ALLEGED NON-PARTIES TO AN ARBITRATION AGREEMENT

Section 103(2)(b) of the Arbitration Act 1996 transposes art.V(1)(a) of the New York Convention 1958 into English law. It allows an English court to refuse to recognise or enforce an arbitral award on the ground that the relevant arbitration agreement was invalid "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". Courts have held that s.103(2)(b) also applies where a defendant proves "that the [arbitration] agreement is not binding on it because [it] was never a party to [the arbitration agreement]": *Dallah Real Estate and Tourism Holding Co v Government of Pakistan* [2010] UKSC 46; [2011] 1 A.C. 763 at [12] and [77]. If a defendant establishes that it is not a party to, and is not otherwise bound by, the arbitration agreement, an English court can refuse to enforce the award.

The Supreme Court's decision in *Kabab-ji v Kout Food Group* [2021] UKSC 48; [2022] 1 All E.R. (Comm) 773 clarifies the law on several issues potentially arising in that context, including how the principles restated in *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38; [2020] 1 W.L.R. 4117 for ascertaining what law was selected to govern an arbitration agreement are equally applicable to the inquiry under s.103(2)(b).

The essential facts were as follows. The claimant, Kabab-ji, entered into a franchise development agreement (FDA) with a Kuwaiti company, Al Homaizi, through which it granted a licence to Al Homaizi to operate a franchise in Kuwait. The FDA contained arbitration, choice of law, and "no oral modification" (NOM) clauses, which were replicated in 10 subsequent franchise contracts between the same parties. In particular:

1. Article 15 stated, "[t]his Agreement shall be governed by and construed in accordance with the laws of England". "This Agreement" was further defined in art.1 to include all of the provisions of the FDA.
2. Article 14 provided for arbitration in Paris (art.14.5), and stipulated that "[t]he arbitrator(s) shall also apply principles of law generally recognised in international transactions. … Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement" (art.14.3).
3. Articles 24 and 26 stated, respectively, that any "interpretation, change, termination, or waiver of any provision" of the FDA would be ineffective unless made in writing, and that the FDA "may only be amended or modified by a written document executed by duly authorised representatives of both Parties". These were supplemented by several other provisions requiring any waiver or assignment also to be in writing.
4. Article 2 obligated the parties to "act in accordance with good faith and fair dealing" when performing the FDA.

The defendant, KFG, later became Al Homaizi's parent company. A dispute arose between the parties, and Kabab-ji commenced arbitration against KFG alone,

relying on the arbitration agreement in the FDA and arguing that KFG became a party to the FDA by virtue of its conduct.

KFG contended in the arbitration that it was not party to the FDA and was therefore not bound by the arbitration agreement. The arbitrators, choosing to apply French law to the issue, rejected KFG's objections and proceeded to render an award against it.

KFG resisted the award's enforcement in England, and also sought to annul the award in Paris. Following a trial of the preliminary issues, the High Court adjourned the action pending the French annulment proceedings. On appeal, the Court of Appeal gave summary judgment against Kabab-ji and held that the award was not to be enforced in England. Kabab-ji appealed further. Meanwhile, the Parisian courts declined to annul the award, holding that the arbitrators were correct to apply French law and in their analysis.

The Supreme Court dismissed the appeal. Lord Hamblen and Lord Leggatt (with whom the other Justices agreed) first confirmed that the issue of whether KFG had become party to the arbitration agreement was an issue governed by the law chosen for the putative arbitration agreement that was alleged to exist. Accordingly, the putative governing law rule reflected the "general approach" in private international law to disputes about the existence of a contract (see [2022] 1 All E.R. (Comm) 773 at [27]). This required the court to ascertain what law had been chosen for the putative arbitration agreement between Kabab-ji and KFG. In that regard, their Lordships further explained that, as there was no international consensus, the same principles as were restated in *Enka* [2020] 1 W.L.R. 4117 were applicable for identifying what law had been chosen for an arbitration agreement within the meaning of s.103(2)(b) and art.V(1)(a), for the sake of "consistency and coherence" (see at [32]–[36]).

Applying the guidance in *Enka*, their Lordships found that art.15 constituted an express choice of English law for the putative arbitration agreement between Kabab-ji and KFG. Notably, they remarked (at [39]) that this would have been so even if the expression "this Agreement" were not specifically defined to refer to all of the contractual terms, because those words taken alone would still "ordinarily and reasonably [be] understood to denote all the clauses incorporated in the contractual document".

In reaching that conclusion, the court rejected Kabab-ji's argument that art.14.3 of the FDA changed the analysis, reasoning (at [43]–[48]) that it merely stipulated what rules of law *the arbitrators* were required to apply, and was therefore irrelevant to how *a court* was to ascertain the law chosen for the putative arbitration agreement. Their Lordships also rejected the argument that the "validation principle", being the principle that a choice of law provision "should be interpreted so as to give effect to … the presumed intention that an arbitration agreement will be valid and effective", justified the inference that art.15 was not intended to cover the arbitration agreement (see at [50]–[52]). They explained (at [51]) that the "validation principle" was a "principle of contractual interpretation" which applied only when it was proven that the parties did enter into an arbitration agreement, so could not be invoked to "create an agreement which would not otherwise exist".

Having found that English law had been chosen for the putative arbitration agreement, the court examined whether Kabab-ji had a real prospect of establishing

that KFG was a party to it under English law. The answer was negative. Article 24 applied to render any oral termination of the FDA (and thus any oral novation) ineffective, and the other NOM provisions foreclosed any other workaround (see at [64]–[65]). Their Lordships disagreed with Kabab-ji's reliance on arts 14.3 and 2, reasoning (at [72]–[74]) that:

1. Article 14.3 only addressed the arbitrators and, in any event, did not permit the application of a rule which "contradict[ed] the strict wording of the [FDA]"; and
2. Kabab-ji needed first to establish that KFG was a party for it to be obligated to act in good faith and, regardless, it was not contrary to good faith for KFG to rely on the NOM provisions if it had not been estopped from doing so.

The Supreme Court's decision in *Kabab-ji* clarifies four matters of significance.

First, whilst the Supreme Court in *Enka* had addressed the issue obiter, *Kabab-ji* confirms that a choice of law clause which states that "this agreement is governed by X law" will normally be interpreted as an *express choice* for all the provisions of the contract including the arbitration clause, even where the expression "this agreement" is not expressly defined (see at [39]). In effect, the Supreme Court has rejected the idea, previously adopted in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 W.L.R. 102 (at [27]) and in other jurisdictions (e.g. *BNA v BNB* [2019] SGCA 84 at [61]–[63]), that a "this agreement"-type clause can only constitute an *implied* choice of law for the arbitration agreement. It is submitted that the court's approach is analytically correct. If a choice of law provision appears in a contractual document, the question is whether it covers the arbitration agreement on its proper construction. Where it does, there is nothing implicit about the choice it represents (see further *Enka v Chubb* [2019] EWHC 3568 (Comm); [2020] 1 Lloyd's Rep. 71 at [51]–[56]).

Secondly, *Kabab-ji* also establishes that a "this agreement"-type provision should not be construed as not extending to an arbitration agreement in the same document merely because it selects a law under which an alleged non-party to the arbitration agreement will not be bound by it. This must be correct. Notwithstanding its ambitious-sounding label, the "validation principle" involves no more than a court inferring that rational parties are unlikely to have intended to choose a law that would nullify or stultify their arbitration agreement as far as they could have helped. It cannot sensibly be applied where a defendant alleges that it did not agree to arbitrate to begin with.

Thirdly, their Lordships' characterisation of art.14.3 as a provision that merely directed the arbitrators to apply certain rules of law in the arbitral proceedings is to be welcomed. Unlike litigation before the courts, international arbitration has an additional, sui generis dimension of private ordering. Parties who agree to arbitrate are able to direct in their arbitration agreement that the arbitrators should (or should not) do various things (see G. Born, *International Commercial Arbitration* (2021), at pp.2118–2119 and 2129), such as to apply a particular law in the arbitration. Such a directive is conceptually distinct from selecting a law to govern the contract and/or arbitration agreement: J. Lew, *Applicable Law in International Commercial Arbitration* (1978), at paras 131 and 133. The one does

not automatically entail the other, especially since the arbitration agreement may have to be interpreted or enforced by a non-arbitral entity, such as the courts of the seat or an enforcement forum. Therefore, a provision worded to require the arbitrators to apply a particular law ought not to be construed as a choice of law for the arbitration agreement unless there are sufficient indications that the parties wanted it to have that additional function. Where the contract already contains a general choice of law provision, it is inferable that the parties intended only to direct the arbitrators and not to dictate the proper law of the arbitration agreement.

Finally, their Lordships' conclusion that the NOM provision in art.24 applied to render a purported oral termination by agreement ineffective is a logical extension of the reasoning in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] A.C. 119, where the Supreme Court held that parties could contract to disable themselves from varying their contract orally. The legal requirements for discharging a contract by agreement are essentially the same as those needed for a variation, and some commentators even regard the latter as an instance of the former: e.g., J. Cartwright, *Formation and Variation of Contract*, 3rd edn (2021), at para.3-53. It is therefore hard to justify any differences in treatment.

Nevertheless, *Kabab-ji* still leaves three questions unanswered.

First, their Lordships, having found an express choice, lacked the occasion to address the Court of Appeal's suggestion that an implied choice of law should be identified only if it passes the "business efficacy" test for the implication of contractual terms (see [2020] EWCA Civ 6; [2020] 1 Lloyd's Rep. 269 at [53]). There is some force in that proposition, owing to how Lord Diplock said in *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] A.C. 572 at 603; [1970] 3 All E.R. 71 at 91 that an English court was to "appl[y] the ordinary rules of English law relating to the construction of contracts" when identifying choices of law. Moreover, the tests for implying terms "in fact" are designed to discern that which the parties "must have intended" but left unexpressed (*Geys v Société Générale* [2012] UKSC 63; [2013] 1 A.C. 523 at [55]; *Marks & Spencer v BNP Paribas* [2015] UKSC 72; [2016] A.C. 742 at [63]), which makes them arguably relevant in this context.

Secondly, their Lordships' statement that the issue of whether a defendant is party to an arbitration agreement is governed by the law selected for the putative arbitration agreement (see [2022] 1 All E.R. (Comm) 773 at [27]) accords with the approach previously taken in *Dallah* [2011] 1 A.C. 763 at [72] and [78] (cf. *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 2 All E.R. (Comm) 1 at [25]–[36]), but might still be questioned as a matter of principle. The putative *lex contractus* rule is inappropriate for a situation where a contract containing a choice of law provision uncontroversially exists between A and B and the dispute concerns whether someone else (C) is bound by the provisions in that contract. It treats the choice of *lex contractus* made by A and B as if it were also made by C, when that is the very question to be determined (see Restatement of the US Law of International Commercial Arbitration at §4.10, note c). It is also worth noting that the putative *lex contractus* rule is not "generally accepted" in the wider common law sphere. It was rejected by Lord Mance I.J. in *Lew v Nargolwala* [2021] SGCA(I) 1 at [70]–[76] in favour of an approach focusing

on "the circumstances of the transaction or relationship alleged to have given rise to a concluded contract", and by Edelman J. in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453 (affirmed in [2017] FCAFC 6) in favour of applying the *lex fori*.

The reason that their Lordships gave (at [27]) for applying the putative *lex contractus* rule was that "the first choice of law rule [in art.V(1)(a)] could never apply" in an alleged non-party situation without it. However, it is arguable that the choice of law rules in art.V(1)(a) were meant to apply only where a party contends that the arbitration agreement was not "valid" in the narrow sense of the term (i.e. where the arbitration agreement is alleged to be void and/or unenforceable, without there being any dispute about whether it existed or who was party to it). This is for two reasons.

First, s.103(2)(b) and art.V(1)(a) avail a defendant who is not bound by an arbitration agreement only because courts have looked past its strict wording in order to obviate the absurdity of a non-party being left without a defence: see *Dallah* [2008] EWHC 1901 (Comm); [2009] 1 All E.R. (Comm) 505, Annex 6 at [11]–[12]. This was done by (somewhat artificially) extending the concept of "validity" to include the issue of whether an arbitration agreement *exists* between the relevant claimant and defendant, or binds that defendant for some other reason. It need not follow that the express choice of law rules in art.V(1)(a), which were inferably designed for validity disputes in the narrow sense, must accompany that extension, particularly if their application would be inapt. Indeed, applying the two rules for validity issues in the wider sense would mean that the issue of whether a parent company is bound (qua parent) by an arbitration agreement entered into by its subsidiary would also be governed by the putative chosen law or the seat law in the absence of a choice, when the orthodox approach is to have the *lex incorporationis* apply to that issue: *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm); [2017] 1 All E.R. (Comm) 207 at [18]–[21] (but cf. *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] EWCA Civ 51 at [112]–[118]).

Secondly, the words "to which the parties have subjected it" in art.V(1)(a) imply that the first choice of law rule was not envisaged to apply where the defendant alleges that it was not a "part[y]" to the arbitration agreement and could not have "subjected it" to any law. The same might be said of the back-up rule pointing to the seat law, worded to apply when the "parties" have "fail[ed]" to give any "indication thereon". A non-party could neither have "subjected" the arbitration agreement to a law nor have "fail[ed]" to do so, making the application of either rule to an alleged non-party situation rather bizarre.

For both reasons, it is arguable that neither choice of law rule in art.V(1)(a) applies in an alleged non-party case, and the court was too quick to conclude that the putative *lex contractus* approach should be applied. Notwithstanding past authorities, a rule selecting the law of the country with the closest connection to the events allegedly resulting in KFG being bound, or one that applied the *lex fori* as a safeguard before applying the putative chosen law (cf. A. Briggs [1990] L.M.C.L.Q. 192 at 198) are more attractive candidates in principle. However, since their Lordships' conclusion forms part of the decision's ratio, any such innovation must await another appeal.

Finally, one might question whether a term in a detailed commercial contract stipulating that "the arbitrators shall apply X law" would be construed by an English court to be an implied choice of X law for the arbitration agreement when there is no general choice of law clause in the contractual document. Their Lordships' treatment of art.14.3 of the FDA (at [45]–[46]) suggests that such a provision will be construed (absent strong indications to the contrary) only to be a choice of the "law [which] the arbitrators are to apply in deciding the substantive issues in dispute" and not as a choice for the arbitration agreement as well. This is consistent with the guidance in *Enka v Chubb* [2020] 1 W.L.R. 4117 at [159], which requires a court to be satisfied that the supposed implied choice was "the only reasonable conclusion to be drawn from the circumstances". Sophisticated parties can be expected to have said so if they wished to do more than to direct the arbitrators to apply a particular law, and the fact that no choice of law provision for the contract or the arbitration agreement was inserted might suggest that the parties simply failed to agree (cf. *Enka* at [155]). The "business efficacy" test, if applicable, supports the same conclusion. ↺

Matthew Chan
Barrister, *London*

Myron Phua
Solicitor-advocate, *London*

REGAL INDIGNITY

Sheikh Mohammed Bin Rashid al-Maktoum v Haya Bint al-Hussein [2021] EWCA Civ 129 asked whether UK courts have jurisdiction to investigate foreign espionage in the context of a dispute over the wardship of two children. A unanimous Court of Appeal decided that they did. It held that the foreign act of state doctrine (FAS) did not apply and, even if it did, an exception should be made on grounds of public policy.

The case reframes the reasoning of the landmark decision of the Supreme Court in *Belhaj v Straw* [2017] UKSC 3; [2017] A.C. 964. There, a carefully constructed majority said there are:

> "issues which are inappropriate for the courts of the UK to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it" (Lord Neuberger at [123]).

The High Court in *Re al-Maktoum* [2020] EWHC 2883 (Fam) at [48] responded, drily, that "the contours of the … doctrine are not yet wholly defined". But it then sought to draw the contours along different lines. This is important because the Supreme Court heard an appeal on the same issue over two years ago, in *Law Debenture Trust v Ukraine* [2018] EWCA Civ 2026; [2019] Q.B. 1121. At the time of writing that case had yet to be decided.

↺ Arbitration agreements; Choice of law; Enforcement; Implied terms; Interpretation; New York Convention awards; Non-parties