Document information

Publication
b-Arbitra | Belgian Review of Arbitration

Jurisdiction
United Kingdom

Court
Supreme Court of the United Kingdom

Case date
9 October 2020

Case date
27 October 2021

Parties
Claimant, Enka Insaat Ve Sanayi AS
Claimant, Kabab-Ji SAL
Defendant, OOO Insurance Company Chubb
Defendant, Kout Food Group

Bibliographic reference
Claire Morel de Westgaver and Katherine Jonckheere, 'Note : The law applicable to the arbitration agreement: Commentary on the UK Supreme Court's decisions in Enka v Chubb and Kabab-Ji SAL v Kout Food Group from a Belgian law perspective', in Caroline Verbruggen and Maarten Draye (eds), b-Arbitra | Belgian Review of Arbitration, (Wolters Kluwer 2022, Volume 2022 Issue 1) pp. 63 - 82

Note : The law applicable to the arbitration agreement: Commentary on the UK Supreme Court's decisions in Enka v Chubb and Kabab-Ji SAL v Kout Food Group from a Belgian law perspective

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The law applicable to the arbitration agreement: Commentary on the UK Supreme Court's decisions in *Enka v Chubb* and *Kabab-Ji SAL v Kout Food Group* from a Belgian law perspective

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I. Introduction

1. The past two years will forever be known for the devastating effects caused by the COVID-19 pandemic. As the world was forced to adapt to a new reality, so did justice systems by way of increased use of technology, including the replacement of in-person with virtual or remote hearings. At the same time, the UK Supreme Court, sitting remotely, (1) rendered two landmark decisions on an issue that has long sparked an intense debate: the law applicable to the arbitration agreement.

2. In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; [2020] 1 WLR 4117 (" ***Enka v Chubb*** "), (2) the Supreme Court revisited the question of which law should govern the arbitration agreement, in the absence of an express choice, and more specifically whether the arbitration agreement should be governed by the law of the contract that contains it (the *lex contractus* or 'main contract' approach) or rather the law of the chosen seat of arbitration (the *lex loci arbitri* or 'seat' approach). This issue had arisen in the context of an application for an anti-suit injunction before any arbitration
P 64 had taken place.

3. A year later, the Supreme Court in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 (" ***Kabab-Ji v KFG*** ") (3) considered the same question in the context of enforcement proceedings. (4)

4. As both cases illustrate, the question of which law governs an arbitration agreement is often determinative of matters of jurisdiction. In *Enka v Chubb*, whether Russian or English law applied to the arbitration agreement determined whether a tort claim fell within its scope and ultimately the outcome of the respondent's application for an anti-suit injunction referring that claim to arbitration. In *Kabab-Ji v KFG*, enforcement of an arbitral award depended on whether there was a valid arbitration agreement between the claimant and non-signatory respondent, and the answer to this question depended on whether English or French law applied.

5. After providing an overview of the factual background and decisions rendered in each case, the present commentary attempts to look at the issue of the proper law of an arbitration agreement, in the absence of an express choice, from a Belgian law perspective. In doing so, we consider how the Belgian courts might have addressed the key question that was before the UK Supreme Court in light of Belgian law precedents and other sources.

II. The UK Supreme Court's decision in *Enka v Chubb*

6. In its decision in *Enka v Chubb*, the Supreme Court clarified the position under English law in respect of the governing law of an arbitration agreement. By majority, the Court held that where the law applicable to an arbitration agreement is not specified, a choice of law for the main contract will be taken as a choice of law to govern the arbitration agreement contained in it. This is the general rule "even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration". (5) However, in the absence of a choice of law for the main contract, the law of the seat will
P 65 govern by default, as the law with the closest and most real connection.

A. Factual background

7. The case concerned an anti-suit injunction intended to restrain OOO Insurance Company Chubb ("**Chubb**"), a Russian insurance company, from pursuing court

proceedings in Russia against Enka Insaat ve Sanayi AS ("**Enka**"), a Turkish engineering and construction company. Enka had been engaged as a sub-contractor on a project for the construction of a power plant in Siberia. In February 2016, a fire severely damaged the power plant and Chubb paid out approximately US$ 400 million to the owner of the plant under its insurance policy. Having become subrogated to the power plant owner's rights, Chubb brought a tort claim in the Moscow commercial court against Enka (among others) to claim compensation.

8. Enka sought an anti-suit injunction in the English High Court, on the basis that Chubb's claim had to be arbitrated in London. Enka separately requested the Moscow court to refer the parties to arbitration in accordance with its obligations under Article II(3) of the New York Convention. (6) Enka relied on the arbitration agreement contained in the construction contract between itself and the owner of the power plant, which provided for all disputes between the parties to be settled by ICC arbitration in London. The construction contract contained neither a choice of law for the arbitration agreement nor a governing law clause in the main contract.

9. Whether Enka was entitled to obtain the anti-suit injunction turned on the question of whether Chubb's claim fell within the scope of the arbitration agreement, which needed to be answered in light of the law applicable to it. If Russian law governed the arbitration agreement, Chubb's claim would possibly fall outside the scope of the arbitration agreement. Chubb did not dispute that the dispute would fall within the scope of the arbitration agreement if the arbitration agreement were instead governed by English law.

10. The High Court refused to grant the anti-suit injunction on the basis of *forum non conveniens,* considering it more appropriate for the Moscow court to decide whether Chubb's claim fell within the scope of the arbitration agreement. The Court of Appeals disagreed with the High Court, found that English law applied to the arbitration
P 66 agreement, and accordingly granted the anti-suit injunction. The Supreme Court granted Chubb permission to appeal that decision.

B. The majority decision

11. The UK Supreme Court rendered its judgement on 9 October 2020. By a 3-2 majority, the Supreme Court first confirmed the general rule for contracts containing a choice of law clause. In these instances, and in the absence of an express choice of law for the arbitration agreement, a choice of law in respect of the parties' substantive obligations will "*apply*[] *to an arbitration agreement set out in a clause of the contract, even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration*." (7)

12. In doing so, the Supreme Court confirmed the rule laid down in the 2012 Court of Appeal decision in *Sulamerica v Enesa* (8) . In that case, the Court of Appeal had held that the proper law of an arbitration agreement is to be determined by application of the English common law conflict of laws rules for determining the applicable law of any contract. In *Sulamerica*, the Court of Appeal had therefore recommended that a three-stage enquiry be conducted as follows.

(i) Where the parties made an express choice of law to govern the arbitration agreement, that choice of law is effective, irrespective of the main contract's applicable law.

(ii) Where the parties did not expressly specify a law to govern the arbitration agreement, the courts will consider whether the parties made an implied choice of law to govern the arbitration agreement.

(iii) Where the courts are unable to determine the law governing the arbitration agreement through implication, the courts will consider what the law with the 'closest and most real connection' is. (9)

13. Under this three-stage enquiry, where the parties failed to make an express choice of law (stage 1), the courts turn to stage 2 to determine the implied choice of law. To this end, the Court of Appeals found it appropriate to start from the assumption that, "*in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law*." (10) Therefore, if parties have
P 67 not made an express choice of law for the arbitration agreement, "the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate." (11)

14. The Supreme Court in *Enka v Chubb* thereby effectively affirmed stage 2 of the three-stage enquiry the Court of Appeals adopted in *Sulamerica*. The Supreme Court held that, where parties have not made an express choice of law to govern the arbitration agreement, under English law, a choice of law in respect of the main contract applies to the arbitration agreement contained in it, even where this is different from the law of the chosen seat of arbitration. (12) This presumption is only subject to two exceptions: (1) where the law of the seat indicates that the arbitration agreement must also be treated as subject to that law (as is the case in, for example, Sweden and Scotland, (13) but not England & Wales), and (2) where there is a serious risk that the law of the main contract would render the arbitration agreement ineffective (based on the "validation principle" of contractual interpretation in English law). (14)

15. The Supreme Court observed that, although there is no uniformity, many commentators on international arbitration, arbitrators and other jurisdictions support the presumption that a choice of law in respect of the main contract will apply to an arbitration agreement contained in it (in the absence of an express choice). (15)

16. Its decision differed from the lower Court of Appeals' decision, which stated that, as a
P 68 matter of implied choice, the arbitration agreement should be governed by the law of the seat, unless there were "powerful countervailing factors". (16) The Supreme Court strongly disagreed:

> *As we have discussed, a clause such as "This Agreement is to be governed by and construed in accordance with the laws of [a named country]" is naturally and sensibly understood to mean that the law of that country should govern and determine the meaning and effect of all the clauses in the contract which the parties signed including the arbitration clause.* ***It is unclear to us why more should be needed – or what more on the Court of Appeal's approach is required – to make it clear that a phrase such as "This Agreement" means the whole agreement and not just part of it*** *.* (17)

17. The Supreme Court further criticised the Court of Appeals for having "*put*[] *the principle of separability of the arbitration agreement too high*". (18) According to the principle of separability, an arbitration agreement forming part of a contract will not be regarded as invalid simply because the contract is invalid. (19) However, this does *not* mean that an arbitration agreement is to be treated as distinct from the rest of the contract for *other* purposes, such as determining the law of the arbitration agreement. (20)

18. In this way, the Supreme Court reintroduced certainty with respect to a conflict of laws question that would concern the majority of cases, namely situations where the parties have selected the law governing the underlying contract and the seat of arbitration, but not the law of the arbitration agreement.

19. However, the facts of the dispute in *Enka v Chubb* presented an additional issue. As mentioned above, there was no express choice of law clause governing the parties' substantive obligations under the construction contract. The Supreme Court was therefore required to determine the law applicable to the arbitration agreement through stage 3 of the common law enquiry.

20. The Supreme Court ruled that in the absence of an express or implied choice of law for the arbitration agreement, the law of the seat governs by default, as the law with the closest and most real connection. (21) The main rationale for this position was that the chosen seat of arbitration is the place where, legally, an arbitration agreement is to be
P 69 performed. (22) In selecting a particular seat, the parties subject themselves to the jurisdiction of the courts of that particular seat for the purpose of deciding on validity or enforceability issues that might arise with their arbitration agreement. (23) Logically, the law of the seat, therefore, has a closer connection to the arbitration agreement itself, as compared to the law of the main contract – once established – which is concerned with performance of the parties' substantive obligations. (24)

21. The Supreme Court further considered that "*it would* [...] *be wrong for the English common law to adopt a rule out of step with* [...] *the underlying uniform rule established by the New York Convention*", which provides its own conflict of laws rules for determining the law of the arbitration agreement in the context of enforcement. (25) Pursuant to Article V(1)(a) of the New York Convention, recognition or enforcement of an award may be refused if 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* ". (26) The majority, therefore, held that, as a default rule, the law of the chosen seat of arbitration is the law "*most closely connected with the arbitration agreement*", (27) which in this case was London. (28)

C. Dissenting opinion

22. Lord Burrows and Lord Sales agreed with the majority that, where the parties fail to make an express choice of law to govern the arbitration agreement, by implication, the law of the main contract is also the law of the arbitration agreement. (29) There is no similar presumption with respect to the law of the seat. (30) The dissenting justices set out in detail their reasons for this presumption, several of which overlapped with those cited by the majority. (31) These reasons include the general rule that the same law generally governs the entire contract and the rationale for the doctrine of separability.
P 70 With respect to the former, the dissenting judges recognised that the splitting of a contract or dépeçage is "*the exception but not the rule*". As for the doctrine of separability, they appeared to agree with the majority that the doctrine of separability inherent with arbitration agreements should not justify a departure from the general rule. This is because this doctrine was not developed with the law applicable in mind but rather for the specific purpose of preventing any arguments that the arbitration agreement is invalid, non-existent or ineffective, simply because the main contract is. (32)

23. Contrary to the majority, however, the dissenting judges found that the parties had impliedly chosen Russian law to govern their contract, applying Article 3.1 of the Rome I

Regulation. Article 3.1 provides that a contract is governed by the law chosen by the parties, which choice is "*made expressly or is clearly demonstrated by the terms of the contract or the circumstances of the case.*" (33) While the main contract did not contain a "*classic choice of law clause*", there were numerous references to Russian law in the contract. (34) In addition, there were "*several other circumstances*" which demonstrated a choice of Russian law for the main contract, including that the place of performance was in Russia, the head-contractor was a Russian company and the primary language of the contract was Russian. (35) As such, the dissenting opinion found that the law governing the arbitration agreement was Russian law, as the law that the parties impliedly chose to govern their contract. (36)

24. The dissenting judges also did not agree with the majority's view that the law with the "*closest and most real connection*" as contemplated in stage 3 of the common law enquiry is the law of the chosen seat of arbitration. Taking the *lex contractus* approach into stage 3 of the common law enquiry, the dissenting judges considered that had there been no implied choice of Russian law to govern the arbitration agreement (by virtue of the implied choice of the same law to govern the contract), the law with the "*closest and most real connection*" would still have been the law of the main contract. (37) Consequently, there should be only one presumption or general rule in the absence of an express choice of law for the arbitration agreement: that the law applicable to the main contract is also
P 71 the law applicable to the arbitration agreement. (38) ● The one exception would be where the validation principle applies, namely, situations where applying the law governing the main contract would render the arbitration agreement invalid. (39)

25. Contrary to the majority, the dissenting judges dismissed the relevance of the conflict of laws rules in Article V(1)(a) of the New York Convention, describing the provision as containing a "*very simple and inflexible default rule*", which should not displace the "*closest and most real connection*" rule at common law. (40) The dissenting judges further raised concerns over the difficulty of reconciling the default rule in Article V(1)(a) with the validation principle, since the provision allows for the invalidity of an arbitration agreement under the law of the seat without exception. (41) In the same vein, Lord Sales indicated that the majority decision's approach of adopting a "*radically divergent default rule*" (i.e. the law of the seat in stage 3 of the enquiry compared to the law of the main contract in stage 2) would incentivise litigation and go against the expectations of commercial parties. (42)

III. The UK Supreme Court's decision in *Kabab-Ji v Kout Food Group*

26. In *Kabab-Ji v KFG*, the Supreme Court considered the issue of the law applicable to the arbitration agreement again. However, this time, the issue arose in the context of enforcement proceedings rather than a request for an anti-suit injunction. The Court unanimously decided that, although not directly applicable, its conclusions in *Enka v Chubb*, "*apply with equal force*" where the question arises "*after an award has been made in the context of enforcement proceedings.*" (43) As the Court had already observed in *Enka v Chubb*, "*it would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been*
P 72 *made*". (44) ●

A. Factual background

27. The dispute arose under a franchise development agreement (the "**FDA**") whereby Kabab-Ji SAL ("**Kabab-Ji**"), a Lebanese company who owned a restaurant concept specialising in Lebanese and Middle Eastern food, granted a license to franchise the restaurant concept in Kuwait to a Kuwaiti company, Al Homaizi Foodstuff Company ("**Al Homaizi**"). The FDA was expressly governed by English law and provided for ICC arbitration in Paris. (45)

28. Following a corporate restructuring, Al Homaizi became a subsidiary of Kout Food Group ("**KFG**"). A dispute subsequently arose between the parties, which led Kabab-Ji to commence arbitration against KFG but not Al Homaizi. KFG objected to the jurisdiction of the arbitral tribunal on the ground that it was not a party to the FDA or the arbitration agreement. Applying French law (as the law of the seat), the arbitral tribunal concluded that KFG was bound by the arbitration agreement. The tribunal further found KFG in breach of the FDA and rendered an award in favour of Kabab-Ji.

29. KFG challenged the award in France on the basis that the award had allegedly been rendered without jurisdiction, as KFG was not a party to the arbitration agreement contained in the FDA. In parallel, Kabab-Ji brought enforcement proceedings in England.

30. The English High Court found that the arbitration agreement was governed by English law, and decided that KFG had not become a party to the FDA or the arbitration agreement, given the strict '*no oral modification*' provisions contained in the FDA. (46) However, the High Court judge stopped short of making a final determination and instead adjourned the proceeding in anticipation of the Paris Court of Appeal's decision on the annulment application. (47) Both parties appealed.

31. The English Court of Appeals subsequently held that the High Court judge had been wrong to adjourn the enforcement proceeding. According to the Court of Appeals, the French court would be applying internal French law to determine the validity of the

P 73 arbitration agreement and therefore its decision would not be relevant to the English proceeding. (48) The Court of Appeals confirmed that the arbitration agreement was governed by English law and, as a matter of English law, KFG had not become a party to the FDA or the arbitration agreement. (49) The Court of Appeal accordingly refused recognition and enforcement of the award. (50)

32. A few months after the English Court of Appeals' decision, the Paris Court of Appeals reached the opposite conclusion. Applying French law to the arbitration agreement (as anticipated by the English Court of Appeals and as the arbitral tribunal had done), the Paris Court found that KFG was bound by the arbitration agreement and accordingly dismissed the annulment action. (51)

B. The decision

33. In a judgment issued on 27 October 2021, the Supreme Court unanimously decided that English law governed the arbitration agreement by virtue of the parties' implied choice, on the basis that the main contract was expressly governed by English law. (52)

34. The Supreme Court thereby confirmed that its conclusions in *Enka v Chubb* applied equally in the context of enforcement proceedings; the rationale for this decision being that it would be "*illogical*" for the law governing an arbitration agreement to be different depending on when the question is raised. (53) This was the case even though the Court was not applying English common law conflict of laws rules for determining the law governing contractual obligations as in *Enka v Chubb*, but the "*international conflict of*
P 74 *laws rules*" set out in Article V(1)(a) of the New York Convention (transposed into English law by section 103(2)(b) of the English Arbitration Act 1996). (54)

35. Consistent with its view set out in *Enka v Chubb*, the Supreme Court in *Kabab-Ji v KFG* held that a choice of law for the main contract "*should normally be sufficient to satisfy the first rule in article V(1)(a)*", and thus constitute an implied choice of law for the arbitration agreement. (55) The Supreme Court relied in this regard on the words " *failing any indication thereon* " in Article V(1)(a), which it indicated "*signifies that something less than an express and specific agreement will suffice*". (56) It contrasted this language with the language in Article V(1)(d), which provides that recognition or enforcement of an arbitral award may be refused where the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, *"failing such agreement"*, the law of the seat. (57)

36. Given that English law was the law impliedly chosen by the parties to govern the arbitration agreement, the 'no oral modification' provisions in the main contract prevented KFG from becoming a party to the arbitration agreement (and the FDA generally). (58) The Supreme Court accordingly confirmed that the Court of Appeals was justified in refusing recognition and enforcement of the award, and dismissed the appeal. (59)

IV. Discussion

37. The key question before the UK Supreme Court in both *Enka v Chubb* and *Kabab-Ji v KFG* was: what is the law applicable to the arbitration agreement, in the absence of an express choice? In particular, the Court was concerned with a situation where the parties had not expressly chosen the law governing the arbitration agreement, but they had made a choice with respect to the law of the main contract and the seat of arbitration.
P 75 (60) This is a very common scenario in international commerce, where negotiating parties are often unaware of the potential significance of the law governing their arbitration agreement. The UK Supreme Court held that, in those circumstances, a choice of law for the main contract also applies to an arbitration agreement contained in it, even where this law is different from the law of the chosen seat of arbitration.

38. Before considering this question from a Belgian law perspective, it is necessary to distinguish between different issues that can arise in relation to an arbitration agreement and the different laws that may apply depending on the issue at stake. For example, whether parties have the capacity to conclude an arbitration agreement (also referred to as *subjective arbitrability*) will be a matter of the law applicable to them. (61) When it comes to the object of an arbitration agreement or which disputes are capable of being settled by arbitration (also referred to as *objective arbitrability*), the Belgian courts will apply their own law, the *lex fori*. (62) In terms of *formal validity*, there is notably no requirement in Belgian law for the arbitration agreement to be in writing (although this remains a requirement for the recognition and enforcement of arbitral awards under the New York Convention). (63) When an arbitration is seated in Belgium, an arbitration agreement must nonetheless meet the definition set out in Article 1681 of the Belgian Judicial Code ("**Judicial Code**"), which permits only disputes arising out of a "defined legal relationship" to be submitted to arbitration. (64)

39. However, the question before the UK Supreme Court specifically concerned the *substantive validity* of an arbitration agreement: in *Enka v Chubb*, the issue was whether an arbitration clause covered a particular dispute; in *Kababi-Ji v KFG*, whether an arbitration agreement could be extended to a non-signatory parent. Under Belgian law,
P 76 the substantive validity of an arbitration agreement can be considered a matter of consent, and is to be determined by reference to the law applicable to the arbitration

agreement. (65)

40. Using the recent decisions of the UK Supreme Court as a springboard, the below discussion first identifies which conflict of laws rules might assist with determining the law applicable to the arbitration agreement and then considers how such rules might be applied to determine the applicable law, from a Belgian law perspective.

A. Identifying the relevant conflict of laws rules

41. To determine the law governing the arbitration agreement, the UK Supreme Court in *Enka v Chubb* applied the English common law conflict of laws rules for determining the law governing contractual obligations generally. (66) The Court considered these rules more appropriate than the rules for resolving conflicts of laws under the Rome I Regulation, which expressly excludes arbitration agreements from its scope. (67) In *Kabab-Ji v KFG*, the Supreme Court was faced with the same task of determining the law applicable to the arbitration agreement. However, in this case, it did not apply English common law rules but instead the "*international conflict of laws rules*" of Article V(1)(a) of the New York Convention (enacted into English law by section 103(2)(b) of the English Arbitration Act). (68) As mentioned, this provision states that enforcement or recognition may be refused if the arbitration agreement was not valid "*under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*". Despite the different legal framework, the Supreme Court held that its conclusions in Enka "*apply with equal force where the question of validity arises, as it does in this case, after an award has been made in the context of enforcement proceeding*". (69)

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42. As a starting point, the Belgian arbitration law contains two relevant provisions setting out conflict of laws rules:

(i) Article 1717, paragraph 3(a)(i) of the Judicial Code, which provides that an arbitral award may be set aside if the party making the application furnishes 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 Belgium*" (which provision is modelled on Article 34(2) (a)(i) of the UNCITRAL Model Law (as amended in 2006)); and

(ii) Article 1721, paragraph 1(a)(i) of the Judicial Code, which provides that the court may refuse to recognise or enforce an arbitral award if the defendant furnishes 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*" (which provision enacts Article V(1)(a) of the New York Convention).

43. Article 1682, paragraph 1 of the Judicial Code further stipulates that "[t]*he court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, declare itself without jurisdiction, unless the arbitration agreement relating to the dispute is invalid or has ceased to exist* [...]" (enacting Article II(3) of the New York Convention). This provision does not expressly specify conflict of laws rules in respect of the law applicable to the substantive validity of an arbitration agreement. However, as the UK Supreme Court pointed out in *Enka v Chubb*, it is generally accepted that the same conflict rules should apply as those at the stage of enforcement since it would be illogical if the law applicable to an arbitration were to differ depending on when the question of validity is raised (whether at the stage of enforcement of the arbitration agreement or the award). (70)

44. Belgian arbitration law accordingly sets out two conflict of laws rules, which mirror the conflict of laws rules contained in the UNCITRAL Model Law and New York Convention: (a) the law chosen by the parties; or failing any indication thereon (b) the law of the seat (which, in the case of setting aside proceedings under Article 1717 of the Judicial Code, is

P 78 Belgium).

45. The immediate question that arises is whether the parties' choice of law can be express or implied. In this regard, the UK Supreme Court recognised that commentators disagree on whether the first rule set out above refers only to an express choice of law or also includes an implied choice. (71) Notwithstanding, the Court concluded that the word "indication" in "failing any indication thereon" in Article V(1)(a) of the New York Convention suggests that "something less than an express and specific agreement will suffice". (72) It specifically contrasted this language with the language of Article V(1)(e) of the New York Convention, which provides that recognition or enforcement of an award may be refused if, inter alia, the arbitral procedure was not in accordance with the agreement of the parties, or "*failing such agreement*" the law of the country where the arbitration took place. (73) The Court was therefore of the view that a choice of law governing the arbitration agreement cannot only be express, but also implied. (74) This approach is consistent with international court practice. (75)

46. Interpreting the Belgian arbitration law in the same way would be consistent with the conflict of laws rules in the Rome I Regulation, which in Belgium determines the law applicable to contractual obligations. (76) Contrary to English law, Belgian law does not have conflict of laws rules determining the law governing contractual obligations beyond those set out in the Rome I Regulation. While arbitration agreements are excluded from its scope, the Rome I Regulation is therefore the first point of reference on how a choice

of law might be understood from a Belgian law perspective.

47. Pursuant to Article 3(1) of the Rome I Regulation, a contract shall be governed "*by the law chosen by the parties*", which choice can be "*made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case*". Article 3(1) therefore states that a choice of law can be implied, based on the terms of the contract or the circumstances of the case. Similarly, one may understand references to "the law to which
P 79 the parties have subjected [the arbitration agreement]" in the Belgian arbitration law as encompassing not only to an express, but also an implied, choice.

48. This approach would further be consistent with conflict of laws rules in many other legal systems which recognise implied choices of law. (77)

49. It is therefore reasonable to conclude that a choice of law for the arbitration agreement can be express or implied also as a matter of Belgian law.

B. Determining the applicable law

50. Considering the above conflict of laws rules, a question then arises as to which circumstances can be considered as an implied choice of law for an arbitration agreement. As regards this particular issue, the UK Supreme Court held that a choice of law in respect of the main contract generally applies to an arbitration agreement contained in it, even where this is different from the law of the chosen seat of arbitration. Although guidance is much less extensive, it appears that the Belgian courts may reach the same conclusion.

51. The issue seems to have come up only peripherally in Belgian case law. More specifically, Belgian courts considered the issue as part of decisions on arbitrability in the context of exclusive distribution agreements of indefinite duration (for which there are mandatory provisions of Belgian law to consider).

52. Notably, the Antwerp Court of Appeals held in 2001 that the validity of an arbitration agreement must be determined in accordance with the "*lex contractus*", which in that case was Swiss law (as the law chosen by the parties to govern the main contract), and not the *lex fori*, Belgian law. (78) The Belgian Supreme Court overturned the Court of Appeal's decision but on what appears to be a different point: the fact that "*an arbitration clause is subjected, according to the will of the parties, to a foreign law*" does not exclude the power
P 80 of the Belgian judge to determine issues of arbitrability that touch upon its domestic public order. (79) This suggests that the ruling of the Antwerp Court of Appeals as to the law applicable to the issue of validity of the arbitration agreement being the "*lex contractus*" stands.

53. In the same context of exclusive distribution agreements, the Court of Appeal of Liège in 2003 again held that the law applicable to the substantive validity of an arbitration agreement, in the absence of an express choice, should be the law chosen to govern the main contract (which was Swiss law). (80)

54. More recent commentary also adheres to the view that "[g]*enerally the law applicable to the arbitration agreement is considered to be the law of the agreement of which the arbitration clause forms part*". (81)

55. This approach makes sense for the reasons described in the UK Supreme Court judges' opinions in *Enka v Chubb* and *Kabab-Ji v KFG*. First, it is reasonable to assume that commercial parties negotiating a contract would expect their choice of law for the contract to apply to all of the provisions of that contract, including the arbitration clause. (82) Second, the principle of separability would not stand in the way of such a conclusion. Indeed, under Belgian law also, this principle is limited to ensuring that a decision of invalidity of the main contract does not automatically entail the invalidity of an arbitration agreement contained in it. (83) Third, the Belgian arbitration law does not contain a provision similar to those found in the Scottish or Swedish arbitration acts, which provide that, in the absence of express choice, the arbitration agreement will be
P 81 governed by the law of the country of the seat. (84) All of these factors support the view that a choice of law in respect of the main contract will apply to an arbitration agreement contained in it, which Belgian courts also adhered to in the past, although case law on this issue is very limited.

56. Nonetheless, the recent UK Supreme Court decisions have not gone without criticism. For example, the Supreme Court partly based its decision on an assumption that international authority favours the *lex contractus* approach. (85) Yet, recent empirical research shows that, in reality, a majority of jurisdictions favour the law of the seat. (86) In addition, other methods of determining the law applicable to an arbitration agreement exist, such as the "common intention" approach adopted by the French courts, and the validation approach adopted in Swiss arbitration law. (87)

(...)

V. Conclusion

58. In *Enka v Chubb* and *Kabab-Ji v KFG*, the UK Supreme Court has helpfully clarified which law governs an arbitration agreement as a matter of English law. The Court held that, where parties have not made an express choice of law to govern their arbitration

agreement, a choice of law in respect of the main contract applies to an arbitration agreement contained in it, even where this is different from the law of the chosen seat of arbitration.

59. The Belgian courts do not appear to have considered the issue of the law applicable to the arbitration agreement since the new Belgian arbitration law took effect in 2013, and even past cases are few and far between. Nonetheless, the following conclusions can be drawn on the law applicable to the arbitration agreements as a matter of Belgian law:

(i) Where the parties have made an express choice of law to govern their arbitration agreement, this choice will be respected in accordance with the relevant provisions of the Belgian arbitration law.

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(ii) Where there is no express choice of law, the situation is less clear. Although Belgian courts seem to have expressed a preference for the *lex contractus* or main contract approach in the past (such that an arbitration agreement is governed by the law of the contract that contains that arbitration agreement), it remains to be seen whether they would indeed adopt this approach and effectively follow the recent decisions of the UK Supreme Court. While there is much to be said for the UK Supreme Court's reasoning, many jurisdictions take a different approach (most commonly, the *lex loci arbitri* or seat approach, whereby an arbitration agreement is governed by the law of the chosen seat of arbitration). These jurisdictions from which Belgian courts may draw inspiration include civil law jurisdictions and jurisdictions with an arbitration law arguably more similar to the Belgian arbitration law than English arbitration law.

(iii) In the absence of an express or implied choice of law, the law applicable to the arbitration agreement will be the *lex loci arbitri* or law of the seat, as stated in the Belgian arbitration law.

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References

1) The respective hearings can be viewed on the UK Supreme Court's website at https://www.supremecourt. uk/cases/uksc-2020-0091.html and https://www.supremecourt.uk/cases/uksc-2020-0036.html
2) The UK Supreme Court's decision in *Enka v Chubb* is available at https://www.supremecourt.uk/cases/ docs/uksc-2020-0091-judgment.pdf. The decision is also published in excerpts in this issue of b-Arbitra.
3) The UK Supreme Court's decision in *Kabab-Ji v KFG* is available at https://www.supremecourt.uk/cases/ docs/uksc-2020-0036-judgment.pdf. The decision is also published in excerpts in this issue of b-Arbitra.
4) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "**New York Convention**"), Article V.
5) *Enka v Chubb*, para 53.
6) Article II(3) of the New York Convention provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
7) *Enka v Chubb*, para 53.
8) *Sulamerica v Enesa* [2012] EWCA Civ 638; [2013] 1 WLR 102 (" ***Sulamerica*** "). The UK Court of Appeal decision in *Sulamerica* is available at https://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html.
9) *Sulamerica*, para 25.
10) *Sulamerica*, para 11.
11) *Sulamerica*, para 11.
12) *Enka v Chubb*, paras 53 and 170(iv)-(v).
13) Swedish Arbitration Act, Section 48(1) ("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."); Arbitration (Scotland) Act, Section 6 ("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.")
14) *Enka v Chubb*, paras 70-72, 95-109, 170(vi). In *Sulamerica*, there had in fact been such a risk since the law of the main contract, which was Brazilian law, would have rendered the arbitration agreement enforceable only with the other party's consent. *Enka v Chubb*, para 103.
15) *Enka v Chubb*, paras 55-57.
16) [2020] EWCA Civ 574, para 104.
17) *Enka v Chubb*, para 60 (emphasis added).
18) *Enka v Chubb*, para 61.
19) *Enka v Chubb*, paras 40-41, 61.

20) *Enka v Chubb*, paras 41 and 61.
21) *Enka v Chubb,* para 120.
22) *Enka v Chubb*, para 121.
23) *Enka v Chubb*, para 121.
24) *Enka v Chubb*, para 122.
25) *Enka v Chubb*, para 141.
26) New York Convention, Article V(1)(a) (emphasis added).
27) *Enka v Chubb,* para 120.
28) *Enka v Chubb,* para 156.
29) *Enka v Chubb,* paras 229-230.
30) *Enka v Chubb*, para 229.
31) *Enka v Chubb*, paras 231-255.
32) *Enka v Chubb*, paras 231-233 and 268-270. See also the majority decision at paras 38-40 and 193(iii).
33) *Enka v Chubb*, para 205.
34) *Enka v Chubb*, paras 202-203.
35) *Enka v Chubb*, para 204.
36) *Enka v Chubb*, para 228.
37) *Enka v Chubb*, para 256.
38) *Enka v Chubb*, para 257(iii).
39) *Enka v Chubb*, para 257(iv). See also paras 276-277.
40) *Enka v Chubb*, paras 250-253 and 289-291.
41) *Enka v Chubb*, paras 251 and 291.
42) *Enka v Chubb*, paras 270, 283, 286, 292.
43) *Kabab-Ji v KFG*, paras 29 and 35.
44) *Kabab-Ji v KFG*, para 35 (citing *Enka v Chubb*, para 136).
45) The parties further entered into ten Franchise Outlet Agreements ("**FOAs**") relating to individual outlets in Kuwait. However, as the UK Supreme Court pointed out: "[t]*he issues were formulated by reference to the FDA as it was agreed that this would be determinative of the like issues arising under the FOA*s". This commentary therefore also only refers to the FDA.
46) [2019] EWHC 899 (Comm), para 66.
47) [2019] EWHC 899 (Comm), para 67.
48) [2020] EWCA Civ 6; [2020] 1 CLC 90, para 81. This was a reference to the French "règle matérielle", whereby the validity of an arbitration agreement is determined by the common will of the parties without reference to any national law.
49) [2020] EWCA Civ 6; [2020] 1 CLC 90, paras 70 and 79.
50) [2020] EWCA Civ 6; [2020] 1 CLC 90, para 85.
51) *Kabab-Ji SAL v Kout Food Group*, Cour d'appel de Paris, 23 June 2020, n°17/22943. The Paris Court of Appeal's decision is available at https://jusmundi.com/fr/document/decision/fr-kabab-ji-s-a-l-company-v-koutfood-group-company-jugement-de-la-cour-dappel-de-paris-tuesday-23rd-june-2020#decision_11637. An appeal against the Paris Court of Appeal decision with the French Court of Cassation is still pending.
52) *Kabab-Ji v KFG*, para 39.
53) *Kabab-Ji v KFG*, para 35.
54) *Kabab-Ji v KFG*, para 26. As mentioned above (see paragraph 21), pursuant to Article V(1)(a) of the New York Convention, recognition or enforcement of an award may be refused if 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."
55) *Kabab-Ji v KFG*, para 33.
56) *Kabab-Ji v KFG*, para 33.
57) *Kabab-Ji v KFG*, para 33.
58) *Kabab-Ji v KFG*, para 69.
59) *Kabab-Ji v KFG*, para 93.
60) In *Enka v Chubb*, the underlying contract was potentially governed by Russian law while the seat was London. In *Kabab-Ji v KFG*, the main contract was governed by English law and the seat was Paris.
61) M. PIERS, "Article 1681" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide* (Kluwer International, 2016), pp. 82, 100.
62) M. DRAYE & E. STEIN, "Article 1682" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 100; C. VERBRUGGEN, "Article 1721" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 527.
63) M. DRAYE & E. STEIN, "Article 1682" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 99.
64) Judicial Code, Article 1681 ("An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.") See, for example, Court of Appeals Brussels, 29 August 2018, no. 2016/AR/2048, published in *b-Arbitra* , 2019, Issue 1, pp. 173-190.

65) M. PIERS, "Article 1681" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 81; M. DRAYE & E. STEIN, "Article 1682" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 99.
66) *Enka v Chubb*, para 27. According to these rules, a contract is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected.
67) Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations Article 1(2)(e). See *Enka v Chubb*, paras 25 and 27.
68) *Kababi-Ji v KFG*, para 29.
69) *Kabab-Ji v KFG*, para 35.
70) *Enka v Chubb*, para 136. See also G. BORN, *International Commercial Arbitration* (3rd ed, 2021), pp. 3765-3766 and pp. 3783-3784 ("In general, the same choice-of-law rules that apply to the recognition and enforcement of arbitration agreements under Article II also apply in the context of the recognition and enforcement of awards under Article V: it would make no sense to require application of different choiceof-law standards at different stages of the arbitral process.")
71) *Enka v Chubb*, para 129; *Kabab-Ji v KFG*, para 33.
72) *Kabab-Ji v KFG*, para 33.
73) *Kabab-Ji v KFG*, para 33.
74) *Kabab-Ji v KFG*, para 34.
75) UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, 2016), available at https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=145, pp. 141-142.
76) Belgian Code of International Private Law, Article 98, para 1.
77) G. BORN, o.c., p. 2940 ("Choice-of-law agreements may be implied or tacit, as well as express. This is recognized in most legal systems and has particular importance in the context of international commercial arbitration.") Id., p. 3786 ("Article V(1)(a) provides for application of the law chosen by the parties, regardless whether that choice is express or implied. (476) That is consistent with more generally-applicable choice-of-law rules, which almost universally recognize implied choices of law.")
78) Belgian Supreme Court, Case No. C.02.0216.N (*Colvi/Interdica*), Judgment of 15 October 2004, Pas. 2004, No. 485, 1600, citing Antwerp Court of Appeal, Judgment of 17 December 2001 ("La validité de la clause d'arbitrage doit, par conséquent, être appréciée en principe suivant la *lex contractus*, qui est le droit suisse et non suivant la *lex fori*, qui est le droit belge.")
79) *Id.*, p. 10.
80) Liège Court of Appeal, Judgment of 28 April 2003, *J.T.*, 2003, liv. 6116, 811, 812.
81) M. PIERS, "Article 1681" in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium*, *A Practitioner's Guide,* Kluwer International, 2016, p. 81; D. MATRAY & G. MATRAY, "La rédaction de la convention d'arbitrage", in G. KEUTGEN (ed.), *La convention d'arbitrage, groups de sociétés et groups de contrats – arbitrageovereenkomst, vennootschapsgroepen en groepen overeenkomsten*, Brussels, Bruylant, 2007, p. 61.
82) *Enka v Chubb*, para 60 ("what more… is required – to make it clear that a phrase such as "This Agreement" means the whole agreement and not just part of it?"); *Kabab-Ji v KFG*, para 39 ("In our view, the effect of these clauses is absolutely clear. Clause 15 of the FDA is a typical governing law clause, which provides that "this Agreement" shall be governed by the laws of England. Even without any express definition, that phrase is ordinarily and reasonably understood (for the reasons given at paras 43 and 53 of our judgment in Enka) to denote all the clauses incorporated in the contractual document, including therefore clause 14.")
83) Judicial Code, Article 1690(1) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement.")
84) See paragraph 14 above.
85) *Enka v Chubb*, pars 55-68.
86) See M. SCHERER & O. JENSEN, "The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in *Enka v Chubb*", 41(2) IPRAX 2021, 177 (2021); AMIR, "The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIArb London's Branch Keynote Speech 2021", Kluwer Arbitration Blog, 21 May 2021, consulted at: http://arbitrationblog.kluwerarbitration.com/2021/05/21/the-proper-law-of-the-arbitration-agreementa-comparative-law-perspective-a-report-from-the-ciarb-londons-branch-keynote-speech-2021/ .
87) Swiss Federal Act on Private International Law, Article 178(2) ("As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.")

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