Note: Kout Food Group v. Kabab-Ji SAL. Cour de Cassation, Pourvoi nº 20-20.260, 28 September 2022

Nota: Kout Food Group v. Kabab-Ji SAL. Corte de Cassação, Recurso nº 20-20.260, 28 de Setembro de 2022

SUMMARY: I – Decision; II – Commentary; II.A Introduction; II.B Background; II.C KFG's jurisdictional objection; II.D French Cour de cassation's decision; II.E Divergence between French and English courts; II.F Lack of common ground on the law applicable to the arbitration agreement; II.G Conclusion; References.

I – DECISION

COUR DE CASSATION

Première chambre civile

Arrêt nº 679 FS-B

Pourvoi nº K 20-20.260

M. Pascal CHAUVIN (président)

Audience publique du 28 septembre 2022

Kout Food Group (Koweit) v. Kabab-Ji SAL (Liban)

Exposé du litige

Faits et procédure

1. Selon l'arrêt attaqué (Paris, 23 juin 2020), le 16 juillet 2001, la société libanaise Kabab-Ji a conclu avec la société koweïtienne Al-Homaizi Foodstuff Co WWL (AHFC) un contrat de franchise d'une durée de dix années pour l'exploitation de la marque de restauration «Kabab-Ji» au Koweït. Le contrat de franchise, ainsi que les accords conclus pour chaque point de vente, prévoyaient l'application du droit anglais. Ils stipulaient une clause d'arbitrage à [Localité 3] selon le règlement de conciliation et d'arbitrage de la Chambre de commerce internationale (CCI).

2. En 2004, la société AHFC a informé la société Kabab-Ji de la restructuration du groupe par la création d'une société holding koweïtienne, Gulf and World Restaurants & Food, devenue Kout Food Group (KFG).

3. Le 16 juillet 2011, faute de nouvel accord, les contrats sont arrivés à expiration.

4. Le 27 mars 2015, la société Kabab-Ji a introduit devant la CCI une procédure d'arbitrage à l'encontre de la société KFG. Par une sentence rendue à Paris le 11 septembre 2017, le tribunal arbitral a étendu les contrats à la société KFG et condamné celle-ci à verser à la société Kabab-Ji les redevances de licence impayées entre 2008 et 2011, outre une indemnité au titre de la perte de chance.

[...]

Moyens

Sur le premier moyen

Enoncé du moyen

6. La société KFG fait grief à l'arrêt de rejeter son recours en annulation de la sentence, alors:

«1º/ que l'existence et l'efficacité de la convention d'arbitrage s'apprécient au regard de la loi expressément choisie par les parties pour la régir; qu'en se prononçant comme elle l'a fait, motifs pris notamment qu' «aucune stipulation expresse n'a été convenue entre les parties qui désignerait la loi anglaise, comme régissant la clause compromissoire» et que «KFG ne rapporte pas la preuve d'aucune circonstance de nature à établir de manière non équivoque la volonté commune des parties de désigner le droit anglais comme régissant l'efficacité, le transfert ou l'extension de la clause compromissoire, et dont le régime est indépendant de celui des accords», après avoir pourtant constaté que selon l'article 1 du Contrat de développement de franchise (CDF), signé entre Kabab-Ji et AHFC le 16 juillet 2001, intitulé «contenu du contrat», «le présent contrat comprend les paragraphes qui précèdent, les termes énoncés ci-après, les documents qui y sont mentionnés ainsi que toute(s) pièce(s), annexe(s) ou modification(s) à celui-ci ou à ses accessoires qui doit être signé ultérieurement par les parties. Il doit être interprété dans son ensemble et chacun des documents mentionnés doit être considéré comme faisant partie intégrante du présent Contrat et interprété comme un complément aux autres», que selon l'article 15 du même contrat, et l'article 27 des CPVFs, il était prévu que le «présent Contrat sera régi par le droit anglais et interprété conformément à ces dispositions», et que selon les clauses compromissoires figurant au CDF et aux CPVFs (articles 14 et 26), les arbitres devaient appliquer «les stipulations

contenues dans le Contrat» et les «principes de droit généralement reconnus dans le cadre des transactions internationales» et ne pouvaient appliquer «toute règle qui contredit la formulation stricte du Contrat», ce dont il résultait que les parties ont expressément soumis au droit anglais les conventions d'arbitrage, la cour d'appel n'a pas tiré les conséquences légales de ses constatations au regard de l'article 1520.1º du code de procédure civile;

2º/ que le juge ne peut dénaturer l'écrit qui lui est soumis; qu'en se prononçant comme elle l'a fait, après avoir constaté que selon l'article 1 du Contrat de développement de franchise (CDF), signé entre Kabab-Ji et AHFC le 16 juillet 2001, intitulé «contenu du contrat», «le présent contrat comprend les paragraphes qui précèdent, les termes énoncés ci-après, les documents qui y sont mentionnés ainsi que toute(s) pièce(s), annexe(s) ou modification(s) à celui-ci ou à ses accessoires qui doit être signé ultérieurement par les parties. Il doit être interprété dans son ensemble et chacun des documents mentionnés doit être considéré comme faisant partie intégrante du présent Contrat et interprété comme un complément aux autres», que selon l'article 15 du même contrat, et de l'article 27 des CPVFs, il était prévu que le «présent Contrat sera régi par le droit anglais et interprété conformément à ces dispositions» et que selon les clauses compromissoires figurant au CDF et aux CPVFs (articles 14 et 26) les arbitres devaient appliquer «les stipulations contenues dans le Contrat» et les «principes de droit généralement reconnus dans le cadre des transactions internationales» et ne pouvaient appliquer «toute règle qui contredit la formulation stricte du Contrat», ce dont il résultait que les parties ont expressément soumis au droit anglais les conventions d'arbitrage, la cour d'appel a dénaturé les termes clairs et précis des articles 1, 14 et 15 du CDF et 26 et 27 des CPVFs, en méconnaissance de l'obligation faite au juge de ne pas dénaturer l'écrit qui lui est soumis;

3º/ en toute hypothèse, que l'existence et l'efficacité de la convention d'arbitrage s'apprécient au regard de la loi choisie par les parties pour la régir; qu'à défaut de stipulations manifestant une intention contraire des parties, le choix de la loi applicable au contrat est présumé valoir pour l'ensemble de ses stipulations, en ce compris la clause compromissoire; qu'en statuant comme elle l'a fait, après avoir constaté que le CDF et les CPVFs étaient expressément soumis au droit anglais et devaient être interprétés conformément à ces dispositions, sans caractériser une intention contraire des parties de soumettre l'existence et l'efficacité de la convention d'arbitrage à une autre loi que celle applicable au contrat, la cour d'appel n'a pas légalement justifié sa décision au regard de l'article 1520.1º du code de procédure civile.

Motivation

Réponse de la Cour

7. En vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique, à moins que les parties aient expressément soumis la validité et les effets de la convention d'arbitrage elle-même à une telle loi.

8. Ayant souverainement retenu que le choix du droit anglais comme loi régissant les contrats, ainsi que la stipulation selon laquelle il était interdit aux arbitres d'appliquer des règles qui contrediraient les contrats, ne suffisaient pas à établir la commune volonté des parties de soumettre l'efficacité de la convention d'arbitrage au droit anglais, par dérogation aux règles matérielles du siège de l'arbitrage expressément désigné par les contrats, et que la société KFG ne rapportait la preuve d'aucune circonstance de nature à établir de manière non équivoque la volonté commune des parties de désigner le droit anglais comme régissant l'efficacité, le transfert ou l'extension de la clause compromissoire, la cour d'appel a, sans dénaturation, légalement justifié sa décision d'apprécier l'existence et l'efficacité de la convention d'arbitrage, non pas au regard du droit anglais, mais au regard des règles matérielles du droit français en matière d'arbitrage international.

9. Le moyen n'est donc pas fondé.

Dispositif

PAR CES MOTIFS, la Cour:

REJETTE le pourvoi;

Condamne la société Kout Food Group aux dépens;

En application de l'article 700 du code de procédure civile, rejette la demande formée par la société Kout Food Group et la condamne à payer à la société Kabab-Ji la somme de 3 000 euros;

Ainsi fait et jugé par la Cour de cassation, première chambre civile, et prononcé par le président en son audience publique du vingt-huit septembre deux mille vingt-deux.

II – COMMENTARY

II.A INTRODUCTION

On 28 September 2022, the *Cour de cassation* in France issued its ruling in the well-known *Kabab-Ji v. Kout Food Group* case[1], which gained the spotlight in recent years due to the dispute between the parties on the law applicable to the arbitration agreement. This case evidenced the divergence between French and English courts on this issue as the arbitral award gave rise to parallel annulment and enforcement proceedings in both countries, resulting in contradictory decisions.

Whilst it is well established in international arbitration that different laws may govern the underlying contract and the arbitration clause, there is no common ground as to which law shall govern the arbitration agreement where there is no express provision in this regard (which is almost invariably the case). The issue is raised mainly where one of the parties challenges the validity or scope of the arbitration clause, and the choice-of-law may impact the outcome of the case. For instance, depending on the law applicable to the arbitration agreement, a certain subject-matter might be considered arbitrable or not and a non-signatory included or excluded from the subjective scope of the arbitration agreement.

In the *Kabab-Ji v. Kout Food Group* case it was in dispute between the parties whether a non-signatory party was bound by the arbitration agreement that had been signed only by another company of the same group. In order to ascertain the subjective scope of the arbitration agreement the arbitral tribunal had to decide whether it would base its decision on French law, given that the seat was in Paris, or apply English law, in accordance with the choice-of law clause. The arbitral tribunal decided to extend the arbitration agreement by applying the French law approach towards the applicable law to the arbitration agreement and the arbitral award was challenged before the French courts.

As shown below, the *Cour de cassation* stood by its long-standing position that the scope of the arbitration agreement shall be assessed in light of the parties' common intention without the need for a conflict-of-law analysis and upheld the arbitral tribunal's award. The *Cour de cassation*'s decision was contradictory to the judgment of the UK Supreme Court, which decided that

1 Cour de cassation, Kabab-Ji SAL Company v. Kout Food Group Company, Pourvoi nº 20-20.260, 28 September 2022.

English law should govern the arbitration agreement, and this should not be extended.

II.B BACKGROUND

The dispute that led to the decision of the French *Cour de cassation* arose from a Franchise Development Agreement ("FDA") entered into between the Lebanese company Kabab-Ji Sal and the Kuwaiti company Al Homaizi Foodstuff Company ("AHFC") on 16 July 2001. Under the FDA, the franchisor Kabab-Ji granted a licence to the franchisee AHFC to operate franchise outlets using its restaurant concept in Kuwait for a ten-year period. In addition, the parties concluded specific Franchise Outlet Agreements ("FOAs") with respect to each franchise outlet opened in Kuwait.

Both the FDA and the FOAs ("Agreements") provided for the application of English law and contained arbitration clauses referring to the ICC Rules and selecting Paris as the seat of the arbitration.

In 2005, AHFC's group underwent a corporate restructuring. As a result, the holding company Kout Food Group ("KFG") was established and AHFC became its subsidiary. Kabab-Ji was informed of the restructuring on 2 October 2004 and consented to it provided that the operation would not affect the terms and conditions of the contracts between them[2].

On 16 July 2011, the Agreements expired without the parties having agreed upon their extension or renewal[3].

On 27 March 2015, Kabab-Ji commenced arbitration proceedings against KFG only i.e. without including the original signatory AHFC. KFG raised a jurisdictional objection claiming that it was not a party to the Agreements or to their arbitration clauses[4].

On 11 September 2017, the arbitral tribunal, composed of the president, Mr Bruno Leurent, and the co-arbitrators, Mr Mohamed Abdel Wahab and Mr Klaus Reichert, rendered an award by majority holding that KFG was bound by the arbitration clause under French law. Furthermore, the arbitral tribunal found that KFG was in breach of the Agreements according to English law, and

2 Paris Court of Appeal, No. 17/22943, 23 June 2020, para. 4.
3 Paris Court of Appeal, No. 17/22943, 23 June 2020, para. 5.
4 UK Supreme Court, Kabab-Ji SAL Company v. Kout Food Group Company, [2021] UKSC 48, para. 5.

awarded unpaid licence fees, compensation for Kabab-Ji's loss of chance and legal costs[5].

Following the issuance of the award, KFG initiated setting aside proceedings in France, the seat of the arbitration, whilst Kabab-Ji brough enforcement proceedings in England.

II.C KFG'S JURISDICTIONAL OBJECTION

KFG participated in the arbitration under protest arguing that it was not a party to the Agreements, or the arbitration clauses contained therein[6]. KFG contended that the existence and effectiveness of the arbitration clause are matters governed by the law chosen by the parties and that the parties had expressly chosen English law to govern the Agreements. According to KFG, it did not become a party to the arbitration agreement under English law. KFG relied on the wording of the contractual provisions and the interplay between them arguing that the term "Agreement" was defined in the contract and covered all its terms, including the arbitration clause. It was KFG's case that the parties had expressly agreed that the "Agreement" as a whole was subject to English law.

The relevant contractual provisions on which KFG relied read as follows[7]:

> Article 1: Content of the Agreement
>
> This Agreement consists of the foregoing paragraphs, the terms of agreement set forth herein below, the documents stated in it, and any effective Exhibit(s), Schedule(s) or Amendment(s) to the Agreement or to its attachments which shall be signed later on by both Parties. It shall be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others.
>
> Article 14: Settlement of Disputes
>
> [...]
>
> 14.2. Except for those matters which specifically involve the Mark, any dispute, controversy or claim between LICENSOR and LICENSEE with respect to any issue arising out of or relating to this Agreement or the breach thereof, ... shall, failing amicable settlement, on request of LICENSOR or LICENSEE, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
>
> 14.3. The arbitrator(s) shall apply the provisions contained in the Agreement. The arbitrator(s) shall also apply principles of law generally recognised in international transactions. The arbitrator(s) may have to take into consideration some mandatory provisions of some countries i.e. provisions that appear later on to have an influence on the Agreement. Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement.
>
> [...]
>
> 14.5. The arbitration shall be conducted in the English language, in Paris, France.
>
> Article 15: Governing Law
>
> This Agreement shall be governed by and construed in accordance with the laws of England.

II.D FRENCH COUR DE CASSATION'S DECISION

The French *Cour de cassation* did not deviate from its long-standing approach and dismissed KFG's appeal. The court reiterated once again that, given the separability presumption of the arbitration agreement, and unless the parties have specifically chosen its governing law, the parties' common intent should be applied to analyze its subjective scope, without the necessity of resorting to a specific law. The French courts understand that the intention of the parties is only limited by the mandatory rules of French law and by international public policy.

The *Cour de cassation* found that the Paris Court of Appeal correctly decided to assess the scope of the arbitration clause by taking into consideration the substantive arbitration rules of French law on international arbitration as the latter had found that (i) the choice of English law to govern the underlying agreement was not sufficient to demonstrate that the parties intended to submit the arbitration agreement to such law in derogation of the rules of the seat of the arbitration and that (ii) KFG did not provide evidence of any circumstance that might show that it was the parties' intention that the effectiveness, transfer or extension of the arbitration agreement should be subject to English law.

The *Cour de cassation* does not review the facts of the case, but only decides whether the law has been correctly applied. The facts were considered by the Paris Court of Appeal which is supposed to analyze the arbitrators' decisions by

5 Mr Klaus Reichert dissented. As stated in the judgement of the United Kingdom Court of Appeal: "The dissenting third arbitrator Mr Klaus Reichert SC, who is an English qualified lawyer, agreed that French law applied to the issue of validity of the arbitration agreement, but dissented by concluding that the appellant's case should fail because, applying English law, KFG never became a counterparty to the FDA which meant that it owed no obligation to the appellant under the FDA and that the appellant had sued the wrong party" ([2020] EWCA 6, para. 4).

6 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company, [2021] UKSC 48, para. 5.

7 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company, [2021] UKSC 48, para. 37.

taking into account all legal and factual elements. Besides holding that it was not the parties' intention to apply another law to the arbitration agreement other than the law of the seat of the arbitration, the Paris Court of Appeal found that KFG should be bound by the arbitration clause due to its involvement in the contract. The Paris Court of Appeal found that KFG performed the agreement by managing the restaurants in Kuwait, paying royalties, presenting itself as Kabab-Ji's interlocutor and leading the negotiation on the Franchisee's side regarding a possible renewal of the Agreements. Accordingly, the Paris Court of Appeal decided that the arbitral tribunal rightly found that the arbitration clause extended to KFG without having to decide whether the arbitration clause had been transferred from AHFC to KFG.

II.E DIVERGENCE BETWEEN FRENCH AND ENGLISH COURTS

The *Cour de cassation's* decision is opposite to the decision handed down by the UK Supreme Court arising from the same case. On 27 October 2021, the UK Supreme Court held that the recognition and enforcement of the award had been rightly refused on the grounds that the law governing the arbitration agreement was English rather than French law and that, under the former, KFG did not become a party to the arbitration agreement.

The UK Supreme Court reinforced the conclusions reached in the *Enka* case[8], in which it had set out guidance as to the law applicable to the arbitration agreement[9]. In that case, the UK Supreme Court found that a choice of governing law for the contract generally applies to the arbitration agreement that is contained therein, unless the parties have agreed otherwise. The court also stated that the choice of a different country as the seat of the arbitration is not sufficient to rule out the presumption that the governing law of the underlying contract is also applicable to the arbitration agreement. Furthermore, by interpreting Articles 1, 14 and 15 quoted above, the UK Supreme Court found that there was no wording indicating that the parties intended to except Article 14 of their choice of English law to govern all the terms of the FDA[10].

When deciding whether KFG became a party to the arbitration agreement under English law, the UK Supreme Court first noted that Kabab-Ji claimed that KFG became a party to the arbitration agreement by becoming a party to the FDA, and that there were no arguments that KFG would have become a party to

8 UK Supreme Court, Enka Insaat ve Sanayi A.S. *v.* OOO Insurance Company Chubb [2020] UKSC 38.
9 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company [2021] UKSC 48, para. 5.
10 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company [2021] UKSC 48, para. 39.

the arbitration agreement otherwise[11]. However, the UK Supreme Court found that there was no agreement in writing to this effect between the parties and therefore it ruled that KFG did not become a party to the FDA and consequently neither to the arbitration agreement[12]. The UK Supreme Court held that the FDA provided that it could be amended only in writing and that the contractual provisions prohibiting oral modification were an obstacle to Kabab-Ji's case that KFG became a party because there had a been a novation of the FDA[13].

II.F LACK OF COMMON GROUND ON THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

International arbitrations may involve a myriad of laws. For instance, it is possible that different laws govern the substantive aspects of the contract, the arbitration agreement and the arbitration proceedings[14]. However, while the parties usually select the law applicable to the underlying contract through a choice-of-law clause and choose the *lex arbitri* by agreeing on the seat of the arbitration, the parties almost invariably neglect the choice of a specific law to govern the arbitration agreement. The reason behind this is that those negotiating international agreements are quite often unfamiliar with arbitration, or because they opt to remain silent to avoid potential points of conflict during the negotiations. Nevertheless, despite being neglected, the law applicable to the arbitration agreement plays a decisive role as it governs e.g. the arbitrability of the subject-matter and the validity of the arbitration clause.

Where there is no express agreement in this regard, the question of which law applies to the arbitration clause becomes much more complex where the seat of the arbitration is in a country other than the one of the law applicable to the merits of the contract.

Due to the separability presumption, the arbitration agreement clause is autonomous from the contract in which it has been included. This principle has two main consequences: (i) the invalidity of the main contract does not necessarily imply the invalidity of the arbitration clause; (ii) the possibility that the clause may be governed by a law other than that applicable to the main contract. The separability presumption was referred by the *Cour de cassation*, establishing that "due to a substantive rule of the law of international arbitration, the arbitration clause is legally independent of the main contract which contains

11 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company [2021] UKSC 48, para. 54.
12 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company [2021] UKSC 48, para. 54.
13 UK Supreme Court, Kabab-Ji SAL Company *v.* Kout Food Group Company [2021] UKSC 48, para. 69.
14 See OHLROGGE, Leonardo; SAYDELLES, Rodrigo Salton Rotunno. Lei aplicável à cláusula compromissória na arbitragem internacional. *Revista de Arbitragem e Mediação*, n. 7, p. 241-268, out.-dez. 2020.

it directly or by reference"[15]. Such "substantive rule" ("*une règle matérielle du droit de l'arbitrage international*"), i.e. the separability principle, is one of the pillars of arbitration and is expressly provided for in the arbitration laws of several countries[16].

Given that under the separability principle different laws may govern the main contract and the arbitration agreement, it is important to establish criteria to determine the applicable law to the latter. However, there is currently little consensus on these criteria, leaving a large margin of uncertainty[17]. Scholars and courts have been achieving different conclusions regarding what the optimal choice of law to govern the arbitration clause would be, and how to determine it.

Nevertheless, there are two prevailing approaches.

The first possibility for the governing law of the arbitration agreement is the law that governs the underlying contract. Some legal scholars hold the view that there is even a presumption in this regard[18], which should be especially strong when the arbitration agreement is included in the body of the contract itself[19]. They consider that there would be no special reason to choose another law to govern only one of the clauses of the contract just because this clause is the arbitration agreement[20]. In this sense, in *Sonatrach Petroleum v. Ferrell International*[21], the England and Wales High Court held in 2001 that "[w]here the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the

15 "En vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence".

16 For example: United Kingdom (UK Arbitration Act, 1996, Session 7); Brazil (Act 9.307/96, Art. 8); Portugal (Voluntary Arbitration Law, Art. 18, (2)(3)); France (*Code de Procédure Civile*, Art. 1447); Switzerland (Federal Act on Private International Law, Art. 178(3)); Scotland (Arbitration Act 2010, art. 5); Spain (Ley 60/2003, 22(1)); Sweden (Swedish Arbitration Act – SFS 1999:116, Section 3). Moreover, the principle is also referred to in Art. 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (2006).

17 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. 2nd ed. New York: Cambridge University Press, 2012. p. 69; ASHFORD, Peter. The Law of The Arbitration Agreement: The English Courts Decide? In: *The American Review of International Arbitration*, v. 24, n. 3, p. 469-485, 2013. p. 469.

18 LEW, Julian; MISTELIS, Loukas; KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 109; COLLINS, Lawrence. The law governing the agreement and procedure in international arbitration in England. In: Julian Lew (ed.). *Contemporary Problems in International Arbitration*. London: Springer-Science+Bussiness Media, B. V. 1987, p. 127; DERAINS, Yves. ICC Arbitral Process: Part VIII. Choice of Law Applicable to the Contract and International Arbitration. *In: ICC International Court of Arbitration Bulletin*, v. 6, n. 1, 1995. p. 16-17.

19 LEW, Julian. SulAmérica and Arsanovia: English Law Governing Arbitration Agreements. In: AFFAKI, Georges; NAON, Horacio Grigera. *Dossier of the ICC Institute of World Business Law*: Jurisdictional Choices. Paris: ICC, 2015. p. 136.

20 REDFERN, Alan; HUNTER, Martin; BLACKABY, Nigel; PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 6th ed. 2015. p. 159.

21 England and Wales High Court, Sonatrach Petroleum Corp (BVI) *v.* Ferrell International Ltd, [2001] EWHC 481 (Comm).

substantive contract". Such approach was confirmed in further case law and is especially strong under English law. According to the UK Supreme Court in the *Enka* Case,"[w]here the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract"[22].

The second possibility is to consider the law of the arbitration seat also applicable to the arbitration agreement. Such approach was adopted in several decisions, which ruled that there is a strong tendency to understand that the arbitration clause is subject to the law of the seat of arbitration in the absence of an express contractual provision as to the law applicable to the arbitration agreement[23]. Furthermore, it is also understood that Article V(1)(a) of the 1958 New York Convention contains a conflict of laws rule according to which the validity of the arbitration clause will be examined according to the law chosen by the parties or, in the absence thereof, according to the law where the award was made, i.e., the law of the seat[24]. In analyzing this provision of the New York Convention, Gary Born identifies the law of the place of arbitration as a general rule when the parties do not choose a law applicable to the arbitration agreement ("mandatory international default rule")[25].

French courts have developed a third alternative, which consists in analyzing the existence and scope of the arbitration agreement through the common intent of the parties. French courts understand that international arbitration clauses are "autonomous" from any legal system, and should be governed by general principles of international law[26]. The leading case of such approach was the *Municipalité de Khoms El Mergeb v. Société Dalico* decided

22 UK Supreme Court, Enka Insaat ve Sanayi A.S. *v.* OOO Insurance Company Chubb [2020] UKSC 38.

23 The arbitration laws of Sweden and Scotland also provide for the application of the law of the seat to the arbitration clause when the contract is silent. The Swedish Arbitration Act in Section 48 provides that "If an arbitration agreement has an international connection, the agreement shall be governed by *the law agreed upon by* the parties. If the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country where, in accordance with the parties' agreement, the arbitration had or shall have its seat. The first paragraph shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement or was duly represented". The Scotland Arbitration Act of 2010 provides in its section 6 that "Where (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law".

24 FOUCHARD, Philippe; GAILLARD, Emmanuel; GOLDMAND, Berthold. *Fouchard Gaillard Goldman on International Arbitration*. The Hague: Kluwer Law International, 1999. p. 227; REDFERN, Alan; HUNTER, Martin; BLACKABY, Nigel; PARTASIDES, Constantine. *Op. cit.*, p. 160.

25 "In cases where 'the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly),' then Article V(1)(a)'s second prong expressly prescribes a mandatory international default rule. That default rule, which was one of the Convention's major innovations, is the law of the arbitral seat, not the law governing the underlying contract. It violates the Convention for national courts to reject this default rule, in favor of either the law governing the underlying contract, the law of the enforcement forum, or otherwise" (BORN, Gary. *International Commercial Arbitration*. 3rd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 603).

26 BORN, Gary. *Op. cit.*, p. 516.

by the French *Cour de cassation* in 1993[27]. The *Cour de cassation* found that the common intent of the parties was enough for an international arbitration to be valid, with no need for any legal reference to a statutory law[28]. The only limits to be considered by this approach are the international public order and the mandatory provisions of French law[29]. Such approach was also followed in 2003, in *Société Uni-Kod v. Société Ouralkali*[30], and in 2009, in *SA Burkinabe des ciments et matériaux v. Société des ciments d'Abidjan*[31]. The position adopted by the French courts aims to give maximum legal effect to agreements to arbitrate, being considered a "pro-arbitration" approach[32]. In the context of the jurisdictional objections involving non-signatory parties like in the *Kout Food Group v. Kabab-Ji SAL* case, the French approach has the advantage of enabling arbitrators and courts to focus exclusively on the parties' intentions leaving aside nuances of different arbitration laws. Nevertheless, it should be noted that even though French courts follow an approach detached from a specific law, the intention of the parties are limited by French law, the law of the seat.

To avoid uncertainty, it is recommended that the parties take into account the consequences of the separability principle where the law applicable to the underlying agreement differs from the law of the seat of the arbitration. Notably, the model clause provided by the Hong Kong International Arbitration Centre (HKIAC) suggests that the parties make an express choice in such cases[33].

27 *Cour de cassation*, n. de pourvoi 91-16828, 1993.

28 "Mais attendu qu'en vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique".

29 LEW, Julian; MISTELIS, Loukas; KRÖLL, Stefan. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. p. 126-127.

30 "En vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence, et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique".

31 "Mais attendu qu'en matière internationale, la clause d'arbitrage, juridiquement indépendante du contrat principal, est transmise avec lui, quelle que soit la validité de la transmission des droits substantiels".

32 BORN, Gary. *International Commercial Arbitration*. 3rd ed. Alphen aan den Rijn: Kluwer Law International, 2014. p. 516.

33 Hong Kong International Arbitration Centre (HKIAC)'s model clause: "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The law of this arbitration clause shall be... (Hong Kong law). * The seat of arbitration shall be... (Hong Kong). The number of arbitrators shall be... (one or three). The arbitration proceedings shall be conducted in... (insert language) – Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different". The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract".

II.G CONCLUSION

The decision of the *Cour de cassation* in the *Kabab-Ji v. KFG* confirmed once again its well-established position that, where the seat of the arbitration is in France, the scope of the arbitration agreement shall be assessed purely by focusing on the parties' common intent ("*d'après la commune volonté des parties*"). This analysis is detached from the provisions of any national law to the extent that the mandatory rules of French law on international arbitration are not violated ("*sous réserve des règles impératives du droit français et de l'ordre public international*").

The conflicting decisions rendered by French and English courts demonstrate that there is no international common ground towards the law applicable to the arbitration agreement. However, predictability can be achieved by expressly providing in the arbitration agreement for which law it is subject to, especially where the law applicable to the underlying agreement is different from the law of the seat. Since the parties rarely include a specific choice of law to govern the arbitration agreement, arbitral institutions should consider following the example of the Hong Kong International Arbitration Centre which recommends such a choice in its model arbitration clause.

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Revista Brasileira de

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Ano XIX – Nº 76 – Out-Nov-Dez 2022