CORRESPONDENT'S REPORT: FRANCE

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In 2020, the French courts rendered three important decisions or series of decisions in relation to international commercial contracts and international arbitration. These related to:

(1) the right of an international arbitral tribunal to apply the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles") in circumstances where the parties to a contract had not agreed on the governing substantive law;
(2) the impact of Covid-19 on a *force majeure* clause in electricity supply contracts; and
(3) the different approaches taken by French and English courts in deciding what law governs an arbitration agreement and, consequently, what law determines who may be a party to that agreement.

The French courts' decisions are discussed in the same order below:

1. FRENCH COURTS UPHOLD AN INTERNATIONAL ARBITRAL TRIBUNAL'S DECISION TO APPLY UNIDROIT PRINCIPLES

As is well known, the UNIDROIT Principles are a "soft law" instrument designed by leading civil law and common law experts to reflect best international contract practice. The UNIDROIT Principles can be used in multiple ways. Principally, they may serve as: (i) a model for national or international legislation dealing with the law of contract; (ii) the governing law of a contract; or (iii) a source to interpret or supplement the governing law of a contract.

Since their first edition in 1994, the UNIDROIT Principles have been influential in the reform of contract law in numerous countries including China, France and Russia. They are being increasingly referred to by international arbitral tribunals and national courts and have been used by them in more than 500 reported cases.[1]

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[1] Available at http://www.unilex.info/principles/cases/country/all (last accessed 30 September 2020).

In February 2020, the French courts were confronted for the first time with the issue of deciding whether to uphold an ICC award in which the arbitral tribunal had applied the UNIDROIT Principles to an international contract for which the parties had been unable to agree on a national substantive law.[2] The case involved the sale of steel tubes by an Indian company to a Romanian company. Finding the tubes defective, the Romanian company initiated ICC arbitral proceedings against the Indian company, who maintained that Indian substantive law applied. On the other hand, the Romanian party contended that Romanian law applied. The seat of the arbitration was Paris. The arbitral tribunal decided, by a majority, to apply the UNIDROIT Principles 2010 to the dispute and, on this basis, held the Indian party liable in damages for the defective tubes.

The Indian party challenged the award claiming, pursuant to Article 1520(3) of the French Code of Civil Procedure, that the arbitral tribunal had failed to conform with its mandate as it had rendered the award in equity and not in accordance with Indian law, which it alleged was the agreed applicable law.[3] The French court found that as the parties had not agreed on the applicable law, the arbitral tribunal could select the applicable law by way of the direct method ("*voie directe*").[4] The French court further noted that under both the ICC Rules[5] and French law,[6] in circumstances where parties cannot agree on the governing law of the contract, an arbitral tribunal can apply the "rules of law" which it determines to be appropriate.[7] The term "rules of law" has a broader meaning than the term "law" as it includes transnational commercial law and non-national sets of rules or principles such as the UNIDROIT Principles.[8] Finding that the contract was "largely international" the court noted, the arbitral tribunal had decided to apply the UNIDROIT Principles 2010. The court found that, in applying the UNIDROIT Principles, the arbitrators had not, as the Indian party alleged, decided in equity but instead "in law". The Indian party's contentions were therefore unfounded.

In finding that the arbitral tribunal had decided "in law", the French court's decision is well justified.[9] The UNIDROIT Principles comprise more

[2] Paris Court of Appeal, 1st Chamber, 1st Section, 25 February 2020, No 17/18001, *Société Prakash Steelage Ltd v Société Uzuc SA*.

[3] Article 1520(3) of the French Code of Civil Procedure provides that an award may be set aside where "the arbitral tribunal ruled without complying with the mandate conferred upon it".

[4] Meaning without reference to conflicts of law rules.

[5] Article 21(1) of the ICC Rules of Arbitration.

[6] Article 1511 of the French Code of Civil Procedure.

[7] Similarly, Article 28 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended, when dealing with rules applicable to the substance of a dispute, refers to "rules of law".

[8] Fry, J and others, *The Secretariat's Guide to ICC Arbitration* (ICC, Paris, 2012 – ICC Publication no 729E) 222 (paragraph 3-761).

[9] Under Article 1511 of the French Code of Civil Procedure and Article 21(1) of the ICC Rules of Arbitration. By contrast, English law requires the parties' prior agreement before an arbitral tribunal may decide without reference to a national law. Section 46(1)(b) of the Arbitration Act 1996.

than 200 carefully drafted articles and are as detailed and comprehensive as some national laws of contract.[10] They should therefore not be confused with equity. Moreover, the tribunal's award appears fair and reasonable. The UNIDROIT Principles represent a compromise between civil law, the law of the Romanian party, and common law, the law of the Indian party, and therefore represent a sort of "middle ground" between the two legal systems concerned.

While the French court's decision comes as no surprise,[11] it is reassuring that the French courts have confirmed that, in circumstances where parties have not agreed on the substantive law which is to be applied to their contract, an international arbitral tribunal with its seat in Paris is free to apply the UNIDROIT Principles as the "governing law" of that contract. The Principles are an invaluable source of legal norms for international arbitrators.

2. AS A RESULT OF COVID-19, FRENCH COURTS HAVE SUSPENDED PERFORMANCE OF ELECTRICITY SUPPLY CONTRACTS ON THE BASIS OF *FORCE MAJEURE* CLAUSES

As a result of Covid-19, the Paris Commercial Court has, on the basis of *force majeure* clauses in certain electricity supply contracts, relieved buyers from their contractual obligation to purchase electricity from France's main electrical utility company, Électricité de France ("EDF").[12]

Traditionally, EDF has been the main, if not exclusive, producer and distributor of electricity in France. However, in 2010, the French Government passed a law designed to promote competition in the electricity distribution sector. Under this law, EDF is obliged to make available to other companies a substantial volume of its electricity production, so that they might be able to distribute electricity in competition with EDF. The electricity to be made available by EDF has to be sold at a price fixed by the Government – €42 per MWh[13] – designed to enable such other companies to compete effectively with EDF.

[10] Dominique Bureau, note under *Société Prakash Steelage Ltd v Société Uzuc SA* Court of Appeal of Paris, 25 February 2020, Rev arb 2020, no 1, 216, 219-221. Under Article 21(3) of the ICC Rules, an arbitral tribunal may only act as an *amiable compositeur* or decide in equity if the parties have agreed to give it such power.

[11] The French courts had in two previous cases upheld the application by international arbitrators of the "general principles of contract applicable in international commerce" and "international *lex mercatoria*" as rules of law applicable to international commercial contracts. Dominique Bureau, note under *Société Prakash Steelage Ltd v Société Uzuc SA*, Court of Appeal of Paris, 25 February 2020, Rev arb 2020, no 1, 216, 219-220.

[12] Paris Commercial Court, summary proceedings, 20 May 2020, No 2020016407, *Total Direct Energie*; Paris Commercial Court, summary proceedings, 26 May 2020, No 2020016519, *Gazel Energie Generation*; Paris Commercial Court, summary proceedings, 26 May 2020, No 2020016517, *Gazel Energie Solutions*; Paris Commercial Court, summary proceedings, 27 May 2020, No 2020017535, *Alpiq Energie France*.

[13] MWh = Megawatt hour. A MWh is a unit for measuring power.

To implement this arrangement, each potential distributor has had to enter into a frame contract (*accord-cadre*) with EDF pursuant to which it agreed to purchase a specific volume of electricity at the Government-fixed price from EDF. A number of frame contracts have since been entered into in this way, based on a Government form of contract.

While the French Civil Code contains a provision defining *force majeure*,[14] which is fairly restrictive, it is not a matter of public policy (*ordre public*) and therefore can be modified. Consequently, parties are free by a contract clause to expand the range of events or circumstances which may constitute a *force majeure* and thereby excuse a party from performing its contractual obligations.[15] Frequently, parties do so.

The contracts referred to above contained such a clause, allowing each party to suspend performance in the case of *force majeure* defined as follows:

> "*Force majeure* means an external, irresistible and unforeseeable event making it impossible to perform the Parties' obligations under reasonable economic conditions."[16]

Following the outbreak of Covid-19 and the resulting lockdown measures taken by the French Government in March 2020, electricity consumption fell sharply in France leading to a steep drop in the market price of electricity.[17] Thus, while the companies which had contracted to buy electricity from EDF were required to do so at €42 per MWh, the price fixed by the Government, in certain cases they were only able to sell it for €21 per MWh.[18] Some companies were incurring losses ranging from €3 to 4 million per month.[19]

Given the situation, four distribution companies applied to the Commercial Court of Paris for an interim order that would allow them, on the basis of the *force majeure* clause in their contracts, to suspend their obligation to purchase electricity from EDF.

While neither EDF nor the distribution companies disputed the externality and unforeseeability – two of the requirements of the *force majeure* clause – of the impact of Covid-19, EDF maintained that other requirements of the clause had not been satisfied. EDF argued that: (1) it was not impossible for the companies to take delivery of the volumes of electricity agreed and pay the contract price and that, under French case law, a party cannot invoke *force majeure* in order to be relieved of its payment obligations; (2) the fixed price at which EDF was obliged to sell electricity (€42 per MWh) was in fact below EDF's own production costs and had not been adjusted by the Government

[14] Article 1218 of the French Civil Code.

[15] Malaurie, P and others, *Droit des Obligations* (11th Edition, LGDJ, Issy-les-Moulineaux, 2020) 543 (paragraph 592).

[16] In French: "*La force majeure désigne un évènement extérieur, irrésistible et imprévisible rendant impossible l'exécution des obligations des Parties dans des conditions économiques raisonnables*". *Alpiq Energie France* Judgment, 7.

[17] *Alpiq Energie France* Judgment, 6.

[18] *Total Direct Energie* Judgment, 10, *Gazel Energie Generation* Judgment, 9 and *Gazel Energie Solutions* Judgment, 4 and as a result were experiencing large losses.

[19] *Alpiq Energie France* Judgment, 8 and *Gazel Energie Solutions* Judgment, 4.

since 2012; and (3) the temporary losses experienced by the companies were the result of normal market fluctuations that the companies could sustain, especially as they were financially strong.[20]

When deciding on the case, the French court focused on the concept of "reasonable economic conditions". While noting that the contracts did not define this term, the court interpreted a *force majeure* event under this clause to mean "an upheaval in economic conditions which gives rise to the unforeseen arrival of significant losses from performance of the contract".[21] Thus, in several of its judgements, the court noted the following:

(1) as the relevant distribution company had to purchase electricity at €42 per MWh,
(2) as electricity by its nature cannot be stored but must be disposed of immediately, and
(3) as the result of the fall in demand, the company could only sell electricity at €21 per MWh,

the company concerned was sustaining important immediate and final losses for a length of time it could not control.[22] Accordingly, the court found that the requirements for *force majeure* under the relevant clause were clearly satisfied and the distribution companies were therefore entitled to suspend performance of their contracts immediately.

With minor deviations, the French court followed this line of reasoning, as well as this conclusion, in all of its judgements. Although these are only summary proceedings (*référé*), they have been confirmed by the Paris Court of Appeal,[23] and are perhaps the first proceedings in France to address whether the consequences of Covid-19 may constitute contractual *force majeure*.

3. HOW THE FRENCH COURTS DETERMINE THE LAW WHICH GOVERNS AN ARBITRATION AGREEMENT AND HENCE WHO IS A PARTY TO IT

French and English courts have been adopting different and conflicting approaches to the question of deciding what law governs an arbitration agreement. How this issue is resolved can have important consequences,

[20] *Total Direct Energie* Judgment, 6 and 7.

[21] In French: *un bouleversement des conditions économiques antérieures qui se traduit par la survenance de pertes significatives nées de l'exécution du contrat. Total Direct Energie* Judgment, 10.

[22] For example, the *Total Direct Energie* Judgment, 10-11.

[23] On 28 July 2020, the Paris Court of Appeal confirmed in similar terms the *Total Direct Energie*, the *Gazel Energie Solutions*, and the *Gazel Energie Generation* judgments (Paris Court of Appeal, 1st Chamber, 1st Section, 28 July 2020, *Total Direct Energie* (No 20/06689); *Gazel Energie Solutions* (No 20/06676); *Gazel Energie Generation* (No 20/06675)). EDF withdrew its appeal against the *Alpiq Energie France* judgment (Paris Court of Appeal, 1st Chamber, 1st Section, 28 July 2020, *Alpiq Energie France* (No 20/06677)).

as, among other things, it may determine who is – or is not – a party to an arbitration agreement, as the following case illustrates:

In 2001, Kabab-Ji SAL, a Lebanese company ("Kabab-Ji"), and Al Homaizi Foodstuff Company, a Kuwaiti company ("AHFC"), entered into a Franchise Development Agreement (the "FDA"). The FDA provided that it was governed by English law and contained both an arbitration clause, providing for ICC arbitration with the seat in Paris, and a "No Oral Modification" clause.[24] Several years later, AHFC informed Kabab-Ji of the establishment of a Kuwaiti holding company for its group, Kout Food Group ("KFG").

In 2015, Kabab-Ji began an ICC arbitration against KFG, who was not a signatory to the FDA, but not against its subsidiary, AHFC, who was the signatory to the FDA. In 2017, the arbitral tribunal seated in Paris found by a majority, that: KFG was a party to the arbitration agreement contained in the FDA; the terms of the FDA extended to KFG; and KFG was liable in damages to Kabab-Ji. Subsequently, KFG applied to the French courts to have the award set aside.

Thereafter Kabab-Ji applied to the English courts for an order seeking recognition and enforcement of the award in England. KFG argued that this order be refused.[25]

The decisions of the English and French courts are summarised in chronological order below:

(A) English Court of Appeal decision of 20 January 2020[26]

The parties agreed that the law governing the validity of the arbitration agreement would determine whether KFG became a party to that agreement.[27] The parties were nevertheless in disagreement as to whether such validity was to be determined by English law, the governing law provided for in the FDA, or the law of France, being the law of the place of arbitration.

To resolve this issue, the English court engaged in a close analysis of the terms of the FDA, noting that Article 1 of the FDA stated that: "This Agreement" included all of the terms of the agreement and that Article 15 of the FDA provided that it was to be governed by English law. The arbitration clause was contained in Article 14. As the arbitration clause was one of the terms of the

[24] The parties also entered into certain related agreements but as they similarly provided for the application of English law and ICC arbitration they do not affect the discussion here.

[25] Pursuant to section 103(2)(a) and (b) of the Arbitration Act 1996. Section 103(2) essentially incorporates the defences in Article V.1 of the New York Convention including that enforcement of an award may be refused where "the arbitration agreement was not valid under the law to which the parties subjected it". Section 103(2)(b).

[26] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* (CA) [2020] EWCA Civ 6; [2020] 1 Lloyd's Rep 269. In the first instance decision of 8 April 2019, the English High Court had ruled on four preliminary issues in favour of KFG but then adjourned the enforcement proceedings pending the outcome of the setting aside procedure in Paris.

[27] Court of Appeal ("CA") Judgment, paragraph 10.

agreement and as Article 15 provided that the agreement was to be governed by English law, the court concluded that it was "clear" from Articles 1 and 15 that the arbitration clause was to be governed by English law.[28]

While acknowledging that a governing law clause in a contract does not necessarily cover the arbitration agreement, the court found that, in this case, it did so "because of the correct construction of the terms of Articles 1 and 15 taken together".[29] The court also took comfort from Article 14.3 of the FDA which provided that: "[t]he arbitrator(s) shall apply the provisions contained in the Agreement". The court interpreted these words to mean that the arbitrators must apply all the provisions, including the governing law clause in Article 15, to any dispute as to their own jurisdiction.[30]

The court stated that the concept of "separability of an arbitration agreement", enshrined in Section 7 of the Arbitration Act 1996, did not assist KFG's position as its purpose was to ensure that the arbitration agreement survives the termination of the main agreement, not "to insulate the arbitration agreement from the substantive contract for all purposes".[31] Nor was the court concerned with the provision for Paris as the seat of arbitration as it believed that it "cannot overcome the clear effect of the express terms of the FDA that Article 15 [providing for English law] covers not only the FDA but the arbitration agreement."[32]

Having determined that "there was an express choice of English law as the governing law of the arbitration agreement",[33] the court then considered whether under English law KFG had become a party to it. Kabab-Ji claimed that KFG had become a party in light of the "unequivocal conduct by KFG in performing the contract such as paying invoices" for some 30 months and its exercise of various contractual rights.[34] On the other hand, KFG relied on the "No Oral Modification" clause in the FDA to reject the contention that KFG had become a party to the agreement, maintaining that the evidence submitted by Kabab-Ji fell short of that required under English law[35] which would preclude KFG from relying on the "No Oral Modification" clause in the FDA.[36]

Agreeing with KFG, the Court of Appeal found that KFG was not a party to the FDA or the arbitration agreement and consequently, the award was not enforceable against KFG under Section 103(2) of the Arbitration

[28] CA Judgment, paragraph 62.
[29] *Ibid.*
[30] CA Judgment, paragraph 63.
[31] CA Judgment, paragraph 66.
[32] CA Judgment, paragraph 68.
[33] CA Judgment, paragraph 70.
[34] CA Judgment, paragraph 43.
[35] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* (SC) [2018] UKSC 24; [2018] BLR 479; [2019] AC 119; [2018] 2 WLR 1603; [2018] 4 All ER 21; 179 Con LR 1.
[36] CA Judgment, paragraph 71.

Act 1996.[37] The Court of Appeal saw no reason to adjourn the proceedings[38] out of deference to the previously begun French proceedings to set aside the award, noting that: "the French Court will apply French law without regard to any principles of conflicts of laws".[39]

(B) Paris Court of Appeal decision of 23 June 2020[40]

In applying to have the award set aside in France, KFG argued that the tribunal should have applied English law to the arbitration agreement, as the English Court of Appeal had done so in its 20 January 2020 decision and consequently found that the arbitral tribunal had no jurisdiction over KFG.[41] Furthermore, assuming that French law was applicable, KFG contended that the conditions laid down by the relevant French substantive rule (*règle matérielle*) for the extension of the arbitration clause to KFG had not been satisfied.[42] On the other hand, Kabab-Ji maintained that, as the seat of the arbitration was Paris, the existence and validity of an arbitration clause was to be governed by French substantive rules of law and that, applying these, the arbitral tribunal had correctly decided that the arbitration clause in the FDA was extended to KFG.[43]

After reviewing the terms of the FDA, the French court referred to a well-established French substantive law rule applicable to an international arbitration agreement,[44] according to which such agreement is to be

[37] CA Judgment, paragraph 81. Apparently, the court's conclusion was that the alleged arbitration agreement with KFG "was not valid under the law to which parties subjected it [English law according to the court]" under section 103(2)(b) of the Arbitration Act 1996.

[38] As the first instance English court had done. CA Judgment, paragraph 31.

[39] CA Judgment, paragraph 31. In support of this statement, the court cites to Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd Edition, Sweet & Maxwell, 2007), paragraphs 300 and 301, which is a work by Swiss legal authors. Paragraph 301 states that French "material rules [substantive rules] ... ignore the law chosen by the parties to govern the arbitration agreement" (page 261). If this statement is intended to mean that French courts disregard the law which parties may have chosen to govern an arbitration agreement, it is incorrect (and may have misled the English Court of Appeal). Where the parties have chosen a law to govern the arbitration agreement, the French courts will give effect to that choice as it would represent "the common will of the parties". This is clear from the decision of the Paris Court of Appeal, page 5, discussed below. Where in this case the Paris court differed from the English court was on whether the parties had chosen English law to govern the arbitration agreement, the Paris court finding (unlike the English court) that the terms of the agreement were "not in themselves sufficient to establish the common will of the parties to submit the arbitration clauses to English law" ("*ne sauraient suffire, à elles seules, à établir la volonté commune des parties de soumettre les clauses compromissoires au droit anglais*", page 5). The French courts would also not proceed by way of conflict of law rules to decide on the law governing an arbitration agreement, where the parties had not made a choice, but instead by way of French substantive law rules relating to international arbitration, as the Paris Court of Appeal does in this case (like the arbitral tribunal before it).

[40] Paris Court of Appeal, 1st Chamber, 1st Section, 23 June 2020, No 17/22943, *Société Kout Food Group v Société Kabab-Ji SAL*.

[41] Paris Court of Appeal ("Paris CA") Judgment, page 3. See Article 1520(1) of the French Code of Civil Procedure which provides that an award may be set aside where an arbitral tribunal lacks jurisdiction.

[42] Paris CA Judgment, page 3.

[43] Paris CA Judgment, page 4.

[44] Established by the *Dalico* case, Cass. 1st Civ. 20 December 1993, *Dalico*, JDI 1994, p 432, note Gaillard.

interpreted in accordance with "the common will of the parties" without the need to refer to a national law:

> "Pursuant to a substantive rule (*règle matérielle*) of international arbitration law, the arbitration clause is legally independent of the underlying contract in which it is included either directly or by reference, and its existence and efficacy are to be interpreted, subject to mandatory rules of French law and international public policy, according to the common will of the parties, without the need to refer to any national law."[45]

The French court noted that the arbitral tribunal had rightly applied French law to determine whether it had jurisdiction over KFG since the validity of the arbitral award depended on the law prevailing at the seat of the arbitration. Any action by the losing party to have the award set aside, the court noted, would fall within the jurisdiction of the Paris Court of Appeal which would apply French law to the subject.[46]

The French court found that the selection of English law as the law governing the FDA and the prohibition on arbitrators to apply a rule which would contradict the FDA[47] were insufficient in themselves to establish that "the common will of the parties" was to submit the arbitration clause to English law and thus to derogate from French substantive rules of international arbitration which apply at the seat of arbitration expressly chosen by the parties.[48]

Contrary to the English Court of Appeal, the French court found that the parties had not expressly agreed that English law would govern the arbitration clause.[49] Moreover, the French court noted that, in the context of proceedings under French law to set aside an award, it could not be limited by a foreign court's interpretation of the FDA and its arbitration clause, or the foreign court's decision to apply English law to it.[50] The French court stated that an arbitration clause in an international contract has a validity and effectiveness of its own which requires it to be extended to the parties directly implicated in the performance of the contract and in the disputes to which it may give rise:

> "once it is established that their contractual situation and their activities give rise to the presumption that they have accepted the arbitration clause, the existence and scope of which they were aware of, although they were not signatories to the contract in which it was contained."[51]

Based on the facts of the case, the French court concurred with the arbitral tribunal's decision that the arbitration agreement extended to KFG.[52]

[45] Paris CA Judgment, page 5.
[46] *Ibid.*
[47] The arbitration clause (Article 14) had provided that the "arbitrators shall apply the provisions contained in the" FDA. CA Judgment, paragraph 9.
[48] Paris CA Judgment, page 5.
[49] *Ibid.*
[50] *Ibid.*
[51] In French: "*dès lors qu'il est établi que leur situation contractuelle et leurs activités font présumer qu'elles ont accepté la clause d'arbitrage dont elles connaissent l'existence et la portée, bien qu'elles n'aient pas été signataires du contrat qui la stipulait.*". Paris CA Judgment, page 6.
[52] Paris CA Judgment, page 7.

(C) Commentary

Both decisions can be justified as correct, so it appears, under their respective legal systems. Pursuant to Article V.1(a) of the New York Convention,[53] an English court is entitled to refuse to enforce an arbitral award where the arbitration agreement "is not valid under the law to which the parties subjected it". The English court closely examined the FDA and, in a reasoned decision, interpreted it to mean that the arbitration agreement was governed by English law. After then examining various English cases, the court concluded that KFG was not, under English law, a party to the arbitration agreement.

On the other hand, the French court, like the arbitral tribunal, applied well-established French law relating to international arbitration pursuant to which French courts do not engage in a conflicts of law analysis to determine what law applies to an arbitration agreement. Instead, they apply a substantive (or forum) rule which is "adapted to the international nature of arbitration" and "independent [...] of any applicable national law".[54] According to this rule, the validity of an international arbitration agreement will be determined by a French court based upon its assessment of the existence of the parties' common intention to submit to arbitration and French international public policy (defined as the "French legal system's view of the fundamental requirements of justice in an international context"[55]). No reference to any national law is required.

It is regrettable that the courts of two neighbouring countries, both major centres of international arbitration, are arriving at contradictory decisions on the question of which country's law applies to arbitration agreements. The fact that, in addition, each country applies a different test to determine whether a non-signatory can be deemed to be a party to such an agreement only compounds the situation.

Unfortunately, there is little chance that their different approaches – about which neither the English nor the French courts manifest concern – will be reconciled in the near future. Since these decisions were rendered, the UK Supreme Court in another case in October 2020 summarised the principles which it considers govern the determination of the law applicable to the arbitration agreement. This summary included the following two principles:

> "(iv) Where 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.

[53] And the corresponding provision of the Arbitration Act of 1996, section 103(2).

[54] Gaillard, E and Savage, J (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law, 1999) 212-213 (paragraphs 412 and 414).

[55] *Ibid*, 232 (paragraph 441).

(v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement."[56]

These indicate that the UK Supreme Court (which has agreed to hear Kabab-Ji's appeal of the ruling of the English Court of appeal)[57] will not reverse the decision of the Court of Appeal that English law applies to the arbitration agreement in the *Kabab-Ji* case.

Although the more dogmatic French approach to the validity of an international arbitration agreement is not without its critics, even in France,[58] the likelihood that the French courts will back away from their use of a substantive rule in international arbitration to determine the validity of an arbitration agreement is slim.[59] At the same time, the rather simplistic approach adopted by the French courts to the choice of law issue is favourable to international arbitration as it gives those courts wide freedom to recognise and enforce international arbitration awards.

(D) Drafting Advice

In the meantime, if parties are entering into contracts which are expressed to be governed by the law of a country other than that of the law of the place of arbitration, they will be well advised to consider including a choice of law provision in their arbitration clause so as to make it clear what law applies to the arbitration clause.[60] The above decisions indicate that English and French courts would recognise and give effect to such a provision.[61]

[56] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (SC) [2020] UKSC 38, paragraph 170. However, the summary includes a further principle which may negate the inference referred to in principles (iv) and (v): "(vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration." It is unclear whether principle (vi), notably clause (a), could be relevant where the seat of arbitration is Paris as in the *Kabab-Ji* case.

[57] *See* GAR report of 10 July 2020 entitled, "UK Supreme Court to hear *Kabab-Ji v Kout* appeal".

[58] *See* Seraglini, C and Ortscheidt, J, *Droit de l'Arbitrage Interne et International* (2nd Edition, LGDJ 2019) 550-556 (paragraphs 601-606).

[59] *Ibid*, 556 (paragraph 606). But for a vigourous defence of the French approach with specific reference to the *Kabab-Ji* case, *see* Emmanuel Gaillard, "Les Vertus de la Méthode des Règles Matérielles Appliquées à la Convention d'Arbitrage (Les enseignements de l'affaire *Kout Food*)", Rev arb 2020, no 3,701.

[60] The Hong Kong International Arbitration Centre ("HKIAC") includes a choice of law provision in the standard arbitration clause it recommends for use by parties who elect arbitration under the HKIAC Administered Arbitration Rules. However, it appears to be one of the few international arbitral institutions to include such a provision in its recommended standard arbitration clause.

[61] CA Judgment, paragraph 11, and Paris CA Judgment, page 5, recognising that the "common will of the parties" will determine the law that governs an arbitration agreement. The position of English law in this respect is confirmed by the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (SC) [2020] UKSC 38, paragraph 170.