

Volume 38, No. 4, 2020

ASA Bulletin

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Editor in Chief: Matthias Scherer



Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

Jurisdiction over Non-signatories, the Irreconcilable Approaches of French and English Courts

Case Note on: (i) English Court of Appeal Decision of 20 January 2020 and (ii) Paris Court of Appeal Decision of 23 June 2020

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Annulment – Arbitration agreement – Conflict of laws – Court review – Enforcement – English courts – Extension of the arbitration agreement – French courts – Involvement in the performance – Jurisdiction – Law applicable – New York Convention – Non-signatory – Third-party

Introduction

The enforcement proceedings, in England and in France, of an ICC arbitral award rendered in Paris on 11 September 2017 highlight the divergent approaches adopted by these two jurisdictions regarding the law applicable to the arbitration agreement and the inconsistencies that may arise in connection thereto.

Whereas France is one of the most liberal arbitration seats in the world with respect to jurisdiction, England adopts a more conservative approach.

Applying the *lex contractus* to the arbitration agreement, the English Court of Appeal refused to grant enforcement to the arbitral award finding that the arbitration agreement had not been transferred to the respondent in the arbitration under the relevant provisions of the contract.

In France, the motion for annulment brought against the same award was dismissed by the Paris Court of Appeal. Agreeing with the majority of the arbitral tribunal, the Court held that according to material rules of international arbitration law (“*règles matérielles du droit de l’arbitrage international*”) the arbitration agreement, valid in principle and not governed

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by any national law, extends to any non-signatory directly involved in the performance of the contract containing the arbitration agreement.

The Courts' decisions and their factual background are presented below (I) followed by a discussion of the issues at stake (II).

I. Factual background and summary of the Courts' decisions

1) Factual background

Kabab-Ji, a Lebanese company, and AHFC, a Kuwaiti company, entered into a Franchise Development Agreement (the "FDA") on 16 July 2001. Under the FDA, AHFC was to manage the operation of a fast food and catering brand in Kuwait for ten years. For the opening of each franchise, the parties were to enter into a specific implementation agreement. The parties' agreements provided for the application of English law and included an ICC arbitration clause with Paris as the seat of arbitration.

The relevant provisions of the FDA were:

"Article 14: Settlement of Disputes

[...]

14.2. Except for those matters which specifically involve the Mark, any dispute, controversy or claim between LICENSOR and LICENSEE with respect to any issue arising out of or relating to this Agreement or the breach thereof, ...shall, failing amicable settlement, on request of LICENSOR or LICENSEE, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

14.3. The arbitrator(s) shall apply the provisions contained in the Agreement. The arbitrator(s) shall also apply principles of law generally recognised in international transactions. The arbitrator(s) may have to take into consideration some mandatory provisions of some countries i.e. provisions that appear later on to have an influence on the Agreement. Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement.

[...]

Article 15: Governing Law

ARTICLES

This Agreement shall be governed by and construed in accordance with the laws of England.”

The FDA also provided for “*No Oral Modifications*” clauses that prohibited its transfer or assignment and more generally any modification without the parties’ prior written consent.

The relevant provisions were:

“Article 3: Grant of Rights

3.1. License:

... This grant is intended to be strictly personal in nature to the LICENSEE and no rights hereunder whatsoever may be assigned or transferred by LICENSEE in whole or in part without the prior written approval of LICENSOR.

Article 19 Rights not Transferable

The parties hereto agree that all rights granted LICENSEE under this Agreement are personal in nature and are granted in reliance upon various personal and financial qualifications and attributes of LICENSEE. LICENSEE'S interest under this agreement is not transferable or assignable, under any circumstances whatsoever, voluntarily, by operation of law or otherwise without the written consent of LICENSOR or purported transfer or assignment of all or any part of such interest shall immediately terminate this Agreement without further action of the parties and without liability to LICENSOR or its designee of any nature.

Article 24 Entire Agreement

... No interpretation, change, termination or waiver of any provision hereof, and no consent or approval hereunder, shall be binding upon the other party or effective unless in writing signed by LICENSEE and by an authorized representative of LICENSOR or its designee.

Article 26 Amendment of Agreement

The Agreement may only be amended or modified by a written document executed by duly authorised representatives of both Parties. ”

In 2004, following a corporate reorganization, AHFC became a subsidiary of the Kout Food Group (“KFG”). Kabab-Ji was notified of this

change of control to which it consented, provided that such change would have no impact on the agreements that were already signed. While KFG did not formally become a party to the FDA, it nevertheless became actively involved in its performance.

In 2015, Kabab-Ji filed a request for arbitration against KFG exclusively. KFG objected to the jurisdiction of the arbitral tribunal on the ground that under English law it had not become a party to the FDA, including its arbitration agreement.

In its award of 11 September 2017, the arbitral tribunal found, by a majority, that it had jurisdiction over KFG, applying (i) French law to the validity and the extension of the arbitration agreement and (ii) English law to determine whether a transfer of the substantive rights and obligations of the FDA to KFG had occurred. The arbitral tribunal held (i) that the arbitration agreement had been extended to KFG as a result of its involvement in the performance of the FDA and that (ii) a transfer of the substantive rights and obligations of the FDA had occurred by way of a novation. On the merits, KFG was found liable for breach of contract.

The dissenting arbitrator, an English qualified lawyer, agreed that French law applied to the validity of the arbitration agreement but, unlike the majority, found that under English law KFG never became a counterparty to the FDA which meant that it owed no obligations to Kabab-Ji.²

2) The Courts' decisions

KFG brought a motion for annulment of the arbitral award before the Paris Court of Appeal on 17 December 2017. Around the same time, Kabab-Ji initiated enforcement proceedings in London.

Findings of the English courts:

KFG challenged the enforceability of the award on the ground that it was not bound by a valid arbitration agreement under section 103(2)(b) of the 1996 English Arbitration Act.³

² See summary of the arbitral award at paras. 3-4 of the English Court of Appeal's decision.

³ Section 103(2)(b) of the 1996 English Arbitration Act provides: "(2) *Recognition or enforcement of the award may be refused if the person against whom it is invoked proves [...] (b) that 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.*"

The case gave rise to two decisions: a decision of the High Court on 29 March 2019⁴ and a decision of the Court of Appeal on 20 January 2020.⁵

The Court of Appeal denied enforcement, agreeing in substance with the reasoning of the High Court, but reversing its decision to stay the enforcement proceedings pending the outcome of the French annulment proceedings.⁶

In order to determine the law applicable to the arbitration agreement, the English courts considered whether the parties had made an express or implied choice of governing law.

The English courts held that English law, the law expressly chosen by the parties in article 15 of the FDA to govern their “*Agreement*”, also applied to the arbitration agreement.

To reach this conclusion, they read Article 15 of the FDA together with its Article 1.⁷ Article 1 defined “*Agreement*” as including all of the terms of the agreement set out in the FDA, meaning that the arbitration agreement contained in Article 14 was covered by the choice of law provision of Article 15. They also relied on Article 14.3 providing that “*the arbitrator(s) shall apply the provisions contained in the Agreement*”.

Accordingly, the arbitral tribunal should have applied English law to determine whether there had been a transfer of rights and obligations to KFG and consequently whether KFG had become bound to the arbitration agreement (“*plainly one and the same question*”).⁸

⁴ J (Lebanon) v K (Kuwait), High Court, 29 March 2019, [2019] EWHC 899 (Comm), 2019 WL 01936281.

⁵ Kabab-Ji S.A.L. (Lebanon) v. Kout Food Group (Kuwait), Court of Appeal, 20 January 2020, Case No. A4/2019/0944, [2020] EWCA Civ 6, 2020 WL 00265025.

⁶ In its decision of 29 March 2019, the High Court decided to stay enforcement pending the Paris Court of Appeal’s decision, in the hope that its opinion “*will not go unnoticed in the French courts, given that on any basis English law is central to the decision*”. It also reserved its final decision on the transfer of the FDA to KFG until the submission of further documents by Kabab-Ji aimed at establishing a written consent to the transfer of the FDA. The Court of Appeal reversed the High Court decision on the ground that no stay should have been granted.

⁷ Article 1 of the FDA “*Content of the Agreement*” provided: “*This Agreement consists of the foregoing paragraphs, the terms of agreement set forth herein below, the documents stated in it, and any effective Exhibit(s), Schedule(s) or Amendment(s) to the Agreement or to its attachments which shall be signed later on by both Parties. It shall be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others.*”

⁸ High Court decision, paras. 11-20; Court of Appeal decision, paras. 62-70.

On this issue, the English courts noted that the “*No Oral Modification*” clauses of the FDA prohibited the addition of a third party to the FDA without the parties’ express written consent which was absent in this case.⁹

Although KFG had indeed treated itself as if it were the licensee,¹⁰ such course of action was held insufficient under English law to override the clear wording of the FDA since it did not amount to “*an unequivocal representation that the variation of the FDA to add KFG as a party was valid notwithstanding that the formal requirements of the No Oral Modifications clauses had not been complied with.*”¹¹

Consequently, no valid arbitration agreement existed between the parties and the award was not enforceable against KFG under section 103(2) of the Arbitration Act 1996.

Findings of the Paris Court of Appeal:

On 23 June 2020, the Paris Court of Appeal dismissed KFG’s motion for annulment.

In its action to set aside the award, KFG argued, among other grounds,¹² that the arbitral tribunal wrongly retained jurisdiction under Article 1520 1° of the French Code of Civil Procedure since it should have applied English law to the arbitration agreement and, consequently, found that it had no jurisdiction over KFG. Assuming that French law was applicable to the arbitration agreement, the conditions required by French law for the extension of an arbitration agreement were not met. In any event, the arbitration agreement would be inoperative and inapplicable to KFG since no

⁹ High Court decision, paras. 21-54; Court of Appeal decision, paras. 71-81.

¹⁰ High Court decision, para. 51; Court of Appeal decision, para. 80.

¹¹ Court of Appeal decision, para. 80. In the *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, the Supreme Court set a test to override the clear wording of “No Oral Modification clauses” that was applied by the Court of Appeal in this case. The test set out at paragraph 16 of *Rock Advertising* states as follows: “*I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself...*”

¹² KFG also alleged that the arbitral tribunal did not comply with its mission (1520 3° of the Code of Civil Procedure) and that it breached the adversary principle (1520 4° of the Code of Civil Procedure). The present commentary is limited to the jurisdiction ground of annulment.

transfer of the FDA's substantive obligations to KFG could have occurred under English law.

In line with its well-established case-law, the Paris Court of Appeal held that *“pursuant to a material rule of international arbitration law, the arbitration agreement is legally independent from the main contract that contains it, directly or by reference, and its existence and validity must be appreciated, subject to mandatory rules of French law and international public order, according to the parties' common intention, without the need to refer to a national rule of law”*.¹³

In the instant case *“the designation of English law as governing the Agreements in a general fashion and the prohibition made to the arbitrators to apply a rule that would contradict the Agreements, were not sufficient, by themselves, to establish the parties' common intention to submit the arbitration agreements to English law and thereby derogate to the material rules of international arbitration that were applicable at the seat of arbitration expressly elected by the parties”*.¹⁴

Concerning the extension of the arbitration agreement to KFG, also in line with its well-established case law, the Court held that *“the arbitration agreement inserted in an international contract has a validity and efficiency of its own that command to extend its application to parties directly involved in the performance of the contract and the disputes that can arise therefrom, from the moment it can be assumed, based on their contractual situation and activities, that they have accepted the arbitration agreement knowing its existence and scope, notwithstanding the fact that they did not sign the contract providing for it.”*¹⁵

¹³ *“En vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence, et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique.”*

¹⁴ *“La désignation du droit anglais comme régissant de manière générale les Accords et l'interdiction faite aux arbitres de ne pas appliquer une règle qui contredirait les Accords ne sauraient suffire, à elles seules, à établir la volonté commune des parties de soumettre les clauses compromissoires au droit anglais et de déroger ainsi aux règles matérielles en matière d'arbitrage international, qui étaient applicables au siège de l'arbitrage expressément désigné par les parties.”*

¹⁵ *“[L]a clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application aux parties directement impliquées dans l'exécution du contrat et dans les litiges qui peuvent en résulter, 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 connaissaient l'existence et la portée, bien qu'elles n'aient pas été signataires du contrat qui la stipulait.”*

The French Court then reviewed the factual elements relied on by the arbitral tribunal to establish KFG's direct involvement in the performance of the FDA.

The Court held that KFG's had indeed been involved in the performance, termination and renegotiation of the FDA and its implementation agreements for several years since the contemporaneous documents showed that:

- KFG had been put in charge of the operation of the restaurants in Kuwait in accordance with the agreements;
- KFG had presented itself as the licensee to Kabab-Ji and expressly relied on the agreements;
- KFG had directly paid royalties to Kabab-Ji under the agreements;
- KFG had conducted the negotiations for the attempted renewal of the agreements, and subsequently, for their termination.

The Paris Court of Appeal concluded from this review that the arbitral tribunal rightly held that the arbitration clause of the agreements had been extended to KFG.

Concerning the transfer of the substantive rights and obligations of the FDA to KFG, the Court held that this issue, “*that enabled to determine the extent of the liability*” of KFG and did not fall within the scope of the Court's review, “*entertains no relation of dependency whatsoever*” with the extension of the arbitration clause “*that enabled the arbitrators to retain jurisdiction*” over KFG.

II. Analysis

1) The law governing the arbitration agreement: conflict of laws method v./material rules method

The opposite conclusions reached by the English and French courts in this case result not only from a difference in the method of designating the law applicable to the arbitration agreement, but also from two different conceptions of international arbitration agreements.

Like many other countries, English courts resort to conflict of laws rules to determine the law applicable to the arbitration agreement that they

treat as any other clause of a contract.¹⁶ As illustrated by this case, English courts will most often rule that the law chosen by the parties to govern their contract, either express or implied, also governs the arbitration agreement. Recent attempts to reverse this presumption have been quashed by the UK Supreme Court.¹⁷ When no choice of law is made by the parties, either express or implied, the courts will determine which legal system the contract has the closest and most real connection with. The law of the seat of arbitration will most often be found to be most closely connected to the arbitration agreement. The English approach follows the conflict of laws rules of Article V (1)(a) of the New York Convention.¹⁸

While English law recognizes the principle of separability of the arbitration agreement,¹⁹ unlike in France, its scope is limited to saving the arbitration agreement in situations where the main contract is allegedly ineffective under the applicable law. As explained by the sitting judge in the Court of Appeal’s decision under review:

“the rationale of separability is that it ensures that the dispute resolution procedure chosen by the parties survives the main agreement becoming unenforceable for example because of fraud or misrepresentation [...] In other words it does not preclude the arbitration agreement being construed with the remainder of the main agreement as a whole, a fortiori [...] where, as here, there is nothing in the wording of the arbitration agreement which suggests that it is intended to be construed in isolation from the remainder of the main agreement...”²⁰

¹⁶ See *Sul America v Enesa Engenharia* [2012] 1 Lloyd’s Law Rep 671 (CA) at [9]: “The proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognise and give effect to the parties’ choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection.”

¹⁷ *Enka v Chubb* [2020 UKSC 38] published on 9 October 2020. The lower judges had held that there is a strong presumption that the parties have impliedly chosen the law of the seat of the arbitration to govern the arbitration agreement. The Supreme Court disagreed.

¹⁸ Article V 1(a) of the New York Convention provides that: “Recognition and enforcement of the award may be refused [...] (if) : (a) The parties [...] were, under the law applicable to them, under some incapacity, or the said 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...”

¹⁹ See Article 7 of the 1996 Arbitration Act.

²⁰ See para. 66.

In France, the 1972 Hecht decision was the starting point of the construction by the Paris Court of Appeal of a set of material rules governing the arbitration agreement and favoring its validity under all circumstances.²¹ According to the formula adopted in the Dalico case²² and reiterated in the decision under review: “*by virtue of a material rule of international law of arbitration, the arbitration agreement is legally independent from the main contract that contains it directly or by reference and its existence and effectiveness are determined according to the common intention of the parties without reference to a national law, subject to the mandatory rules of French law and international public policy.*” Later, the French courts went even further stating, as in the examined decision, that an international arbitration agreement has “*a validity and efficiency on its own*” (“*une validité et une efficacité propres*”).

The French choice of the material rules method flows from the idea that international arbitration is a transnational dispute resolution system that must follow its own set of rules favoring its efficiency and not depend on the vicissitudes of local laws. The material regime applicable to arbitration agreements is broad and encompasses every question relating to their validity, scope, transmission and effects that may arise before a French judge, regardless of the location of the seat of arbitration. Even though certain rules were codified in the 2011 Decree that reformed French arbitration law, the content of “*the mandatory rules of French law and international public policy*” that regulate international arbitration agreements is still evolving. Several French authors have thus pointed out the lack of predictability of the material rules method.²³

Although the *Cour de Cassation* admits the possibility for the parties to depart from the French material rules and submit the arbitration agreement

²¹ *Cour de Cassation*, 4 July 1972, *Hecht*, *Journal du Droit International* 1972, p. 843, B. Oppetit; Paris Court of Appeal, 13 December 1975, *Menicucci*, *Journal du Droit International* 1977, p. 107, E. Loquin; *Revue de l'Arbitrage*, 1977, p. 147, P. Fouchard.

²² *Cour de Cassation*, 20 déc. 1993, *Dalico*, *Journal du Droit International* 1994, p. 432, E. Gaillard, p. 690, E. Loquin; *Revue de l'arbitrage* 1994, p. 116, H. Gaudemet-Tallon.

²³ S. Bollée, “*Quelques remarques sur la pérennité (relative) de la jurisprudence Dalico et la portée de l'article IX de la Convention européenne de Genève*”, *Journal du Droit International*, No.1, January 2006, var. 5; P. Mayer, “*Les limites de la séparabilité de la clause compromissoire*”, *Revue de l'arbitrage*. 1998, p. 359; P. Mayer, “*De l'autonomie de la clause compromissoire, Cour de cassation (1re Ch. civ.). - 20 décembre 1993, Comité populaire de la municipalité de Khoms c. Soc. Dalico Contractors*”, *Revue Critique de Droit International Privé*, 1994, p. 663; C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2019, § 605.

to a national law,²⁴ such a choice must be expressed in unequivocal terms. This is illustrated by the examined decision where the Paris Court of Appeal held that KFG did not submit any element “*establishing in non-equivocal terms the parties’ common intention to designate English law to govern the validity, transfer or extension of the arbitration agreement which regime is independent from that of the agreements.*”

Unless there is a clear intention to the contrary, it is not unreasonable to assume, like the English courts did, that parties intended that the law chosen to govern their contract also applies to all of its clauses, including the arbitration agreement.

The English approach, however, does not take into consideration the specificity of the arbitration agreement which is procedural in nature. When entering into a contract, parties certainly have in mind its substantive terms, not necessarily the procedural aspects attached to the arbitration agreement. It is thus also reasonable to assume that parties intended to provide for a valid dispute resolution system which would not be affected by the constraints and limitations of local laws.

In this regard, the law of the seat of arbitration is another strong connecting factor, since the seat is the place where the arbitration agreement will deploy its effects and where the courts will assess the validity of the arbitral award.

In theory at least, the material rules method aims at avoiding the uncertainties resulting from the determination and application of a connecting factor. It also aims at ensuring a uniform regulation of international arbitration favoring its effectiveness and predictability. Such a result, however, can only be achieved when the material rules have their origin in an international convention.

An interesting alternative approach exists in Switzerland. Article 178(2) of the Swiss Private International Law Act (PILA) provides for a conflict of laws rule *in favorem validitatis* which goal is to ensure the enforceability of international arbitration agreements. Under Article 178(2) of the PILA, the arbitration agreement is indeed valid “*if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.*”

²⁴ *Cour de Cassation*, 30 March 2004, n° 01-14.311, *Unikod*, *Revue de l’arbitrage*, 2005, p. 961, C. Seraglini ; *Journal du Droit International*, 2006, p. 127 ; S. Bollée, “*Quelques remarques sur la pérennité (relative) de la jurisprudence Dalico et la portée de l’article IX de la Convention européenne de Genève*”, *Journal du Droit International*, No.1, January 2006, var. 5 ; *RTD com.* 2004. 443, E. Loquin.

The French and Swiss approaches in this regard are rather unique. Many countries, like England for example, follow the conflict of laws rules set out in Article V(1)(a) of the New York Convention, which subjects the validity of the arbitration agreement to the law chosen by the parties and in the absence thereof, to the law of the seat of arbitration.

Every time national laws differ in their approach from the conflict of laws rules of the New York Convention, a risk of contradictory decisions may arise which may in turn jeopardize the enforceability of the award as in the instant case.²⁵

The French and Swiss approaches, however, are indisputably more favorable to the validity and enforceability of international arbitration agreements. The criteria set out by the New York Convention appears outdated in this regard and it may now be time for a reform. The adoption of an international instrument regulating the material validity of international arbitration agreements and their scope could also be envisioned to reduce the uncertainties associated with the conflict of laws analysis and to achieve greater consistency.

III. The jurisdiction of the arbitral tribunal and the extension (and non-extension) of the arbitration agreement to KFG

The risk of contradictory decisions resulting from the application of two different laws to the arbitration agreement materialized in this case.

While the English courts applied the strict provisions of the FDA to deny jurisdiction to the arbitrators, the Paris Court of Appeal confirmed their jurisdiction by applying another material rule of international arbitration.

Since the nineteen eighties, the Paris Court of Appeal, with the approval of the *Cour de Cassation*²⁶, has developed an increasingly liberal case-law with respect to jurisdiction over non-signatories.

²⁵ See on this issue J-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, 2nd ed., Zurich 2007, No. 300-301.

²⁶ See *Cour de Cassation*, 5 June 1991, *Revue de l'arbitrage* 1991, p. 453 (2^e esp.), P. Mayer ; *Cour de Cassation*, Civ. 1, 27 March 2007, *stés ABS et AGF Iart c/ sté Amkor Technology et a*; *Revue de l'arbitrage*, 2007, p. 785 ; *Cour de Cassation*, 7 November 2012, No. 11-25891.

The material rule of extension was formulated for the first time in the *Korsnas Marma* decision of 1988 where the Paris Court of Appeal held, in a formula from which it has almost not departed since (except for a few variations):

*“the arbitration agreement inserted in an international contract has a validity and efficiency of its own that command to extend its application to parties directly involved in the performance of the contract and in the disputes that can arise therefrom, whenever it can be assumed, based on their contractual situation and activities, that they knew the existence and scope of the arbitration agreement, notwithstanding the fact that they did not sign the contract providing for it.”*²⁷

The mechanism of extension of an arbitration agreement operates notwithstanding the absence of the transmission of the substantive rights and obligations arising from the contract that contains the arbitration agreement. It is akin to a tacit acceptance or ratification by conduct of the arbitration clause.²⁸

The direct involvement of the third party in the performance of the contract is often sufficient to extend its arbitration agreement, the knowledge of which is presumed based on objective elements such as the situation and activities of the third party.²⁹ Certain decisions, in particular those of the *Cour de Cassation*, do not even refer to the presumed knowledge of the arbitration agreement.³⁰ Here, the Court of Appeal referred to the “*acceptance*” of the arbitration agreement which is rather exceptional.

²⁷ Paris Court of Appeal, 30 November, 1988, No. 88/10719, *Revue de l'arbitrage*, 1989, p. 691; Paris Court of Appeal, 15 May 1990 No. 023089; Paris Court of Appeal, 7 December 1994, *Revue de l'arbitrage*, 1996, p. 265, C. Jarrosson; Paris Court of Appeal, 7 May 2009, No. 08/02025; Paris Court of Appeal, 5 May 2011, No. 10/04688; Paris Court of Appeal, 18 December, 2018, n° 16/24924; Paris Court of Appeal, 26 November 2019, n° 18/20873.

²⁸ See P. Mayer, “*Note - Cour d'appel de Paris (1re Ch. suppl.) 28 novembre 1989; Cour d'appel de Paris (1re Ch. suppl.) 8 mars 1990*”, *Revue de l'Arbitrage*, p. 675 : “*Fort heureusement la formule frappante qu'affectionne la Cour de Paris ne recouvre qu'une réalité des plus modestes. Si les «non signataires» se voient étendre l'application de la clause, ainsi que la charge des obligations substantielles ou le bénéfice des droits, c'est tout simplement parce que, de par leur propre volonté, pas toujours expresse mais certaine, ils y sont devenus parties.*”

²⁹ F.X. Train, “*L'extension de la clause compromissoire*, *Chronique des années 2012-2017*”, *Revue de l'arbitrage* 2017, p. 389.

³⁰ See for instance, *Cour de Cassation*, 27 March 2007, *stés ABS et AGF Iart c/ sté Amkor Technology et a*; *Revue de l'arbitrage.*, 2007, p. 785 ; F.-X. Train, “*Action directe et arbitrage – à propos de l'arrêt ABS du 27 mars 2007*”, *Cahiers de l'arbitrage*, vol. IV,

French courts attach decisive importance to the economic reality of a given transaction and seek to determine, who the real decision makers and beneficiaries behind the original signatories of the contract are in order to determine the scope of the arbitration agreement. They conduct a legal and factual enquiry of the third party's involvement reviewing, as was the case in the decision of 23 June 2020, the documents (emails, letters, internal documents, meeting minutes, agendas, etc.) exchanged between the parties to infer a tacit consent to the arbitration agreement.

The idea is to avoid a fragmentation of the dispute between different jurisdictions, inconsistent decisions and thereby to ensure the good administration of justice. The Paris Court of Appeal has indeed explained that: "*efficiency commands that the arbitrator be seized of all the economic and legal aspects of disputes concerning the parties involved in order for him to apprehend everyone's liability in the context of their mutual relations.*"³¹

A few examples of the type of involvement required includes:

- In the *Cotunav* decision of 25 June 1991, the contract containing the arbitration agreement provided for the performance of certain obligations by a third party. By accepting to perform these obligations, the third party necessarily ratified the contract, including its arbitration agreement.³²
- In the *Jaguar* decision of 7 December 1994, the arbitration agreement was extended to the French subsidiary of Jaguar on the ground that it was "*directly interested in the dispute*" for having served as an intermediary between the English mother company and the buyer.³³
- In the *ABS* decision of 27 March 2007, the involvement of the two subsidiaries of an American company, signatory of the arbitration

Pedone, 2008, p. 30 ; RTD com. 2007, p. 677, E. Loquin ; *Cour de Cassation*, 7 November 2012, No. 11-25891, *Société Iakovoglou Prodomos et compagnie et autre c/ société Amplitude*, JCP, 2012 I 1354, n° 5, C. Seraglini; Dalloz 2012, p. 1195, spéc. p. 1197, T. Clay. See also, Paris Court of Appeal, 7 May 2009, No. 08/02025; Paris Court of Appeal, 5 May 2011, No. 10/04688.

³¹ Paris Court of Appeal, 15 May 1990, No. 023089. See also Paris Court of Appeal, 7 December 1994, *Revue de l'arbitrage*, 1996, p. 265, C. Jarrosson: stating that the arbitration agreement extends to third parties directly involved in the performance of the contract "*so that the arbitrator may be seized of all the economic and legal aspects of the dispute*".

³² *Cour de Cassation*, 5 June 1991, *Revue de l'arbitrage*, 1991, p. 453 (2^e esp.), P. Mayer ; *Cour de Cassation*, 11 June 1991, *Revue de l'arbitrage*, 1992, p. 73, D. Cohen.

³³ Paris Court of Appeal, 7 December 1994, *Revue de l'arbitrage*, 1996, p. 265, C. Jarrosson.

agreement, had consisted in intervening for the approval by the counterparty of the electronic components which were the subject matter of the contract.³⁴

- As illustrated in a *Cour de Cassation* decision of 26 October 2011, the involvement of the third party in the main contract containing the arbitration agreement can also result from the performance of a subcontract by that third party.³⁵ The circumstance that both the main contract and the subcontract contain an arbitration clause providing for different arbitral institutions is irrelevant.³⁶

Commenting on French case law, Professor Christophe Seraglini notes that the French courts seem in reality to proceed with an “*objective extension of the international arbitration agreement to the third party, without any real consideration for his acceptance of this clause, but based on a mere direct involvement, voluntary and more or less substantial as the case may be, sometimes on a mere interest, in the performance of the contract containing it.*” He adds that “[o]ne can even wonder, in spite of certain decisions evoking it, whether it really matters that the third party could have known or should have known of the arbitration agreement.”³⁷

Consequently, French courts will rarely refuse to extend an arbitration agreement to a third party that has participated, either directly or indirectly, in the performance of the contract containing it. The question of whether the material rule of extension leaves any room for the expression of a contrary intention can be posed.

In the case under review, although the original parties to the FDA had not referred, as such, to the mechanism of extension which they surely ignored, they had nevertheless expressed their intention not to transfer or assign the FDA to a third party without the prior written approval of the

³⁴ *Cour de Cassation*, 27 March 2007, *stés ABS et AGF Iart c/ sté Amkor Technology et a.*, *Revue de l'arbitrage*, 2007, p. 785, J. El Adhab. F.-X. TRAIN, “*Action directe et arbitrage – à propos de l'arrêt ABS du 27 mars 2007*”, *Cah. arb.*, vol. IV, Pedone, 2008, p. 30 ; *RTD com.* 2007, p. 677, E. Loquin.

³⁵ *Cour de Cassation*, 26 October 2011, No. 10-17708.

³⁶ Paris Court of Appeal, 17 March 2015, No. 14/03992.

³⁷ C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2019, § 722 : “*En réalité, la jurisprudence semble donc bien opérer une extension objective de la clause d'arbitrage internationale au tiers, sans véritable considération relative à son acceptation de cette clause, mais fondée sur sa seule implication directe, volontaire et plus ou moins substantielle selon les cas, voire sur son seul intérêt, dans l'exécution du contrat la contenant. On peut même se demander, malgré certains arrêts l'évoquant, s'il importe vraiment que le tiers puisse avoir connu ou ait dû connaître la clause d'arbitrage.*”

licensor. They had also subjected any amendment of the FDA to the parties' written consent. The FDA's provisions in that regard could reasonably be interpreted as a manifestation of the parties' intention to exclude any legal theory that would result in a third party becoming bound by the contract, including its arbitration agreement.³⁸

However, such an interpretation does not take into consideration the French conception of the principle of the independence of the arbitration agreement which warrants an appreciation of jurisdiction distinct from that of the liability on the merits of the non-signatory.

In its decision, the Paris Court of Appeal clearly distinguished between the issue of jurisdiction, on the one hand, to which it applied the material rule of extension and, the issue of the transfer of the substantive rights and obligations, on the other hand. The Court underlined that the latter "*entertains no relation of dependency whatsoever with [...] the extension of the arbitration agreement*" and that it "*enabled to determine the scope of liability*" of KFG. As the Paris Court of Appeal pointed out, the transfer of substantive rights fell out of the scope of the court's review under Article 1520.1° of the Code of Civil Procedure.

In other words, while the issue of jurisdiction is determined by application of the French material rules under the control of French courts, the issue of the substantive liability of the third party is determined by application by the arbitrators of the law governing the merits of the dispute, on which French courts exercise no control.

In their award, after finding jurisdiction over KFG, the arbitrators applied English law and principles of good faith and estoppel to find that a substantive transfer of the rights and obligations of the FDA to KFG had taken place. It is on this basis that KFG was found liable to Kabab-Ji.³⁹ The English judges who examined the issues of jurisdiction and substantive liability as one and the same issue, had a different reading of English law and agreed with the dissenting arbitrator that no transfer of rights had taken place.

³⁸ See in particular Article 19 that stated that "*LICENSEE'S interest under this agreement is not transferable or assignable, under any circumstances whatsoever, voluntarily, by operation of law or otherwise without the written consent of LICENSOR*" and Article 24 that provided that "*no interpretation, change, termination or waiver of any provision hereof, and no consent or approval hereunder, shall be binding upon the other party or effective unless in writing signed by LICENSEE and by an authorized representative of LICENSOR or its designee.*" Also Article 17 "*Any waiver of any term or condition of the Agreement must be in writing and signed by the affected party.*"

³⁹ High Court decision, paras. 40-42.

Likewise, in the famous *Dallah case* French and English courts applied French law to the arbitration agreement but nevertheless reached opposite conclusions with respect to its extension to the Pakistani government.⁴⁰

By way of comparison, Swiss courts, like French courts, also extend arbitration clauses to non-signatories based on their involvement in the contract containing the clause.⁴¹ The Swiss approach, however, appears to be less liberal than the French one and could arguably be more in line with traditional principles of contracts law. *First*, in the decisions examined, the Federal Tribunal starts approaching jurisdiction by articulating the principle of privity of contracts.⁴² *Second*, the formula used by the Federal Tribunal does not contain the word “*extend*” and puts more emphasis on the consent of the third party: “*the third party that involves itself in the performance of the contract containing the arbitration agreement is presumed to have adhered to it, by concluding actions, if its intention to be a party to the arbitration agreement can be inferred from this involvement.*”⁴³

In conclusion, the lack of uniformity in the rules governing international arbitration agreements, their scope and the type of control to be undertaken by national courts when reviewing jurisdiction, can lead to the unfortunate result that an arbitral award which has been considered valid at the place of arbitration will not be enforceable elsewhere. As stated earlier, a reform of the New York Convention and / or the adoption of an international instrument regulating the validity of international arbitration agreements and providing some uniform standards would be welcome.

⁴⁰ See F-X. Train, “*L’affaire Dallah ou de la difficulté pour le juge anglais d’appliquer le droit français, note sous Paris, Pôle 1 – Ch. 1, 17 février 2011 et Cour suprême du Royaume-Uni, 3 novembre 2010*”, *Revue de l’Arbitrage*, 2012, p. 374.

⁴¹ C. Muller, S. Pearson, *Swiss Case Law in International Arbitration*, 3rd Ed. Schulthess, 2019, p.82.

⁴² See for instance, 134 III 565 [568] “*by virtue of the principle of privity of contracts, the arbitration agreement included in a contract only binds its counterparties*” (“[e]n vertu du principe de la relativité des obligations contractuelles, la convention d’arbitrage incluse dans un contrat ne lie que les cocontractants”).

⁴³ ATF 129 III 727 consid. 5.3.2 p. 737 ; 4P.48/2005 du 20 septembre 2005, consid. 3.4.1 : “*le tiers qui s’immisce dans l’exécution du contrat contenant la convention d’arbitrage est réputé avoir adhéré, par actes concluants, à celle-ci si l’on peut inférer de cette immixtion sa volonté d’être partie à la convention d’arbitrage.*”

Samantha NATAF, *Jurisdiction over Non-signatories, the Irreconcilable Approaches of French and English Courts. Case Note on: (i) English Court of Appeal Decision of 20 January 2020 and (ii) Paris Court of Appeal Decision of 23 June 2020*

Summary

Recent enforcement proceedings, in England and in France, of an ICC arbitral award rendered in Paris on 11 September 2017 highlight the divergent approaches of the two jurisdictions regarding the law applicable to international arbitration agreements and the risks of contradictory decisions resulting thereto.

Following the conflict of laws method and the criteria set out by Article V(1)(a) of the New York Convention, the English Court of Appeal refused to grant enforcement to the award on the ground that it had not been transferred to the non-signatory respondent in the arbitration under the English *lex contractus*.

Applying French material rules of international arbitration to the arbitration agreement, the Paris Court of Appeal dismissed the motion for annulment brought against the same award finding that the arbitral tribunal had jurisdiction over the respondent, the arbitration agreement having been extended to it as a result of its involvement in the performance of the contract containing it.

This case shows that the lack of uniformity in the rules governing international arbitration agreements and in the type of judicial control to be undertaken by national courts, can lead to the unfortunate result that an arbitral award which has been considered valid at the place of arbitration will not be enforceable elsewhere.

A reform of the New York Convention and/ or the adoption of an international instrument regulating the material validity of international arbitration agreements would help achieving greater consistency.

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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