do: *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm); [2010] 1 Lloyd's Rep. 631 at [67]–[75].

The question whether the mistake was a common mistake, or satisfied the criteria in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] Q.B. 679 for the setting aside of the contract on that basis, may well have been determined against Mr Elston in any event. There was no such problem in the swaps litigation, where the contracts were void ab initio. Alternatively, the public interest in the finality of litigation, and the nature of a compromise agreement, may be sufficient to lead to implication of a term that the agreement will stand notwithstanding future changes in the law, or a rule of public policy to that effect: *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] Q.B. 303 at [23] and [64]. But to say that he was not mistaken was to depart from the factual findings of the judge, and from the majority judgment in *Kleinwort Benson*. If that decision is wrong, it has not yet been revealed to us. ☙

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PERSISTENT QUESTIONS AFTER ENKA V CHUBB

The question of how a court is to identify the proper law of an arbitration agreement (the AA law) where no specific choice of law has been made for it has recently been clarified by the Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38; [2020] 1 W.L.R. 4117. Previous authorities were "long divided" (see at [3] and [45]–[52]). One approach had been to hold that an express choice of law for the contract usually denoted an *implied* choice for the arbitration agreement (e.g. *Sulamérica*, *Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 W.L.R. 102 at [11] and [27]), but it was not explained why the choice was characterised as *implicit* even where it was apparently worded for the whole contract. Another, which the court below adopted, was that an express choice for the contract would "rarely" be a choice of AA law, because an arbitration agreement was a separate contract from the agreement containing it even for choice of law purposes. The parties were instead "strong[ly] presum[ed]" to have chosen the law of the arbitral seat to be the AA law given the "clos[e] relat[ionship]" between the two ([2020] EWCA Civ 574; [2020] 3 All E.R. 577 at [89]–[105]). Commentators were similarly at odds.

The *Enka* appeal therefore afforded an opportunity for the Supreme Court to settle the law. The facts can be briefly stated. A construction project in Russia was damaged by fire. Chubb, the project's subrogated insurers, sued Enka, the sub-contractors, in Russia. Enka sought an anti-suit injunction from the English courts, arguing that the claims were covered by a London arbitration agreement in the construction contract. Chubb responded that the claims fell outside the arbitration agreement. The contract contained no choice of law provision. Chubb succeeded in the High Court, which held that England was forum non conveniens for determining whether Chubb breached the arbitration agreement because (inter

☙ Bankruptcy; Common law; Income payments agreements; Mistake of law; Pensions; Unjust enrichment

alia) Russian law arguably governed it. The Court of Appeal disagreed, holding that English law governed the arbitration agreement pursuant to the "strong presumption" that the parties implicitly chose the seat law to be the AA law, and granted the injunction.

Both the majority and minority rejected the Court of Appeal's analysis. The majority (Lord Hamblen, Lord Leggatt, and Lord Kerr) favoured a rule that, where the parties have not made a specific choice of law for the arbitration agreement per se, "a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract" ([2020] 1 W.L.R. 4117 at [43]–[54] and [170(iv)]). However, if there existed "at least a serious risk" that the application of a law would invalidate or "significantly undermine" the arbitration agreement, the parties will be assumed not to have chosen that law for it (at [106]–[109]). This could include a situation where that law interpreted arbitration clauses in a way that failed to recognise that rational commercial parties are likely to have chosen arbitration as a "one stop" forum for the resolution of disputes, as the House of Lords did in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] 4 All E.R. 951.

By comparison, the minority (Lord Burrows and Lord Sales) opined that there was a "presumption or general rule that the proper law of the main contract is also the arbitration agreement", whether as a consequence of the parties being taken to have chosen so or by virtue of the "closest connection" test (at [229]–[255] and [257(iii)]). This general rule could be exceptionally displaced where that law would invalidate the arbitration agreement, but not otherwise (at [194]–[199] and [251]).

The majority and minority agreed that there was no express choice of law for the construction contract. Their disagreement concerned whether there had been an *implied* choice for the contract or for the arbitration agreement.

For the majority, in order to discern an implied choice of law for a contract or an arbitration clause, a court had to be satisfied that such was the "only reasonable conclusion" to be drawn in the circumstances, so that it could be inferred as a matter of "necessary implication" (at [159]). On the facts, the absence of a choice of law provision in a lengthy contract between sophisticated parties betokened an inability to agree (at [148]). Hence, there was no implied choice for the contract or the arbitration clause specifically as a matter of "necessary implication", and the residual "closest connection" test was applicable (at [171]). Accordingly, because the arbitration agreement was most closely connected with the arbitral seat, it was governed by the seat law (at [156]–[158]).

For the minority, however, the parties had made an *implied* choice of Russian law for the contract's substantive terms, owing to how the contract made several references to Russian law and had only a few non-Russian elements (at [200]–[205]). From that it followed that the parties had also made an implied choice of Russian law as the AA law. The minority would also have held that Russian law was the AA law in the absence of choice, on the basis that the law governing the substantive terms of the contract was the law with which an arbitration clause had the "closest connection" (at [231]–[253]).

The majority's approach doubtlessly results in a more predictable and less artificial rule than that of the Court of Appeal. The latter had left one wondering whether anything less than a "this Agreement" clause with an accompanying

definition of "Agreement" to encompass all of the document's terms could be an express choice. Rejecting that approach, the majority explained that, even without an accompanying definition, a choice of law clause worded for "this agreement" can "naturally and sensibly" be interpreted to apply to an arbitration agreement contained in the contract (at [60]). The majority also clarified that the "separability" doctrine was applicable only when assessing an arbitration clause's validity. It did not make an arbitration agreement a separate contract for choice of law purposes (at [41] and [61]–[62]).

Although technically obiter, the aforementioned two clarifications are cogent. The phrase "this agreement" (and its variants) would normally be understood by a reasonable business-person to mean "all the terms in this contractual document". True, it is conceivable that "this agreement" might denote what lawyers call the "main" or "substantive" contract (see at [141] and [187]), being the part of the contract to which the Rome I Regulation applies. But business-people are unlikely to have had that usage in mind.

As to the majority's take on "separability", there is no good reason why an arbitration clause should be a separate contract for choice of law purposes. As Hoffmann L.J. exhorted, "it is always essential to have regard to the reason why the [separability] question is being asked" (*Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701 at 722D; [1993] 3 All E.R. 897 at 913). That a different choice of law regime applies to arbitration agreements does not necessitate treating them as separate contracts.

That said, the court's reasoning is not completely clear or uncontroversial, and several questions persist.

First, in light of the majority's confirmation that "separability'" was inapplicable for choice of law purposes, it is somewhat unclear what the majority meant when it stated that "a choice of governing law *for the contract* will generally apply to an arbitration agreement which *forms part of the contract*" (at [170(iv)], emphasis added). If an arbitration agreement "forms part of the contract", a choice of law "for the contract" must *always* be a choice for the arbitration agreement, not "generally" so. Given that, at [43]–[52], the majority formulated the rule after analysing cases which involved choice of law provisions worded for the entire contract, it may be that their statement was meant to convey the point, made by Andrew Baker J., at first instance ([2019] EWHC 3568 (Comm); [2020] 1 Lloyd's Rep. 71 at [51]–[55]), that a choice *ostensibly worded* for the entire contract, such as a "this agreement"-type provision, will "generally" be interpreted to cover the arbitration agreement as well. Even so, the logic of that analysis cannot be translated to *implied* choices, for which the issue is not whether a phrase like "this agreement" is construable as denoting the entire contract, but whether the parties can be regarded by "necessary implication" to have chosen an AA law in the circumstances. It might therefore be queried why the majority did not differentiate between express and implied choices when formulating the rule.

Alternatively, it may be that, as Lord Burrows appears to conceive, the majority was intending to articulate the proposition that an express or implied choice of the substantive terms of the contract under *the Rome I Regulation* would "carr[y] across" to be the AA law, irrespective of the arbitral seat ([2020] 1 W.L.R. 4117

at [234] and [260]). However, such a rule would be unsound for identifying either express or implied choices.

When analysing a putative *express* choice of AA law, the question is not what the law of the contract under Rome I is, because that will only determine what law governs the substantive terms of the contract. Instead, the proper question is whether the words alleged to constitute an express choice of law for the arbitration agreement—such as a "this Agreement" provision—are construable as applying to all the terms of the contract including the arbitration clause. As Andrew Baker J. pointed out ([2020] 1 Lloyd's Rep. 71 at [51]–[55]), it is an "error of analysis" to think in terms of a choice of law for the substantive terms (identifiable under Rome I) "translating" over to the arbitration clause as if the one logically preceded the other, as was done in *Sulamérica* ([2013] 1 W.L.R. 102 at [31]). Were a choice of law clause properly construable to be a choice for the *whole* contract—such as where it stipulates that "this Agreement shall be governed by English law" and defines "this Agreement" to encompass "all the provisions in this document"—a choice would have been made directly for the arbitration clause, albeit by way of a more general description (i.e. "this Agreement") than one specifically mentioning the arbitration agreement. The same logic applies where "this Agreement" is not defined. Conversely, were a choice of law clause properly construable as importing a choice for the substantive terms *alone*—e.g. where it provides "this agreement is governed by English law except for the arbitration clause"—that choice, though evidently for the substantive terms, would not "carry across" to the arbitration agreement. Thus, either the choice of law provision selects a law for the arbitration agreement, or it does not. Article 3(1) of Rome I, which answers the question of what law governs the substantive terms, cannot inform the inquiry.

Similarly, the proposition that an implied choice of law for the substantive terms identified under Rome I can "carry across" to be the AA law arguably contradicts the majority's "necessary implication" test for identifying implied choices. It is not generally the case that an *implied* choice of law to govern the substantive terms per se would be intended to be a choice of AA law as well. As the majority points out, an arbitration clause is "more readily" amenable to being governed by a different law because it has a "different subject matter and purpose from the rest of the contract" ([2020] 1 W.L.R. 4117 at [40] and [61]). The AA law governs not only its validity, but also its interpretation and scope, and the rights and duties that it creates. It can determine various important issues, such as whether the arbitration agreement is enforceable against non-parties, whether a party has committed a repudiatory breach by suing elsewhere or refusing to participate, and whether an implied term of confidentiality arises. Consequently, parties may frequently have good reasons for desiring a different law to govern the AA in a given case, particularly where the seat law is "friendlier" for arbitration agreements than the law governing the substantive terms in these matters. For example, English law might be regarded by pragmatic business-people to be better for an arbitration agreement than one less frequently chosen—not merely because it construes them purposively (cf. *Enka* at [199]), but because it generally offers sensible, "arbitration-friendly" answers to the issues above. Such might often render it impossible to say that it was "ineluctabl[y]" the parties' unspoken intention to select the same law for the substantive terms and the arbitration clause.

For these reasons, it is doubtful whether the majority actually intended to postulate that an *implied* choice of law for a contract's substantive terms (as identified under Rome I) will generally constitute a choice of AA law. That is a conceptually different question from whether a "this Agreement"-type clause can generally be construed to cover all of a contractual document's terms, for which the answer is legitimately "yes". It is regrettable that the majority, in answering the latter affirmatively, may inadvertently have given an affirmative (though obiter) answer to the former as well.

Secondly, the majority's observations on the test for finding an implied choice of AA law invite controversy. The majority, observing that there was no "substantial difference" between the common law test and the test under Rome I, affirmed Lord Diplock's "necessary implication" formulation in *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab)* [1984] A.C. 50; [1983] 2 All E.R. 884, whereby an implied choice cannot be identified unless it is the only reasonable conclusion to be drawn from the circumstances. The difficulty is that Lord Diplock's formulation, which Lord Toulson in *Lawlor v Sandvik Mining & Construction Mobile Crushers and Screens Ltd* [2013] EWCA Civ 365; [2013] 2 Lloyd's Rep. 98 equated with the Rome I standard, arguably did not represent the common law test. As was explained in *GDE LLC v Anglia Autoflow Ltd* [2020] EWHC 105 (Comm); [2020] 1 W.L.R. 2381 at [105] and [116]–[120], the common law test traditionally involved a looser standard than that under art.3(1) of Rome I despite their "passing [structural] resemblance[s]". The latter seeks to identify a choice so clearly demonstrable that "the parties must have taken it without saying" (see *Lawlor* at [33]). By contrast, the common law test searched not for an "ineluctabl[e]" intention but a broadly inferable or imputable one (*Lawlor* at [28]–[29]; *GDE* at [116]), and was "frequently elided" with the "close connection" test—a test "no longer concerned with intention at all" (*Lawlor* at [26]; *Enka* at [36]). Given these differences, the "necessary implication" formulation arguably involves a departure from the demonstrably less stringent standard previously applied in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583; [1970] 1 All E.R. 796, where the mere fact that a party acceded to another's proposal to use an English standard form signified an implied choice of English law ([1970] A.C. 583 at 612, cf. 608). This explains why Lord Toulson, who was cognisant that it was a "mistak[e] … to apply [A]rticle 3 through the prism of the preceding common law" (*Lawlor* at [30]), could still say that Lord Diplock's formulation was apposite for Rome I.

Because the majority did apply the "necessary implication" test to the facts, it must now be regarded as authoritative. This invites the further question of whether, and, if so, to what extent, the majority was endorsing the tentative suggestion in *Kabab-ji SAL v Kout Food Group* [2020] EWCA Civ 6; [2020] 1 Lloyd's Rep. 269 at [53] and [70] that the "business efficacy" test for the implication of contractual terms must be satisfied in order to identify an implied choice of law. Certainly, there are discernible parallels between the majority's restated test—which demands that "the parties must have taken it without saying that their contract should be governed by that law" or that it must be the "only reasonable conclusion in the circumstances"—and the standard of "necessity" required for the ad hoc implication of a term (see [2020] 1 W.L.R. 4117 at [159]). Furthermore, the

majority's observations that a choice of law for a contract, "*like any contractual term*, may be explicitly articulated or may be a matter of necessary implication" and that no "sharp distinction" existed between express and implied choices because "the extent to which *a contractual term* is spelt out … or requires a process of inference to identify it is a matter of degree" (all at [35], emphasis added) strikingly resemble Lord Hoffmann's observations on implied terms in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988. But one might still question whether the "business efficacy" test can sensibly be imported wholesale. A choice of law is rarely required for a contract to work or to be practically coherent, except where the law applicable by default would result in its invalidity or inoperability. It may therefore be that Lord Hoffmann's hypothesis, that implication ultimately involved an exercise in ascertaining what the parties intended and was not exhausted by the traditional tests, retains its explanatory force here, *pace Marks & Spencer v BNP Paribas* [2015] UKSC 72; [2016] A.C. 742 at [31]. If so, an affirmative answer to either the "business efficacy" or "officious bystander" tests may be sufficient but *not necessary* to identify an implied choice.

Finally, there is considerable indeterminacy in the majority's suggestion that their general rule might not apply where a law might "significantly undermine" the commercial purpose of an arbitration agreement ([2020] 1 W.L.R. 4117 at [109]). Even in cases where a system of law would invalidate the arbitration agreement, one might question what happens if the invalidating rule is relatively obscure. Can a court assume that the parties would have known of that rule, as to infer that they must have selected a different law? It is also unclear what other events or juridical peculiarities might be said to "undermine" the purpose of an arbitration agreement. For example, the High Court of Australia has declined to apply *Fiona Trust* whilst still giving arbitration clauses a tolerably liberal interpretation (*Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 93 A.L.J.R. 582 at [18]–[21]). Might that count? Would a ban on the enforcement of arbitration clauses by anti-suit injunction (cf. *Allianz SpA v West Tankers Inc* (C-185/07) EU:C:2009:69; [2009] 1 A.C. 1138), or awarding damages for breach, occasion sufficient "impairment"? Because disputes about the AA law typically arise when one law affords more attractive interpretative or remedial possibilities than another, the majority's "carve-out" is bound to invite ingenious arguments. ☙

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☙ Arbitration agreements; Choice of law; Implied terms