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THE LAW GOVERNING ARBITRATION AGREEMENTS
Comparative study of English law and French law

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AA	Arbitration Agreement
CA	Court of Appeal
Cass	Court of Cassation
Ed.	Edition
EWCA	England and Wales Court of Appeal
EWHCJ	England and Wales High Court of Justice
Ibid.	In the same place
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
LCIA	London Court of International Arbitration
NYC	New York Convention
Op. cit.	In the work previously cited
P.	Page
Para.	Paragraph
Pp.	Pages
SIAC	Singapore International Arbitration Centre
UK	United Kingdom
UKSC	United Kingdom Supreme Court

INTRODUCTION

1. "*Resolving conflict is rarely about who is right. It is about acknowledgment and appreciation of differences*"[1]. This saying resonates deeply in alternative dispute resolution, and even more in international arbitration, where resolving conflict improves when we acknowledge not only differing perspectives on the core disputes but also, and more importantly, appreciate the differences in legal approaches behind them.

2. The existence of alternative dispute resolution and arbitration procedures are not a recent development. Indeed, arbitration is considered one of the oldest forms of justice, predating even the judicial institutions of Roman law: "*Arbitration is as old as human societies, and international arbitration is not much younger*"[2]. However, the significant growth in the use of these alternative methods has been particularly notable over the past two decades.

3. Arbitration is increasingly becoming a preferred method for resolving disputes, with parties frequently turning to it as a viable alternative to litigation. While the study of arbitration has evolved over centuries and remains a subject of ongoing interest, this research paper will not focus on tracing its historical development. The history of arbitration, though rich and complex, could warrant an entirely separate thesis on its own.

4. ***Definition of arbitration.*** The term "arbitration" can be defined as a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, who renders a binding decision resolving the dispute at hand.[3] In other words, arbitration is fundamentally a private judicial process that allows parties to resolve their disputes without submitting to a state court. It is essentially an alternative to traditional litigation and plays a crucial role in the administration of justice. Although arbitration is not the only private dispute resolution method, it holds a significant position today and has consistently proven to be an effective method of resolving disputes. As professors Jalal El Ahdab and Daniel Mainguy described it, arbitration

[1] Thomas Crum.
[2] J. KARTON., International Arbitration as Comparative Law in Action, Journal of Dispute Resolution, 2020, p. 3 ; see also: David R., *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited,* 24 ARB, 2008.
[3] G. Born, *International Arbitration: Law and practice,* Third Edition, Wolters Kluwer 2021, p. 2.

is « *un objet de fascination, d'intérêt de rejet, de curiosité, une institution vivante et efficace ou qui se veut efficace* ».[4]

5. A distinction is made between commercial arbitration and investment arbitration. Commercial arbitration is primarily characterized as arbitration that does not involve investment disputes. This distinction was notably established in the landmark *Achmea*[5] case which distinguishes these two types of arbitration. While commercial arbitration "*originates from the autonomy of the will of the parties involved*", investment arbitration "*stems from a treaty through which member states agree to remove certain disputes from the jurisdiction of their own courts, particularly those concerning the application or interpretation of the treaty*."[6] Investment arbitration, which is entirely distinct from commercial arbitration, will not be addressed in this study, which solely focuses on international commercial arbitration.

6. ***Definition of arbitration agreement.*** Traditionally, a fundamental distinction is made between two types of agreements. Consent to arbitration is expressed either through an arbitration clause, included in the contract to address future disputes, or through a submission agreement, concluded after a dispute has arisen. The focus of the present study is on arbitration agreements in the sense of arbitration clauses as contractual provisions that allow parties to submit future, yet-to-be-arisen disputes to arbitration. Notably, the study solely focuses on international arbitration agreements.

7. An arbitration agreement is the cornerstone of international arbitration and the entire arbitral process. Indeed "*no arbitration is possible without its very basis, the arbitration agreement*".[7] Thus, without a valid agreement to arbitrate, there are generally no legal grounds to compel a party to resolve a dispute through arbitration or to enforce an arbitral award against them.[8] This makes it essential to determine the validity of the arbitration agreement, which is examined under the specific law designated as applicable to this issue.

8. Most commercial contracts today typically include arbitration agreements, which must be drafted with precision. Notably, there are readily designed 'model clauses' which provide generic yet

[4] J. El Ahdab and D. Mainguy, *Droit de l'arbitrage : théorie et pratique*, LexisNexis. 2021.
[5] CJUE, 6 mars 2018, *Achmea*, affaire C-284/ 16.
[6] *Ibid.*
[7] G.. Born, *International Arbitration: Law and practice*, Third Edition, Wolters Kluwer 2021, p. 51; also cited: A. Van Den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Kluwer Law International, 1981, 144-45.
[8] *Ibid.*

concise templates of clauses, provided by international arbitration institutions such as the ICC, SIAC, LCIA and ICDR.[9] Effectively, a well-drafted arbitration agreement can ensure an efficient arbitration process, while a clause less crafted could potentially lead to various legal and practical issues.[10]

9. Thus, parties often invest significant effort in carefully drafting their arbitration agreements. However, parties tend to overlook a crucial aspect that can have far-reaching implications: designating the law applicable to the arbitration agreement itself.

10. ***Relevance of the law applicable to the arbitration agreement***. When addressing the topic of applicable law in international commercial arbitration, it is essential to differentiate between various choice-of-law issues, as multiple "applicable laws" can govern distinct aspects of the arbitration. These distinctions include the substantive law governing the parties' underlying contract, the law governing the arbitration agreement, the law applicable to the arbitral proceedings known as the procedural law. More importantly, these aspects may indeed be each governed by different laws.[11] However, the focus of this study is exclusively on the law governing the arbitration agreement, leaving aside the other applicable law in arbitration.

11. Determining the law applicable to an arbitration agreement is crucial: The importance of the law applicable to the arbitration agreement lies in its role in governing some practical aspects of the agreement. It governs matters of formal and substantive validity, formation, termination, interpretation, assignment and waiver of the arbitration agreement.[12]

12. This issue is of particular significance because the arbitration agreement forms the foundation of the tribunal's jurisdiction.[13] The validity of the arbitration agreement under the applicable law affects not only the ability to refer disputes to arbitration but also the enforceability of the resulting award.

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[9] *Ibid.* p. 51-52.
[10] *Ibid.*
[11] G. Born, *op. cit.*, p. 42.
[12] A. SAMPAIO, *The law governing the arbitration agreement: Why we need it and how to deal with it*, International Bar Association.
[13] S. PEARSON, *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, Arbitration International, Oxford University Press 2013, Volume 29 Issue 1.

13. However, despite its high importance, parties frequently fail to specify the law governing of the arbitration agreement. Even standard clauses, such as the ICC model clause,[14] typically omit this consideration and do not address this aspect of the arbitration agreement. It seems like including such a provision is often seen as complicating the drafting process. As a result, parties tend to focus on other elements, such as the seat of arbitration, with belief that this sole choice will resolve any issues arising from the arbitration agreement.

14. Given that different national laws apply varying criteria to the validity and scope of arbitration agreements and each has its own approaches on this matter, particularly for instance the differing approaches between English and French law, and in the absence of standardization and harmonization, the outcome of a dispute can significantly depend on the law that governs the arbitration agreement. Thus, it is essential to clearly agree upon the law applicable to the arbitration agreement to avoid uncertainties and ensure the agreement's enforceability.

15. Therefore, it becomes clear that the central questions deserving attention in the present study are the following:

How do English law and French law each determine the law governing arbitration agreements? In what ways do their approaches converge and diverge in this determination?

16. The present study will address these questions on the law governing arbitration agreements, providing a comparative analysis between English and French law. This topic is particularly important because, as we will explore, English and French law approach this aspect in significantly different ways. And within each legal system, the outcomes of each solution vary depending on whether the parties have expressly chosen an applicable law for their arbitration agreement, whether they have impliedly chosen one, or more critically, when no choice has been made at all.

17. We will begin by examining the rare instances where English and French law align more or less, specifically where parties have explicitly chosen the law governing the arbitration agreement (**Preliminary**). Next, we will delve into the core differences between the two diverging English and French approaches, considering the more common scenario where the parties have not made

[14] *Ibid.*

any choice of law for the arbitration agreement (**Part One**). Finally, we will analyze the proposed reform of the English Arbitration Act, as it is important to consider whether the new English approach will align more closely with the French model or continue to diverge (**Part Two**).

PRELIMINARY: CONVERGING APPROACHES IN THE PRESENCE OF AN EXPRESS CHOICE OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

18. The determination of the applicable law is a crucial issue in defining the scope of an international arbitration agreement. Despite its importance, parties tend to forget to determine such law.

19. However, In the very rare instances where parties make an express choice of law governing the arbitration agreement, this choice takes precedence over any other applicable law. This aspect is due to two key principles recognized by English and French law: first, the acknowledgment that arbitration agreements can be governed by a different law than the one governing the main contract in accordance with the principle of separability (**Chapter 1**), and second, the principle of party autonomy, which ensures that courts respect the law chosen by the parties to govern the arbitration agreement (**Chapter 2**).

20. Since the present study does not focus primarily on the principle of separability of the arbitration agreement or the principle of party autonomy, we will only provide an overview of these concepts, highlighting their key aspects relevant to the study. The primary purpose of discussing these principles is to extract their implications, which are pertinent to determining the law applicable to the arbitration agreement.

CHAPTER 1: ARBITRATION AGREEMENTS MAY BE GOVERNED BY A DIFFERENT LAW THAN THE MAIN CONTRACT

21. As previously mentioned, it appears that when assessing the applicable law to an arbitration agreement, the first important criteria to evaluate is to check if the parties have chosen a specific law to govern their arbitration agreement.

22. However, in order to understand this point, it is essential to understand the ability for an arbitration agreement to be governed by a different law than the law governing the contract in the first place. This possibility is in fact a direct implication (**II**) of a well-known principle which nothing other than the principle of autonomy of the arbitration agreement, or the doctrine of separabitlity (**I**).

I. The doctrine of separability of the arbitration in English and French law

23. The 'doctrine of separability' or 'principle of autonomy' of the arbitration agreement is a fundamental concept in both English and French law, although each jurisdiction emphasizes on different aspects of this autonomy.

24. Traditionally, the autonomy of the arbitration agreement refers to its autonomy from the underlying contract that contains it; preferably referred to as "*the principle or doctrine of separability*" in English law, and "*principle of autonomy*" in French law.

25. According to this principle, arbitration agreements are distinct from the main contracts to which they are attached. The main contract would outline the rights and obligations of the parties, while the arbitration clause is an agreement to resolve disputes arising from conflicts over the substantive contract.[15] This means that the arbitration agreement is a separate contract, and this explains why many legal systems categorize international arbitration within their procedural codes,[16] and why courts recognize and uphold this distinction as well.[17]

26. In fact, G. Born refers to this principle as "*one of the conceptual and practical cornerstones of international arbitration*." Thus it is widely accepted that an arbitration agreement should not be seen as a part of the main contract but rather as a "contract within a contract".[18]

27. In English law, the autonomy of the arbitration agreement is more recognized as the doctrine of separability. This doctrine, under English law too, allows the arbitration agreement to be treated independently from the main contract, ensuring that any invalidity in the contract does not necessarily affect the arbitration agreement itself. This principle is crucial because it could allow disputes to be resolved through arbitration even if the main contract is challenged.

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[15] L. VAZZOLER, *Kabab-Ji Sal V. Kout Food Group Decision UKSC 2021, in International Law and Politics,* Volume 54, p. 1129.
[16] Code de Procedure Civile Français (CPC), Art. 1442-1449 (Fr.) ; L.VAZZOLER, *op. cit.*, p. 1129.
[17] Cass. 1e civ., July 4, 1972, *Hecht v. Buisman's* ; CA Paris, December 13, 1975, *Menicucci v. Mahieux* ; UK supreme Court, *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb*, [2020] UKSC 38.
[18] L.VAZZOLER, *op. cit.*, p. 1130-1131 ; Julio C. RIVERA, *Arbitraje Comercial Internacional Y Domestico, International And Domestic Commercial Arbitration*, Second ed., 2014, 157.

28. Although English law acknowledges the principle of separability at first glance,[19] it does not however fully embrace it on all levels. This is particularly evident in the English approach when dealing with the determination of the applicable law to the arbitration agreement, as we will discuss further below, where courts often assume that when the parties choose a specific law to apply to the main contract, English courts interpret it as if the parties intended their arbitration agreement to be governed by this same law, rather than treating it as entirely independent. The *Enka* case[20] exemplifies this more restrictive interpretation of separability, in its reasoning that seeks to provide to allegedly follow the parties' commercial expectations that the same law governs the entire contract.[21] However this reasoning might heavily be contradictory the doctrine of separability which English law allegedly embodies.

29. Therefore, under English law, while the doctrine of separability is recognized and well-established, the arbitration agreement's autonomy does not prevent the assumption that the parties' choice of law governing the main contract also applies to the arbitration clause.[22]

30. In contrast, French law upholds the autonomy of the arbitration agreement in a way more rigid way, fully embracing it on many levels. Indeed, the French approach emphasizes on the fact that the arbitration agreement is not only independent of the main contract but is also independent from any national law, hence only governed by substantive rules. In fact, the evolution of the French jurisprudence reflects a particularly robust and extreme interpretation of the separability principle. As extensively discussed by J.P. Ancel[23] and reiterated by J.F. Poudret,[24] four landmark decisions – *Gosset*, *Hecht*, *Menicucci* and *Dalico* – have significantly shaped the understanding of this principle. From these rulings, three key distinctions emerge: the autonomy of the validity of the arbitration clause from the validity of the main contract, the autonomy of the law governing the arbitration agreement from the one governing the main contract, and the autonomy of the

[19] The English Arbitration Act provides that an arbitration agreement cannot be affected by the contract even when the latter is "*invalid, non-existent or ineffective*".
[20] *Enka v. Chubb, op. cit.*
[21] *See infra 49.*
[22] E. GAILLARD, *Les vertus de la méthode des règles matérielles appliquées à la convention d'arbitrage (Les enseignements de l'affaire Kout Food)*, Rev. Arb. Vol. 2020, Issue 3, p. 709.
[23] J.P. ANCEL, *L'actualité de l'autonomie de la clause compromissoire, Travaux du Comité français de DIP*, 1991-1992, pp. 81-83.
[24] J.F. POUDRET et S. BESSON, *Comparative law of international arbitration*, Sweet & Maxwell Ltd 2007, p. 132.

arbitration agreement from any national law. This last interpretation of the separability principle is unique to French law and is not recognized under English law.

31. It is important to note that, before the principle became firmly established in French law, the recognition of the separability principle was less clear and not as strongly supported. However, with its eventual solidification, French law now embraces a much broader and more comprehensive interpretation of separability, far more expansive than that recognized under English law.[25]

32. The French roots of the known principle of separability of the arbitration agreement from the main contract goes back to the *Gosset* decision rendered in 1963, in which the Court of cassation had held that the arbitration agreement "*whether concluded separately or included in the contract to which it relates, shall […], have full legal autonomy and shall not be affected by the fact that the aforementioned contract may be invalid*".[26] In fact, this principle, according to which arbitration agreements are autonomous of the main contract, is incorporated as a substantive rule of French international arbitration law, in the sense that French courts will always consider arbitration agreements to be independent from the contract, regardless of the laws governing the contract or even the arbitration agreement itself.[27]

33. The other aspect of the principle of separability was subsequently determined by the *Hecht* decision in 1972.[28] This case raised the issue of whether French law, which prohibits arbitration in non-commercial disputes, applied to an arbitration clause within an international commercial agreement. The French court aimed and sought to exempt the arbitration agreement from the "*principe d'illicéité*" of arbitration clauses in mixed contracts, a principle on which the validity of the clause was contested. In order to do so, the French Court of Appeal upheld the arbitration clause's autonomy which was reiterated by the Court of Cassation stating that "*in international arbitration, the arbitration agreement is completely autonomous*".[29] It was asserted by some scholars that this could mean that the arbitration agreement is also independent of any national

[25] J.F. POUDRET et S. BESSON, *Comparative law of international arbitration*, Sweet & Maxwell Ltd 2007, p. 139.
[26] Cass. 1e civ., May 7, 1963, *Ets. Raymond Gosset v. Carapelli*.
[27] E. GAILLARD and J. SAVAGE, *The Autonomy of the Arbitration Agreement in FOUCHARD GAILLARD GOLDMAN on International Commercial Arbitration*, Kluwer Law International 1999, pp. 199.
[28] *Hecht v. Buisman's, op. cit.*; J.F. POUDRET et S. BESSON, *op. cit.*, p. 142.
[29] *Hecht v. Buisman's, op. cit.*. ; J.F. POUDRET et S. BESSON, *op. cit.*, p. 143 ; Ch. SERAGLINI et J. ORTSCHEIDT, *Droit de l'arbitrage interne et international,* Lextenso ed., Montchrestien, coll. Domat droit privé, 2013, 2013, p. 490.

law, as it was subsequently confirmed in the *Menicucci* case; however, as rightly pointed out by J.F. Poudret, this goes beyond the meaning of the *Hecht* decision which simply concluded that by consenting to arbitration the parties intended to exclude the French law which would have prohibited it.[30]

34. In the subsequent *Menicucci* decision in 1975, the French court further clarified its position on the autonomy of arbitration agreements by emphasizing on the validity of the clause independently of any reference to state law:[31] "*valable indépendamment de la reference à toute loi étatique*" which highlights the second aspect of the principle of autonomy in the sense adopted by French law.

35. The French court hence established the principle of autonomy which allows the arbitration agreement to be governed by international substantive rules rather than any national law.[32] On another note, this marked a significant recognition of the systematic application of French-origin substantive rules to define the framework of arbitration agreements, which will be thoroughly studied below.

II. Implications of the doctrine of separability

36. The doctrine of separability of the arbitration agreement leads to two direct outcomes: first, the arbitration agreement cannot be affected by the main contract's status, second and more importantly in the interest of the present study, the arbitration agreement can be subject to a different applicable law that the one governing the main contract.

37. First, the principle of separability's main implication is that the status of the main underlying contract does not and cannot affect the arbitration agreement. In other words, this means that the validity of the arbitration is not affected by the validity of the main contract. Consequently, regardless of whether the main contract "*never came into existence, was avoided, was discharges or was repudiated*",[33] the arbitration agreement retains its validity and effectiveness independently.

[30] J.F. POUDRET et S. BESSON, *op. cit.*, p. 143.
[31] *Menicucci v. Mahieux, op. cit.*
[32] C. SERAGLINI et J. ORTSCHEIDT, *Droit de l'arbitrage interne et international,* Lextenso éd., Montchrestien, coll. Domat droit privé, 2013, p. 490 ; Poudret, p. 144.
[33] E. GAILLARD and J. SAVAGE, *The Autonomy of the Arbitration Agreement in FOUCHARD GAILLARD GOLDMAN on International Commercial Arbitration,* Kluwer Law International 1999, p. 210.

Thus, the arbitration agreement stands on its own and continues to be enforceable, irrespective of any issues or challenges affecting the main contract. In fact, the English Arbitration Act explicitly provides that an arbitration agreement cannot be affected by the contract even when the latter is "*invalid, non-existent or ineffective*".[34]

38. However, it is important to note that this does not imply that an arbitration agreement cannot be invalid, but rather provides it with an added layer of protection to ensure the the unfolding of arbitral proceedings.

39. Second, the other main consequence of the principle of autonomy of the arbitration agreement would be that the arbitration agreement may be governed by a different law from the one governing the underlying contract.[35] This implies that the law applicable to the main contract is not the one necessarily applicable to the arbitration agreement, and this could be on one hand a result of the express choice of the parties of the law governing their arbitration agreement, or on another hand, the result of the application of the different approaches in determining the law governing it as we'll extensively see below.

40. In conclusion, it is clear that both English and French law recognize the principle of separability of arbitration agreements, though each legal system extends this principle in different ways. The key takeaway from this principle, which is particularly relevant to this study, is that in both jurisdictions, the arbitration agreement can be governed by a different law than the one governing the main contract.

41. It is worth noting that this implication is not an obligation rather than an option. The parties are free, if desired, to expressly choose the same law governing their contract to also govern their arbitration agreement.

42. Thus, the arbitration agreement can be governed by a different law than the one applicable to the main contract, depending on the choice of law principles applied. This means that when the parties' have not chosen a law to govern their arbitration agreement, the latter will either be governed by a national law based on the conflict of laws rule, as adopted by the English approach, or by substantive rules as adopted by French one.[36]

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[34] *Ibid.* p. 211 ; English Arbitration Act 1996.
[35] FOUCHARD GAILLARD GOLDMAN *on International Commercial Arbitration, op. cit.*,p. 211.
[36] *Ibid.*, p. 212.

43. This leads us to our next point: now that the principle of separability and its consequences are clear, it is evident that the parties have the freedom to select a distinct law to govern their arbitration agreement, separate from the law governing the main contract. This brings us to another widely recognized principle, the principle of party autonomy, which asserts in one of its aspects that courts respect the parties' choice of law.

CHAPTER 2: THE RECOGNITION OF THE PARTIES' CHOICE OF LAW APPLICABLE TO THE ARBITRATION AGREEMENT

44. It is well established that the arbitration agreement can be governed by a different law that the one governing the rest of the contract. However, the parties of a contract may not necessarily be aware of the existence of such principle, or even if they are, they often overlook its importance.

45. If the parties fail to take the further step of expressly choosing a specific law for their arbitration agreement, arbitral tribunals and courts will eventually make that decision for them, which could lead to outcomes that the parties did not intend. On the other hand, if the parties do make an explicit choice in this matter, their decision holds significant weight and their intentions are well respected by courts.

46. Indeed, in addition to the principle of separability, the principle of party autonomy (**I**), and the validation principle (**II**) further reinforce the importance of the parties' choices.

I. <u>The principle of party autonomy: the respect for the parties' express choice of the law</u>

47. The principle of party autonomy is a broad principle that encompasses various sides in international arbitration. For the purposes of our study, we focus specifically on how this autonomy is respected when parties choose the law applicable to the arbitration agreement.

48. Party autonomy in arbitration manifests itself in aspects from the beginning to the end of the process. This autonomy is evident in the parties' ability to choose arbitrators, select the applicable

law for the procedure, and even influence how the arbitration is conducted.[37] Particularly relevant to this discussion is the notion that party autonomy extends to the choice of the law applicable to the arbitration agreement itself. This principle ensures that the arbitration reflects the parties' preferences, although it might sometimes be subject to certain limitations.[38]

49. In the rare instances where parties explicitly choose a specific law to govern their arbitration agreement, both English and French law recognize and uphold the parties' clear intent, favoring it over any other potentially applicable law.

50. It is worth noting that this scenario represents one of the very few cases where English and French law converge, with both legal systems respecting the parties' express choice of law in arbitration agreements.

51. While the principle of autonomy is provided in the English Arbitration Act 1996, which references it directly or indirectly across its different sections,[39] one could easily infer from decisions rendered by English courts that English law prioritizes the parties' intent when they choose a law applicable to their arbitration agreement. This is seen in most English decisions, such as the *Enka* decision which will be extensively explored below. What is important to note here is that the very first step of the English method when determining the law applicable to the arbitration agreement requires English courts to first check whether the parties have expressly chosen a law to be applicable to the arbitration agreement. If such choice was made, there is no need for the courts to interpret it or make further research on this matter, as it immediately applies the selected law by the parties to the arbitration agreement.

52. Similarly, under French law, the courts place significant importance to the parties' intent when the have expressly chosen the law applicable to the arbitration agreement. While also upholding party autonomy, French law adopts a slightly different approach by prioritizing the parties' intent but also ensuring it is consistent with French public policy and international arbitration standards.[40]

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[37] C. CHATTERJEE, *The Reality of The Party Autonomy Rule In International Arbitration*, Journal of International Arbitration, Kluwer Law International 2003, Volume 20, Issue 6, pp. 539 – 560, spec. p. 540.
[38] C. CHATTERJEE, *op. cit.*, spec. p. 540.
[39] *Ibid.*, spec. p. 542.
[40] Cass. civ. 1re, 30 mars 2004, *Soc. Uni-Kod c/ Sté Ouralkali* ; Cass Civ. 1, 20 December 1993, *Municipalité de Khoms El Mergeb v. Dalico*.

53. Therefore, both English and French legal systems place high value on respecting the parties' will, particularly when the parties have expressly chosen the law applicable to their arbitration agreement.

54. However, it would also be interesting to examine how each of these legal systems responds when the law chosen by the parties has the effect of invalidating the arbitration clause. In other words, to determine whether English and French law apply the validation principle in such cases.

II. Pro-arbitration approaches and the validation principle

55. The validation principle in arbitration aims to uphold the enforceability of an arbitration agreement wherever possible. This principle suggests that if an arbitration agreement is capable of being interpreted under multiple laws, courts or arbitral tribunals would apply the law that would validate the agreement, rather than a law that would render it invalid.

56. The validation principle is both recognized under English and French law, once again each in its own way.

57. Under English law, the validation principle has been a guiding rule even though it has sometimes operated discreetly. Prior to the establishment of the well-known three-steep English approach, which will be thoroughly discussed below, English courts tended to favor the application of the law of the seat, with a discreet motivation, as scholars point it out, of upholding the validity of the arbitration agreement, thereby protecting it from the risks of invalidation under the law of the contract.[41] A notable example of this approach is seen in the *Sulamérica* case, where the arbitration agreement was saved from the Brazilian law's provisions which could have invalidated it. And indeed, this was not the first time the English courts had applied a "silent pro-validation"[42] ruling as they had several times favored the law of the seat avoiding the potential invalidation of the arbitration agreement.[43]

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[41] S. PEARSON, *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, Arbitration International, Oxford University Press 2013, Volume 29 Issue 1, p. 124.
[42] *Ibid.*, p. 124.
[43] *Ibid.; see also cited: XL insurance Ltd v. Owen Corning* and *Abuja International Hotels Ltd v. Meridien SAS*.

58. The *Enka* decision also refers to a certain validation principle, referring to it in the absence of an express choice of law as a counterargument to the inference that the law governing the contract was intended to apply to the arbitration agreement:[44] *"the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective*."

59. However, it is worth noting in a small aside, that as we'll see with the proposed reform of the English Arbitration Act, the validation principle might no longer be a concern of English law anymore, as it the new Arbitration Act could potentially move away from it.[45]

60. Similarly, French law acknowledges the validation principle, adopting it in a more express way. In accordance with the French approach holding a substantive rule method and as already mentioned, the existence and effectiveness of arbitration agreements are not governed by any national law rather than by "*mandatory rules of French law and international public policy, on the basis of the parties' common intention"*.

61. More importantly, Gaillard addresses the issue of the scenario in which the law expressly chosen by the parties to govern the arbitration agreement includes a provision that could render the agreement null or ineffective under the specific circumstances of the case.[46] He mentions some scholars' opinion according to which they argue that if a court were to invalidate an arbitration agreement based on the conflict of law rules, this would clearly constitute a breach of the principle of validity. The reasoning behind this is that there would be a contradiction between the parties' intention to arbitrate and the nullity of the arbitration agreement, which should be resolved by prioritizing the principle of validity over the invalidating law.[47]

62. Gaillard further emphasizes on that a reference to a law that nullifies the arbitration agreement should not override the rule of party autonomy in arbitration. Consequently, there is a tendency to prioritize the parties' intention to arbitrate over the law that nullifies the agreement.[48]

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[44] *Enka vs.* Chubb, *op. cit.*, para 170.
[45] *See infra 256.*
[46] E. GAILLARD, *Les vertus de la méthode des règles matérielles appliquées à la convention d'arbitrage (Les enseignements de l'affaire Kout Food)*, Rev. Arb. Vol. 2020, Issue 3, p. 726.
[47] *Ibid.*
[48] *Ibid.*

63. Therefore, it is evident that both England and France are both pro-arbitration places, and the English and French courts would both not hesitate to save the arbitration agreement from any potential invalidation, thus reinforcing the parties' will to be subject to arbitration.

64. In conclusion, it is clear that the parties' choice of law for arbitration agreements is respected under both English and French law, in accordance with the principles of separability and party autonomy.

65. This shared respect for the parties' intent represents the only convergence between these two legal systems.

66. However, these principles only benefit the parties when they have explicitly chosen the applicable law for their arbitration agreement. Unfortunately, as previously mentioned, parties rarely take the care of choosing such law. This is where the difficulties and challenges arise, as the English and French approaches in determining the applicable law to the arbitration agreements in the absence of an express choice made by the parties are substantially different (**Part One**).

PART ONE: DIVERGING APPROACHES IN THE ABSENCE OF A CHOICE OF LAW APPLICABLE TO THE ARBITRATION AGREEMENT

68. As we have previously seen, it is well-established that in cases where the parties have explicitly chosen the applicable law to their arbitration agreement, both English and French law recognize and uphold this choice, with courts generally compelled to respect it.

69. However, in practice, it is rare for the parties to actually make an express choice of law for their arbitration agreement. As previously discussed, parties often tend to overlook the specific law governing the arbitration agreement, leading most arbitration agreements to be drafted without any reference to such choice.

70. This makes it essential to examine situations where the parties have not expressly chosen a governing law for their arbitration agreement, to understand how English and French courts approach these scenarios and the implications that arise from it.

71. Thus, in this section, we will be examining the scenario where the parties have not made an explicit choice of law governing their arbitration agreement.

72. It is true that the question of determining the applicable to the arbitration agreement is addressed by article V(1)(a) of the New York Convention and article 34(2)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration 2006 (Model Law); which provide a conflict of laws rule applicable to arbitration agreements.[49] However, this particular conflict rule cannot be a general principle relied upon for two main reasons. First, its formal application is restricted to enforcement under the New York Convention and annulment proceedings under the Model Law, excluding other contexts such as applications for a stay or anti-suit injunctions in English courts.[50] Second, this rule's interpretation remains ambiguous, particularly concerning whether the law governing the arbitration agreement must be explicitly chosen by the parties or if it can be implied. Thus, extending the conflict rule of the New York Convention to all matters related to the arbitration agreement's existence, validity, or effectiveness does not fully address these questions and cannot achieve complete harmonization, even at the enforcement stage.[51]

[49] R. NAZZINI, *The law applicable to the arbitration agreement: Towards transnational principles,* Cambridge University Press, 2016, p. 685.
[50] *Ibid.*
[51] *Ibid.*

73. Therefore, it is essential to analyse and compare the perspectives of English and French law on this matter, especially given that there is no universally accepted international approach yet and in the contrary, there are, and will likely continue to be, significantly divergent views on this matter.

74. In this section, we will first explore both English and French diverging approaches whenever the parties have not made a choice of law applicable to the arbitration agreement, whether they have chosen a law applicable to the main contract or not, this only being relevant with regards of English law (**Chapter 1**). Second, we will conduct a case study of the *Kout Food v. Kabab-ji* case, as it constitutes a perfect illustration of the divergent approaches of both legal systems (**Chapter 2**).

75. It is important to note that we will not dedicate separate sections to distinguishing between cases where a governing law for the contract exists or is absent. This aspect will be addressed throughout our examination of the evolution of English law on the matter, and it is not relevant for French law.

CHAPTER 1: DISTINCT APPROACHES WITH OR WITHOUT A CHOICE OF LAW APPLICABLE TO THE MAIN CONTRACT

76. First, we have established that if there is an express choice of law applicable to the arbitration agreement, English and French courts will give effect to the parties' express intention.

77. Now, in cases where such choice is not made, English and French courts deal with this situation very differently. While the English law approach is a bit more complex as it also differentiates whether the parties have chosen a law applicable to the contract or not, French law on the other hand has one straight forward rule applied regardless of the choices of laws made for the main contract.

78. Thus, the question of whether the law applicable to the main contract is present or absent is only relevant under English law, as French law does not make this distinction.

79. Therefore, our analysis will focus first on the English approach which is a conflict of laws one (**I**), followed by an examination of the French approach which is a substantive rule one (**II**). It is important to keep in mind that in this section, we are dealing with the scenario where the parties have not made a choice of law applicable to the arbitration agreement.

I. <u>English Law: An application of the conflict of laws approach</u>

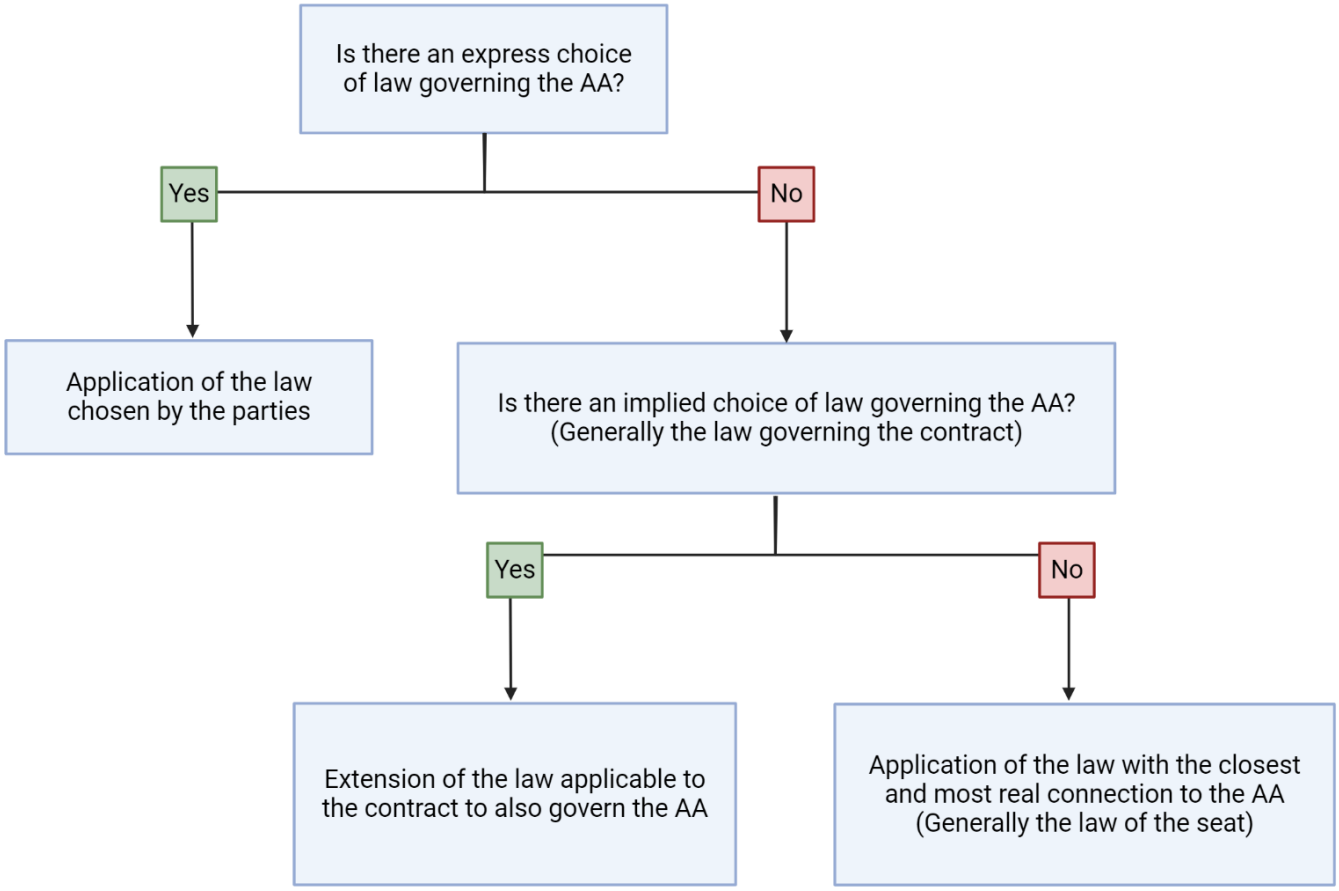
80. First, the English approach has not always been historically unified and clear and is still considered to be complex up to this day. Over time, English jurisprudence has evolved on this issue, gradually developing a more or less clear method for determining the law applicable to arbitration agreement.

81. Although the English approach is still marked by uncertainty, English courts currently seem to follow a three-step method when determining the applicable law for an arbitration agreement as follows:[52] First, if there is an express choice of law specified by the parties, the courts generally honor this choice. Second, in the absence of an express choice, the courts look for an implied

[52] UKSC 48, *Kabab-ji SAL v. Kout Food Group* [2021]; *Enka v. Chubb*, op. cit. ; EWCA Civ 638, *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012].

choice of law, which is often inferred to be the law governing the underlying contract. The courts typically respect this implied choice as well. However, if neither an express nor an implied choice of law is present, the courts will then determine the applicable law based on the legal system that has the closest and most substantial connection to the arbitration agreement.

82. To provide more clarity and a more structured overview, the following flowchart[53] illustrates the method followed by English court when determining the law applicable to the arbitration agreement. This method applies since the adoption of the three-step inquiry[54] up to the present, which will potentially change with the upcoming reform of the Arbitration Act[55]:



[53] This flowchart was created based on the *Enka* decision, specifically for this study.
[54] *Enka v. Chubb*, op. cit. ; *Sulamérica v. Enesa*, *op. cit*.
[55] *See infra.* Part Two.

83. However, on one hand, this three-step approach has not always been consistently applied and was only formally established in 2012 with the *Sulamérica* decision, later reaffirmed by the *Enka* decision.

84. On another hand, this approach is likely to diverge with the upcoming reforms in the 2024 Arbitration Act 2024, as discussed in Part Two of this study.

85. But before delving into the details of how the three-step approach was established (**B**)(**C**), it is important to first provide an overview of the English courts' deviations from this method prior to its eventual recognition as a guiding principle (**A**).

A. Prior case law before the adoption of the English approach: A tendency to favor the law of the seat

86. In fact, the jurisprudence has faced its turning point in 2000 with the *XL Insurance. v. Owens Corning* case.[56] In this case, the drafted arbitration clause provided that '*any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996*'. Effectively, the English commercial court had considered that '*by stipulating for arbitration in London under the provisions of the Arbitration Act 1996, the parties chose English law to govern matters which fell within those provisions […] and by implication chose English law as the proper law of the arbitration clause*'. Thus, in this case which was considered to be an 'exceptional' one,[57] the court did not take into account the express choice of the parties of the law applicable to the contract, and in the contrary, it held that the law of the seat implicitly chosen by the parties was the one to also govern the arbitration agreement.

87. Later cases have subsequently reverted to the traditional practice of extending the law applicable to the contract to also govern the arbitration agreement. However, this approach was disrupted

[56] EWHCJ, Commercial Court, [2000], *XL Insurance Ltd v. Owens Corning Corp.*
[57] S. PEARSON, *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, Arbitration International, Oxford University Press 2013, Volume 29 Issue 1, p. 120.

again in 2007 when the English courts deviated from it with the *C v. D* case.[58] Here again, although the parties had made an express choice of the applicable law to the contract, which was the New York law, the court held that the chosen law of the seat was the one to be taken into account as the law governing the arbitration agreement.

88. However, these inconsistent decisions were swiftly set aside, particularly as the English courts firmly established a clearer methodology with the landmark decision in the *Sulamérica* case.

B. The determination of the law of the arbitration agreement in *Sulamérica*: the instauration of the three-step inquiry

89. In the *Sulamérica* case, which eventually established the traditional approach, it is worth noting that the initial ruling did not follow this now-accepted methodology. In fact, the court of first instance initially adopted a completely different approach.

90. The relevant facts of the case regarding the chosen applicable laws in the dispute were as follows: The parties had not made an express choice of the law governing their arbitration clause. The primary contract was governed by the chosen Brazilian law, while the arbitration clause specified London as the seat of arbitration.

91. At the first instance, the Commercial Court had initially held that the law of the seat of arbitration should also govern the Arbitration Agreement, as it was deemed to be the one with the closest and most real connection with the arbitration agreement itself.

92. During this period, it was still unclear which approach was actually adopted by the English courts. Indeed, prior to the Court of Appeal's ruling in the *Sulamérica* case, English courts even often favored the view that the law of the seat of arbitration should govern the arbitration agreement, rather than the law applicable to the underlying contract.[59]

93. However, this approach did not endure long. The Court of Appeal in the *Sulamérica* case provided a clearer perspective. While the court did not quite establish one single definitive rule according

[58] EWCA Civ 1282, [2007], *C v. D*, Case No. A3/2007/1697.
[59] S. PEARSON, *op. cit.*, p. 122.

to which the law of the arbitration agreement would always be designated, the court did however provide a 'guidance' on determining the latter.[60]

94. First, the Court of Appeal did acknowledge that the arbitration agreement can be governed by a different law that the one applicable to the substantive contract.[61] Second, the Court of appeal introduced a "three-stage inquiry" framework for determining the applicable law for arbitration agreements, consisting of its express choice, its implied choice, and closest and most real connection to the arbitration agreement.

95. As previously discussed, the three questions to be asked by the court while determining the proper law of the arbitration agreement are incident one to another. First step: if the parties have expressed an explicit choice of law to govern their arbitration agreement, the court stops its investigation here and applies this expressly chosen law to the aa. Moving to the second step when the first one does not apply: if the parties have not expressly chosen the law governing the arbitration agreement the court then examines whether there is an implied choice of that law made by the parties. In fact, this is where the difficulties and nuances arise. This step introduces complexity, as the court must carefully inspect the parties' intentions to discern what their implicit choice of law for the arbitration agreement might have been.

96. In the *Sulamérica* case, the nuance lies in determining on one hand whether (1) the parties have made an implied choice of the law by designating Brazilian law as the law governing the main contract; or on another hand, (2) whether English law, as the law of the seat of arbitration, should govern the arbitration agreement; either because it was impliedly chosen by the parties or because it has the closest connection with the arbitration agreement. Which eventually leads to the third step of the analysis in the absence of an implied choice.[62]

97. Theoretically, it is recognized that an express choice of the law applicable to the underlying substantive contact can be considered as a "*strong indication of the parties' intention in relation to the agreement to arbitrate*".[63] However, this reasoning was set aside in light of the facts of the *Sulamérica* case, for two key reasons. First, if Brazilian law (the law governing the main contract) were to govern the arbitration agreement, it would have led to consequences misaligned with the

[60] *Ibid.* p. 122.
[61] *Ibid.*
[62] R. NAZZINI, *op. cit.*, p. 687.
[63] *Ibid.* p. 688 ; S. PEARSON, *op. cit.*, p. 123.

parties' intention: indeed, the parties clearly drafted the arbitration agreement to be mutually binding; yet the Brazilian law would cause the arbitration agreement to only bind the insurers.

98. This inconsistency indicates that the parties could not have intended for Brazilian law to govern their arbitration agreement, meaning it cannot be considered as an implied choice.[64] Therefore, after ruling out the extension of the law governing the main contract to the arbitration agreement, the court examined the English law (the law of the seat of arbitration) to see if it is an implied choice of law for the arbitration agreement. Ultimately, the court took the English law into account but not under the 'second step' as an implied choice, but rather as the law that has the closest and most real connection to the arbitration agreement,[65] thereby applying the third step.

99. On an appreciative note, the decision in *Sulamérica* was viewed as appropriate by some, as applying Brazilian law would have rendered the arbitration clause ineffective, making it unlikely that the parties intended it to govern. However, others criticized the approach for its unpredictability in determining the parties' implied choice of law, noting that absolute certainty in contract interpretation is rarely achievable.

100. In any case, to conclude on the *Sulamérica* case, while English courts admit a presumption that the express choice of law applicable to the contract is considered to be an implied choice of the law of the arbitration agreement, this presumption can and has to be rebutted on the facts on a case by case basis.[66]

C. The reaffirmation and clarification of the three-step inquiry in *Enka*

101. Another important case law came into frame to evaluate this matter in 2020. In the *Enka* case, the supreme court also had to examine the applicable law for the arbitration agreement. *In casu*, the case involved a fire at a power plant in Russia, where 'Chubb', the insurer, compensated the owner, took over its rights through subrogation, and filed a claim in a Russian court against a subcontractor 'Enka', alleging that Enka's defective work during construction caused the fire. Indeed, the

[64] R. NAZZINI, *op. cit*, p. 688 ; S. PEARSON, *op. cit*, ; see also *Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR102, paras 30 (Moore-Bick LJ).
[65] R. NAZZINI, *op. cit.*, p. 688.
[66] *Ibid.* p. 687.

arbitration agreement was included in Enka's subcontract, which was governed by Russian law. However, the arbitration agreement did not specify a choice of law, but it did provide for arbitration under the International Chamber of Commerce (ICC), with London as the designated seat of arbitration. The party Enka sought an anti-suit injunction in London to move the dispute from the Russian court to arbitration. Effectively, in this case, the determination of the governing law of the arbitration agreement had to be carefully examined as it would determine the breadth of the arbitration agreement's interpretation and whether the party's claim fell within its scope, thereby justifying injunctive relief.[67] In order to do so, the English court sought to determine which "*system of national law*" governed the arbitration agreement.[68]

102. The *Enka* case hence gave a chance to the UK Supreme Court to clarify the principles related to the law governing arbitration agreements.

103. As previously explained, the English approach is based on the three-step inquiry according to which the courts check (1) if there is an express choice of law for the arbitration agreement, (2) if not, check for an implied choice of this said law, (3) in the absence of such choice, determine the law with the closest and most real connection with the arbitration agreement.[69]

104. The parties had not made an express choice of law for the arbitration agreement, hence bringing the court to shuffle between the second and third step of the abovementioned method.

105. In the *Enka* case, the Supreme Court affirmed that the inquiry should conclude with the contract's choice of law clause unless there are strong reasons not to apply the law governing the rest of the contract. An example where the court might not apply the contract's law is if there is a substantial risk that the main contract's law would invalidate the arbitration agreement. However, in the present case, the parties had not chosen a law to govern the main contract, and that the latter is objectively governed by Russian law.[70]

106. Effectively, the court summarized its reasoning in nine principles according to which it based its judgment on determining the law applicable to the arbitration agreement, stating them as follows:[71]

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[67] W.DAY, *Applicable law and arbitration agreements*, The Cambridge Law Journal, 2021.
[68] M.E. ANCEL, *La loi applicable à la convention d'arbitrage au Royaume-Uni : les enseignements de l'arrêt Enka*, Libres Propos RDIA n°4, 2021, p. 170 *; Enka v Chubb, op. cit.*
[69] G. BORN, *op. cit.* ; *Sulamérica v. Enesa, op. cit.* ; R. NAZZINI, *op. cit.* ; M.E. ANCEL, *op. cit.*
[70] M.E. ANCEL, *op. cit.*, p. 170 ; *Enka v Chubb, op. cit.*
[71] *Enka v. Chubb, op. cit.*, para 170.

i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

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

vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have

chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.

107. Applying these principle, the Court was brought to rely on the last step of the three-step method, focusing on the determination of the law with the closest connection to the arbitration agreement. It concluded that there was no choice of law expressly made by the parties to govern neither the contract nor the arbitration agreement, thus making the law of the seat applicable to the arbitration agreement, "*as the law with which the dispute resolution clause is most closely connected*".[72]

108. Although *Enka* did not extend the law applicable to the contract to the arbitration agreement *in casu,* its judgment does confirm the principle according to which when the arbitration agreement does not state a governing law but is part of a broader contract with a choice of law applicable to it, that choice typically extends to the arbitration agreement. This situation frequently arises because parties often agree on a contract with a specified choice of law and include an arbitration clause without considering that the arbitration agreement constitutes a separate agreement within the contract.

109. It is worth noting that the *Enka* decision was reached by a majority and not unanimously. In fact, the judges involved were divided on the issue of which law applied to the contract, specifically regarding the determination of the implied choice of law. This division shows a potential weakness in the English approach: while it asserts that the law governing the contract can extend to the arbitration agreement, courts then face difficulties to determine what that law actually is.

110. This lack of clarity sends a first troubling signal regarding the current English approach; because when the law of the contract is uncertain, the resulting ambiguity can lead to complex interpretations and lack of unified opinion, which is what happened in the *Enka* case.

111. Furthermore, Professor Marie-Élodie Ancel extensively explains the complex reasoning behind the UK Supreme Court's approach when determining the law governing the arbitration agreement

[72] *Enka v. Chubb, op. cit.*, para 171.

when the parties have not made an express choice. First, Professor Ancel explains that the judges primarily consider whether the parties might have implicitly chosen a law, relying on a "*key presumption*": if the parties selected a law for their main contract, they likely intended that same law to be applicable to the arbitration clause as well.[73]

112. While this approach might seem like it provides predictability and simplicity, there are however two "*counter-presumptions*", Professor Ancel says, that can refute this assumption. First, since the law of the arbitration seat asserts its applicability to both the arbitration proceedings and the agreement itself, it may be inferred that the parties intended this law to also govern the arbitration clause. Second, the validation principle suggests that in some instances, the law of the main contract may risk invalidating the arbitration agreement, thus meaning that the court should instead better apply the law of the seat to ensure the clause's validity and effectiveness.

113. Therefore, the concept of an "implied choice" as discussed in *Enka* might present more challenges than anticipated. Not only does it require the court to dig deeper into determining whether the parties have expressly or implicitly chosen a law to govern the contract, but even if such a choice is identified, it may not necessarily reflect the "implied choice" of law for the arbitration agreement, as other laws could also be considered in this context. This critical aspect is further discussed below when comparing the two different methods.

II. French Law: A systematic application of the substantive rules approach

114. In French law, the question of the applicable law to the arbitration clause does not arise in the same way as it does in English law. Instead, French courts, dealing with this issue in less problematic way, favour the development of straightforward substantive rules that govern the arbitration agreement.

115. As we have seen the difficulties encountered by the analysis adopted by English courts, one could understand why French judicial decisions have generally opted for a different solution. French

[73] M.E. ANCEL, *op. cit.*

courts have favored the application of principles of international arbitration law to the formation and validity of international arbitration agreements.

116. In France, the approach differs: there is no debate over whether the arbitration agreement is governed by the law of the seat or the law of the contract. Instead, the French perspective treats arbitration agreements on their own, having their own distinct legal regime. Rather than relying on a specific national law to govern the arbitration agreement, it applies transnational, international principles, which are in other words the substantive rules.

117. The French approach mainly shows that the jurisprudence favors "simplicity"[74], and instead of facing the typical difficulties in determining the law governing arbitration agreements in accordance with the conflict of laws approach, French law insists on a systematic application of the substantive French rules.[75]

118. To begin, before detailing the evolution and approach in depth,[76] it is important to understand how differently French law addresses this mater in a general sense: Regardless of the law governing the main contract, whenever the parties have not made a choice of law governing the arbitration agreement, French judges assess the existence and effectiveness of the arbitration agreement based on the parties' common intent. But it is essential to note that this examination is subject to the mandatory rules of French law and international public policy, without reference to any specific state law.

119. As we have previously discussed, French law acknowledges that arbitration agreements are "autonomous" from other national legal system and, are instead directly subject to principles of international arbitration law.[77] Indeed, French courts regard the validity of the arbitration agreement as being governed by *des règles matérielles* that are independent of any national legal system in the absence of an express or implied choice by the parties.

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[74] Ch. SERAGLINI et J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, Lextenso éd., Montchrestien, coll. Domat droit privé, 2013, p. 489.
[75] G. BORN, *International Commercial Arbitration*, 'Chapter 4: Choice of Law Governing International Arbitration Agreements', Third Edition, pp. 507 – 674.
[76] E. Gaillard rightly mentions that : « *Le professeur Fadlallah et le Président Hascher ont admirablement montré, dans leur ouvrage consacré aux grandes décisions du droit français de l'arbitrage, comment s'était développée cette jurisprudence sous l'influence des présidents Georges Holleaux, Pierre bellet ou, plus récemment, Jean-Pierre Ancel* », p. 705.
[77] G. BORN, *op. cit.*, pp. 507 – 674, spec. p. 33 of chapter 4.

120. Although this position has been firmly established for decades, it's worth noting that this wasn't always the case in France. In fact, before the landmark *Dalico* decision in 1993, many legal scholars used to consider that the choice of law method played a residual role in French arbitration law.[78] This notion has since been entirely dismissed, as the French approach was unequivocally solidified and endorsed by the Court of Cassation in 1993, marking a definitive shift away from the choice of law method.[79]

A. The establishment of the international arbitration substantive rule approach in *Dalico*

121. The French Court of Cassation has firstly solidified the method of substantive rules in 1993, with the *Dalico* case. This case involved a contract between the "Committee of the Municipality of Khoms El Mergeb" (later succeeded by the Municipality of Tripoli, Libya) and "Dalico Contractors", a Danish company. A clause was included in the contract designating Libyan law to govern the contract and giving Libyan courts jurisdiction. However, a subsequent arbitration clause contained in an annex modified this jurisdictional clause. The Danish company initiated arbitration under this clause, but the Municipality of Tripoli contested its validity, arguing that the annex containing the arbitration clause was unsigned and therefore not valid under Libyan law. Despite this challenge, the Paris Court of Appeal rejected the application for annulment and upheld the arbitrators' decision affirming the existence and validity of the arbitration clause.

122. The court of appeal followed by the Court of cassation have both held that "*according to a substantive rule of international arbitration law*," the existence and validity of an international arbitration agreement "*depends only on the common intention of the parties, without it being necessary to make reference to a national law*."[80] The Court of cassation thereby confirmed Court of Appeal's decision to disregard Libyan law, the law of the contract, when evaluating the existence and validity of the arbitration agreement.[81] Therefore, after thoroughly reviewing the

[78] E. GAILLARD and J. SAVAGE, *The Autonomy of the Arbitration Agreement in FOUCHARD GAILLARD GOLDMAN on International Commercial Arbitration*, Kluwer Law International 1999, p. 219.
[79] *Ibid.*
[80] G. BORN, *op. cit., spec.* p. 33 of chapter 4; *Mergeb v. Dalico, op. cit.*
[81] E. GAILLARD and J. SAVAGE, *op. cit.*, p. 230.

documents related to the dispute, the court has concluded that the parties had clearly intended to be bound by the terms of the arbitration agreement.

123. However this 'substantive rules' approach does not go without limitations, as clearly stated in the Court's decision:[82] "*according to a substantive rule of international arbitration law, the arbitration clause is legally independent from the main contract in which it is included or which refers to it and, provided that no* ***mandatory provision of French law*** *or* ***international public policy*** *is affected, its existence and its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law.*"

124. Thus, according to the *Dalico* decision, the validity of the agreement might only be subject to the requirements of mandatory provision of French law and international public policy. In fact, the 'international public policy' mentioned by the Court aims to embody the consensus within the international business community[83] and encompasses public policy rules that "*if not universal, are at least common to the various legal systems*".[84] Indeed, the French approach implies that arbitration agreements are governed not by national laws, but solely by the requirements of international public policy, which are by definition, very limited.[85]

125. In fact, the goal of the French jurisprudence was to maximize arbitration agreements' efficacy, and thus to establish a legal protection for this particular clause.[86]

126. This approach has been consistently upheld in subsequent French legal decisions and remained unaffected by recent changes to the French Code of Civil Procedure, as courts continue to apply substantive principles of international law continues to international arbitration agreements.[87]

127. However, subsequent case law had initially removed the reference to the mandatory rules of French law with the *Zanzi* case, only to later reintroduce it. This reintroduction occurred with the *Uni-kod* case, which effectively reiterated the language used in the *Dalico* decision.

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[82] *Mergeb v. Dalico*, *op. cit.*
[83] R. NAZZINI, *The law applicable to the arbitration agreement: Towards transnational principles*, Cambridge University Press, 2016, p. 695.
[84] P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (Kluwer 1987) 257, 278.
[85] E. GAILLARD and J. SAVAGE, *op. cit.*, p. 230.
[86] Ch. SERAGLINI et J. ORTSCHEIDT, *op. cit.*, p. 491.
[87] R. NAZZINI, *op. cit.*, p. 695. ; G BORN, *op. cit.*, spec. p. 33 of chapter 4.

B. The progression of the substantive rules approach in *Zanzi* and its refinement in *Uni-kod*

128. Few years later, the landmark *Dalico* decision case was in fact followed by the *Zanzi* decision in 1999, which had slightly derailed from the aforementioned approach by softening its conditions. In the *Zanzi* case, the court of cassation upheld the principle of autonomy, also grounding its ruling on the principle of "legality" (*licéité*) of the arbitration agreement. In its approach, the court seemed to establish a principle of validity without any constraint or limitation other than those that may arise from the will of the parties - "*soumise à aucune contrainte, ni limite autre que celles pouvant résulter de la volonté des parties*".[88]

129. In other words, the *Zanzi* decision hence established that an arbitration agreement is deemed valid as long as the parties intended to create it and be bound by it. This validity was upheld without reference to any specific national law, focusing instead on whether there was a genuine mutual agreement between the parties.

130. However, this lack of restriction might have seemed surprising at that time, as a clause cannot generally be deemed valid or enforceable solely based on the parties' intentions. It must indeed meet certain formal requirements established by a preexisting legal standard, even if these requirements might be considered as highly liberal.[89] Thus, this unrestricted ruling was a more or less occasional solution and did not lead to a general change or shift of the French approach. Later court decisions preferred the original *Dalico* solution reinforcing the more conditioned method.

131. Effectively, in more recent cases, the Court of cassation has appeared to adopt a "*less dogmatic*" and "*more nuanced*" approach, as Ch. Seraglini says,[90] shifting back to the *Dalico* decision.

132. For instance, in the 2004 *Uni-kod* case, the Court held that "*en vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient,*

[88] Ch. SERAGLINI et J. ORTSCHEIDT, *op. cit,* p. 492.
[89] Ch. SERAGLINI et J. ORTSCHEIDT, *op. cit,* p. 493.
[90] *Ibid.*

sous réserve de 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* ».[91]

133. Therefore, the court reintroduced the notion that the validity of the arbitration agreement is not entirely free from legal constraints. Indeed, while French law remains assertive in recognizing the principle of autonomy for arbitration agreements, it now appears to align more closely with the rigorous approach reaffirmed by the *Unikod* decision, expressed in terms very similar if not identical to those of the *Dalico* ruling.[92]

134. Two interesting aspects of the French approach merit attention. First, the established substantive rules are systematically applied whenever French courts are involved in a dispute ruling on the recognition or enforcement of an arbitral award. The important aspect is that these rules automatically apply regardless of the arbitration's designated seat. This means that even if the arbitration is seated outside of France, French courts will still apply their substantive rules when dealing with such issues,[93] which shows their commitment to ensuring a predictable legal framework.

135. Second, a unique and advantageous aspect of the substantive rules approach is that it allows arbitration agreements to bypass the limitations of any specific state's contract law. Indeed, in countries less supportive of arbitration than France, general contract law is often used to challenge the validity of arbitration agreements.[94]

136. Ultimately, the French approach, which focuses on the expressed intent of the parties without relying on any national law, reflects the effectiveness of substantive rules in ensuring the validity of arbitration agreements and their enforceability.

137. Before diving into the *Kabab-ji* case study which will provide a comparative analysis of each approach, we will first assess some preliminary observations on certain comparable aspects of English and French law. These aspects are drawn by the English *Enka* case and the French *Dalico* case along with the subsequent aforementioned decisions. A more detailed critical assessment of the conflicting approaches will be further made below (Chapter 2).

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[91] *Uni-Kod v. Sté Ouralkali, op. cit.*
[92] Ch. SERAGLINI et J. ORTSCHEIDT, *op. cit,* p. 493.
[93] E. GAILLARD, *op. cit.,* p. 705 ; M.E. ANCEL, *op. cit.*, p. 175.
[94] *Ibid.,* p. 716.

Some preliminary observations on the English and French approaches

138. It is undisputed that the English and French law each take a completely different stand when it comes to determining the law governing arbitration agreements: while one follows a relatively complex three-step method, the other has one systematic rule which automatically applies regardless of any other choice of law.

139. However, despite their differences, both English and French laws demonstrate three minor points of convergence.

140. First, both systems have a 'suppletive' or 'subsidiary' character, meaning they would both respect the parties' choice of law governing the arbitration agreement if any. Second, they both show a strong preference for supporting arbitration,[95] as seen in their respective applications of the validation, each in its own, way as previously discussed. Third, the English courts' shift away from the previous emphasis on the arbitration seat brings their approach closer to that of French law,[96] which also gives little weight to the seat of arbitration in its reasoning; although noting that these similarities occur for entirely different reasons at a more detailed level.

141. However, the English and French legal systems have evolved in remarkably different directions.[97]

142. While the English approach still establishes a connection between the arbitration agreement and the main contract, the French one completely denies such interpretation and continues to rightly apply the doctrine of separability throught its systematic application of substantive rules. This marks the very first significant difference between the English and French reasoning.

143. Moreover, in French law, the jurisdictional function of the arbitration agreement is so predominant that French judges typically only examine the clause after the arbitration process has concluded and during the review of the arbitral award. While English judges may address the applicable law of the arbitration clause early in the proceedings, French judges usually intervene later, concentrating on the substance of the arbitral award.[98]

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[95] M.E. ANCEL, *op. cit.*, 175.
[96] *Ibid.*
[97] Prof. Ancel mentions it while also referring to Emmanuel Gaillard's observations.
[98] *Ibid.*, p. 175-176.

144. Whereas these are just preliminary aspects but important ones; the rest will be explored in the subsequent sections of this study.

145. But an interesting remark made by Prof. Ancel merits to be raised here: while the conflict-of-laws English approach holds little relevance within the French context which cannot be inspired by it, the contrary does potentially apply. Indeed, it appears to be conceivable that English courts could draw inspiration from the French approach and potentially develop substantive rules that English judges could apply when ruling on the validity of the arbitration agreement. Indeed, like the validation principle, the presumptions and counter-presumptions used to establish a tacit choice of law for the arbitration clause in English law are, in essence, substantive rules of the forum. The English Courts have shown a clear ability to create such rules and, in theory, could extend this practice to directly define the substantive regime of arbitration clauses. However, given that the English Courts tend to treat the arbitration agreement 'uniformly' regardless of when its validity or effectiveness is assessed, it is unlikely that any methodological shift would occur in English law.[99]

146. However, while the prevailing view a few years ago was that the two methods would not converge anytime soon, it will be interesting to see if this assumption still holds today in light of the proposed reform of the English Arbitration Act. This potential reform could either challenge this perspective entirely or, conversely, confirm that the two approaches will remain distinctly separate, an issue that will be further explored in Part Two.

[99] M.E. ANCEL, *op. cit.*, p. 176 : « *il ne faut pas espérer de révolution méthodologique outre-Manche. La méthode conflictualiste y sera sans doute encore longtemps pratiquée, quitte à réviser et reconcevoir les présomptions censées établir un choix tacite de la loi applicable. Les deux rives de la Manche ne sont pas près de se réunir* ».

CHAPTER 2: CASE STUDY: THE "KOUT FOOD VS. KABAB-JI" CASE

147. This section is an illustrative conclusion, as the *Kout Food v. Kabab-ji* case is a perfect and concrete comparative illustration showcasing the divergent approaches adopted by each English and French law.

148. For information, the *Kabab-ji* case is not the first instance of a confrontation between the English and French courts. A notable earlier example is the *Dallah* case which also highlighted the clash between the two legal systems, showing another aspect of this rivalry.

149. To briefly sum up the *Dallah* case,[100] it involved a conflict arising from a contract that included an arbitration agreement with the seat of arbitration in Paris. Similarly to the *Kabab-ji* case, although one party was heavily involved in the contract's execution, it was not a signatory to the contract. When the contract failed and arbitration proceedings were intiated, the other party denied being bound by the arbitration agreement. The arbitral tribunal, however, ruled it had jurisdiction. When one party sought to enforce the arbitral award in the UK, the English courts had to determine whether the other party was bound by the arbitration agreement under French law. The English courts, while interpreting the French law, found insufficient evidence to establish such a binding intent and refused to enforce the award. Conversely, when the other party sought to annul the award in France, the Paris Court of Appeal took a more flexible approach, considering the party's involvement in the contract and ultimately finding them bound by the arbitration agreement.

150. The *Dallah* case perfectly serves a prime example of the sharp differences between English and French legal approaches. However, it is far from the last instance of such conflict. The ongoing tension between these two courts is echoed in the more recent *Kabab-ji* case, which will be explored in details below.

151. Therefore, it would be insightful to conduct a comparative analysis of the decisions rendered by the English and French courts on the *Kabab-ji* case (**I**), followed by an assessment of the methods each court employed that led to their diverging outcomes (**II**).

[100] CA Paris, 17 February 2011, *Dallah*, Gaz. Pal.

I. Comparative analysis of the divergent decisions by English and French Courts: Conflict of laws vs. Substantive rules

152. In one single dispute, the English and French courts rendered two dramatically different decisions on the same sets of facts, each applying their distinct and opposing approaches.

153. The same award was brought before both courts, one seeking its enforcement and the other its annulment. The courts had to address several issues, including most importantly, determining what law is applicable to the arbitration agreement, and subsequently, whether the arbitration agreement could be extended to a third party. Our study focuses solely on the first problematic.

154. To provide a clear understanding, we will first present the facts and procedure of the case (**A**) to then examine how each court reached different rulings based on these same facts (**B**)(**C**).

A. Context of the dispute

155. To briefly sum up the facts of the dispute, the *Kabab-ji* case involved to a Lebanese company who had entered into a franchise agreement with a Kuwaiti company. The contract was governed by English law and included a clause providing for ICC arbitration in the event of a dispute, with Paris designated as the seat of arbitration. A dispute subsequently arose between the parties, leading the Lebanese company to initiate arbitration proceedings against the holding company (that had been established in the meantime by the original contracting party). The holding company argued that it was not bound by the arbitration agreement, as it hadn't signed it and which was only accepted by its subsidiary.

156. While the arbitral tribunal had shifted the focus on determining the law governing the arbitration agreement, it had concluded that the law of the seat of arbitration should be the law governing the arbitration agreement as well, hence examining the matter in accordance with the substantive rules of French international arbitration law. The holding company ended up being compelled to pay damages to the Lebanese company.

157. The question of the law governing the arbitration agreement was a critical issue in this case, particularly that the law that will be designated as applicable to the arbitration agreement would determine its validity and its scope, and more importantly, would determine the potential extension of the clause to parties other than the signatories, which varies from one the English system to the French one.

158. Effectively, the two confronted laws which were potentially applicable to the arbitration agreement were: English law, which was the law chosen to govern the contract, opposed to French law, which was due to the arbitration agreement referring to the seat of arbitration in Paris. As we have studied the very different English and French approaches; this case perfectly puts in light a perfect comparative application of the two approaches and how each could lead to very different solutions.

159. On one hand, jurisprudence under French law is more favorable to the extension of the arbitration agreement clause to non-signatory third parties. It considers that the clause could be extended to a third party who has materially participated in the performance of the contract, in accordance with an analysis of the facts by the arbitral tribunal.

160. On the other hand, the possibilities under English law for the extension are more limited and often require proof of an abuse of law or for third-party rights, or the demonstration of an estoppel, which prevents a non-signatory who has acted as a contracting party from later disputing their obligation to be bound by the arbitration agreement.

161. The arbitral award, which asserted its own jurisdiction and accepted the extension of the arbitration clause to the holding company by determining that the clause was governed by French law, was challenged in annulment proceedings before the French courts and was subject to a request for enforcement made before the English courts.

B. English court decision: an application of the conflict of laws method leading to the extension of the law governing the main contract

162. As we have previously discussed, the English approach regarding the law governing arbitration agreements was well lastly established with the *Enka* case. In its decision on the *Kabab-ji* case, the UK Supreme Court held that the law applicable to the arbitration agreement was the English law, as it was the law governing the main underlying contract. The UK Supreme Court thus affirmed the London Court of Appeal's judgment, and therefore refused the enforcement of the arbitral award.

163. To fully understand the reasoning behind the UK Supreme Court's decision, it's essential to recognize that the Court anchored its analysis in the following principles:[101] The New York Convention (NYC) as incorporated into the Arbitration Act 1996 and its own previous ruling in the *Enka* case. Effectively, the UKSC applied the conflict of laws approach.

164. The court first reminded the main rule that the validity of an arbitration agreement is governed by "*the law to which the parties subjected it*". By reiterating this rule, the court showed its emphasis on the importance of respecting the parties' intentions regarding their choice of law when expressed.

165. Crucially, the UK Supreme Court reaffirmed its previously established principle that, in the absence of an express choice of law by the parties, the governing law of the arbitration agreement would be determined by the parties' implied choice. Referring back to the three-step inquiry that we have previously discussed, the court followed this process and had to apply *in casu* the second step: as expected, the Court concluded that the implied choice of law is, in fact, the law governing the underlying main contract.

166. Moreover, the following explanation given by the court is worth mentioning, as it further explains its rationae : "*Once it is accepted that an express agreement as to the law which is to govern the arbitration agreement is not required and that any form of agreement will suffice, it seems difficult to resist the conclusion that a general choice of law clause in a written contract containing an arbitration clause will normally be a sufficient "indication" of the law to which the parties*

[101] A. LEJNIECE, *French idealism vs. English pragmatism: The Alternative endings of the Kout Food saga*, Club Español del Arbitraje 2023, Volume 2023, Issue 47, pp. 141 – 146, spec. p. 142.

subjected the arbitration agreement." Therefore, the court considers that by choosing a law to be applicable to the main contract, the parties' choice can be readily interpreted as an "indication" of their intention to have this law applied to their arbitration agreement as well.

167. The UKSC also adds that "*there is no good reason to infer that the parties intended to except [the arbitration clause] from their choice of English law to govern all the terms of their contract*". Although this decision clearly appears to contravene the principle of separability of the arbitration agreement, the reasoning behind it seemed, somewhat surprisingly, perfectly adequate to the UK Supreme Court. This however shows a clear inconsistency in the English approach.

168. To conclude on the English court's decision in the *Kabab-ji* case, it held the non-extension of the arbitration agreement to the non-signatory party, Kout Food in that case, as the arbitration agreement was to be governed by the English law, pursuant to the extension of the law applicable to the main contract.

169. This decision perfectly portrays the English approach which we will subsequently compare to the French one also portrayed in the *Kabab-ji* case.

C. French Court decision: an application of the substantive rules method leading to the law of the seat

170. The French Court of Cassation's approach to determining the law applicable to arbitration agreements stands in real opposing contrast to the UK Supreme Court's one.

171. Indeed, French courts refused to extend the law applicable to the underlying contract contrarily to what was held by the English court. It took a completely different path with an application of substantive rules, which eventually led the extension of the arbitration agreement to the non-signatory party, thus a diagonally opposing solution.

172. The French Court of Cassation emphasized that an arbitration clause is legally independent from the underlying contract in which it is included, whether directly or by reference. According to the court, the existence and validity of an arbitration clause should be interpreted based on the common will of the parties, subject only to the mandatory rules of French law and international public

policy. This interpretation does not require reference to any national law, thereby reinforcing the autonomy of arbitration clauses within the framework of international arbitration.

173. Therefore, the Court of Cassation firmly held that the law that should govern the arbitration agreement is the French law, more particularly its substantive rules. This decision confirms the French preference for applying substantive rules over conflict of laws ones when it comes to determining the applicable law to international arbitration agreements.

174. Let's first closely examine the decision of the Paris Court of Appeal and then the Court of Cassation's confirmation to its ruling. The Court of Appeal stated that the parties' choice of English law to govern the contracts was not sufficient to demonstrate their intent to apply the same law to the validity of the arbitration agreement. The Court found that there was not enough evidence to unequivocally establish the parties' intention to designate English law as governing the "effectiveness, transfer, or extension of the arbitration clause": "*de manière à établir de manière non équivoque la volonté des parties de désigner le droit anglais comme régissant l'efficacité, le transfert ou l'extension de la clause compromissoire*".[102] Consequently, invoking the principle of autonomy, the Paris Court of Appeal concluded that the general choice of law clause did not adequately reflect the parties' intent to subject the arbitration agreement to English law.

175. The Court of cassation upheld the reasoning of the Court of Appeal in its judgment of 2022, reaffirming the established jurisprudence of the Court of Cassation: "*Pursuant to a substantive rule of international arbitration law, the arbitration clause is legally independent from the underlying contract in which it is included either directly or by reference, and its existence and validity are interpreted, subject to the mandatory rules of French law and international public policy, according to the common will of the parties, without the need to refer to any national law"*.[103] The court of cassation thus concluded that, in the absence of an "unequivocal" choice of law specifically applicable to the arbitration agreement, it is exclusively the substantive rules of

[102] *Kabab-ji v. Kout Food, op. cit.*, para. 8.

[103] Translated version of the original paragraph [7] of the French Court of Cassation decision in *Kabab-ji* : « *En vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante 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, à moins que les parties aient expressément soumis la validité et les effets de la convention d'arbitrage elle-même à une telle loi* », para. 7.

French law that should govern the existence and effectiveness of the arbitration agreement, without consideration of English law as the law of the contract.[104]

176. It is clear that the French method diverges significantly from the traditional English conflict of laws approach, the Court of Cassation having applied substantive rules specifically tailored for international arbitration. However, even though this diverging outcome was not surprising, it would be interesting to reflect on these approaches and understand how it led to different rulings.

II. Critical assessment of the two conflicting outcomes

177. The sharp contrasting outcomes between the English court and the French court in this case have drawn significant international attention in the field of arbitration; this is understandable as it is largely due to the different paths each took in analyzing the same exact set of facts and documents.

178. However, these differing results are *not particularly surprising*, and not entirely unexpected as each court simply adhered to each of their well-known and established principles: one following the conflict of rules method, the other following the substantive rules one. By acknowledging these distinct approaches, it becomes clear why the French and English courts reached diagonally opposing solutions regarding the law applicable to the arbitration agreement, which subsequently also influenced their reasoning on another issue, related to the extension of the arbitration agreement to non-signatories which will not be analyzed in the present study.

179. This case serves as a valuable opportunity to explore and assess the two contrasting legal approaches, allowing for a deeper appreciation and critique of each systems (**A**). We will then examine the consequences of such differences (**B**).

[104] *Kabab-ji v. Kout Food, op. cit.,* para 8.

A. Reflection on the two different methods

180. Although each method appears well-suited within the context of its own legal framework, both approaches come with their own set of pros and cons, particularly when put into action in cross-border arbitration disputes.

1) The English approach's contradiction with the doctrine of separability

181. At first glance, the English approach seems understandable: one might see why the court would apply the law governing the main contract to also govern the arbitration agreement. This approach stems from the court's effort to identify an implied choice of applicable law in the absence of an explicit one. The reasoning is that the English courts take a too "*literal*" and contractual interpretation[105], viewing the contract as a whole. Indeed, the English courts overly focused on the defined term "This Agreement" in the choice of law clause considering that it refers to the entire contract.[106] This perspective leads to the assumption that the law chosen by the parties to govern the contract was intended to govern all its clauses, including the arbitration agreement.

182. However, when we delve deeper into this approach, it becomes evident that it may not be the best solution. It barely operates on the "assumption" that the parties consciously intended for the contract's governing law to also apply to the arbitration agreement, even though the parties might not even have considered this and might not have given this much thought, not realizing that the arbitration agreement is meant to be independent of the main contract.[107]

183. Effectively, some French commentators point out this flaw of the English approach, saying that a "*forced extension*" of the law governing the contract cannot be envisaged as the parties might have not intended it to do so, and it would be "*going too far to interpret such clauses as containing an express choice of law governing the arbitration agreement*".[108]

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[105] D. Mainguy says that it is "*une interprétation littérale et contractuelle*".
[106] E. GAILLARD, *op. cit.*, p. 712.
[107] L. VAZZOLER, *Kabab-Ji Sal V. Kout Food Group Decision UKSC 2021, in International Law and Politics,* Volume 54, p. 1132.
[108] L. KAZIMI, *Can't Budge: The Curious Case of Kabab-Ji and the New York Convention,* Kluwer Law International, 2021.

184. That is why, when we take a closer look at the English solution, we see that not only it does not fully align with the doctrine of separability in certain respects,[109] but it is also solely based on the mere assumption that the parties intended for the contract's governing law to also apply to the arbitration agreement, a solution which is both baseless and inconsistent.

2) The uncertain and unpredictable aspect of the English approach

185. Another critique of the English approach and its three-step method often lies in the uncertainty and legal insecurity it may create. While the method seems to be well-structured and methodical, issues arise from its application, particularly at the second step where English courts are tasked with identifying an "implied" choice of law applicable to the arbitration agreement. This stage invites a lot of interpretation and can lead to ambiguous and unpredictable outcomes, as previously discussed with the *Enka* case.[110]

186. Although it is often the case that the law governing the contract is assumed to be the implied choice, there are instances where this is presented as less obvious than it seems, as parties might have not expressly chosen a governing law to the contract either. This leaves the courts with the challenge of determining whether the implied choice should be the law of the contract as subsequently determined, the law of the seat, or any other designated law; or whether the court should bypass this and proceed directly to the third step: identifying the law with the closest and most real connection to the arbitration agreement. This ambiguity is mostly evident when courts struggle to ascertain the implied choice, frequently defaulting to the third step, which focuses on determining the law with the most substantial connection to the arbitration agreement.[111]

187. Indeed, Gaillard even suggests that the English conflictual method is both unpredictable and somewhat hypocritical.[112]

188. This is why the reasoning of the French court, considering that the choice of law for the main contract should not automatically extend to the arbitration agreement and that such a choice does

[109] E. GAILLARD, *op. cit.*, p. 709.
[110] *See supra.*
[111] *Sulamerica, op. cit.;Enka, op. cit.*
[112] E. GAILLARD, *op. cit.*, « *la méthode conflictuelle se montre à la fois peu prévisible et passablement hypocrite* », p. 708.

not unequivocally reflect the parties' intention to do so, can be seen as a sounder and more valid approach.

189. However, this does not mean that the French approach is without flaws; it indeed has its own set of weaknesses.

3) The unrealistic aspect of the French approach

190. Although the French approach seems to be more fit than the English one, it does not go without cons. Indeed, some commentators have criticized the substantive rules method used by French courts to assess the validity of arbitration agreements.[113] One key critic on this matter is directed to the unique aspect of the principle of autonomy as interpreted by French law: they argue that is unrealistic to view arbitration agreements as entirely independent of national law. One cannot ignore that factors such as capacity, consent, and arbitrability must still be governed by national laws, and that the idea of an arbitration agreement being universally valid without reference to any law is implausible.[114]

191. However, such criticisms can be considered as unfounded, as Fouchard, Gaillard and Goldman underline it: "*In French case law, the intention is not to remove the arbitration agreement from all forms of control. It is, instead, to restrict such control to a review of the arbitration agreement in the light of the French conception of the fundamental requirements of justice in international commerce, referred to by the French courts as international public policy"*.[115]

4) The French approach's questionable 'transnational' nature

192. Another reproach concerns the substantive rules being 'transnational' and 'international', when in reality, it is openly acknowledged that these rules originate from French judges. While some scholars argue that French substantive rules are indeed 'international' as they are applied in international arbitrations, other point out that this does not make them automatically applicable

[113] E. GAILLARD and J. SAVAGE, *op. cit.*
[114] E. GAILLARD and J. SAVAGE, *op. cit.*, p. 231.
[115] E. GAILLARD and J. SAVAGE, *op. cit.*, p. 233.

across different national legal systems, unless they have been formally adopted according to each system's own legal standards. Therefore, if these so-called 'transnational' rules are not recognized by national courts that have jurisdiction over the arbitration or the award, it can lead to inconsistent and conflicting outcomes[116], which is exactly what happened in the *Kabab-ji* case.

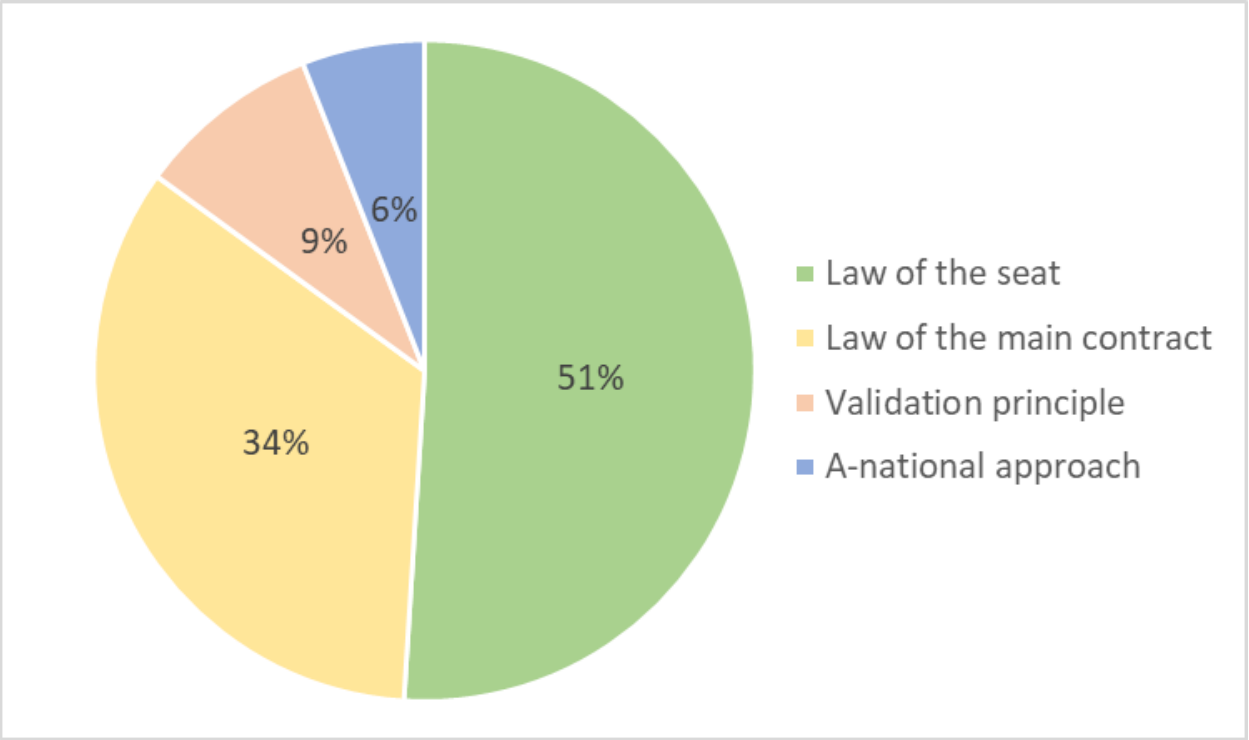
193. However, this critique could equally apply to any legal system whose approach has not been formally recognized by the relevant courts. It is a matter of coincidence on one hand, and lack of harmonization on another, rather than a flaw or problem inherent to the French approach itself. Yet a counterargument to this counterargument deserves attention: while the French method might potentially be acknowledged by other jurisdictions, it does not go unnoticed that in practice, it is far less commonly applied than other approaches. In fact, some studies have shown that the 'a-national law' associated with the French approach is one of the least used globally.

194. In this study, four main world-wide acknowledged approaches were taken into consideration, according to which the arbitration agreement may be governed by (1) an a-national rule of substantive law, (2) any relevant law which validates the arbitration agreement, (3) the law governing the merits of the dispute and (4) the law of the seat of arbitration.[117]

195. The survey conducted by the authors covers how 80 jurisdictions handle situations[118] where the parties have chosen the law applicable to their main contract and have selected a seat of the arbitration, but have not expressly provided for the law governing the arbitration agreement.[119]

[116] R. NAZZINI, *The law applicable to the arbitration agreement: Towards transnational principles*, Cambridge University Press, 2016, p. 696.
[117] M. SCHERER and O. JENSEN, *Towards a harmonized theory of the law governing the arbitration agreement*, 2021, p. 1.
[118] This situation is considered by the authors of the survey to be "the most prevalent situation in international commercial contracts", p. 4.
[119] M. SCHERER and O. JENSEN, *op. cit.*, 2021, p. 2.

196. The following pie chart represents the global distribution of approaches to determining the law governing arbitration agreements across different jurisdictions:[120]



197. As shown in the blue section of the pie chart, the study reveals that only 6% of jurisdictions adopt an 'a-national' or transnational approach according to which the validity of the arbitration agreement depends solely on the parties' common intention, without reference to any national law.

198. To re-center the discussion, back to the reason for highlighting this information: the substantive rules are not as widely embraced as expected. Indeed, it is the least preferred approach among the others. The French method may then lead to uncertainty if not backed up by courts in the jurisdiction where enforcement is sought.

[120] This pie chart was created specifically for this research paper to provide a visual representation of the aforementioned survey results conducted in 2021, which are originally presented in a table on page 4 of the survey '*Towards a harmonized theory of the law governing the arbitration agreement*'.

5) The influence of foreign decisions on the English and French approaches

199. Another interesting point can be raised, which could be either seen as a reproach to the English approach, or simply as a comparative observation between English and French law. This point pertains to how courts are influenced by foreign decisions already rendered on the same award. Gaillard contrasts the two approaches, describing the role of foreign decision as either one of "indifference"[121] vs. "partial consideration".

200. On the one hand, it appears that French courts strictly adhere to their own legal framework when determining the validity or recognition of an arbitral award, entirely disregarding foreign decisions on the matter. Gaillard praises this aspect of French law, noting that: "*C'est en cela que le droit français contemple l'arbitrage pour ce qu'il est, non pour ce qu'un autre ordre juridique estime qu'il doit être*".[122] And this is indeed shown in the *Kabab-ji* case.[123]

201. On the other hand, English courts do not share this same indifference toward foreign decisions. Instead, they show an openness to considering the effects of foreign decisions, but only selectively. For example, the English High Court once acknowledged foreign rulings related to the annulment or enforcement of an arbitral award, but still independently examined some issues such as public policy under English law.[124] Gaillard points out that English courts are willing to recognize a decision that annuls an award but are reluctant to accept one that validates it.[125] However in the *Kabab-ji* case, the English Court of Appeal criticized the High Court for delaying its decision pending a French ruling, considering that the French decision, based on non-English law, would not be binding.

202. Ultimately, this distinction only further shows the more predictable and coherent nature of the French approach compared to the less rigid English one.

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[121] Also mentioned by Professor M.E. Ancel, *op. cit.*, p. 7.
[122] E. GAILLARD, *Les vertus de la méthode des règles matérielles appliquées à la convention d'arbitrage, op. cit.,* p. 709.
[123] *See supra.*
[124] *Carpatsky Petroleum Corp. v. PJSC Ukrnafta case*.
[125] E. GAILLARD, *op. cit.* p. 709.

B. Consequences of such divergent approaches

203. The *Kabab-ji* case serves as a clear illustration of how French and English legal systems stay faithful to their own traditions and principles, even when it leads to different, and sometimes unfavourable outcomes This evidently shows the strong variability in approaches on how to handle the issue of the law governing the arbitration agreement.

204. While each method has its own strength and weaknesses, there is no single "right" or "wrong" approach.[126]. The preference for one method over another often depends on perspective, and no one approach can be deemed “ideal” for all situations.

205. Unfortunately, while the differences between these legal systems can be appreciated from a comparative perspective, they do not come without significant consequences. These divergences can lead to inconsistent outcomes, which shows the necessity of careful consideration during the drafting process of an arbitration agreement to avoid potential risks and uncertainties.

1) An obstacle to uniform enforcement of arbitral awards

206. With the divergences in English and French approaches now clearly established, it is inevitable to notice that their contrasting outcomes will create obstacles at the stage of cross-border enforcement of arbitral awards.

207. This essentially shows the potential for arbitral awards to face inconsistent outcomes depending on the jurisdiction in which enforcement is sought. Such divergences thus present a significant challenge to the “survival” of arbitral awards across different jurisdictions.

208. In the *Kabaji* case, while one same arbitral award was successfully enforced in France, it failed to be recognized in England. This scenario reveals the obstacles posed to achieving consistent and uniform enforcement of arbitral awards. As one article metaphorically described it, this divergence creates a "double life" for an arbitral award,[127] where the same award may be upheld in one country but denied in another.

[126] L. Kazimi, *The Walking Dead: Double Life of the Kabab-Ji Award,* Kluwer Law International, November 16, 2022.
[127] *Ibid.*

2) Unpredictability burdening the contracting parties

209. The unpredictable nature of these diverging methods, leading to sharply opposed solutions, has significant consequences for the parties involved. Parties who believed they were protected by their arbitration agreement may find themselves navigating the entire arbitration process, only to encounter unforeseen obstacles when seeking enforcement. For instance, they could not have anticipated the reasoning behind the English courts' decisions, particularly given that the courts themselves occasionally apply the approach inconsistently.

210. This unpredictability and legal uncertainty, resulting from the big differences between French and English law, lead to a burdensome waste of time and money for the parties involved, much like what occurred in the *Kabab-ji* case.

211. To reduce the risk of conflicting approaches, it is therefore recommended for the parties to expressly specify not only the seat of arbitration but also the law governing the arbitration agreement itself, in addition to the law governing the contract as a whole.

3) A call for reflection and change of approach

212. The *Kabab-ji* case has undeniably captivated the arbitration community with its unique comparative aspects which have made it a focal point for discussions on the challenges of international arbitration. But beyond its immediate implications, this case serves as an important lesson and is now a precedent that can and should be reflected on. The inconsistencies seen in this case serve as a clear reminder of the need for greater harmonization across jurisdictions, particularly in the law governing arbitration agreements.

213. The issue of the law governing the arbitration agreement, being such an obvious and recurring obstacle that has led to contradictory decisions, must serve as a call for change. This ongoing challenge has perhaps prompted the English Law Commission to reconsider the current framework and propose reforms to the Arbitration Act (**Part Two**).

PART TWO: PERSISTENT DIVERGENCE DESPITE THE PROPOSED ARBITRATION ACT REFORM

215. As we've already mentioned, the current established law by English courts is expected to face a turning point with the reform of the English Arbitration Act 1996.

216. Here are some key notes on the process related to this matter: The Arbitration Act 1996 provides the legal framework for arbitration in England and Wales and Northern Ireland. The UK Government requested the Law Commission to review the Arbitration Act, to assess whether any amendments are necessary to maintain the UK's status as a leading destination for commercial arbitration.[128] The Law commission is a statutory body which reviews the law in England of Whales and recommends changes when it is needed. Indeed, one of the suggested amendments pertained to the applicable law to the arbitration agreement.

217. For reminder, the current law on this matter is represented by the *Enka* decision as of 2020, which as complex as it seems, can be summarized as follows: (1) the law governing the AA is the law chosen by the parties to govern it. (2) In the absence of an express choice of the parties, the law governing the AA is the implied choice of the parties, which is the law chosen for the underlying contract (except when the law of the seat provides that the AA is governed by the law of the seat). And finally, if there is no choice of law, neither for the AA nor for the contract, the arbitration agreement will be governed by the law with the closest and most real connection, which is mostly considered to be the law of the seat of arbitration.

218. Given the complexity of the English approach, practitioners have not hesitated to point out the risk of potential inconsistent outcomes when adopting this method. This has led to urgent calls for reform,[129] deeming the overly complex solution of the UKSC in the *Enka* decision as in need of revision.

219. After the request of the UK government, the Law Commission proceeded to review the Arbitration Act which is currently on the road of turning point to replace the traditional English approach with a new one. Following a consultation period, the Law Commission has published its

[128] The Law Commission website, 'Reforming the law, Review of the Arbitration Act 1996'.
[129] Professor Malik Laazouzi during his comparative alternative dispute resolution course in Paris-Panthéon-Assas.

recommendations in September 2023 and an Arbitration Bill was first introduced in November 2023 but was lost when the general election was called. The re-introduction of the Arbitration Bill was recently announced in the King's speech of 17 July 2024.[130]

220. We will first analyze the Law Commission's proposed adoption of the law of the seat as a default law (**Chapter 1**) and see what are the impacts of such adoption on English law and its consequences in international arbitration (**Chapter 2**).

CHAPTER 1: THE ADOPTION OF THE LAW OF THE SEAT AS THE DEFAULT LAW OF THE ARBITRATION AGREEMENT

221. By adding a default rule into the Arbitration Act according to which the arbitration agreement will be governed by the law of the seat, the Law Commission seeks to promote certainty and predictability, aiming to avoid complicated outcomes when it comes to determining the law applicable to the arbitration agreement.

222. Let's first discover the novelty of the proposed reform (**I**) before diving into the Law Commission's reasoning behind it (**II**).

I. <u>The Law Commission's reform proposal on the Arbitration Act 1996</u>

223. The question of how to determine the governing law of an arbitration agreement when the parties have not made an express choice has long been a contentious issue as we have previously seen. Indeed, there is a considerable variation on how different jurisdictions approach this issue.[131] Some default to the law of the seat, others to the governing law of the contract, while some prioritize the "validation principle" or seek to prioritize the parties' common intent in a case by case instance. The divergence in reasoning we have established so far reflects a tension between the following

[130] The law commission website, Reforming the law, 'Review of the Arbitration Act 1996'. https://lawcom.gov.uk/arbitration-bill-re-introduced-to-parliament/

[131] Shearman & Sterling, Reform of the Arbitration Act 1996: Law Commission's Final Report and Amendment Bill, September 20, 2023, p. 3.

two approaches: on one hand the preference in honoring the parties' intuitive assumption that the governing law of the contract extends to apply to all its clauses including the arbitration clause; on another hand, the preference in applying the law of the seat to the arbitration agreement.[132]

224. The only area of common interest across jurisdictions is the need for clarity and certainty in determining the governing law of the arbitration agreement, particularly to prevent costly and unnecessary litigation when no express choice has been made.[133] In this regard, the Law Commission's proposal represents an improvement over the relatively complex common law test established in *Enka*.

225. Effectively, after two rounds of public consultations, the Law Commission produced a final report, in which it recommended that the Arbitration Act 1996 should be amended to "*provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise*".[134]

226. Once the Law Commission's proposed recommendations are officially approved – now being in the committee stage[135] –, a new paragraph will be inserted into the new Arbitration Act, which will be considered as a replacement of the current adopted approach in the *Enka* decision.[136] As previously mentioned, a draft Arbitration Bill was hence proposed including a new 'section 6 A' which provides that:[137]

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

(a) the law that the parties expressly agree applies to the arbitration agreement,

(b) or where no such agreement is made, the law of the seat of the arbitration in question.

[132] Shearman & Sterling, Reform of the Arbitration Act 1996: Law Commission's Final Report and Amendment Bill, September 20, 2023, p. 3.
[133] Shearman & Sterling, Reform of the Arbitration Act 1996: Law Commission's Final Report and Amendment Bill, September 20, 2023, p. 3.
[134] Law Commission, Review of the Arbitration Act 1996: Final Report and Bill, para. 12.77; G. BORN, *op. cit.,* p. 31 of chapter 4.
[135] Status of the progress of the project shown on this website: https://bills.parliament.uk/bills/3733
[136] *Enka v. Chubb*, *op. cit* ; G. BORN, *op. cit.*, p. 32 of chapter 4.
[137] Arbitration Bill to amend the Arbitration Act 1996, para 1.

(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement.

(3) This section does not apply in relation to an arbitration agreement that was entered into before the day on which section 1 of the Arbitration Act 2023 comes into force.

227. Therefore, upon the integration of the Arbitration Bill into the English legal system, when determining the law governing an arbitration agreement whenever the parties have not explicitly agreed on a governing law, English courts will need to adhere with this new systematic method.

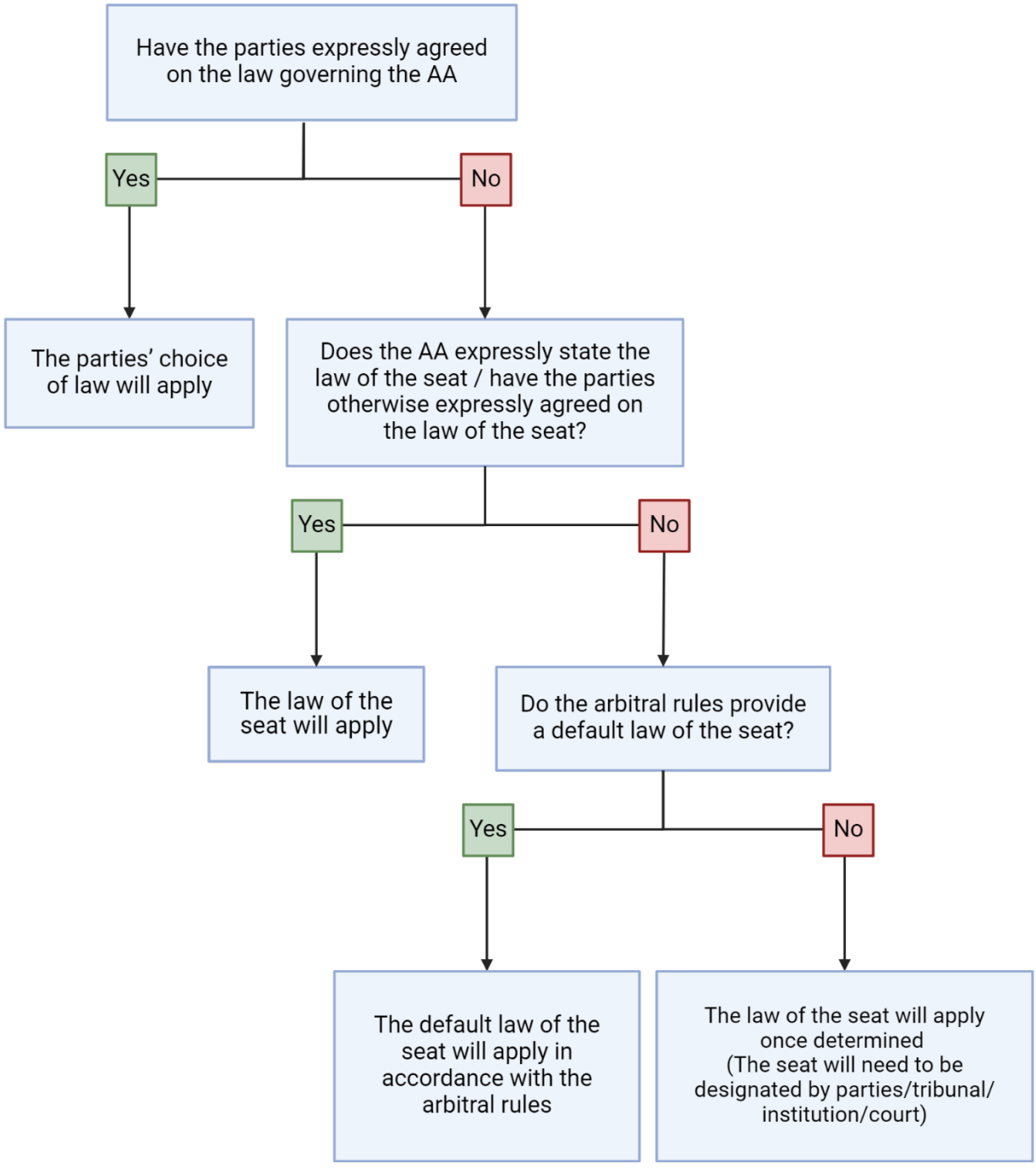
228. The first step is to determine whether the parties have expressly agreed on the law governing their arbitration agreement. If the parties have made such an express choice, that chosen law will govern the arbitration agreement. Clearly, this is not a new development of English law, as it has always been the initial step traditionally followed by courts.

229. The novelty and innovation emerges at the following point: if there is no express agreement on the governing law, the next step is to check whether the arbitration agreement explicitly states the law of the seat of arbitration, or if the parties have otherwise expressly agreed on the law of the seat. In this case, when such choice was made, then the law of the seat will govern the arbitration agreement.

230. Now, in the absence of an express agreement on the governing law or the law of the seat, the next consideration is whether the arbitral rules incorporated into the agreement provide a default law of the seat. If such default law is provided by the arbitral rules, then it will govern the arbitration agreement in accordance with those rules.

231. Finally, if the seat has not been agreed upon and there is no default law provided by the arbitral rules, the seat of arbitration must be designated by the parties, the tribunal, the arbitration institution, or the court. Once the seat is designated, the law of that seat will apply to the arbitration agreement.

232. To provide a clearer understanding of this new approach, it is useful to present the following flowchart, just as we did for the old three-step method:[138]



[138] This flowchart is recreated and inspired from an original flowchart presented by Mayer Brown in '*Law Commission Proposes Seat of Arbitration as the Default Law of the Arbitration Agreement*'.

233. It is already clear that this process ensures a clearer and more systematic method, as there would be less to no room left for interpretation of the parties' implied choice of law applicable to the arbitration agreement.

234. Therefore, whenever the parties do not make an express choice of the law applicable to their arbitration agreement, the Arbitration Act would henceforth lead courts to designate the law of the seat as the governing law of the arbitration agreement.

235. The major change with this reform is that the mere presence of an express choice of the law governing the underlying contract does not mean alone anymore that such choice would extend to the arbitration agreement,[139] contrary to what was provided in the three-step inquiry in *Sulamércia* and *Enka*.

236. At first glance, this project and its new approach do not appear particularly surprising or groundbreaking. Although it represents a significant change and innovative step forward, the preference for applying the law of the seat is not entirely novel or unprecedented in English law. In fact, prior to the *Sulamérica* case, we have seen that courts often leaned towards applying the law of the seat to arbitration agreement. While it is true that the rationale is different and that now the law of the seat would be *systematically* applied, it is interesting to note that this tendency to prefer the law of the seat as governing the arbitration agreement is not entirely unexpected within the context of English law.

237. Now that the new English approach and its mechanism are clear, it is essential to examine the rationale behind this innovation and understand the reasons that lead the Law Commission to adopt it (**II**).

[139] International Commercial Arbitration, 'Chapter 4: Choice of Law Governing International Arbitration Agreements', Gary B. Born, (Third Edition), Kluwer Law International, p. 32 of chapter 4.

II. The Law Commission's reasoning

238. This section of the study is notably intriguing for understanding the reasons behind the law commission's specific amendments. More particularly, it is worth noting that the when the Law Commission drafted this bill and made these recommendations, it was fully aware of the approach already adopted by French jurisdictions, yet consciously chose not to follow the same path, instead opting for a distinct and innovative approach.

239. In its first consultation paper, the Law Commission points out that they were aware that the current law, approach set by *Enka*, was wrong and did in fact cause difficulties. Although various alternative approaches were suggested, the majority already favoured a shift towards the rule that the law of the seat should govern the arbitration agreement.

240. In its second consultation paper, the Law Commission made a preliminary proposal which was heavily influenced by the feedback in the first paper: "*We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself*."[140]

241. In support of its proposal, the law commission explained that the *Enka* decision could lead to many arbitration agreements being governed by foreign law, even when the arbitration is seated in England. This old rule could thus undermine the supportive stance of English law on arbitration, as foreign laws might hinder arbitrability, scope, and separability. It also explains that applying foreign law could complicate the Arbitration Act 1996 by disapplying its non-mandatory substantive provisions. The Law Commission also noted the complexity and unpredictability of the *Enka* ruling, which divided the Supreme Court at that time.[141]

242. After long discussions and analysis of different consultee's opinions, the Law commission, despite some minor objections made against its proposal, ultimately adopted the proposed default rule in the Arbitration Bill, structurally outlining the considerations that led to this conclusion:

[140] Law Commission final report, 12.15.
[141] *Ibid.,* p. 136-137.

243. First of all, the Law Commission seemed interested in inviting more arbitration agreements to be governed by English law. Indeed, it stated in its final report that adopting a default rule favoring the law of the seat would bring "*more arbitration agreements governed by the law of England and Wales, when those arbitration agreements are also seated here*".[142] It is clear that the Law Commission's goal is to maintain England as a leading international arbitration hub and to attract more arbitration cases, which is a move that naturally aligns with the ambitions of all major international arbitration institutions.

244. Moreover, according to the Law Commission, this new approach would ensure the applicability of the doctrine of separability, a principle very valuated in English law as previously discussed.[143] As we have previously discussed, while the old English approach acknowledged the doctrine of separability, it did not fully implement it in practice. This was evident as it was considered that the law governing the main contract could extend to the arbitration agreement. governing the main contract could extend to the arbitration agreement.

245. Second, the default law is seen as a cure for the complex and unpredictable approach provided by the Enka decision. In the contrary, the new default rule "*would have the virtues of simplicity and certainty*".[144]

246. Third, the default rule would preserve the principle of party autonomy in the choice to arbitrate. Effectively, the parties could simply override the default rule by making an express choice of law to govern their arbitration agreements, as the express choice of the parties would prevail on any other rule.[145]

247. Fourth, this new approach would significantly reduce, if not eliminate, instances of uncertainty concerning the law applicable to the AA with regards of the law applicable to the contract. The law commission reminds us that the new rule applies regardless of the arbitration being seated in England or elsewhere, and more importantly notwithstanding if the seat was actually chosen by the parties or otherwise designated. Therefore, this implies that even in cases of doubt regarding

[142] Law Commission *Review of the Arbitration Act 1996: Final report and Bill*, para 12.72.
[143] *Ibid.*, para 12.72.
[144] *Ibid.*
[145] *Ibid.* para. 12.73.

the law governing the underlying contract, the law governing the arbitration agreement is not impacted and is clearly settled.[146]

248. Furthermore, according to G. Born, the goal behind this Arbitration Act is to require treating arbitration agreements "*as presumptively subject to the law of the arbitral seat (and not, where different, the law selected by a general choice-of-law provision)".*[147] G. Born emphasizes on this reform being a great step forward for English law, as the preference towards the law of the seat is seen as a result of the default choice-of-law rule provided by Article V(1)(a) of the New York Convention or even as the parties' choice of an arbitral seat could be seen as an implied choice-of-law.[148]

249. Therefore, in its clear recommendation "19", the Law Commission summarizes its proposal by reiterating that the Arbitration Act 1996 should be amended "*to provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise*".[149]

250. The Law Commission's decision to adopt the law of the seat as the default governing law for arbitration agreements might seem controversial as it marks a complete shift from its old approach. However, as previously noted, it is not entirely surprising and it aligns with what is considered the most common approach.[150] While this shift can provide greater predictability and consistency in the application of the English law, it also brings with it a range of implications, some positive an others less so (**Chapter 2**).

[146] *Ibid.*
[147] G. BORN, *op. cit.*, p 32 of chapter 4.
[148] *Ibid.*
[149] Law Commission Final Report, para. 12.77.
[150] *See infra. 269.*

CHAPTER 2: IMPLICATIONS OF THE NEW DEFAULT RULE

251. Now that we have explored the proposed changes to the Arbitration Act, it is crucial to consider how these revisions might impact the traditional English approach and the parties involved in arbitration agreements (**I**). Additionally, it is intriguing to examine whether this reform could potentially bring the English and French approaches closer together, or if they will continue to remain fundamentally opposed (**II**).

I. Implications on the English approach and on the parties of an arbitration agreement

252. To better understand the implications of this proposal, we will analyze its impact on each relevant principle, as highlighted during the law commission's discussions. We will briefly address the concerns raised at that time with in contrast the responses that resolve them. The goal is to demonstrate how this proposal influences, or does not influence, each principle.

A. Implications on the principle of party autonomy

253. In the Law Commission's discussion on the principle of party autonomy, some consultees argued that excluding implied choices would in a way restrict party autonomy, as these are allowed under the New York Convention. Others also noted that recognizing implied choices could in fact ease disputes about whether a choice was sufficiently clear. Additionally, some consultees pointed out that the New York Convention permits both express and implied choices, suggesting that disregarding implied choices might conflict with the Convention.

254. The Law Commission responded to concerns that their proposal might limit this autonomy by first arguing that, while the New York Convention permits implied choices, it does not require them. They cited examples from other jurisdictions, such as Scotland, China, and France, where laws often prioritize express choices or the law of the seat over implied choices. Moreover, the Law

Commission also emphasized that in the contrary, the proposal would be perfectly consistent with the New York Convention's Article V(1)(a), which favors the law of the seat as a default, aligning with the international approach where implied choices are not always recognized.

255. In, conclusion, the Law Commission clearly noted that their proposal maintains party autonomy in two ways: by allowing parties to make an express choice of governing law for the arbitration agreement, and by ensuring that an express choice to arbitrate is not undermined by an implied choice of governing law. Therefore, the proposal does not reduce the party autonomy, but even if it slightly does by excluding implied choices, the Law Commission believes this is justified by the increased certainty and predictability it provides.

B. Implications on the validation principle

256. The introduction of the new default rule signals the end of the validation principle for English law.

257. The Law Commission discussed the validation principle and reminded that in accordance with *Enka*, if an arbitration agreement might be invalid under the main contract's governing law, it could be implied that the agreement should be governed by the law of the seat.

258. Effectively, some consultees suggested to incorporate the validation principle in the Arbitration Act in order to address concerns about arbitrability and separability. In contrasts, other consultees questioned its necessity, arguing that the validation principle is uncertain itself.[151]

259. However, the Law Commission decided that since the proposal does not start with the assumption that the main contract's law governs the arbitration agreement, the validation principle is unnecessary in the first place. Moreover, while the absence of a validation principle could risk invalidating arbitration agreements under the law of the seat without the fallback of another validating law, the Law Commission asserts that it would be "rare" for an arbitration agreement to be invalid under English law due to its strong pro-arbitration stance. Thus, the Law Commission

[151] Law commission Final Report, *op. cit.*, p. 143.

found no need to include a validation rule, and noted that parties could avoid this risk by expressly choosing a different governing law.[152]

260. However, this firm decision could be subject to criticism as it introduces a new issue. Under the new proposed rule, the law of the seat will apply even if that law might render the arbitration agreement invalid. This adds a new layer of complexity and potential risks, and parties will now have to give greater consideration to the choice of the seat and anticipate any validity issues that could arise from that choice.[153]

C. Other relevant implications

1) Implications regarding the seat of arbitration

261. One of the most obvious aspects of this new rule is the importance it gives to the arbitration seat.

262. Therefore, the Law Commission rightly addressed the issue of what would happen when the parties have not mentioned a seat in the arbitration agreement. Without a designated seat, with the current law based on *Enka*, it is unclear what law governs the arbitration agreement. Thus, some consultees suggested that in the absence of a specified seat, the law of the main contract should apply, while others also recommended using the closest connection to determine the governing law.

263. Moreover, suggestions were also made on alternative approaches, such as limiting the application of the proposal to situations where the seat is already agreed upon in the arbitration agreement.[154] However, the Law Commission favored a broader application of the proposal, and explained that applying the default rule to any seat, even if designated later, would provide clearer and better guidance.

264. Thus, the Law Commission noted that, under English law, every arbitration will eventually have a designated seat, which can be determined after the start of arbitration proceedings. More importantly, the Arbitration Act allows the seat to be subsequently chosen "*by the parties, or the*

[152] *Ibid.*, p. 144.
[153] Mayer Brown, *Law Commission Proposes Seat of Arbitration as the Default Law of the Arbitration Agreement*, Legal Update, September 2023.
[154] Law Commission, *op. cit.*, para. 12.67.

tribunal, or an arbitral institution, or otherwise determined – presumably by the court".[155] Therefore, once the seat is designated, it can retroactively establish the governing law of the arbitration agreement.

265. Therefore, with the new default rule, the seat of arbitration becomes a pivotal factor in determining the governing law of the arbitration agreement. Which means that parties will have one new concern, which is to carefully designate the seat within their agreements to avoid potential uncertainties and the associated costs of leaving such determinations to an institution, tribunal, or court. Until it becomes standard practice to explicitly state the governing law of the arbitration agreement, the designation of the seat will play a decisive role in this matter.[156]

2) Implications on ongoing arbitrations pre-reform

266. A small yet noteworthy aspect that deserves to be shortly addressed is the impact of the new default rule on arbitration agreements that had already led parties to enter arbitration proceedings before the reform: What would happen in such cases, and which approach would apply, the old one or new one? Simply put, there's no need for concern because parties engaged in ongoing or imminent arbitrations, or those dealing with arbitration awards related to agreements rendered before the introduction of the new law, can continue to rely on the existing principles established in *Enka* if desired.[157] The requirements of the new law, which is likely to come into effect in 2024, will only apply to arbitration agreements entered into after the reform takes place, thus not applicable retroactively.

3) Progress with the new English approach

267. While the new default rule will reduce much of the uncertainty associated with determining the governing law, explicitly stating the law remains the most effective way to avoid costly disputes.

[155] Law Commission Final Report, para. 12.63.
[156] Mayer Brown, *Law Commission Proposes Seat of Arbitration as the Default Law of the Arbitration Agreement*, Legal Update, September 2023.
[157] *Ibid.*

268. The arbitration Bill already seems like a great step forward taken by the law commission and gives hope for promising outcomes under the new English approach.

269. Indeed, if we revisit the pie chart previously highlighted (*see supra 196*), it is evident that the *law of the seat*, represented by the green section of the pie chart, is the most widely adopted approach, accounting for 51% of the jurisdictions reviewed.

270. While the law of the seat approach is the most common predominant approach acknowledged and applied internationally,[158] this does not necessarily mean that it is the best option. However, at least, it is it is an improvement over the old English approach, and this reform could potentially lead to more harmonized and uniform outcomes, aligning with the majority of jurisdictions that apply a similar approach.

271. It is understandable that this approach offers greater clarity and potentially more predictability and simplicity compared to other more complex methods which can require additional subjective interpretations. By simply comparing the new English approach with the old one, the improvement is evident before even seeing its results. As G. Born also observes, this notable shift in how English law addresses the choice of the law governing international arbitration agreements was "*this time, in the right direction*".[159]

272. Once the Law Commission's proposal will be implemented, it will be intriguing to observe whether other common law jurisdictions, which currently follow the same or a similar approach as outlined in *Enka*, or even any other jurisdiction, will consider revising their methods too.

II. Potential similarities between the English and French approaches?

273. It's clear that the proposed new English Arbitration Act does not bring the English approach any closer to the French one. Ironically and from a comparative perspective, one could say that this reform only serves as a renewal of the differences between the two legal systems.

[158] M. SCHERER and O. JENSEN, *Towards a harmonized theory of the law governing the arbitration agreement*, 2021, p. 4.
[159] G. BORN, *op. cit.*

274. While the new English approach to determining the governing law of arbitration agreements remains fundamentally distinct from French law, a closer examination reveals certain underlying, though very superficial, similarities. However, their approaches still diverge significantly, while some minor common ideas might be discerned.

A. Persistently divergent approaches with subtle alignments

275. It's important to note that the similarities discussed below are only at a macro level, meaning they are quite minor, but they are nonetheless noteworthy.

1) Some superficial similarities

276. First, the principle of party autonomy remains as a similarity between the two approaches, although each expresses it in its own way. Both systems treat the rules as suppletive. While this is not a completely new aspect of the proposed reform, but it has persisted and wasn't disregarded in the new approach. Indeed, just as parties can override the substantive rules by expressly choosing the law governing their arbitration agreement, the new English default rule can also be overridden by the parties' express choice of law.

277. Second, another point of alignment is seen in the respect for the doctrine of separability. Although this principle is interpreted very differently by each system (for instance, French law applies the autonomy of the arbitration agreement both from the contract and any national law), it appears that they both now admit that the law governing the contract is not the same as the one governing the arbitration agreement. Previously, under the old English approach, separability was not fully respected, as English courts often simply extended the law of the contract to the arbitration agreement, treating it as part of the contract. Now, the Law Commission, recognizing this inconsistency, clarified in the proposal that English law upholds the principle of separability, and the law of the contract will no longer be assumed to govern the arbitration agreement. Unlike the previous English approach, where courts might have inferred the governing law of the arbitration agreement from the main contract, such an inference is no longer valid, neither under French law nor under the new English approach.

278. Third, the predictability of both approaches (although achieved in different ways) has become a new point of nature resemblance. Both approaches now offer a systematic application of their respective rules: substantive rules in France and the new default rule in England. Each system now provides a clear and consistent systematically applicable rule, that function without ambiguous interpretations, which also reflects their shared goal of reducing complexity and uncertainty.

2) Two different concerns: Simplicity vs. Effectiveness

279. As previously discussed, the new English approach disregards the validation principle. While the Law Commission tried to justify this omission, it cannot go unnoticed that this might be a flaw of this new rule. But this path taken by the Law Commission shows its new way of addressing the applicable law issue, focusing on "simplicity" rather than efficacy. Indeed, the new rule is undisputedly a way simpler way to resolve the question of choice of law, as it is straightforward directly guiding the courts to apply a specific well determined law: the law of the seat. Therefore, the Law Commission's vision and intention is to simplify the issue of determining the law governing the arbitration agreement, in order to ensure legal certainty and predictability. This contrasts with the French approach, which is less concerned with simplicity and more focused on ensuring the effectiveness of arbitration agreements.

280. Effectively and in contrast, the French approach seems to prevail effectiveness over this kind of simplicity, by maintaining clear protection of the validity of arbitration agreements through its perspective of the validation principle. Indeed, by applying substantive rules rather than national laws, this would make it possible to "*shield this legal regime from the vagaries of the conflict of laws rules, to subject it to rules specially drawn up* […]*, and which are intended to ensure the effectiveness of the agreement.*"[160] Therefore, by applying these substantive rules specially 'designed' for the international arbitration agreement, this would "*thereby neutralize any obstacles to the validity and effectiveness of the arbitration agreement posed by State law that could be designated by conflict of laws rules*."[161]

[160] Ch. SERAGLINI, J. ORTSCHEIDT, Droit de l'Arbitrage Interne et International, 2e édition, LGDJ, 2019, para. 591.
[161] *Ibid.*

3) Hypothetical illustration with the *Kabab-ji vs. Kout Food* case

281. On another note, one could speculate that with this new rule, English and French courts might arrive at more coinciding outcomes when the seat of arbitration is in France, as the English court would apply the French law to the arbitration agreement. However, this cannot be definitively asserted and is not necessarily the case. But it is true that, occasionally, there could be such instances: while the approaches themselves would remain different, the results could, by pure coincidence, align when the arbitration seat is in France. However, this is a question that can only be answered on a case-by-case basis.

282. To illustrate this potential coincidence, let's revisit the *Kabab-ji* case in which the seat of arbitration was in France. Hypothetically, if the English courts had applied the new rule, they would have determined that French law, as the law of the seat, governed the arbitration agreement. This would've led for the application of French law as but interpreted by English courts. However, does this automatically mean that the arbitration agreement would have automatically been extended to a non-signatory party? Certainly not. The decision of extending the arbitration agreement or not to a non-signatory party would depend on how the English courts would interpret the relevant French rules on the specific facts of the case.

283. A similar situation occurred in the *Dallah* case, where English courts, despite applying French law, interpreted it differently than the French courts and thus refused to extend the arbitration agreement to the non-signatory party.

284. Ultimately, the outcome would depend on the specific facts of the case and how the English courts interprets French law *in casu*. Thus, while the approaches remain persistently divergent, there are instances where the solutions reached by the courts could occasionally align but only when the seat of arbitration is in France and more importantly, depending on interpretation of the facts and the French law by the English courts.

B. Two approaches, one common ambition: the pursuit of a leading arbitration hub

285. It’s no secret that each state and its institutions aim to become the leading center for arbitration worldwide. Both France and England, with their respective legal frameworks and arbitration institutions, are certainly committed to this goal too.

286. While it's true that both English and French arbitration institutions are already among the most prominent ones in the world, this does not diminish their ambitions. Each continues to strive for even greater influence and recognition in the international arbitration community.

287. Ironically, amid the many differences between English and French law, we can identify another point of convergence: both share the same ambition to become the world’s leading arbitration hub. In fact, this shared goal shows the intensity of the competition between the two jurisdictions, despite their distinct legal methodologies

288. Beneath the surface of their differing legal approaches lies a deeper rivalry: a competition for the top spot as the world’s leading arbitration institution. This battle could be more than just about legal principles but also about prestige, influence, and the ability to attract high-profile international disputes. Each legal system seeks to continuously refine its laws, aligning them closely with what could make them the most attractive venue for international arbitration.

289. France, with its pro-arbitration legal framework rooted in the French Code of Civil Procedure and the presence of the International Chamber of Commerce (ICC) in Paris, is a major force in the international arbitration world. While France is not undergoing any major reforms in the near future regarding the law governing arbitration agreements, it has already established what it considers to be the most suitable solution for this issue through its well-developed jurisprudence. This legal framework has been carefully refined over time, incorporating the French unique aspects such as the ‘extreme’ principle of autonomy of the arbitration agreement, the validation principle, and the French courts’ strong commitment to respecting the parties' intentions, without referring to any national law.

290. England, through its English Arbitration Act 1996 and the London Court of International Arbitration (LCIA), has also established itself as a leading arbitration place of arbitration as well.

Building on this strong foundation, with the proposed reform of the Arbitration Act, England's commitment to attracting more arbitration disputes is even clearer. The Law Commission's message is simple: it invites parties to arbitration agreements to choose London as the seat if they want to ensure that English law applies to their arbitration agreement. Effectively, this would serve as a strong advertisement for English arbitration institutions, which further shows their appeal on the global stage.

CONCLUSION

291. This comparative study has demonstrated the evident clash between the leading arbitration hubs in their approaches to determining the law applicable to arbitration agreements.

292. While it is true that both legal systems share a common aspiration for legal certainty and demonstrate their pro-arbitration stance, the approaches they take to achieve these goals remain distinctly different, with little to no sign of convergence on the horizon.

293. The consequences of these divergences are indeed far-reaching as we have seen it throughout the present study. Time and again, parties to arbitration have faced diametrically opposed outcomes, with one party successfully enforcing an award while the other faces annulment. Such discrepancies result not only in wasted time and financial resources but also in a profound sense of legal uncertainty.

294. On a positive note, one promising development is the upcoming reform of the English Arbitration Act, which does mark a great step forward. However, despite this progress, the English and French approaches are likely to remain distinct.

295. ***Recommendations.*** The only truly reliable solution for ensuring predictability, certainty, and secure outcomes lies in one fundamental practice: parties must explicitly specify the law governing the arbitration agreement in the clearest possible terms within the arbitration clause itself.

296. To encourage this best practice, arbitration institutions should take the initiative to update their model clauses, placing clear emphasis on the importance of specifying the applicable law just as they with other elements of a standard arbitration clause.

297. Another practical recommendation, once a dispute has already arisen, is for parties and their legal counsel to carefully consider the distinct principles adhered to by the concerned courts. Before initiating enforcement or annulment proceedings, it is crucial to evaluate whether the desired outcome aligns with the legal principles and approaches of the respective jurisdiction. This strategic foresight would prevent the pursuit of proceedings with likely unfavorable outcomes, thereby saving time and money.

298. Additionally, while the following recommendation may seem somewhat utopian or idealistic, it would be valuable for the international arbitration community to strive for greater harmonization

in this area. Although complete unification of approaches is evidently unrealistic, at the very least, an increased cooperation across jurisdictions could lead to greater harmonization and uniformity in this matter.

299. **In conclusion, while significant progress has been made in the evolution of both English and French law, we remain distant from a universally unified solution regarding the law governing arbitration agreements. The only existing harmonization occurs when the parties have already made a choice of law. Thus, the key to achieving greater predictability and certainty in arbitration lies in the hands of the parties themselves: putting in the extra effort of choosing the law governing the arbitration agreement with the same care as drafting the agreement itself. Although this may seem like a minor detail, it can save considerable time and cost in the event of a dispute, because *ill-thought-out* arbitration agreements may come back to *bite* the parties later on.[162] As Benjamin Franklin wisely said, "***An ounce of prevention is worth a pound of cure***". A well-drafted agreement today is not only prudent but can ultimately shield the parties from protracted legal battles and uncertainties in the future.**

[162] A. LEJNIECE, *French idealism vs. English pragmatism: The Alternative endings of the Kout Food saga*, Club Español del Arbitraje 2023, Volume 2023, Issue 47, pp. 141 – 146.

BIBLIOGRAPHY

Books

English-Language Books:

- BESSON Sébastien and POUDRET Jean-François, *Comparative Law of International Arbitration*, Sweet & Maxwell Ltd, translated 2007, original 2002.
- BORN Gary B., *Choice of Law Governing International Arbitration Agreements (Updated March 2024), in International Commercial Arbitration*, Third Edition, Kluwer Law International 2021, pp. 507 – 674.
- BORN Gary B., *International Arbitration: Law and Practice*, Third Edition, Wolters Kluwer 2021.
- CHATTERJEE Charles, *The Reality of The Party Autonomy Rule In International Arbitration, Journal of International Arbitration*, Kluwer Law International 2003, Volume 20, Issue 6.
- GAILLARD Emmanuel and SAVAGE John (eds), *Part 2: Chapter I - The Autonomy of the Arbitration Agreement in Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999, pp. 197-240.
- JAN V. D. BERG Albert, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Kluwer Law International, 1981.

French-Language Books:

- ANCEL Jean Pierre, *L'actualité de l'autonomie de la clause compromissoire*, Travaux du Comité français de DIP, 1991-1992, pp. 75-119.
- EL AHDAB Jalal et MAINGUY Daniel*, Droit de l'arbitrage : théorie et pratique*, LexisNexis, 2021.
- FADLALLAH Ibrahim et HASHER Dominique, *Les grandes décisions du droit de l'arbitrage*, 2019.

- FOUCHARD Philippe, GAILLARD Emmanuel and GOLDMAN Berthold, *Traité de l'arbitrage commercial international*, Litec, 1996.
- LE BARS Benoit et DALMASSO Joseph, *Arbitrage commercial international - Les grands arrêts du droit français*, LexisNexis, 2016.
- SERAGLINI Christophe et ORTSCHEIDT Jérôme, *Droit de l'arbitrage interne et international*, Lextenso éd., Montchrestien, coll. Domat droit privé, 2013.

Articles

- ANCEL Marie-Élodie, *La loi applicable à la convention d'arbitrage au Royaume-Uni : les enseignements de l'arrêt Enka*, Libre Propos RDIA n°4, 2021.
- DAY William, *Applicable law and arbitration agreements*, The Cambridge Law Journal, 2021.
- GAILLARD Emmanuel, *Les vertus de la méthode des règles matérielles appliquées à la convention d'arbitrage (Les enseignements de l'affaire Kout Food)*, Revue de l'Arbitrage, Comité Français de l'Arbitrage 2020, Volume 2020, Issue 3, pp. 701 – 726.
- KARTON Joshua, International Arbitration as Comparative Law in Action, Journal of Dispute Resolution, Volume 2020, Issue 2, 2020.
- KAZIMI Leila, *Can't Budge: The Curious Case of Kabab-Ji and the New York Convention*, (Assistant Editor to the Managing Editor), Kluwer Law International, November 15, 2021.
- KAZIMI Leila, *The Walking Dead: Double Life of the Kabab-Ji Award*, (Assistant Editor to the Managing Editor), Kluwer Law International, November 16, 2022.
- LEJNIECE Aija, *French idealism vs. English pragmatism: The Alternative endings of the Kout Food saga*, Club Español del Arbitraje 2023, Volume 2023, Issue 47, pp. 141 – 146.
- Mayer Brown, *Law Commission Proposes Seat of Arbitration as the Default Law of the Arbitration Agreement*, Legal Update, September 2023.
- NAZZINI Renato, *The Law Applicable to the Arbitration Agreement: Towards transnational Principles*, Cambridge University Press, 2016.
- PEARSON Sabrina, *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, in William

W. Park (ed), Arbitration International, Oxford University Press 2013, Volume 29 Issue 1, pp. 115-126.

- RIVERA Julio C., *Arbitraje Comercial Internacional Y Domestico, International And Domestic Commercial Arbitration*, Second ed., 2014.
- SAMPAIO Amanda Nunes, *The law governing the arbitration agreement: Why we need it and how to deal with it*, International Bar Association.
- SCHERER Maxi and JENSEN Ole, *Towards a harmonized theory of the law governing the arbitration agreement*, 2021.
- Shearman & Sterling, *Reform of the Arbitration Act 1996: Law Commission's Final Report and Amendment Bill*, September 20, 2023.
- VAZZOLER Lennart, *Kabab-Ji Sal V. Kout Food Group Decision UKSC 2021, in International Law and Politics*, Volume 54, pp. 1125-1135.

Case law

- CA Paris, 17 February 2011, *Dallah*, Gaz. Pal.
- CA Paris, December 13, 1975, *Menicucci v. Mahieux.*
- Cass. 1e civ., July 4, 1972, *Hecht v. Buisman's.*
- Cass. 1e civ., May 7, 1963, *Ets. Raymond Gosset v. Carapelli.*
- Cass. civ. 1, 20 December 1993, *Municipalité de Khoms El Mergeb v. Dalico.*
- Cass. civ. 1, 5 January 1999, *Zanzi.*
- Cass. civ. 1, 30 mars 2004, *Soc. Uni-Kod v. Sté Ouralkali.*
- CJUE, 6 mars 2018, *Achmea*, affaire C-284/16.
- England and Wales Court of Appeal, Civ 638, [2012], *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA.*
- England and Wales High Court of Justice, Commercial Court, [2000], *XL Insurance Ltd v. Owens Corning Corp*, 2 Lloyd's Rep. 500.
- EWCA Civ 1282, [2007], *C v. D*, Case No. A3/2007/1697.
- UK Supreme Court 38, [2020], *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb.*
- UK Supreme Court 48, [2021], *Kabab-ji SAL v. Kout Food Group*.

Legislation and Other Resources

- Arbitration Bill 2024
- English Arbitration Act 1996
- French Code of Civil Procedure
- Law Commission, Review of the Arbitration Act 1996: Final Report and Bill
- Law Commission website
- New York Convention
- UNCITRAL Model Law on International Commercial Arbitration 2006

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