division of authority (particularly between Emanuel v Symon and Blohn v Desser) on the question whether a submission could be implied, but said that that need not be decided. If the agreement had to be an express one, it was not essential that a particular form of words should be used: it could mean only that the express terms of the contract, when properly construed, contained an agreement to submit. If an implied agreement sufficed, there was nothing which could lead to the conclusion that, if the agreement was silent on the question, a term could be implied that the judgment debtor had submitted to the jurisdiction. The fact that leave could be given to serve proceedings under RSC Order 11 by virtue of the choice of English law did not amount to a law which "govern[ed]" the contract.

(4)
In Jamieson v Northern Electricity Supply Corp (Private) Ltd, 1970 SLT 113, registration of a Zambian judgment was set aside because the 1933 Act did not apply to Zambia. It had been argued that there had been an implied submission to the Zambian courts by an employee because the contract of employment was entered into in, and to be performed in Zambia, and assumed to be governed by Zambian law. Lord Johnston (at 116) took the view that a submission was not lightly to be implied, and could not be implied from a conjunction of those factors.

(5)

In Vogel v RA Kohnstamm Ltd [1973] QB 133 Ashworth J held that Blohn v Desser had been wrongly decided, and that an implied submission was not sufficient. That was a case of enforcement at common law of an Israeli default judgment in favour of an Israeli buyer of leather against an English company. The plaintiffs argued that the defendants were resident in Israel or had by implication agreed to submit themselves to the jurisdiction of the Tel Aviv court, relying on these alleged facts for the implied submission: (a) the contract was made within the jurisdiction of the foreign tribunal; (b) by or through an agent residing there; (c) such agent was a person carrying on business and resident within that jurisdiction; and (d) the contract was to be performed within the jurisdiction. Ashworth J found that the defendants were not resident in Israel and that they had not agreed to submit to the jurisdiction of the Tel Aviv court. He referred to Sirdar Gurdyal Singh v Rajah of Faridkote, and to Emanuel v Symon, which in his view established “the principle that an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which courts of this country have entertained as a legal possibility. Recognising that such an agreement may be made expressly they have in terms decided that implication is not to be relied upon”. He regarded Blohn v Desser as inconsistent with those decisions.

(6)
A similar view was taken at first instance by Scott J in Adams v Cape Industries [1990] Ch 433 (Scott J and CA), where most of the authorities were reviewed. He referred to Sirdar Gurdyal Singh v Rajah of Faridkote and Emanuel v Symon and to the views expressed in the then current editions of Cheshire and North and Dicey & Morris that an agreement to submit must be express and cannot be implied, and said that Diplock J was wrong in Blohn v Desser to regard it as settled law that an agreement to submit to the jurisdiction need not be expressed but could be implied. He then said (at 465-466): “But, accepting that an implied agreement to submit might suffice, nonetheless it is, in my judgment, a clear indication of consent to the exercise by the foreign court of jurisdiction that is required.”

55.
In the face of these conflicting decisions and dicta, it is necessary to step back and consider the question as a matter of principle and authority.

56.
First, the question is whether the judgment debtor agreed to submit to the jurisdiction of the foreign court. Second, the agreement does not have to be contractual in nature. The real question is whether the judgment debtor consented in advance to the jurisdiction of the foreign court. This point was made by Goff LJ in SA Consortium General Textiles v Sun and Sand Agencies Ltd [1978] QB 279, 303, who said that the expression “agreed … to submit to the jurisdiction” in the Foreign Judgments (Reciprocal Enforcement) Act 1933, section 4(2)(a)(iii), meant “expressed willingness or consented to or acknowledged that he would accept the jurisdiction of the foreign court. It does not require that the judgment debtor must have bound himself contractually or in formal terms so to do”. Third, it is commonplace that a contractual agreement or a consent may be implied or inferred. Fourth, there is no reason in principle why the position should be any different in the case of a contractual agreement or consent to the jurisdiction of a foreign court: cf Briggs, Civil Jurisdiction and Judgments, 6th ed, para 7.59. [2] Fifth, on analysis in context the authorities which deny the possibility of an implied agreement (especially Sirdar Gurdyal Singh v Rajah of Faridkote) really meant that there had to be an actual agreement (or consent). Thus where a person became a shareholder in a foreign company, “to all intents and purposes, it is as if there had been an actual and absolute agreement” by the shareholder to the provisions for suit and service in its constitution: Copin v Adamson at 18-19.

57.

In English domestic law, there are, broadly, two classes of implied term. The first class, sometimes called terms implied as a matter of fact, consists of terms implied from the circumstances in order to give effect to the intention of the parties to the contract. The authorities on this class of implied term have been reviewed comprehensively by Lord Neuberger in Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2015] 3 WLR 1843, at paras 15-31, and it is not necessary to repeat what he said there. The policy of the common law is not to imply such terms lightly, and that is why the principles have been formulated in terms of necessity or business efficacy or "it goes without saying." The second class consists of terms implied by law, which are implied into classes of contractual relationship as a necessary incident of the relationship concerned. An example is the obligation of confidentiality in banking contracts or in arbitration agreements: Michael Wilson & Partners Ltd v Emmott [2008] EWCA Civ 184, [2008] Bus LR 1861 ("really a rule of substantive law masquerading as an implied term": at para 84). On the different types of implied term see Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, 137, per Lord Wright; and more recently Geys v Société Générale [2012] UKSC 63, [2013] 1 AC 523, at para 55, per Lady Hale.

58.
Because there has to be an actual agreement, the agreement or contractual term cannot be implied or inferred from such matters as:

(1)
the mere fact of being a shareholder in a foreign company or a member of a foreign partnership: Copin v Adamson (in the Court of Exchequer); Emanuel v Symon (and Blohn v Desser must be regarded as wrongly decided on this point);

(2)
the fact that the contract which was the subject of the foreign proceedings was made in the foreign country: Sirdar Gurdyal Singh v Rajah of Faridkote; Emanuel v Symon; Mattar and Saba v Public Trustee; Jamieson v Northern Electricity Supply Corp (Private) Ltd; Vogel v RA Kohnstamm Ltd;

(3)
the fact that the contract was governed by the law of the foreign country: Sfeir & Co v National Insurance Co of New Zealand; Jamieson v Northern Electricity Supply Corp (Pte) Ltd; Vogel v RA Kohnstamm Ltd; cf New Hampshire Insurance Co v Strabag Bau AG [1992] 1 Lloyd's 361, 371-372 (a case on jurisdiction of the English court);

(4)
the fact that the contract was to be performed in the foreign country: Sfeir & Co v National Insurance Co of New Zealand; Mattar and Saba v Public Trustee; Jamieson v Northern Electricity Supply Corp (Pte) Ltd; Vogel v RA Kohnstamm Ltd; or

(5)
the fact that the result of the contract being governed by the foreign law gives the foreign court jurisdiction under its own law: Dunbee Ltd v Gilman & Co, (Australia) Pty Ltd.

Implied terms in the conflict of laws

59.
Finally it is necessary to consider the implications in the conflict of laws of the distinction between terms implied in fact or from the circumstances, on the one hand, and terms implied by law, on the other hand. The starting point is that the characterisation of whether there has been a submission to

the jurisdiction of the foreign court for the purposes of enforcement of foreign judgments depends on English law: Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236 (a case on submission in the course of proceedings). But in the present context what that means is that there must have been an agreement to submit to the jurisdiction of the foreign court, and that agreement may arise through an implied term.

60.
Terms implied as a matter of fact depend on construction of the contract in the light of the circumstances. Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. [3] In such a case the role of the expert is not to give evidence as to what the contract means. The role is "to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules": King v Brandywine Reinsurance Co [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep 655, para 68; Dicey, paras 9-019 and 32-144 ("the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract"). [4]

61.
The position is different in the case of terms implied by law, where the function of the expert would be to give an opinion on whether a particular term is implied by law. That is because whether there are statutory terms or other terms implied by law depends on the foreign law. The common law rules, as indicated above, apply to the question whether there has been a contractual submission, and at common law "[t]he proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms" (Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277, 291 (PC)); and for other cases, the Rome Convention and the Rome I Regulation refer to the applicable law of the contract or the putative law of the term. [5] As a matter of English law, the fact that a contract is governed by English law or was made in England provides a basis for service out the jurisdiction under what was previously RSC Order 11, rule 1 and is now CPR, Practice Direction 6B, does not mean that there is an implied contractual submission to the jurisdiction: cf Dunbee Ltd v Gilman & Co (Australia) Pty Ltd, above.

Jurisdiction under New York law

62.
So far as concerns Vizcaya, the complaint in the New York proceedings claimed that the New York Bankruptcy Court had jurisdiction over Vizcaya for these reasons: the account agreements were deemed to be entered into in the State of New York and were to be performed in New York through securities trading activities that would take place in New York; the Vizcaya account was held in New York, and Vizcaya wired funds from its Bank Safra account to the BLMIS account in New York for application to its account with BLMIS and the conduct of trading activities in New York, and invested in BLMIS; Vizcaya purposefully availed itself of the benefits of conducting transactions in New York, out of which the action arose. Vizcaya had therefore submitted itself to the jurisdiction of the courts of New York.

63.
The motion for summary judgment pleaded that the trustee met the necessary standard of showing that the court had prima facie jurisdiction over the defendants. The basis of jurisdiction which was asserted was that the transfers arose out of a business transaction tied to Vizcaya's securities account in New York; and that under the New York long arm statute, CPLR 302(a)(1), [6] the maintenance of a securities account in New York was a sufficient basis for finding personal jurisdiction for claims

arising out of “transaction of business”. It was claimed that the defaulting defendants purposefully availed themselves of the benefits of the transactions arising out of the Vizcaya accounts by requesting or directing that funds be invested by BLMIS in New York and by receiving the US$180m in transfers.

64.
The motion relied on another decision in the Madoff affair dealing with avoidance of fraudulent transfers arising out of BLMIS account transactions, in which the defendants had customer agreements deemed to be made in New York and subject to New York law, directed transfers to and from their BLMIS account, and where one of the defendants designated a United States agent to direct financial transactions to act on its behalf; as a result, the defendant’s conduct established sufficient minimum contacts to support a finding of personal jurisdiction: Picard v Cohmad Securities Corp, 418 BR 75, 80-81 (Bankr, SDNY 2009).

65.
The order entering the default judgment recited that “the Trustee made a proper prima facie showing of personal jurisdiction”.

66.
Evidence on New York law submitted by the trustee in these proceedings was (1) a witness statement by Professor Kenneth Klee, who specialises in insolvency law, and who is a member of the law faculty of UCLA Law School and a practising lawyer and (2) a witness statement by Mr Gonzalo Zeballos, a partner in the firm of Baker & Hostetler LLP, who act for the trustee.

67.
Professor Klee’s evidence was directed to the trustee’s rights under the Account Management Documents, and only Mr Zeballos’ evidence was directly relevant to the issues in this appeal. Under the heading “Submission to New York Law” his evidence was as follows:

“18. The Customer Agreement deems New York state law as the law governing the Agreement. It is the Trustee’s position that the language of the Customer Agreement in and of itself supports the application of substantive New York law to all matters pertaining to the Account Management Documents.

19. It is notable, however, that even if the New York choice of law test (the ‘significant relationship’ or ‘grouping of contacts’ approach [footnote omitted] [7]) is applied to determine the applicable/proper law of the Account Management Documents, that New York law would still be the applicable law relating to the Account Management Documents.

20. As a matter of New York law (ie since it is the applicable law of the Account Management Documents), Vizcaya agreed to the jurisdiction (and venue) of the New York courts. This is apparent from, inter alia, the fact it executed and agreed to the Account Management Documents that explicitly establish a contractual agency relationship governed by New York substantive law and the fact that Vizcaya carried on business in New York.

…

22. It is well-settled under New York law that by agreeing to a contract governed by New York law, involving the transaction of business in New York by an agent, a party submits to the ‘specific jurisdiction’ of New York courts for adjudicating matters arising from that contract. Parke-Bernet Galleries Inc v Franklyn 26 NY 2d 13, 16 (1970).

23. Specific jurisdiction “exists when ‘a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum’.” Chlose v Queen Bee of Beverly Hills LLC 616 F 3d 158, 164 (2d Cir 2010) (quoting Helicopteros Nacionales de Colombia SA v Hall, 466 US 408, 414, n 8 (1984).

24. Under New York law, specific jurisdiction is established over a non-domiciliary who, in person or through an agent: (1) transacts any business within the state … New York Civil Practice Law and Rule para 302; Malmsteen v Universal Music Group Inc, 2012 WL 2159281, at *3 (SDNY June 14, 2012).

25. Because the Account Management Documents establish an on-going principal-agent relationship with BLMIS, Vizcaya’s execution and agreement to the Account Management Documents constitutes the transacting of business in New York. The Account Management Documents define the commercial structure that provides the foundation for Vizcaya’s sole commercial activity – to invest with BLMIS in New York.”

68.
His evidence is therefore that under New York law: (1) the choice of New York law to govern the contract is effective to apply New York substantive law to all matters relating to the Account Management Documents; (2) the contractual relationship would have been governed by New York law even in the absence of an express choice; (3) Vizcaya agreed to the jurisdiction (or specific jurisdiction) of the New York courts by agreeing to the Account Management Documents which established an agency relationship and by carrying on business in New York (or transacting business in New York); (4) specific jurisdiction is established under the New York CPLR over a non-domiciliary who transacts any business within New York.

69.
Even as a matter of New York law the evidence does not state that a choice of law carries with it an agreement to the jurisdiction of the New York court, since it only does so, according to the evidence, if there is also transaction of business in New York. [8] All that is being said is that in the factual circumstances of the case the New York court has jurisdiction under the long arm statute.

70.
Most relevant for present purposes, there is no suggestion that there is a term implied as a matter of fact or as a matter of law that Vizcaya consented to the jurisdiction of the New York court. For a term to be implied as a matter of fact, the trustee would have to adduce evidence of New York law, not on what the contract means, but that there is a rule of interpretation or construction, on the basis of which the Gibraltar court could conclude that clause 10 in the context of the choice of law and the deemed place of contracting amounts to a choice of jurisdiction. For a term to be implied as a matter of law, the expert would have to show what relevant terms are implied under New York law. There is no relevant evidence under either head. The statements that Vizcaya agreed to the jurisdiction of the New York court by agreeing to New York as the governing law and by transacting business in New York say no more than that these factors justified the assumption of jurisdiction under New York CPLR, section 302.

71.
There is no basis on the wording of the contract or in the evidence for the trustee’s suggestion that it makes a difference that the contract deems it to have been made in New York. In the English cases the fact that a contract was made in the foreign country had no weight in determining whether a party had agreed to submit. If there had been an implied term under New York law as a result of that provision, no doubt it would have been relied upon in the motion in New York for the default

judgment. The unsurprising overall effect of the evidence is that, as in English law or Gibraltar law, these are factors in the exercise of long arm jurisdiction.

72.
There is therefore no basis in the evidence for the assertion that there was a contractual term that Vizcaya submitted to the New York jurisdiction.

The scope of any jurisdiction agreement

73.
The trustee would in any event have other formidable difficulties. The first is that, if a jurisdiction agreement is to be implied as a matter of fact or law, prima facie it would not apply to these proceedings. In AWB (Geneva) SA v North America Steamships [2007] EWCA Civ 739, [2007] 2 Lloyd's Rep 315 a swap agreement provided that pursuant to the ISDA Master Agreement, the agreement was governed by English law and subject to the exclusive jurisdiction of the English courts. The trustee of one of the parties brought statutory avoidance proceedings in Canada. The Court of Appeal refused to grant an anti-suit injunction, because the choice of law and choice of jurisdiction agreement did not apply to the insolvency proceedings. The proceedings in Canada did not relate to a dispute under the contract. They were part of insolvency proceedings. It was a matter for the Canadian Court to decide on the relief that it is prepared to grant within the scope of those proceedings as it is concerned with issues of insolvency and not with issues which relate to the contractual obligations under the agreement.

74.
In this case, of course, the jurisdiction agreement would be governed by New York law, and what disputes to which it is applicable would be a question of interpretation governed by the applicable law. But there is no evidence of any rules of interpretation under New York law which could lead the Gibraltar court to the conclusion that any implied submission under clause 10 would apply to avoidance proceedings.

Arbitration agreement

75.
It is therefore unnecessary to go further and consider whether the arbitration agreement in clause 13 applies to the insolvency proceedings, and therefore whether the default judgment would be unenforceable in any event because it was obtained in breach of an arbitration agreement: see Dicey, para 14R-097.

V Disposition

76.
The Board will therefore humbly advise Her Majesty that the appeal should be allowed. Any consequential order will depend on the terms of the settlement between the parties, who have liberty to apply.

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[1] Since then the Canadian common law on the enforcement of foreign judgments has developed differently from English law: see Beals v Saldanha [2003] 3 SCR 416; (2003) 234 DLR (4th) 1; Dicey, para 14-091.

[2] It should be noted, however, that (1) the formal requirements for the existence of a jurisdiction agreement under the recast Brussels I Regulation (1215/2012), Article 25 (and its predecessors) are

strict, and (2) the Hague Convention on Choice of Court Agreements, 2005, provides (Article 3(b)) that “an exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.” The Hague Convention is not in force as between the United Kingdom and the United States.

[3] The Rome Convention and the Rome I Regulation (Regulation 593/2008) on the law applicable to contractual obligations apply in Gibraltar. Because the contract was made in 2005 it is the Rome Convention which would be applicable to this case. But “agreements on the choice of court” are excluded from the scope of each of them (article 2(2)(d)), and the common law rules therefore apply in the present case.

[4] The law is the same in the United States: see Wright, Miller etc , Federal Practice and Procedure , section 2444 (“The purpose of an expert witness in foreign law is to aid the court in determining the content of the applicable foreign law, not to apply the law to the facts of the case”).

[5] Rome Convention, articles 8(1), 10(1)(a); Rome I Regulation, articles 10(1), 12(1)(a).

[6] New York CPLR, section 302, is headed “Personal jurisdiction by acts of non-domiciliaries” and so far as material provides: “(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary … who in person or through an agent: (1) transacts any business within the state …”

[7] The omitted footnote concludes that the various contacts with New York (performance in New York; subject matter of the contract; Vizcaya’s only business being in New York) meant that the significant relationship test for the law governing the contract led inexorably to the conclusion that New York law applied.

[8] Mr Zeballos does not refer to the New York General Obligations Law, section 5-1402, which provides, in summary, that any person may sue a foreign corporation in New York, where the action relates to any contract in which a choice of New York law has been made, and which (a) is a contract arising out of a transaction covering in the aggregate not less than US$1m, and (b) which contains a provision whereby such foreign corporation agrees to submit to the jurisdiction of the courts of New York.