The law governing arbitration agreements in a recent judgment of the Supreme Court of the United Kingdom

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1. We are concerned this afternoon with the decision of the Supreme Court of the United Kingdom in *Enka İnşaat ve Sayani AŞ v OOO Insurance Company Chubb* [2020] UKSC 38:

https://www.bailii.org/uk/cases/UKSC/2020/38.html

2. In summary, in *Enka v Chubb*, Enka (a Turkish corporation) was a main contractor on a power station construction project in Russia. A huge fire at the construction site caused damage to the owner's property. The Russian company which owned the project claimed on its insurance with Chubb, a Russian insurance company, which paid out. Chubb thereby claimed to be subrogated to the to the relevant legal rights of its Russian insured, and in reliance on these it claimed compensation against Enka before the Russian courts. The construction contract, to which Enka was party but Chubb was not, contained a provision – the validity of which was not in dispute – for arbitration in London. Pointing to the arbitration agreement, Enka objected to being sued by Chubb, before the Russian courts. Chubb denied that the claim it was bringing fell within the arbitration agreement (the grounds on which it did so are not clearly established), and battle was therefore joined.

3. We need to notice two provisions of the construction contract, which was drafted in Russian and in English, with Russian being conclusive. In Clause 50, the construction contract provided as follows:

> 50.1. The Parties undertake to make in good faith every reasonable effort to resolve any dispute or disagreement arising from or in connection with this Agreement (including disputes regarding validity of this agreement and the fact of its conclusion (hereinafter - 'Dispute') by means of negotiations between themselves. In the event of the failure to resolve any Dispute pursuant to this article within 10 (ten) days from the date that either Party sends a Notification to the opposite Party containing an indication of the given Dispute (the given period may be extended by mutual consent of the Parties) any Party may, by giving written notice, cause the matter to be referred to a meeting between the senior managements of the Contractor and Customer (in the case of the Contractor senior management shall be understood as a member of the executive board or above, in the case of Customer, senior management shall be understood as general directors of their respective companies). The parties may invite the End Customer to such Senior Management Meeting. Such meeting shall be held within fourteen (14) calendar days following the giving of a notice. If the matter is not resolved

> within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:
> • the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
> • the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,
> • the arbitration shall be conducted in the English language, and
> • the place of arbitration shall be London, England.
> 50.2. Unless otherwise explicitly stipulated in this Agreement, the existence of any Dispute shall not give the Contractor the right to suspend Work…
> 50.5. All other documentation such as financial documentation and cover documents for it must be presented in Russian."

4. One sees from this that the Clause contained many details, obligations, which arose to bind the parties when problems began to emerge; if these obligations did not result in satisfaction the clause referred the parties to arbitration. Even at this introductory point we can see that the obligation to arbitrate was a contingent element in a more complex contact term.

5. In Russia, the court at first instance refused to refer the parties to arbitration, one supposes on the basis that the claim which it was bringing did not fall within the four corners of the agreement. The first instance court also dismissed Chubb's claim on its merits. An appeal against those decisions, which amply demonstrate the impartiality and competence of the Russian court, was pending. In England, after some initial stumbling, Enka applied for an injunction to restrain Chubb from proceeding with its Russian claim on the basis that it was obliged by the contract and the arbitration agreement to proceed by 'international arbitration' in English in London. No-one seems to have argued that 'international arbitration' was intended to reduce the relevance of English law to the very minimum. But perhaps it was. As we shall see, the court treated this as English arbitration, or as very English arbitration. Even at this very early stage one may wonder whether it should have.

6. The critical issue, on which the decision of the English court would turn, was the material scope and hence the binding force of the arbitration agreement. Resolution of that issue would require the English court to identify the law that governed the arbitration agreement. As to that, it is important to note that the arbitration agreement was a term of a larger contract, and was undeniably valid: the only question was the content of the obligation to arbitrate. In addition, one should note, the members of the court agreed, by construing the language of the construction contract, albeit in a way which leaves one slightly uneasy, that the parties had not expressed a choice of law to govern the construction contract or, therefore, the arbitration agreement.

7. And as to that last point, in Attachment 17 to the construction contract, 'Applicable Law' was defined as meaning

> Law of the Russian Federation, including legislation of the Russian Federation, all regulatory legal acts of the State Authority Federal Bodies, State Authorities of the constituent entities of the Russian Federation, legislation of the constituent entities of the Russian Federation, regulatory legal acts by Local Authorities and any other applicable regulatory legal acts.

8. With that introduction, I have tried to organise the points which I wish to make into a list of ten, in the hope that this may be helpful and compatible with the structure of this afternoon's session. Let us begin.

(1) What is the conflicts rule that identifies the law which is to govern an arbitration agreement (and where does one find it) ?

9. The point of departure is to identify the source of the conflicts rule which supplies the choice of law rule which determines the scope and meaning of the arbitration agreement. This is a problem because of the exclusion of arbitration agreements from the Rome I Regulation by its Article 1(2)(e). The initial question is what that exclusion means: the answer is that the matter is left to the common law rules of private international law. The consequential question is what those common law rules say; and on this question the court was divided and, in my opinion, wrong. At this point, though, the argument is wholly internal to the common law.

10. One possible deduction from the Regulation's exclusion, was that it required the court to apply the conflicts rules of the common law as these apply or applied to contracts as though Rome I had never been made. Another possible conclusion was that the relevant conflicts rule of the common law was that the arbitration agreement was governed by the law which applied to the construction contract of which it was a term, and that it did not matter how this *lex contractus* was identified). The majority of the court took the former position; the position of the minority seemed to fluctuate between the two.

11. Although the matter is one of pure common law theory at this point, perhaps of reduced interest to a non-common law audience, my own view is that the majority were wrong: that the law that governs the arbitration agreement should be seen as the law (however identified) that governs the contract of which it is a term if the arbitration agreement is a term of a substantive contract. On this view, the exclusion of arbitration from the scope of the Regulation simply means that the Regulation does not claim or demand to apply to it. It does not mean that a court is forbidden to refer to the Regulation as a step in the answer which its native rules of the conflict of laws require it to find. I would have thought this was obvious, but at the moment this is not the prevailing view.

12. It may be thought to follow from the majority that we must identify the law that governs the arbitration agreement as though the Rome I Regulation did not exist. But as we shall see, the majority did not take the advice it appeared to have given itself.

(2) How do parties choose the law to govern the arbitration agreement ?

13. Only in the most rare cases – I am not sure that I have ever seen one – does the substantive contract say in express terms that the law which governs it also governs the arbitration agreement. One is tempted to think that this is because they would regard it as faintly idiotic to be required to choose twice when they think they are making a single contract, but that is simply a guess.

14. It follows that if the law that governs the arbitration agreement is chosen, the choice will have to be demonstrated by other means. The choice of law can be shown only from the contract itself; and the court was unanimous in its conclusion, expressed as a general

proposition, that if the parties have chosen the law to govern the contract, have chosen the *lex contractus*, this will amount to (an implied) choice of that same law to govern the arbitration agreement. This is put on the basis of coherence and consistency; it might also have been based on the proposition that a choice of law to govern every clause of the construction contract except for parts of Clause 50 would be a very strange thing to see.

15. In the case itself, where the contract appeared to have been drafted in Russian and translated into English (there does not appear to have been a Turkish version), both versions being adopted by the parties, there was a provision, in Attachment 17, set out above, which looked as though it might have been a choice by the parties of Russian law to govern their contract. The court appeared to take the view that because it was not a choice of law clause in classic (which means classic English) form, there was no express choice of law in the contract. As the majority judgment put it at [150]:

> Had it been the parties' choice, however, that the construction contract should be governed by the "Applicable Law" as defined in Attachment 17, it would have been simple to say so. Yet, as noted, there is no clause which states this. Rather, the term "Applicable Law" is used in specific provisions of the contract which impose obligations on the contractor to comply with laws and regulations applicable in the country where the construction work was to take place. As the Court of Appeal observed (at para 107), it is a common technique in international construction contracts to define such an applicable law or laws and to impose an obligation to comply with them separately from any choice of the law that is to govern the validity and interpretation of the parties' contractual rights and obligations.

16. But this raises a significant question which the court avoided. If the real question is whether a term in the contract constitutes a choice of law to govern the contract, is the answer to be given by applying the *lex fori*'s sense of what amounts to a choice of law, or the *lex fori*'s drafting conventions about how a choice of law is usually, or should be, expressed ? If the contract appears to be a Russian thing, should we not answer the question whether the parties made a choice by looking to Russian law and Russian principles of drafting ? So that one would ask whether, when looked at through this lens, Attachment 17 would be read as choosing the law that governed the contract and as choosing the law to apply to the arbitration agreement ?

17. The court appeared to opt for a cruder approach, interpreting the term of the contract according to English standards, as though it were drafted by English parties who knew what they were doing and not doing. That seems wrong. It denatures a contract to interpret as though it had been drafted by English professionals; it comes close to being archaic to suggest that if a choice of law is to be made it has to be executed in a particular form or use a prescribed verbal formula. If one has already concluded that a contract is governed by English law, then – but only then – do English principles of construction apply to the contract. Prior to that, it is unconvincing to treat Russian and Turkish parties as though they were English, and the contract they made as subject to English drafting conventions.

18. Even so, the court was unanimous in its conclusion that the construction contract was governed by Russian law. According to the majority of the court at [161] this resulted from Article 4.3 of the Rome I Regulation; according to the minority at [205] it resulted from Article 3.1 of the Regulation, the parties' choice of law being 'clearly demonstrated by the terms of the contract or the circumstances of the case'. The next question is whether this was reason enough to conclude that Russian law applied to the arbitration agreement.

(3) Where the *lex contractus* is identified otherwise than by choice which the parties can be seen to have made, does it also govern the arbitration agreement ?

19. On this issue the court was divided, and this reflected its division on the reason for concluding that the *lex contractus* was Russian law. The majority said that where the parties had not chosen the law that governed the main contract (that is, it was an Article 4 case, not an Article 3 case), the arbitration agreement would generally be governed by the law of the seat, in this case, English law. Their analysis was that the specific identification of the seat, coupled with the parties' failure to choose the law to govern the contract, was enough to indicate that the law of the seat governed the arbitration agreement: not just the procedure, which would be fair enough, but the interpretation of the arbitration agreement.

20. To my mind this is simply and plainly wrong. One notes the irony of the conclusion that the arbitration agreement depends on the particular way the Rome I Regulation applies to the construction contract: that is a very strange way of not applying the Regulation to a matter excluded from it. If one asks for evidence that the parties intended two different laws to govern their contract, it is hard to see any. It is quite useless to say, as the majority did, that a contract can be governed by two different laws. One searches in vain for any indication that this is what the parties focused on and actually wanted. Had they done so, they could have said so…

21. The minority took the view that there was, as a matter of common law theory, no sharp common law line between cases where the law governing a contract is chosen and where it is not. There are several reasons for this. First, the practical reason why the parties did not choose may well be because they saw no need to choose, it being to them blindingly obvious what law would govern their contract, and all of it, and to them it was entirely satisfactory that this was so. After all, and as said before, it would be unreal to suppose that the Turkish and Russian parties who drafted the construction contract were versed in the peculiar drafting conventions of the English conflict of laws.

22. There is a second reason to prefer the minority view. As a matter of fundamental common law theory, and by way of contrast with the Rome I Regulation, a contract is governed by the law which the parties intended to govern it. Choice of law by the parties is no more than a way – a good way, but still only a way – of ascertaining the intention of the parties. That being so, a sharp distinction between choice and non-choice may reflect the Rome I Regulation (which does not apply to the matter at hand!), but it does not reflect the common law whose concern is to identify, from all the evidence, the law which the parties appear to have intended to govern their contract.

23. And in any event, what does the fact that the parties have agreed the arbitral seat tell us about the interpretation of the contract which may, if things go wrong and differences remain unresolved, lead to the arbitral tribunal ? It tells us nothing. It certainly tells us everything about the place, procedure, and process of dispute resolution It tells us that a dispute, defined by the terms of a contract which is governed by Russian law, will be heard and disposed of in London. It does not tell us that English law applies to any part of the contract. In my opinion, the distinction drawn by the majority is unjustified and unprincipled. But they are justices of the Supreme Court of the United Kingdom. And I am not.

(4) What is the approach if parties have not identified the seat of the arbitration ?

24. For the minority, it will obviously make no difference, because they will consider the *lex contractus* to govern the scope of the arbitration agreement in any event.

25. The majority did not need to deal with the possibility, but if they had, what would they have said ? I cannot tell, but the best guess is that they would have had to fall back on the *lex contractus*, even though this has been identified otherwise than by choice. If that is correct, their conclusion comes to this: the arbitration agreement will be governed by the *lex contractus* except where the parties have not chosen the *lex contractus* but have specified the seat of the arbitration. I don't know what others think, but this strikes me as a rather surprising legal rule. If it is justifiable, at least from a common lawyer's perspective, it has to be on the basis that this is the court's best attempt to ascertain the intention of the parties.

26. And that raises, for the second time this afternoon, an extremely difficult issue. This time we cannot ignore it, alas. When an English court has to deduce the intentions of English parties, who have drafted or agreed to documents in the English language, the application of the English common law's rules of contractual interpretation, which are themselves rather challenging, can be justified as forming the background against which the parties may be taken to have acted. The basic rule of the common law is that the intentions of parties are assessed objectively rather than subjectively: the court does not try to open a window into the parties' minds. Where parties have concluded a contract and have reduced it to writing, their intentions are gathered from the written contract. These rules work well when the parties are English, working and writing in their native language and unaffected by any non-English legal tradition.

27. But these rules were not designed to work, and do not work well, when the parties are not English, are not drafting in their native language or their native law. To apply English common law rules of construction to establish the intentions of parties who were in no relevant sense English, seems wrong in principle. If it produces a rule in the terms which the majority of the court supported, it is wrong in its result.

28. Let me be clear about something important, though. This was an application heard in conditions of some urgency. The idea that an English court could be called on the ascertain the true contractual intentions of Turkish and Russian corporate entities (and/or their various legal representatives) is undoubtedly challenging. The English court would presumably interpret the words they used against the interpretive background appropriate to the parties; it would presumably have asked what reasonable Turkish and Russian entities would have taken the counterparty to mean, and so on. And that takes time, and evidence. It may therefore be that the court felt that it needed to cut corners; the court was not sympathetic to the view of the judge at first instance who had concluded – rather sensibly, one may think – that this was a task better discharged by a court in Russia. My point is simply that it should make the minimum number of questionable assumptions; and that is why I prefer the judgment of the minority. It will obviously take a lot of work to persuade the English courts to reconsider this. It may not be possible at all.

(5) Does the idea of severability play any useful part in this analysis ?

29. No, it does not. It is well understood that the dispute resolution provisions of a contract are severable from the main body of the contract so that their validity is not called into question

when the validity of the main contract is called into question. Many good and sufficient practical reasons justify this conclusion: it is, as usual, the attempt to find unnecessary theoretical explanations which makes everything worse. The best practical reason: when the parties agreed to arbitration in a city, or to adjudication in a country, they will have intended the tribunal or court so designated to have, among its tasks and powers, that of deciding whether the parties were contractually bound to each other. Severability if you like; common sense in any event.

30. But severability is a practical matter. Once it acquires the burden and curse of theory which it absolutely does not need, it spawns mutant arguments. For example, it encourages some to think that because the arbitration is severable it need not be governed by the *lex contractus* of the contract of which it has been made – by the parties themselves ! – as a term. It encourages others to say that it cannot be governed by the law of a contract from which it is always liable to be detached. This strikes me as being terribly wrong; and some of my writing to this effect was referred to in the minority judgment of Lord Burrows. The only conclusion which I consider to be sound is that the severability of an arbitration clause from the body of the contract of which it is a term is completely irrelevant to the question of what is its governing law.

(6) What difference, if any, is made if there is a dispute about the very validity of the arbitration agreement ?

31. The decision of the court required it to identify the law governing the material scope of an arbitration agreement which was agreed to be valid and binding on the parties to it. The analysis would have had to be different – and the only question is how different – if the Russian party, for example, had argued that the arbitration agreement was invalid, or was liable to be rescinded, or simply void of legal effect. There are cases, but they are mercifully few, in which this is the legal analysis of the positions of the parties. But what does happen then ?

32. In the course of its analysis of the law governing the arbitration agreement, the majority suggested that a principle of validation was justifiable, and was supported by allowing the law of the seat to determine the validity of the arbitration agreement: it was assumed that the law at the place of the seat was more likely to regard the arbitration agreement as valid. The majority relied on a case decided by the Court of Appeal, *Sulamérica v Enesa*, in which a London arbitration clause was found to be governed by English law, according to which it would be effective, rather than by the *lex contractus*, Brazilian law, according to which it would not be operative without the consent of one of the parties. That, though, does not appear to raise an issue of validity, just of scope and condition and effect. The so-called principle of validity is an unhelpful contribution to the analysis, not least because we all accept that people who intend to make legally binding agreements sometimes fail.

33. The law that determines whether a contract, or other agreement, was validly made, or made so that the law gives effect to it, is always a cause of difficulty. The common law sought to apply the law which would have governed the contract if it were assumed to be valid; the Rome Convention and Rome I Regulation did and do something similar. In this context, though, it seems easy enough to say that the arbitration agreement does not perish if the contract of which it is a term is alleged, or determined, to be void of legal effect.

34. However, if one party nevertheless says that he did not agree to arbitrate, the law which is to be applied to test the validity of this assertion, if a law is needed, should not be one which assumes that the arbitration is valid, for there is no principled reason for taking one side against the other prior to the decision of the court. In short, there is nothing in the judgment that suggests that the application of the law of the country of the seat will make a useful contribution at this point. The application of whatever choice of law rule the forum court applies when dealing with a contention that one party is not bound to a supposed contract should apply here also. No special treatment is called for.

(7) What is the approach if the arbitration agreement is not (simply) a term contained within the substantive contract ?

35. This question is, on one level, easy to answer. If the parties enter into a freestanding agreement to arbitrate disputes which have arisen or which may arise between them, that agreement, that contract will have its own governing law. The context being one in which the Rome I Regulation cannot apply, an English court will ask which is the law which the parties intended to govern their agreement to arbitrate. In such a case, it will be tempting to say that it must be the law at the seat of the arbitration, for where there is no obvious indication of the intention as to governing law but there is an express choice of seat, the conclusion that this points to the law the parties intended to govern the agreement will be all but irresistible.

36. This leads to the conclusion that the law governing the arbitration agreement will vary according to whether this agreement is or is not a term of another substantive contract; and some will question whether this can be correct. They may say: it is a matter of chance or convenience whether the agreement to arbitrate is included in a contract from which it is severable, or is made to be entirely separate from it. The answer is that it may be a matter of chance, but it is also a fact, and facts have consequences.

37. The answer has to be that sometimes the way we arrange our affairs has consequences which we may not have foreseen. The fact that the parties did not think to conclude an agreement to arbitrate when they made their contract, but did so separately, later, does not mean that we are looking at two ways of doing the same thing, but at two different things altogether.

(8) Does the New York Convention play any part in this analysis ?

38. No, it does not. But for some reason the majority considered that its conclusion, that in this case the arbitration agreement was governed by the law of the place of the seat, was consistent with the New York Convention. At [127] the majority reasons that Article V(1)(a) of the New York Convention is aligned with its conclusion. Article V(1)(a) specifies, among the limited circumstances in which recognition or enforcement by the courts of a Convention state of an award made in another Convention state may be refused, proof that the arbitration agreement ‘is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’. From that the majority deduced that where the parties have not ‘subjected the arbitration agreement to a law of their choice, the law of the place of the seat may be pointed to to impugn the validity of the arbitration agreement.

39. This bears all the hallmarks of inventive advocates offering the court a possible argument which will look good and internationalist, but which is in truth no more than a mirage. It is concerned with the enforcement or non-enforcement of awards, which is a wholly separate issue. The validity of awards is quite separate from the interpretation of agreements, and to read across from one to the other is without legal or logical justification.

(9) What is the correct approach when the issue arises not between the original contracting parties but after assignment, subrogation, succession or transfer of the original contractual rights ?

40. This issue does not directly arise from the discussion in the judgment itself, and it does not affect the law which governs the arbitration agreement, but it is necessary to mention it before we come to the tenth point.

41. On the Russian side, the original contracting party, Energoproekt, had transferred its rights and obligations under the construction contract to another Russian company, Unipro, with the agreement of Enka. The fact that it had transferred rights and obligation, with the consent of Enka, made the process more a novation than an assignment. However, Chubb paid out to Unipro, and became – it does not appear to be disputed – subrogated to Unipro's right to claim compensation from Enka. That right of Unipro not to be damaged by Enka derived from the contract with Enka which contained Clause 50. It appears to have been assumed in England – I have no idea what view was taken in Moscow – that Chubb was bound by whatever duty to arbitrate bound or would have bound the party it insured.

42. How that result comes about is harder to say. The dominant English view appears to be that it would be unconscionable, or contrary to equitable principle, if the insurer were to proceed against the defendant outside arbitration. It is not a matter of contract law, for the insurer is not party to the construction contract. But if the right of which the insurer takes control is created by the contract, the insurer will only be allowed to exercise it in the way in which the contracting party could itself have done. In other words, the duty to proceed to arbitration does not come from the litigant's promise to arbitrate, but from the court's analysis that the right sought to be enforced against the defendant has impressed on it the duty to arbitrate, so that whoever picks it up and asserts is bound to do so only in arbitration. That seems to suggest the rule being applied is part of the *lex fori*, not part of the arbitration agreement.

(10) And the injunction ?

43. This brings us to our last point. A majority of the Supreme Court concluded that the right which Chubb sought to enforce against Enka was one which required it to enforce by arbitration in London. The court therefore ordered an injunction to restrain Chubb from pursuing its legal proceedings before the appellate court in Russia. The court was unanimous in its conclusion that *if* the arbitration agreement was governed by English law it applied to the dispute raised between the parties; that being so and the seat being in London, the Russian proceedings were being brought by Chubb contrary to its legal (or perhaps equitable) obligations, and that commission of such a wrong could and should be restrained by injunction. Had the conclusion of the court been that the arbitration agreement was governed by Russian law, it would have been necessary to send the case back to the first instance court for a proper

investigation of whether, as a matter of Russian law, the dispute fell within the arbitration agreement: that question had not been dealt with below, so it would have needed to be investigated.

44. The proposition that the court may and should act if London is the seat of the arbitration is well established; the proposition that a party who is breaking its contract, or (perhaps in the case of subrogation or assignment) committing an equitable wrong equivalent to breaking its contract, is entirely orthodox in English law. At the end, the conclusion certainly follows from the premises. The difficulty is with the analysis of the majority, rather than with its conclusion.

45. The argument was certainly raised that even if the arbitration agreement was governed by English law, the court should have refrained from issuing an injunction and have left it to the Russian court to take the decision. After all, Russia is a signatory to the New York Convention, and there was no obvious reason in this case – it is not always so, but one may quietly observe that Russia and Turkey, Putin and Erdogan, have formed some kind of authoritarian alliance – to suspect that the Russian court would favour one side over the other. The trouble was that the Appeal Court was expected to deal with both issues which had been before the court below, with the result that it might deliver judgment on the merits of Chubb's claim in circumstances in which the parties were bound to arbitrate in London. That made the case for intervention a practical one.

46. Would the answer have been different if the seat had been located in a city outside the United Kingdom ? It is a good question – it has always been a good question – but our courts have managed to avoid giving it an answer.

47. There will be a suspicion in some minds that the decision was also intended to proclaim the new freedom which English courts have to give full and proper effect to arbitration agreements. One notes the rather jarring self-congratulation at [24]; but in a competitive world – and it is a competitive world – this is only to be expected. Freed from the shackles of the decision in C-185/07 *Allianz v West Tankers*, the English courts are free to reassert the basic truth of the English common law (even in the context of an 'international arbitration', as I observed at the beginning, that a party which is breaching its legal obligation to another may be brought before the court and ordered to behave in accordance with the requirements of the law and of conscience. That was how English law was, and that is how English law will be again. That, perhaps, is the basic offering of London arbitration.

48. And I should make it clear that I approve of this aspect of the decision wholeheartedly. If an English court has arrived at the conclusion that a person who is subject to its jurisdiction is committing a legal wrong, invading the legal or equitable rights of the claimant, it has never been attractive to say that it should, nevertheless, refrain from doing anything to prevent the wrong and leave it to the courts at the place of the wrongful conduct to deal with it. There may be another way of looking at it, but I do not understand it.

Conclusion

49. I was invited to speak about the law governing an arbitration agreement in the recent decision of the Supreme Court. I have tried to do that. In summary, the answer is that the law governing the arbitration agreement will be the law governing the contract of which it is a term, that latter law being identified by the Rome I Regulation. You will have seen that the issue on which the court was divided was one of identifying that law in one specific case: when the

parties to the contract of which it is a term *have not* chosen the law in accordance with Article 3 of the Rome I Regulation but *have* identified the seat of the arbitration: the majority of the court considers that in this one case the arbitration agreement is governed by the law of the country at the place of the seat. That makes a fairly narrow point of difference; but it allows us to think more broadly about the manner in which we approach this rather question which, at first sight, can be simply put but which, on closer inspection, seems to more complicated than it really ought to be.

50. Thank you for your attention.