In short, this case provides a far more revealing exposé of improper purposes than previous authorities, but it also teases those seeking certainty: ultimately none of the three key questions on improper purposes is pinned down by robust ratio.

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IMPLICATION OF JURISDICTION AGREEMENTS

IN *Vizcaya Partners Ltd. v Picard* [2016] UKPC 5, the Privy Council considered an attempt to enforce a New York judgment in Gibraltar. The judgment debtor was not present in New York at the time the New York court assumed jurisdiction, which suggested that enforcement of the US judgment would be refused for want of jurisdiction. However, the argument of the judgment creditor was that an express choice of New York law in the contract, coupled with other factors, was sufficient to imply submission of the parties to the courts of New York (and, accordingly, vest the New York courts with jurisdiction for the purposes of enforcement of the New York judgment). The crux of the case was thus whether the terms of the contract could indicate submission to the jurisdiction of a foreign court, even if that submission was not crystallised in the form of an express contractual provision. The Privy Council held that, while, in principle, it might be possible to imply submission, on the facts, there was no such submission so that the judgment was unenforceable.

The reasoning of Lord Collins, who gave the judgment for the Board, was twofold. The first question for him was whether in principle the English conflict of laws recognised implied jurisdiction agreements as a basis for the enforcement of a foreign judgment. The answer was positive – as a matter of English law, the jurisdiction agreement may be implied, and one can only agree with this proposition.

The second, logically subsequent, question was whether the parties had actually agreed to the jurisdiction of a foreign court, albeit impliedly. And that, Lord Collins stated, is not a question for English law, but is a question for the governing law of the host contract. In the event, the law of New York governed the contract, and thus the court would need to turn to the law of New York to gauge the implication of a jurisdiction agreement. On the facts of the case, Lord Collins was not convinced that New York law permitted the implication of a choice of court agreement on the basis of an express choice of law clause.

The judgment of the Board provides a clear and authoritative account of the manner in which jurisdiction agreements should be implied for the

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purposes of enforcement, yet two contentious points do require consideration. The first point is what law should govern whether a jurisdiction agreement may be implied. The Board, although countenancing the phenomenon of implied jurisdiction agreements as a basis for enforcement in English law, held that the issue of implication was for the law governing the contract that allegedly contained the jurisdiction agreement. In the eyes of Lord Collins, the implication of jurisdiction agreements was properly seen as a question of interpretation which fell to be determined by the law applicable to the host contract. Lord Collins thus applied the law of New York, as selected by the parties, to decide whether a choice of law clause could indicate an implied agreement to the jurisdiction of New York courts.

The question is how this sits with the pre-existing case law and policy considerations. While it is beyond contention that the interpretation of a jurisdiction agreement is to be decided by reference to the law governing the main contract, the existence of consensus – the question of whether a jurisdiction agreement exists in the first place – is generally treated as a question of fact (e.g. *Gan Insurance Co. Ltd. v Tai Ping Insurance Co. Ltd.* [1999] I.L.Pr. 729 (at common law); and cf. in the EU context, Case 24/76, *Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v RUWA* [1976] E.C.R. 1831, at [7]). Characterised as a question of consensus, the implication of a jurisdiction agreement is most naturally subject to the law of the forum and not to the law of the host contract.

English courts have previously decided the implication of jurisdiction by reference to English law, even when the governing law of the contract was allegedly foreign (*Sfeir & Co. v National Insurance Co. of New Zealand* [1964] 1 Lloyd's Rep. 330, 340; *Vogel v RA Kohnstamm Ltd.* [1973] Q. B. 133, 144). These English cases provide a strong rebuttal to the claim, as expressed in *Vizcaya Partners*, that the implication of a jurisdiction agreement is for the law of the host contract. And one may agree with those cases. The implication of a jurisdiction agreement goes to the question whether the parties have agreed a choice of court agreement – a predominantly factual question, subject to the law of the forum. Before interpreting a jurisdiction agreement, one has to ascertain whether or not it exists. On this view, applying foreign law to the implication of a jurisdiction agreement is putting the cart before the horse.

Applying the governing law of the contract to the implication of jurisdiction agreements adds a further layer of complexity to the process of recognition and enforcement of foreign judgments. Viewing the factual implication of jurisdiction agreements as a question for the law of the host contract would mean, in practical terms, that, at the stage of summary proceedings, the parties would be required to produce expert evidence on the content of foreign law (or on the canons of construction of foreign law).

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This is likely to introduce an additional element of uncertainty in the enforcement of a foreign final judgment.

Having said all this, Lord Collins in two parts of the judgment ([58], [61]) made explicit reference to the way that English law would resolve the implication of jurisdiction agreements. Perhaps it was done out of an abundance of caution, but there might be more to it: an alternative reading of the case might be that Lord Collins first checked the existence of a jurisdiction agreement under English law and, because the finding was negative, he then turned to the governing law of the contract. In other words, he sought to give to the judgment creditor two bites at a cherry, in a manner similar to what the CJEU did in Case 313/85, *Iveco Fiat SpA v Van Hool* [1986] E.C.R. 3337. This result-oriented approach might have resonance with those who wish to promote the enforcement of foreign judgments.

The second point of contention, once one assumes that the implication of a jurisdiction agreement is a question of fact and English law is to be applied qua the law of the forum, is the approach to implication in English domestic law. For the sake of clarity, the question here is not about a contract governed by English law, but rather about applying English law qua the law of the forum to the issue of jurisdiction of the foreign court.

Lord Collins, perhaps obiter, stated that, as a matter of English law, the choice of foreign law would not lend force to the implication of a jurisdiction agreement in favour of the foreign court. For this proposition, he relied on the following authorities: *Sfeir; Vogel; Jamieson v Northern Electricity Supply Corp (Pte) Ltd.* [1970] S.L.T. 113, 116; *New Hampshire Insurance Co. v Strabag Bau AG* [1992] 1 Lloyd's 361. However, a careful examination of these authorities lends scant support for the conjecture in *Vizcaya Partners.* None of these cases dealt with the situation in which there was an express choice of law clause in favour of the foreign court, as was indeed the case in *Vizcaya Partners*. In those cases, the governing law of the contract was arrived at through the choice of law rules which apply in the absence of choice, rather than through an express choice of law provision. The result might have been different, and rightly so, had the parties made an express choice of law in the contract.

Lord Collins noted that the English authorities on terms implied in fact were comprehensively reviewed by Lord Neuberger in *Marks & Spencer plc. v BNP Paribas Securities Services Trust Co. (Jersey) Ltd.* [2015] UKSC 72 and that the policy of the common law is not to imply such terms lightly, which is why the principles have been formulated in terms of necessity or business efficacy or "it goes without saying". However, while, from the viewpoint of lawyers, choice of law and jurisdiction agreements are conceptually separate, it would not be an exaggeration to state that, at the stage of negotiations, commercial parties, alive to the certainty and predictability of dispute resolution, would often conceive of choice of law and court as a single package. The reasonable parties who would put

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their mind to the possibility of a dispute arising down the road are unlikely to wish to expose their carefully negotiated transaction to the risk of having a Ruritanian judge applying New York law. It is likely that business people who would submit their contract to a foreign legal system would utter the familiar "Oh, of course!" if an officious bystander were to suggest a choice of court agreement.

Lastly, the scope of the holding in *Vizcaya Partners* is inherently limited. It does not apply under the Brussels I Regulation, since an implied jurisdiction agreement is likely to run foul of the writing requirement (*Strabag Bau AG*) and the principle of certainty, immanent in the Brussels regime.

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