Written evidence from Dr Manuel Penades

Response to the Call for evidence by the Special Public Bill Committee on the Bill to Amend the Arbitration Act 1996

This response only addresses whether clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) is sufficiently clear in its drafting.

I. Summary of proposals

1. This paper proposes the following amendments to the Bill:

   a. Section 6A(2) should be deleted.

   b. The term 'itself' should be added to section 6A(1)(a). The amended provision would read:

      'Law applicable to arbitration agreement

      (1) The law applicable to an arbitration agreement is—

      (a) the law that the parties expressly agree applies to the arbitration agreement *itself*'.

   c. Section 6A should be included in the list of mandatory provisions of Schedule 1 of the Arbitration Act 1996, as per section 4(1) of the Arbitration Act 1996.

   d. Section 100(2) of the Arbitration Act 1996 should clarify that the expression 'the law to which the parties subjected it' in section 103(2)(b) has the same meaning as '(a) the law that the parties expressly agree applies to the arbitration agreement' as per section 6A(1)(a).

II. Introduction

2. The proposed new Section 6A departs in three significant points from the common law doctrine of the proper law of the contract as applied to arbitration agreements by the UK Supreme Court in *Enka v Chubb*.[1] First, it states that an express choice of law referred to the agreement of which the arbitration agreement forms a part is, of itself, insufficient to satisfy the requirement of express choice of law for the

[1] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

arbitration agreement. Second, it eliminates the possibility to choose the governing law impliedly. Third, it replaces the close connection test by a hard-and-fast rule in favour of the law of the seat.

3. This contribution explains why the provisions in Section 6A referring to an express choice of law are not sufficiently clear. Part III proposes three amendments to section 6A. The first is that section 6A(2) should be deleted. The second is that the term 'itself' should be added to section 6A(1)(a). The third is that section 6A should be included in Schedule I as one of the mandatory provisions of Part I of the Arbitration Act 1996.

4. Part IV proposes the inclusion of a cross-reference to section 6A in section 100(2) of the Arbitration Act 1996.

III. Section 6A(2) should be deleted to avoid strategic litigation

5. The Bill recognises express choices of law for arbitration agreements. The rule is apparently simple and respects the fundamental principle of party autonomy, which lies at the core of English commercial law. Uncontroversial scenarios would include cases when parties insert an express choice of law specifically dedicated to the arbitration agreement. The original proposal of the Law Commission in the Second Consultation required that the express choice of law was 'in the arbitration agreement itself'.[2] The Bill eliminated this straitjacket and the location of the choice of law is no longer decisive. Therefore, a separate choice of law clause that refers explicitly to the arbitration agreement would also satisfy the requirements of the new section 6A. Commercial practice, however, demonstrates that these express references to the arbitration agreement are an exceptional occurrence.

6. Under section 6A(2), a choice of law referred to the agreement in which the arbitration agreement is included does not constitute 'of itself' an express agreement for the purposes of section 6A. This rule departs from the understanding in *Enka v Chubb*, which had accepted that the choice of law for the matrix contract extended to the arbitration agreement contained therein 'for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law'.[3] Later in the judgment, the UKSC recognised that this construction was 'natural and sensible' [at 60] and was not hindered by the principle of separability,

[2] The full text of the proposal was: 'the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself'.

[3] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [43].

which has a more limited scope and does not necessarily mean that the arbitration agreement shall be treated for all intents and purposes as 'a different and separate agreement' [at 61].

7. What seemed 'common sense' for the UKSC would no longer be an effective choice of law under the new rule.[4] Instead, what will follow from the adoption of the Bill is a new type of litigation concerned with whether an express choice of law is 'sufficiently' express to satisfy section 6A.[5] That is, the shift will move from 'what amounts to an implied choice of law?' to 'what amounts to an express choice of law?'. Section 6A(2) will fuel this litigation.

8. To date, the question of 'what amounts to an express choice of law' has had little practical relevance in most cases because the same result could be achieved by way of implied choice of law. That is, the availability of the identical outcome under implied choice (as interpreted in *Enka v Chubb*) took the edge off any argument about whether a choice was sufficiently express. With the elimination of implied choice of law in the Bill, the eye of the debate will focus on matters of construction (scope) and form of an express choice made by parties.

9. A critical point in these cases will be the interpretation of section 6A(2). The fact that a generic choice of law agreement 'of itself' does not constitute an express agreement for the arbitration agreement could mean that the same choice *considered together* with other circumstances (i.e., not 'of itself') might satisfy the threshold of section 6A(1)(a). If courts approach this issue as an exercise of contractual construction, the analysis will be unavoidably case-specific and it will be difficult to reach the structural certainty pursued by the reform. If, on the contrary, the exercise is approached as a clarification of section 6A(1)(a), then courts might be able to provide clearer guidelines of general application. While the second approach would be preferable, there is little doubt that the mere existence of section 6A(2) will allow strategic arguments seeking to deviate from

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4 A viable alternative that would have captured the essence of the common sense approach in *Enka v Chubb* while reaching a compromise between most of the concerns in both parties of the debate would have been to change sec 6A(2) in favour of a rule that an express choice of law in the contract should be considered an express choice also for the arbitration agreement unless the parties expressly excluded its application. This would have preserved party autonomy as well as the requirement of an express choice (hence eliminating the uncertainties around implied choice of law). It would have also satisfied those who invoke the appropriateness to align the contract with the arbitration agreement while maintaining the default rule in favour of the law the seat.

5 As evidenced in *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344, similar uncertainty has surrounded the application of sec 1(1)(a) Contracts (Rights of Third Parties) Act 1999, which requires certain matters to be stated expressly.

the spirit of section 6A(1)(a), at least until there is definitive case law on the matter. This would eliminate the efficiency and clarity pursued by the reform. For this reason, the better approach would be to delete section 6A(2).

10. The following examples illustrate scenarios where litigation will probably ensue under section 6A and how the deletion of section 6A(2) would facilitate their resolution. The third example (letter C) also explains why the term 'itself' should be added to section 6A(1)(a) and the fifth example (letter E) argues that section 6A should be included in Schedule I as one of the mandatory provisions of Part I of the Arbitration Act 1996.

A. Arbitration clauses which contain a reference to applicable law

11. The first scenario refers to arbitration agreements which contain a general reference to the applicable law. For instance, 'Any dispute arising out of this contract shall be resolved through arbitration in London in accordance with the law of X', or 'The arbitrators shall decide the dispute in accordance with the law of X'[6]. Neither of these examples include a choice of law specifically dedicated to the arbitration agreement. Rather, they are the only reference to the governing law in the whole contract, *but* they are contained in the arbitration agreement *itself*.

12. Under the pre-reform rules, these cases would ultimately lead to the law of the matrix contract, either by way of express choice or implied choice. In contrast, the conclusion under the new rule is that if this is not an express choice of law for the arbitration agreement, the law of the seat will apply. To the knowledge of the author, there is no English decision that has settled definitely whether a general choice of law in the arbitration agreement itself applies to the matrix contract, to the arbitration agreement or to both. In *Enka v Chubb* the contract did not contain any express choice of law clause. In *Kabab-Ji v Kout Food Group* the choice of law clause was separate from the dispute settlement clause.

13. As mentioned above, the change of wording from the Law Commission's original proposal to the final Bill demonstrates that the location of the choice of law is no longer relevant. What matters is that a generic choice of law 'of itself' will not be sufficient. In the same way that a choice of law for the arbitration agreement in a different clause is as valid as if that choice of law was in the arbitration agreement itself, a generic choice of law would not satisfy the required threshold

[6] See also the recommended clause of the LCIA.

regardless of its location. The certainty pursued by the reform would be better achieved if the scenario described in this section did not amount to an express choice of law for the arbitration agreement. This formalistic approach is alien to the common law tradition but would be the approach coherent with the objectives of the reform. Parties remain able to choose the law governing their arbitration agreement, but they must do so expressly and specifically for such agreement. The deletion of section 6A(2) would reinforce this conclusion.

B. Clauses on 'Governing law and Arbitration'

14. Another scenario of possible controversy will arise when the arbitration agreement and the choice of law for the contract are found in the same clause under a title that mentions both of them (e.g., 'Governing law and Arbitration' or, more loosely, 'Governing law and dispute resolution')[7]. In these cases, a party might want to invoke that the combined reference to both matters in the rubric of the clause indicates that the content of that clause should be read together, therefore extending the choice of law to the arbitration agreement. That is, it is not the generic choice of law 'of itself', but also the location in a clause together with the arbitration agreement plus the reference to both in the title what evidences a sufficient level of close connection between them to extend the application of the choice of law to the arbitration agreement.

15. While these cases will be fact-specific, the faithful[8] compliance with the objectives of the reform would appear to support the view that the type of choice of law clause described in this section would not satisfy the requirements of section 6A(1)(a). There would need to be an additional reference to the arbitration agreement in the text of the choice of law clause itself to pass the line. Again, the deletion of section 6A(2) would reinforce this conclusion.

C. Choice of law clauses that refer to the 'Agreement' when the term 'Agreement' has been defined in the contract to include every clause in the document

16. A third scenario of uncertainty concerns the very ordinary cases in which the matrix contract contains a choice of law clause that refers to the 'Agreement'. When the arbitration agreement is contained in another clause of such 'Agreement', doubts may arise as to whether

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7 A recent example from a case in which I was professionally involved is 'Clause XX: Law and Disputes
This Agreement and all rights and obligations arising in respect of it shall be governed by, performed and construed in accordance with Spanish law and the Parties irrevocably submit their disputes to arbitration in London in accordance with the ICC rules'.

8 And sometimes it will be more a case of faith than reason.

the choice of law clause also applies to the arbitration agreement. The UKSC ruled in *Kabab-Ji* that 'the effect of these clauses is absolutely clear'.[9] Even without any express definition of the term 'Agreement', that choice of law is ordinarily and reasonably understood to denote all the clauses incorporated in the contractual document, including therefore the arbitration agreement. That is, in the eyes of the UKSC these are not cases of implied choice of law for the arbitration agreement, but scenarios of express choice.

17. As with the previous example, this a situation where the use of express choice (step 1) or implied choice (step 2) under the common law doctrine of the proper law of the contract would not have produced any difference of outcome. Both would have led to the law of the matrix contract. In contrast, under the new rule the finding that there is no express agreement for the arbitration agreement would result in the application of the law of the seat.

18. The solution of these cases will not be straightforward. The fact that the choice of law and the arbitration agreement are contained in separate clauses is not determinative. In fact, in *Kabab-Ji v Kout Food Group* the UKSC did not hesitate to rely on the 'no-oral modification clauses' in the Agreement to prevent a change in the parties to the arbitration agreement itself.[10] That is, the arbitration agreement also included the 'no-oral modification' limitations which were contained in other clauses of the contract. The reason for this was that the term 'Agreement' had been expressly defined by the parties as encompassing all the clauses to the contract, including the arbitration agreement. It is very probable that a similar conclusion would be reached concerning clauses in the contract that identify the parties to the 'Agreement' or that provide for confidentiality obligations or impose assignment or entire agreement limitations concerning the 'Agreement'. Unlike the scenarios described in the previous sections, in this example there is an express reference in the contract defining the scope of the clauses contained in the document. That express definition of 'Agreement' goes beyond section 6A(2) and might be sufficient to satisfy the requirements of section 6A(1)(a), even if section 6A(2) was deleted.

19. This result could be confirmed by the fact that while the Law Commission's Consultations and the Final Report confirmed the intention to overrule the UKSC's approach in *Enka v Chubb*, they did not express the same objective concerning *Kabab-Ji v Kout Food*

9 *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, at [39].

10 *Kabab-Ji v Kout Food Group* [2021] UKSC 48, at [55-69].

Group. If the intent of Parliament is also to leave *Kabab-Ji v Kout Food Group* behind, then an express exclusion would be required. A simple way to do this would be to add the term "itself" to section 6A(1)(a). The amended provision would read:

> 'Law applicable to arbitration agreement
>
> (1) The law applicable to an arbitration agreement is—
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> (a) the law that the parties expressly agree applies to the arbitration agreement *itself*'.

D. References to the English arbitration legislation in the arbitration agreement

20. Another scenario is the reference to English arbitration legislation in the arbitration agreement. For instance, parties could provide that the arbitration will be *conducted* 'in accordance with English law' or, more specifically, 'in accordance with English arbitration law' or 'the English Arbitration Act'. The question in these cases is not whether a generic express choice of law for the contract extends to the arbitration agreement. Rather, the issue is whether the reference to English arbitration law in the context of an arbitration agreement amounts to an express choice of law under section 6A(1)(a). The cases will be very rarely problematic because the reference to English arbitration legislation will be frequently linked to a choice of seat also located in England. Consequently, English law would apply under the express choice and law of the seat routes. Still, exceptional cases might exist where parties make reference to an arbitration legislation in their arbitration agreement that differs from that of the seat.

21. The general position under English conflict of laws is that these are valid choices of law. English courts have found that the use of terminology proper of a specific legal system or the reference to concrete legislation of that jurisdiction might constitute a valid indication of the parties' intention to submit their agreement to that law.[11] The concern with that approach is that in those instances courts have characterised the choice as implied. That is, the use of specific terms proper of a legal system or the reference to concrete national legislation implies the parties' agreement on the governing law. The application of this logic to arbitration agreements would fit uneasily with the proposed disregard of implied choices of law. But it would not require a very able mind to slightly change the wording of the reasoning to make it fit under section 6A(1)(a). For instance, it could

[11] *CGU Intl Insurance Plc* v *Ashleigh V Szabo & ors* [2002] 1 All ER (Comm) 83 at [33] (*CGU Intl*) and *Faraday Reinsurance Co Ltd* v *Howden North America Inc* [2012] EWCA Civ 980, at [10]-[12] and [31].

be said that the reference to English arbitration legislation in the arbitration agreement explicitly refers the parties' intention to subject their arbitration to English law.

22. Even if this terminological difficulty was overcome, the reference to English arbitration legislation does not necessarily evidence the will of the parties to submit their arbitration agreement to English law. That reference could well be construed to mean that parties agreed that the arbitration *process* would be conducted in accordance with English law. The distinction between the *lex arbitri* (as the law that governs the arbitration procedure, which usually coincides with the law of the seat / *lex loci arbitri*) and the law governing the arbitration agreement is widely accepted. It is equally agreed that parties can choose the *lex arbitri* as long as they do not violate the mandatory rules of the seat. Section 4(5) of the Arbitration Act 1996 expressly recognises this possibility. It follows that a choice of law like the one discussed in this section (even if found to be express) would not necessarily be 'expressly […] appl[icable] to the arbitration agreement' (as per section 6A(1)(a)). On the other side, the difficulty exscinding between procedural matters (governed by the *lex arbitri*) and substantive or jurisdictional matters (governed by the law governing the arbitration agreement)[12] would make it appropriate to interpret that the parties' express intention was to subject both categories of arbitration related matters (procedure and agreement) to the same law. The deletion of section 6A(2) would not impede this analysis.

E. Express choices of law by reference and the mandatory nature of section 6A

23. The final scenario where issues of express choice might be a source of dispute is when parties do not expressly choose the law for the arbitration agreement but select a set of institutional rules providing for a law governing the arbitration agreement in the absence of choice.[13]

24. The Final Report of the Law Commission accepts that 'an express choice can be made by reference' [at 12.73]. A clear example of this is when parties incorporate by reference the terms and conditions of one of the parties which contain an express choice of law for the arbitration agreement. However, the application of this logic to the

[12] Difficulty which became evident in cases such as *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm) and *Astrazeneca v Albemark* [2010] EWHC 1028 (Comm).

[13] Indeed, some rules state expressly that, in the absence of choice, the arbitration agreement is governed by the law of England and Wales (art. 6 LMAA Terms 2021 or art. 16 The UKJT Digital Dispute Resolution Rules v 1.0 (2021), or the law of the seat (art. 16.4 LCIA Arbitration Rules 2020).

selection of institutional rules requires a double jump. When parties choose institutional rules they do not incorporate a body of rules that includes a choice of law. Rather, parties select a body of rules that contains a choice of law regime to determine the law governing the arbitration agreement (including a default rule). Parties have not selected an applicable either directly or indirectly.[14] The question is then whether such institutional choice of law rules can operate in conjunction with section 6A.

25. The consideration of arbitration rules as indirect choice of law works in the context of section 46 of the Arbitration Act 1996 (applicable law to the merits) because the Act allows parties to choose a governing law or 'other considerations' (section 46(1)(b)). Arbitration rules are such 'other consideration' and the choice must be respected, but section 6A(1)(a) does not allow for this. The express choice must be of a law, which does not exist when parties simply refer to arbitration rules.

26. It would be somehow paradoxical if the same reference to arbitration rules amounted to an express choice of law for the purposes of section 6A(1)(a) (therefore displacing the default rule in favour of the seat under section 6A(1)(b)) while such reference was not deemed a choice of law for the purposes of the operation of the selected arbitration rules (hence triggering the governing law applicable under those rules in the absence of choice).

27. The better view, then, appears to be that the selection of institutional rules which contain a default choice of law rule for arbitration agreements is not an express choice of law under section 6A(1)(a). Rather it is a displacement of section 6A altogether in favour of the choice of law regime provided in the arbitration rules. This construction would require section 6A to be characterised as a non-mandatory provision of the Arbitration Act 1996.

28. Neither the Consultations nor the Final Report of the Law Commission referred conclusively to the possible mandatory nature of section 6A.[15]

29. Notwithstanding the conclusion in the paragraph 27, the efficacy of the policy objectives underlying the Law Commission's proposal would be better achieved if section 6A was a mandatory provision in every

[14] Analogously, article 16 LCIA Arbitration Rules provides a default London seat for the parties unless they choose one in writing. Such a selection of a seat through the arbitration rules would not be treated as an express choice of seat in the arbitration agreement by the Arbitration Act 1996.

[15] But the Second Consultation issued by the Law Commission, para. 2.77, seemed to favour the non-mandatory nature of the provision: 'Where the arbitration is seated in England and Wales, the new rule would avoid the problems which arise from *Enka v Chubb unless the parties explicitly agreed otherwise*, in which case the parties must be taken as facing the consequences with eyes wide open. The *ability to agree otherwise* preserves party autonomy'.

arbitration seated in England. Otherwise, parties would be able to contract out of section 6A by choosing a different national law to govern matters covered by the non-mandatory provision of the *lex arbitri* (section 4(5) Arbitration Act 1996) or, most importantly, by simply choosing arbitration rules which proclaimed the parties' autonomy to choose the law governing their arbitration agreement (either expressly or impliedly). Making section 6A mandatory would require including it in Schedule 1 of the Arbitration Act 1996, as per section 4(1) of the Arbitration Act 1996.

30. Making section 6A mandatory would prevent the displacement of this section by the mere selection of institutional rules containing a different choice of law regime for arbitration agreements. If Parliament wanted to allow the operation of such selection while maintaining the mandatory nature of section 6A, then section 6A(1)(a) would need to be slightly amended. Instead of the wording '(1) The law applicable to an arbitration agreement is (a) the law that the parties expressly agree applies to the arbitration agreement', it could say that '(1) The law applicable to an arbitration agreement is (a) the law that the parties expressly agree applies to the arbitration agreement *or that which becomes applicable in accordance with such other considerations as are expressly agreed by them*'.[16]

IV. Section 6A should apply to the recognition and enforcement of foreign arbitral awards in England and Wales under section 103 of the Arbitration Act 1996

31. Art V(1)(a) of the New York Convention provides that a foreign award may be refused recognition and enforcement when 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'. The default rule in the Bill aligns English law with the New York Convention and hence with global practice, which is a welcome result.

32. Section 103(2)(b) of the Arbitration Act 1996 incorporates article V(1)(a) of the New York Convention and therefore allows 'any indication' of choice of law made by the parties. The UKSC concluded unanimously in *Kabab-Ji v Kout Food Group* that 'the word «indication» signifies that something less than an express and specific agreement will suffice' [at 33]. The court also endorsed the view in

[16] The expression 'other considerations' mirrors the wording of section 46(1)(b) of the Arbitration Act 1996.

specialised commentary that 'any form of agreement, express or tacit, would appear to be sufficient'.[17]

33. It is unclear whether the Law Commission intended the new choice of law rule in section 6A to apply in the context of section 103 of the Arbitration Act 1996. The UKSC said in *Kabab-Ji v Kout Food Group* that the common law rules on choice of law for arbitration agreements were not 'directly applicable' in the context of enforcement actions under the New York Convention [35]. Also, awards caught by section 103 of the Arbitration Act 1996 have a foreign seat by definition and are not English arbitrations. Still, the proposal makes it clear that 'the new rule would apply whether the arbitration was seated in England and Wales, *or elsewhere*' [12.75]. An option would be to interpret this statement as referring to every scenario in which English courts examine an arbitration agreement (whether seated in England and Wales or elsewhere), with the exception of cases caught by section 103 Arbitration Act 1996.[18] That is, two different choice of law treatments would co-exist within the Act. This internal dealignment would be undesirable and could lead to serious inconsistencies. The same arbitration agreement seated abroad could be subject to different laws at the pre-arbitration stage (e.g., an application to stay under section 9 Arbitration Act 1996) and at the post-arbitration stage (when the award resulting from that arbitration agreement was filed for recognition and enforcement before English courts under section 103 Arbitration Act 1996). The UKSC said in *Enka v Chubb* [at 136] and in *Kabab-Ji v Kout Food Group* [at 35] that this divide would be 'illogical'.

34. The better interpretation is that section 6A also extends to cases under section 103 of the Arbitration Act 1996 cases and a cross-reference to this effect in the legislation would be desirable. Nothing in the proposal expressly excludes this reading. In fact, the Report argues that the New York Convention allows, but does not mandate, the recognition of implied choices [at 12.47] and concludes that the proposal is compatible with the New York Convention [at 12.52]. Ultimately, the new rule replaces the common law doctrine with a statutory provision, which becomes part of the of the regulatory fabric of English arbitration law and should not be limited, unless otherwise provided, to areas originally governed by the common law. Section

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17 *Kabab-Ji v Kout Food Group*, at [34], referring to *Summary Analysis of Record of the United Nations Conference May/June 1958* (51).

18 A recent example of this scenario would be *Unicredit v Ruschemalliance LLC* [2024] EWCA Civ 64 concerning the law governing an arbitration agreement seated in France and the possibility to issue an antisuit injunction preventing proceedings in Russia.

100(2) of the Arbitration Act 1996 shows that critical parts of the notion of arbitration agreement in Part III (where section 103 of the Arbitration Act 1996 belongs) 'have the same meaning as in Part I' (where the new section 6A of the Arbitration Act 1996 would be placed). Such internal coherence of English arbitration law supports the application of the proposed rule across the board. To this effect, section 100(2) of the Arbitration Act 1996 should clarify that the expression 'the law to which the parties subjected it' in section 103(2)(b) of the Arbitration Act 1996 has the same meaning as '(a) the law that the parties expressly agree applies to the arbitration agreement' as per section 6A(1)(a).

35. Still, should Parliament adopt the Law Commission's proposal, they would need to be aware of two undesirable (yet tolerable) dealignments.

36. The first would be that English law would move away from the prevailing interpretation of article V(1)(a) of the New York Convention as regards the acceptance of implied choice. The UKSC objected to this departure in *Kabab-Ji v Kout Food Group* [at 31] and held that 'it is desirable that the rules set out in article V(1)(a) for determining whether there is a valid arbitration agreement should not only be given a uniform meaning but should be applied by the courts of the contracting states in a uniform way' [at 32]. Further, the UKSC cited with approval authoritative commentary of the New York Convention providing that 'it has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon' [at 30].

37. This dealignment would not, however, amount to a breach of the UK's obligations as Contracting State to the New York Convention. Other jurisdictions leading in the field of international arbitration such as France have abandoned the choice of law framework of the New York Convention in favour of the application of their national law. The application of the French *règles matérielle* to the validity of arbitration agreements renders implied choices of foreign law irrelevant. In fact, in *Kabab-Ji v Kout Food Group* the French Cour de Cassation ruled that for any choice of law to be considered by French courts, 'the parties must have expressly submitted the validity and effects of the arbitration agreement itself to such a law'.[19] No one questions whether the French approach is in breach France's public international obligations deriving from the New York Convention. In fact, the lack of recognition of an implied choice under the new rule would regularly

[19] *Kabab-Ji v Koot Food Group* (Civ. 1st, 22 September 2022, No. 20-20.260).

result in the application of English law as the law of the seat. The pro-arbitration results that this rule will generally produce could well place the reform within the favourable gateway of article VII of the New York Convention.

38. The second (tolerable) consequence is that the same arbitration agreement (and award) might be treated differently between English and foreign courts if an existing implied choice of law disregarded in England is effective in other jurisdictions. For instance, an arbitration agreement found valid and effective in an English arbitration and / or by English courts (as courts of the seat) might be refused enforcement elsewhere because the law governing the arbitration agreement is found to be another one pursuant to implied choice. And vice versa, an arbitration agreement found valid and effective by an arbitral tribunal seated abroad and even confirmed by the courts of the seat might be refused enforcement in England and Wales on jurisdictional grounds (under section 103(2)(b) of the Arbitration Act 1996) because the existing implied choice is not recognised.

39. It should be noted, however, that retaining the possibility of implied choice does not guarantee the uniformity of outcome between legal systems. For instance, the same dealignment of outcome occurred in *Kabab-Ji v Kout Food Group* between England and France, and it could also arise between two legal systems that accepted an implied choice of law when one of them favoured the law of the matrix contract whereas the other found an implied choice of the law of the seat.

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