Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48 (26 October 2021)

United Kingdom Supreme Court

Press Summary **Issues & Facts**

Michaelmas Term

[2021] UKSC 48

On appeal from: [2020] EWCA Civ 6

JUDGMENT

Kabab-Ji SAL (Lebanon) (Appellant) *v* Kout Food Group (Kuwait) (Respondent)

before

Lord Hodge, Deputy President

Lord Lloyd-Jones

Lord Sales

Lord Hamblen

Lord Leggatt

JUDGMENT GIVEN ON

27 October 2021

Heard on 30 June and 1 July 2021

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Appellant

Nicholas Tse

(Instructed by Velitor Law)

Respondent

Ricky Diwan QC

(Instructed by RPC LLP (London))

LORD HAMBLEN AND LORD LEGGATT: (with whom Lord Hodge, Lord Lloyd-Jones and Lord Sales agree)

Introduction

1. When a court has to decide whether an international arbitration agreement is valid or whether it covers a particular dispute, the first step is to identify which system of law the court must apply to answer this question. How a court of England and Wales should identify the applicable law was recently considered by this court in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] USKC 38; [2020] 1 WLR 4117.

2. In *Enka* the question of which law governed the validity and scope of an arbitration agreement arose before any arbitration had taken place. In the present case the question of which law governs the validity of an arbitration agreement arises in the different context where an arbitration has already taken place and proceedings have been brought in England to enforce an award made by the arbitral tribunal. The defendant (who took part in the arbitration under protest) maintains that it is not a party to the arbitration agreement and is therefore not bound by the decision of the arbitrators. As in *Enka*, the first question is to identify which system of law the English court must apply to decide whether there is an enforceable arbitration agreement. That is the first issue in this appeal. If the courts below were correct to decide that English law should be applied, two further issues arise. One is whether the Court of Appeal was right to hold that, as a matter of English law, the defendant never became a party to the arbitration agreement. The other is whether, procedurally, the Court of Appeal was right to decide that question and give summary judgment refusing enforcement of the award.

   The parties and the agreements

3. The claimant (and appellant) is a Lebanese company which has developed a distinctive type of restaurant specialising in Lebanese and other Middle Eastern cuisines and owns trademarks and other rights underpinning this restaurant concept. By a Franchise Development Agreement dated 16 July 2001 (the "FDA"), the claimant granted a licence to a Kuwaiti company, Al Homaizi Foodstuff Company ("Al Homaizi") to operate a franchise using its restaurant concept in Kuwait for a period of ten years. Under the FDA, the claimant and Al Homaizi subsequently entered into a total of ten Franchise Outlet Agreements ("FOAs") in respect of individual outlets opened in Kuwait. We will refer to the FDA and FOAs collectively as the "Franchise Agreements". The Franchise Agreements are all expressly governed by English law.
4. In 2005 the Al Homaizi Group underwent a corporate restructuring. A new holding company called Kout Food Group ("KFG") was established and Al Homaizi became a subsidiary of KFG. KFG is the defendant to the arbitration claim and the respondent to this appeal.

   The arbitration

5. A dispute arose under the Franchise Agreements which the claimant referred to arbitration under the rules of the International Chamber of Commerce ("ICC") in Paris. That arbitration was commenced against KFG alone, and not against Al Homaizi. KFG took part in the arbitration under protest, maintaining that it was not a party to the Franchise Agreements or the arbitration agreements contained in them.

6. A final hearing took place in Paris before a tribunal of three arbitrators, which made an award in favour of the claimant. The arbitral tribunal unanimously considered that it must apply French law, as the law of the seat of the arbitration, to determine whether KFG was bound by the arbitration agreements, but English law to decide whether KFG had acquired substantive rights and obligations under the Franchise Agreements. A majority of the tribunal (Professor Dr Mohamed Abdel Wahab and Mr Bruno Leurent) held that: (i) applying French law, KFG was a party to the arbitration agreements; (ii) applying English law, there had been a "novation by addition" (rather than substitution) whereby KFG became an additional party to the Franchise Agreements alongside Al Homaizi by reason of the parties' conduct. They went on to conclude that KFG was in breach of the Franchise Agreements and awarded unpaid licence fees, damages and legal costs (with interest on the sums awarded) against KFG. The principal amount of the award is US$6,734,628.19.
7. The third arbitrator, Mr Klaus Reichert SC, dissented on the basis that, applying English law, KFG never became a party to the FDA (or the FOAs), as any novation involving the replacement of Al Homaizi by KFG, or the addition of KFG as a party, was precluded by the strict wording of the agreement. Accordingly, KFG owed no substantive obligations to the claimant under the Franchise Agreements.

The French and English proceedings

8. Following the publication of the arbitration award, KFG brought an action in the French courts to annul the award on grounds which included the contention that the arbitrators had no jurisdiction over KFG as it was not a party to and therefore not bound by the arbitration agreements. Meanwhile the claimant brought the present proceedings in England to enforce the award.
9. The annulment action was heard by the Paris Court of Appeal, which dismissed the action in a decision published on 23 June 2020 (after the judgment of the English Court of Appeal in the present proceedings had been given). KFG has lodged an appeal against the decision of the Paris Court of Appeal with the Court of Cassation.

The New York Convention

10. Both the French and English proceedings are taking place under the international legal framework constituted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 ("the Convention"). The Convention forms the bedrock on which modern international commercial arbitration rests. The number of states which are parties to the Convention currently stands at 168 and includes 165 of the 193 United Nations member states. According to *Born, International Commercial Arbitration*, 3rd ed (2021), p 111, in virtually all contracting states the Convention has been implemented through national legislation. Those states include the United Kingdom and France.

11. As set out in article I, the Convention applies to the recognition and enforcement of all foreign arbitral awards, unless the state where the recognition and enforcement of the award is sought has declared that, on the basis of reciprocity, it will apply the Convention only to awards made in the territory of another contracting state. (The United Kingdom has made such a declaration but, as indicated, the award in this case was made in the territory of another contracting state.) Article II of the Convention establishes a basic rule of recognition of agreements to submit differences to arbitration. Articles III to VI are concerned with the recognition and enforcement of arbitral awards. Article V sets out a limited and exclusive list of grounds on which the recognition and enforcement of an award may be refused. Of primary relevance for present purposes is article V(1)(a), which applies where:
"The parties to the agreement referred to in article II [ie the arbitration agreement] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;"

    Also relevant is article V(1)(e), which applies where:

    "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

    Part III of the 1996 Act

12. The operative provisions of the Convention have been transposed into the law of England and Wales by Part III of the Arbitration Act 1996 (the "1996 Act"). Section 100(1) of the 1996 Act defines a "New York Convention award" as "an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention". Section 101 provides that a New York Convention award may, by leave of the court, be enforced in the same manner as a judgment of the English court and that, where leave is so given, judgment may be entered in the terms of the award.
13. Section 102(1) specifies evidence which a party seeking the recognition enforcement of a New York Convention award must produce. This comprises: (a) the duly authenticated original award or a duly certified copy of it, and (b) the original arbitration agreement or a duly certified copy of it.
14. Section 103 of the 1996 Act replicates article V of the Convention and reads (in relevant part) as follows:
"(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

    (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves -

    (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

...

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."

15. Although article V(1) of the Convention and section 103(2) of the 1996 Act specify the grounds on which recognition or enforcement of the award "may" be refused, the circumstances in which it could be appropriate for the court to recognise or enforce an award where one of those grounds is made out are necessarily constrained by the principles and purposes underlying the Convention, a major object of which is the achievement of uniform international standards. The residual discretion to recognise or enforce an award is correspondingly narrow: see eg *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, paras 67-69 (Lord Mance) and paras 126-131 (Lord Collins). It is not suggested that it could be invoked in the present case.

The proceedings below

16. The present proceedings under section 101 of the 1996 Act to enforce the award as a judgment of the English court have been running in parallel with the action brought by KFG in France to annul the award. There is no doubt that the Paris Court of Appeal is a competent authority of the country in which the arbitration award against KFG was made. Accordingly, if the Paris Court of Appeal had annulled the award, this would have been a ground on which enforcement of the award may be refused by the English court pursuant to article V(1)(e) of the Convention and section 103(2)(f) of the 1996 Act. As it is, the award has not been annulled and the only ground for resisting enforcement of the award available to KFG has been the alleged invalidity of the arbitration agreement, relying on article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act.
17. In the Commercial Court directions were given for a trial of preliminary issues, which took place in March 2019. As reformulated by the judge at the trial with the agreement of the parties, the first three issues were:

(i) Does the law governing the validity of the arbitration agreement govern the question of whether KFG became a party to the arbitration agreement?

(ii) What is that law?

(iii) At English law, has KFG become a party to (i) the FDA and (ii) if different, the arbitration agreement?

(The issues were formulated by reference to the FDA as it was agreed that this would be determinative of the like issues arising under the FOAs. A fourth issue, concerning the law governing the capacity of KFG to join the arbitration agreement, is not relevant on this appeal.)

18. For reasons given in a judgment handed down on 29 March 2019, the judge, Sir Michael Burton, answered the above questions as follows:
(i) The law governing the validity of the arbitration agreement governs the question of whether KFG became a party to the arbitration agreement.

(ii) The law governing the validity of the arbitration agreement is English law.

(iii) At English law, (subject to a point left open in the court's judgment) KFG did not become a party to the FDA or the arbitration agreement of the FDA, the two questions raising the same issue.

19. Despite having, in his words, "taken to the brink" the third of the above issues, the judge did not finally decide it, as he thought it "just possible" that evidence might establish that "there was something approximating to a consent in writing by the parties" to the addition of KFG as a party to the FDA and the arbitration agreement within it: see [2019] EWHC 899 (Comm), paras 64-65. Further, at the claimant's request and against KFG's opposition, the judge adjourned any further hearing until after the Paris Court of Appeal had decided KFG's application to annul the award.
20. The claimant and KFG each appealed against the judge's decision. On 20 January 2020, the Court of Appeal (Flaux LJ, with whom McCombe LJ and Sir Bernard Rix agreed) handed down judgment dismissing the claimant's appeal and allowing KFG's cross-appeal: see [2020] EWCA Civ 6; [2020] 1 CLC 90. In summary, the Court of Appeal held that:
(i) The terms of the FDA provided for the express choice of English law to govern the arbitration agreement in clause 14 of the FDA.

(ii) As a matter of English law, in the absence of written consent as required by the terms of the FDA or any matters capable of giving rise to an estoppel, KFG could not have become a party to the FDA and hence the arbitration agreement.

(iii) The judge should not have granted an adjournment and should have made a final determination that KFG was not a party to the FDA or the arbitration agreement, so that the award is not enforceable against KFG.

21. In the light of these conclusions, the Court of Appeal gave summary judgment in favour of KFG refusing recognition and enforcement of the award.
The issues in this appeal

22. The claimant was given permission to appeal to this court from the decision of the Court of Appeal on five grounds but, in the way the case has been argued, they can conveniently be distilled into three issues:

(i) What law governs the validity of the arbitration agreement?

(ii) If English law governs, is there any real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA?

(iii) As a matter of procedure, was the Court of Appeal justified in giving summary judgment refusing recognition and enforcement of the award?

Issue 1: What law governs the arbitration agreement?

Disputes about parties to the arbitration agreement

23. In *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819 ("*Yukos Oil Co*"), the defendant to a claim to enforce an arbitration award as a judgment of the English court under section 101 of the 1996 Act maintained - as KFG does in this case - that it never became a party to an arbitration agreement with the claimant. The defendant argued that, for this reason, the claimant could not satisfy the evidential requirements in section 102(1). The term "arbitration agreement" is defined for the purpose of Part III of the 1996 Act as "an arbitration agreement in writing": see section 100(2)(a). It was argued that the claimant could not produce "the original arbitration agreement or a duly certified copy of it", as required by section 102(1)(b), because it could not produce an arbitration agreement in writing made with the defendant. If that reasoning was correct, it would also indicate that the claimant could not produce "the duly authenticated original award or a duly certified copy of it", as required in section 102(1)(a), because the award relied on was not made "in pursuance of an arbitration agreement" and therefore did not qualify as a "New York Convention award", as defined in section 100(1).
24. The Court of Appeal rejected the defendant's argument, holding that it is sufficient in order to satisfy section 102(1) to produce a document which the arbitrators have found to be a written record of an arbitration agreement made between the relevant parties and an award containing such a finding. It is then for the person resisting enforcement to prove, under section 103(2)(b), that no such arbitration agreement was ever made, or validly made, to which it was a party: see *Yukos Oil Co* at paras 10-14.

25. This analysis was not disputed, and was specifically adopted by Aikens J in Annex 6 to his judgment at first instance, in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505, where an issue as to whether the person resisting enforcement was a party to the agreement on which the arbitration and the arbitrators' award were founded was again raised (see further the judgment of Lord Mance in the Supreme Court, para 12). Nor has the analysis in *Yukos Oil Co* been disputed in the present case. It is thus common ground that the question whether KFG became a party to an arbitration agreement with the claimant in the terms of clause 14 of the FDA is to be determined in these proceedings by applying article V(1)(a) of the Convention as enacted into English law in section 103(2)(b) of the 1996 Act.

    The article V(1)(a) conflict of laws rules

26. As discussed in our judgment in *Enka*, at para 128, article V(1)(a) of the Convention establishes two uniform international conflict of laws rules. The first, and primary, rule is that the validity of the arbitration agreement is governed by "the law to which the parties subjected it" - in other words the law chosen by the parties. The second, default rule, which applies where no choice has been indicated, is that the applicable law is that of "the country where the award was made". Where the parties have chosen the seat of arbitration, the place where the award was made will be (or be deemed to be) the place of the seat. In English law this is expressly provided by section 100(2)(b) of the 1996 Act.
27. It might be suggested that, if no arbitration agreement was ever made with the person resisting enforcement of the award, there can be no law to which "the parties" subjected it. The general approach in private international law, however, where there is a dispute about whether an agreement exists or is valid is to decide that question by applying the law that would govern the agreement if it exists or is valid: see eg *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), paras 32R-106, 32-110 to 32-113; *Born, International Commercial Arbitration*, 3rd ed (2021), pp 623, 637, 3786. That must be the correct approach to questions of validity under article V(1)(a) of the Convention, as otherwise the first choice of law rule could never apply. The contrary has not been argued in this case.

    Choice of law for the whole contract

28. In *Enka*, the conclusions of this court, as summarised in para 170 of our judgment, included the following:

    "(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."

29. These conclusions are not directly applicable in the present case, as in *Enka* the court was applying the English common law rules for resolving conflicts of laws. In the present case the rules to be applied are those in section 103(2)(b) of the 1996 Act, which transposes into English law the text of the Convention.
30. Counsel for KFG, Ricky Diwan QC, submitted that article V(1)(a) of the Convention does not contain a rule for determining whether there is a choice of law applicable to the arbitration agreement so that by default the law of the forum must apply to determine that question. In support of this submission, he cited two respected commentaries on the Convention, one of which describes article V(1)(a) as containing a "half-way conflict rule" leaving the applicable law to be determined by the conflict of law rules of the forum: *Van den Berg, The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (1981) at p 277; and see also *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) at pp 984-985. The passages cited from these commentaries, however, were referring to the first part of article V(1)(a), transposed into English law in section 103(2)(a) of the 1996 Act, which applies where "the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity". Clearly, referring simply to "the law applicable to [the parties]" does not by itself determine which law is applicable to them. The commentaries take a different view in relation to the part of article V(1)(a) relevant for present purposes, which is transposed into English law in section 103(2)(b) of the 1996 Act. Of the two rules there set out, *Van den Berg* says (at p 291):
"It has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon."

Similarly, Fouchard Gaillard Goldman (at p 985) states that the law governing the validity of the arbitration agreement "must be determined by applying a choice of law rule set forth in the Convention itself."

31. As a general principle, where a statute is passed in order to give effect to the United Kingdom's obligations under an international convention, the statute should if possible be given a meaning that conforms to that of the convention: see eg *R (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48, para 14 (Lord Phillips); *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 24.16. In the case of the New York Convention, that principle is reinforced by the Convention's aim of establishing a single, uniform set of rules governing the recognition and enforcement of international arbitration agreements and awards.
32. In keeping with that aim, it is desirable that the rules set out in article V(1)(a) for determining whether there is a valid arbitration agreement should not only be given a uniform meaning but should be applied by the courts of the contracting states in a uniform way. If, therefore, there was a clear consensus among national courts and jurists about whether or when a choice of law for the contract as a whole constitutes a sufficient indication of the law to which the parties subjected the arbitration agreement, in particular where it differs from the law of the seat, that would provide a cogent reason for the English courts to adopt the same approach. It is apparent, however, that there is nothing approaching a consensus on this question. In these circumstances it seems to us that the English courts must form their own view based on first principles.
33. At para 129 of our judgment in *Enka*, we expressed the view that a general choice of law to govern a contract containing an arbitration clause should normally be sufficient to satisfy the first rule in article V(1)(a). We noted that this conclusion is supported by the text, which brings into play the second, default rule only "failing any indication" of the law to which the parties subjected the arbitration agreement. The word "indication" signifies that something less than an express and specific agreement will suffice. As pointed out by counsel for KFG, the wording of article V(1)(a) may also be contrasted with that of article V(1)(d), under which recognition or enforcement of the award may be refused where:
"The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;" (Emphasis added)

34. Mr Diwan also drew attention to a *Summary Analysis of Record of the United Nations Conference May/June 1958*. This states (at p 51) in relation to the final text of what became article V(1)(a):
"There is no indication in this clause (a) as finally adopted that the decision of the parties as to the law which is to govern their agreement need be in the agreement itself or even in writing. Any form of agreement, express or tacit, would appear to be sufficient."

We read this statement as commentary by the author of the *Summary Analysis*, Mr D W Haight, who represented the ICC at the Conference, rather than (as Mr Diwan suggested) part of the preparatory history of the Convention to which recourse may

be had as a supplementary means of interpretation in accordance with article 32 of the Vienna Convention on the Law of Treaties 1969. Nevertheless, we agree with this commentary as an explanation of what the words used in article V(1)(a) are reasonably understood to mean.

35. 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 subjected the arbitration agreement. Furthermore, the considerations of principle which led us in *Enka* to reach the conclusions quoted at para 28 above apply with equal force where the question of validity arises, as it does in this case, after an award has been made in the context of enforcement proceedings under article V(1)(a) and section 103(2)(b) of the 1996 Act. Indeed, as we observed in *Enka*, at para 136, it would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made. If there is to be consistency and coherence in the law, the same law should be applied - and therefore the principles for identifying the applicable law should be the same - in either case.
36. It is unnecessary for us to explore these issues further on this appeal, however, as the claimant accepts that the general principles summarised in our judgment in *Enka*, at para 170, are applicable where an English court is applying section 103(2)(b) of the 1996 Act to ascertain whether the parties have chosen the law which is to govern their arbitration agreement and, if so, what law they have chosen.
Application to the present case

37. The relevant clauses of the FDA are these:
"Article 1: Content of the Agreement

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

Article 14: Settlement of Disputes

…

14.2. Except for those matters which specifically involve the Mark, any dispute, controversy or claim between LICENSOR and LICENSEE with respect to any issue arising out of or relating to this Agreement or the breach thereof, … shall, failing

amicable settlement, on request of LICENSOR or LICENSEE, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

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

…

14.5. The arbitration shall be conducted in the English language, in Paris, France.

…

Article 15: Governing Law

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

38. The FOAs contain provisions with identical wording.
39. In our view, the effect of these clauses is absolutely clear. Clause 15 of the FDA is a typical governing law clause, which provides that "this Agreement" shall be governed by the laws of England. Even without any express definition, that phrase is ordinarily and reasonably understood (for the reasons given at paras 43 and 53 of our judgment in *Enka*) to denote all the clauses incorporated in the contractual document, including therefore clause 14. If there were otherwise any room for doubt about its meaning - which we cannot see that there is - the phrase is in this case for good measure specifically defined by clause 1, which spells out that "[t]his Agreement consists of … the terms of agreement set forth herein below ...". The "terms of agreement set forth herein below" manifestly include clause 14. There is no good reason to infer that the parties intended to except clause 14 from their choice of English law to govern all the terms of their contract. The "law to which the parties subjected" the arbitration agreement in clause 14 is therefore English law.
Argument based on the UNIDROIT Principles

40. To seek to resist this conclusion, the claimant advanced two arguments. The first relies on the wording of clause 14, which contains the agreement to refer disputes to arbitration. Counsel for the claimant, Mr Nicholas Tse, submitted that, when clauses 1 and 15 of the FDA are read together with clause 14, the proper conclusion to draw is that there is no or no sufficient indication of the law which is to govern the validity of the arbitration agreement. It is therefore necessary to fall back on the default rule that the applicable law is that of the seat of the arbitration, ie France.

41. This argument is based principally on the second sentence of clause 14.3, which reads:
"The arbitrator(s) shall also apply principles of law generally recognised in international transactions."

The parties are agreed - and we are content to accept - that the reference to "principles of law generally recognised in international transactions" is to be understood as a reference to the UNIDROIT Principles of International Commercial Contracts. These are a set of principles formulated by a group of international scholars and published by the Governing Council of the International Institute for the Unification of Private Law ("UNIDROIT"), an intergovernmental organisation. The UNIDROIT Principles are now in their fourth edition, published in 2016. They cover most of the main areas of contract law.

42. As stated in their preamble, the purpose of the UNIDROIT Principles is (among other things) that "they shall be applied when the parties have agreed that their contract be governed by them" and that "they may be used to interpret or supplement domestic law." The UNIDROIT Principles are not intended to have the force of law in their own right. As described by Professor Roy Goode:
"[instruments such as the UNIDROIT Principles] are not issued, endorsed or implemented by law-making bodies. They are essentially non-binding tools made available to the international community for adoption in contracts and use by judges and legislatures."

See Roy Goode, "International Restatements of Contract and English Contract Law" (1997) 2 Unif L Rev 231, 233.

43. The claimant's argument proceeds in the following stages: (1) in article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act the "law" to which the parties subjected the arbitration agreement refers to the law of a country and is not apt to include principles, such as the UNIDROIT Principles, which are not part of any national legal system; (2) while it is accepted that the choice of English law in clause 15 applies to the whole of the FDA including the arbitration agreement in clause 14, the second sentence of clause 14.3 indicates that the whole of the FDA is also intended to be governed by the UNIDROIT Principles; (3) the regime chosen to govern the arbitration agreement, which is not the law of a country but a composite of national law and the UNIDROIT Principles, therefore does not qualify as "law" for the purpose of article V(1)(a) and section 103(2)(b); (4) as there is no "law" to which the parties subjected the arbitration agreement in the FDA, the second, default rule prescribed by those provisions applies and the validity of the arbitration agreement is governed by the law of the country where the award was made.

44. This argument, if sound, would mean that parties who wanted their arbitration agreement to be governed by the law of a designated country supplemented by some additional principles would be denied their choice both of that country's law and of the additional principles, and would instead have their arbitration agreement governed by a different system of law which they did not choose at all. The fact that the claimant's argument leads to a result so illogical and inconsistent with the principle of party autonomy is itself reason to conclude that the argument is unsound. In our view, it contains two patent flaws.
45. First, clause 14.3 stipulates what rules of law the arbitrators are to apply in deciding the substantive issues in dispute. It directs the arbitrators to apply "the provisions contained in the Agreement", which themselves include clause 15 providing that "[t]his Agreement shall be governed by and construed in accordance with the laws of England." In addition, clause 14.3 directs the arbitrators also to apply what is agreed to be a reference to the UNIDROIT Principles. The freedom of the parties to make such provision is expressly recognised by rule 21(1) of the ICC Rules, which states:

    "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

    The phrase "the rules of law" is broader than the rules of a national legal system and is capable of including non-state rules of law such as the UNIDROIT Principles.

46. The present case, however, is not concerned with the rules of law to be applied by the arbitrators to the merits of the dispute. The issue is what law governs the validity of the arbitration agreement, for the purpose of deciding whether enforcement of the award may be refused pursuant to section 103(2)(b) of the 1996 Act. Not only is this a question for the court and not the arbitrators, but what law the arbitrators were required to apply to the merits of the dispute has no direct relevance in answering the question. Even if clause 14.3 were considered also to be relevant for the arbitrators when deciding what law they should apply to determine whether KFG became a party to the arbitration agreement, their decision on that matter which concerned their own jurisdiction is of no legal or evidential value to the court: see *Dallah*, para 30. (We observe in passing that the arbitrators appear to have given no reason for their view that they should apply the law of the seat to decide whether they had jurisdiction.)

47. Secondly, even if the FDA had provided that the arbitration agreement in clause 14 is to be governed by the law of England and also by the UNIDROIT Principles (which is how the claimant seeks to interpret the FDA), this would not have led to the conclusion that the arbitration agreement is governed by French law. It is not necessary to decide the question whether the expression "the law" in article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act is capable of including not only the law of a country but also the UNIDROIT Principles where the parties have indicated that they intend to subject their arbitration agreement to the law of a specified country supplemented by the UNIDROIT Principles. Assuming without deciding, however, that "the law" is restricted to the law of a country, all that follows is that the law to be applied in deciding whether the arbitration agreement was valid consists only of the system of national law selected by the parties and does not also include the UNIDROIT Principles. The fact (assuming it for present purposes to be a fact) that effect cannot be given to the parties' wish to supplement the national law to which they subjected their agreement with further non-binding principles provides no reason to ignore or nullify the parties' clear choice of a governing "law".
48. Accordingly, clause 14.3 of the FDA does not detract from the choice of English law as the law which, under section 103(2)(b) of the 1996 Act, the English court must apply to determine whether KFG became a party to the arbitration agreement within the FDA.

The validation principle

49. The second argument advanced is based on the "validation principle". This is the principle that contractual provisions, including any choice of law provision, should be interpreted so as to give effect to, and not defeat or undermine, the presumed intention that an arbitration agreement will be valid and effective: see paras 95-109 of our judgment in *Enka*; and also para 198 (Lord Burrows) and para 277 (Lord Sales). Hence, where there is a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective, it may be inferred that a choice of law to govern the contract does not extend to the arbitration agreement.
50. The claimant invokes the validation principle to argue that, if applying English law would lead to the conclusion that there was no valid arbitration agreement entered into between the claimant and KFG, then it is to be inferred that the choice of English law to govern the FDA does not extend to the arbitration agreement in clause 14.

51. This argument seeks to extend the validation principle beyond its proper scope. As we have just explained, the validation principle is a principle of contractual interpretation. It applies where the parties to the dispute have agreed to resolve disputes by arbitration and seeks to uphold their presumed intention that their agreement should be legally effective. The validation principle presupposes that an agreement has been made which may or may not be valid. It is not a principle relating to the formation of contracts which can be invoked to create an agreement which would not otherwise exist. There is no reason to approach the question whether parties to a dispute have made any agreement at all with each other with any presumption that they did so. Applying such a presumption would simply beg the question which the court has to answer in this case.
52. It follows that the validation principle does not apply to questions of validity in the expanded sense in which that concept is used in article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act to include an issue about whether any contract was ever made between the parties to the dispute.

Conclusion on Issue 1

53. We would endorse the conclusion of the judge and the Court of Appeal that the law governing the question of whether KFG became a party to the arbitration agreement is English law.

Issue 2 - If English law governs, is there any real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA?

54. The arbitration agreement on which the claimant relies is the arbitration clause in the FDA, which on its face is a contract between the claimant and Al Homaizi. The claimant contends that KFG became a party to the arbitration agreement by becoming a party to the FDA and hence to the arbitration clause within it. No case is advanced that KFG became a party to the arbitration agreement otherwise than by becoming a party to the FDA. The claimant cannot point to any agreement in writing to this effect between itself and Al Homaizi. That presents a difficulty for the claimant in contending that KFG became a party to the FDA because the FDA contains a number of provisions which prescribe that it may not be amended save in writing signed on behalf of the parties. We will refer to these provisions as the “No Oral Modification clauses”. The Court of Appeal held that as a matter of English law these clauses meant that KFG did not become a party to the FDA or the arbitration agreement and that there was no real prospect of the claimant avoiding the effect of these clauses by relying on the doctrine of estoppel or otherwise.

The No Oral Modification clauses

55. The No Oral Modification clauses in the FDA are as follows:

“Article 3: Grant of Rights

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

Article 17: Waiver

17.1. Any waiver of any term or condition of the Agreement must be in writing and signed by the [a]ffected party ...

…

Article 19: Rights not Transferable

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

…

Article 24: Entire Agreement

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

Article 26: Amendment of Agreement

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

56. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119 ("*Rock Advertising*") the Supreme Court held that such clauses are legally effective. In his leading judgment Lord Sumption at para 12 stated that there are at least three legitimate commercial reasons for agreeing such clauses: "The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them."

57. As Lord Sumption observed, the English law of contract "does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy" and there is no policy reason why effect should not be given to the mutual bargain made in No Oral Modification clauses.

58. Lord Sumption recognised that there might be circumstances in which a party was precluded by conduct from relying on No Oral Modification clauses but stated at para 16 that, as a matter of English law, this would require proof of an estoppel. Without examining in detail what such proof would entail, Lord Sumption pointed out that:
"the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering IN.G.LEN SpA* [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."

59. As KFG submitted, the No Oral Modification clauses in the FDA impose a "double lock" on any modification to the FDA, namely: (i) a written document signed by both parties to the FDA (clauses 24 and 26), and (ii) a written document signed by both parties for any waiver of the requirements of the writing requirements (clause 17.1). The imposition of such strict requirements is consistent with the personal nature of the licence granted, as emphasised in clauses 3.1 and 19 of the FDA.
Assignment and novation

60. Under English law contractual rights may be transferred by an assignment of those rights. An assignment cannot, however, transfer contractual obligations. Both contractual rights and obligations may be assumed by a third party where there is a novation. A novation involves the substitution of one contracting party by another with the consent of all parties. It does not involve a transfer of rights and liabilities but rather the discharge of the original contract and its replacement with a new contract, typically on the same terms but with a different counterparty: see generally *Chitty on Contracts*, 33rd ed (2019), Vol 1, paras 19-087 - 19-090.
61. The main differences between assignment and novation were summarised by Aikens J in *Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 (Comm); [2006] 1 All ER (Comm) 56, at para 61 as follows:
"… there are four main differences. First, a novation requires the consent of all three parties involved … But (in the absence of restrictions) an assignor can assign without the consent of either assignee or the debtor. Secondly, a novation involves the termination of one contract and the creation of a new one in its place. In the case of an assignment the assignor's existing contractual rights are transferred to the assignee, but the contract remains the same and the assignor remains a party to it so far as obligations are concerned. Thirdly, a novation involves the transfer of both rights and obligations to the new party, whereas an assignment concerns only the transfer of rights, although the transferred rights are always 'subject to equities'. Lastly, a novation, involving the termination of a contract and the creation of a new one, requires consideration in relation to both those acts; but a legal assignment (at least), can be completed without the need for consideration."

The claimant's case

62. The claimant's main case in the arbitration was that there had been a novation of the FDA by reason of the parties' conduct and the performance by KFG over a sustained period of time of various obligations under the FDA and related FOAs. In light of the undoubted fact of Al Homaizi's continued involvement in various contractual matters, at a late stage of the arbitration the case became one of "novation by addition". This case was accepted by the majority of the arbitral tribunal.
63. Precisely what is meant by "novation by addition", how and when it came about and the precise terms of the new agreement are not explained by the majority arbitrators. As the judge pointed out at para 48 of his judgment:
"… there are in any event very real unanswered questions arising from the Majority's acceptance of this case without further ado:

(i) When did the licence change from there being an exclusive licensee to two licensees?

(ii) How and when did [Al Homaizi] consent to this?

(iii) Above all, what were the terms of such transfer or 'novation'? Were the two licensees to be jointly and severally liable? Was the new additional licensee to be liable in respect of all previous liabilities?"

64. What appears to be contemplated by the claimant is a form of novation whereby the original contract between the claimant and Al Homaizi was terminated by agreement and replaced by an agreement on the same terms save that the licensee was to be both Al Homaizi and KFG. However, the No Oral Modification restrictions under the FDA apply not only to amendments or modifications to the FDA but also to its "termination" - see clause 24. It follows that, in order to be effective, any such termination was required to be in writing and signed by or on behalf of the claimant and Al Homaizi. There is no such document.
65. Any other formulation of the claimant's case would face the same difficulty that, for there to be the necessary consent by the claimant and Al Homaizi to a novation, the terms of the FDA had to be complied with. Thus, if it were suggested that a new agreement was made between the claimant and KFG alongside and on similar terms to the FDA, this would only be permissible if the claimant and Al Homaizi agreed to vary or waive the restrictions in clauses 3.1 and 19 of the FDA which provide that the licence granted to Al Homaizi is personal in nature. Again, those restrictions could only be varied or waived by a written document signed by representatives of both parties to the FDA - see clauses 17, 24 and 26. That was the contractually agreed procedure for the provision of consent to any purported modification. There is no signed written document by which the necessary consent is provided. Without such written consent the modification is ineffective.

66. An analogy can be drawn with clauses which prohibit the assignment of contractual rights without the other party's consent. It is well established that a purported assignment made in breach of such a prohibition will be ineffective: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. As Lord Browne-Wilkinson stated at p 108 of his speech in that case:
"… the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. … If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct contractual relations with third parties."

67. As between the claimant and Al Homaizi, it would be possible for one or other party to be estopped from relying on the No Oral Modification clauses of the FDA if the conditions set out by Lord Sumption at para 16 of his judgment in *Rock Advertising* were satisfied, namely: (i) "some words or conduct unequivocally representing that the variation was valid notwithstanding its informality"; and (ii) "something more … than the informal promise itself". No evidence of any such representation by Al Homaizi has been identified, however, as the courts below found.
68. Even if there was evidence to support an estoppel as against Al Homaizi, that would not necessarily affect the position of KFG. Unless KFG knew that there had been an effective change to the terms of the FDA, it would be entitled to assume that it could not become a party to a licence agreement with the claimant unless the requirements of the No Oral Modification clauses contained in the FDA were satisfied. As the judge stated at para 51 of his judgment:
"Plainly if KFG acted as if it was the licensee that would not be enough, not least because, by virtue of the terms of the FDA, KFG would not believe itself to be at risk of becoming the licensee, with all its obligations, by doing so …"

69. For all these reasons, as a matter of English law, the No Oral Modification clauses are an insuperable obstacle to the claimant's case of novation by addition, quite apart from the difficulty of establishing the terms of any such novation and when and how it was purportedly made.
Reliance on the UNIDROIT Principles

70. The claimant sought to side-step these difficulties by relying on the UNIDROIT Principles pursuant to clause 14.3 of the FDA. In particular, reliance was placed on article 2.1.18 of the UNIDROIT Principles, which provides as follows:
"A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct."

71. The claimant further submitted that article 2.1.18 is a specific application of the general principle set out in article 1.8 that: “A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.” The claimant contended that in the present case KFG acted inconsistently with an understanding it had caused the claimant to have and upon which the claimant reasonably relied that KFG had become a party to the FDA and was accordingly precluded from contending otherwise.
72. As discussed earlier, clause 14.3 of the FDA specifies rules which “the arbitrators” are to apply and is not on its face applicable where the court is considering the logically prior question of whether KFG entered into a legally binding arbitration agreement. Even if clause 14.3 can be treated as applicable to this question, a further and fundamental difficulty for the claimant is that, for reasons already explained, the UNIDROIT Principles can only be relied upon to interpret or supplement English law, not to contradict it. This is made all the clearer by the last sentence of clause 14.3, which states that “under no circumstances” shall the arbitrators apply “any rule(s) that contradict(s) the strict wording of the [FDA]”. In the present case the claimant is seeking to rely on the UNIDROIT Principles to contradict both the No Oral Modification clauses and the minimum requirements set out in *Rock Advertising* which must in English law be satisfied if a party is to be precluded by its conduct from relying on such clauses. Such reliance on the UNIDROIT Principles is contractually impermissible. In any event, it is not explained how the UNIDROIT principle of preclusion would apply in the context of the novation alleged. To rely on the principle would require evidence of conduct from which the claimant had reasonably formed the understanding that Al Homaizi had agreed to terminate the FDA and that all parties had agreed to a new contract on the terms of the FDA notwithstanding the failure to comply with the No Oral Modification clause requirements. No such evidence has been identified.

    Good faith

73. The claimant further sought to rely on the obligation of good faith and fair dealing set out in clause 2 of the FDA. This provides:

    “In carrying out their obligations under the Agreement, the Parties shall act in accordance with good faith and fair dealing. The provisions of the Agreement, as well as any statements made by the Parties in connection therewith, shall be interpreted in good faith.”

    This provision cannot, however, be relied upon as against KFG unless and until it is established that KFG is party to the FDA or is precluded from contending otherwise. It cannot assist in determining whether or not either one or the other has occurred.

74. Even if clause 2 could be relied upon, the first sentence is only relevant to performance of the FDA, which is not in issue. The second sentence requires the provisions of the FDA to be interpreted in good faith; but it is not contrary to good faith to interpret the terms of the FDA in accordance with their express wording, all the more so given the last sentence of clause 14.3 (quoted at para 37 above). The only circumstances in which under English law it might be contrary to good faith to rely on a No Oral Modification clause would be where the minimum requirements for an estoppel identified in *Rock Advertising* were met. They are not arguably met in this case.

    Conclusion on Issue 2

75. In the above circumstances we are satisfied that the Court of Appeal was both entitled and correct to conclude that as a matter of English law there was no real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA. Given the terms of the No Oral Modification clauses, the evidential burden was on the claimant to show a sufficiently arguable case that KFG had become a party to the FDA and hence to the arbitration agreement in compliance with the requirements set out in those clauses, or that KFG was estopped or otherwise precluded from relying on the failure to comply with those requirements. On the findings made by the judge and the evidence before the court, such a case was not and has not been made out. In particular, as the Court of Appeal observed at para 80 of its judgment, no evidence has been identified that goes beyond evidence of "the informal promise itself". We are also satisfied that the Court of Appeal was entitled and correct to conclude that there was no realistic prospect of further evidence being put forward that might lead to a different conclusion. In this regard, it should be borne in mind that there had already been an ICC arbitration involving witness evidence and disclosure of documents in which this issue was contested, and so the identification of further relevant evidence, if there were any, should not have been problematic.

    Issue 3 - As a matter of procedure, was the Court of Appeal justified in giving summary judgment refusing recognition and enforcement of the award?

76. Article V(1) of the Convention provides that recognition and enforcement of the award may only be refused if the party against whom it is invoked "furnishes … proof" of one or more of the grounds set out in article V(1)(a) to (e). Likewise, section 103 of the 1996 Act provides that recognition or enforcement shall not be refused except if the person against whom the award is invoked "proves" one or more of the grounds set out section 103(2)(a) to (f), which mirror those set out in article V(1)(a) to (e).
77. In *Dallah* the Supreme Court held that, where the party seeking to resist enforcement seeks to prove that there was no valid arbitration agreement binding upon it, then the English court has to investigate and determine that issue for itself. As Lord Mance stated at para 28 of his judgment:

"Neither article V(1)(a) nor section 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue."

78. The claimant submitted that this requires a full evidential hearing and trial of the issue and that it is necessary to ensure that all documents available to the arbitrators are also available to the judge making the determination. It was also submitted that, in the interests of uniformity and consistency, this court should set out a standard but streamlined procedure to be followed whenever such an issue is raised. We reject these submissions.
79. In *Dallah* the argument advanced was that, where the arbitral tribunal has decided that there was an arbitration agreement between the parties, any court asked to enforce the award (other than a court of the seat of the arbitration) should do no more than "review" the arbitrators' decision. The Supreme Court rejected that contention and held that, while the court may find it useful to see how the arbitrators dealt with the question, the arbitrators' decision on a matter which determines their own jurisdiction has no legal or evidential value and the court must consider and determine the question independently for itself. Nothing was said, however, which sought to prescribe how that "ordinary judicial determination" was to be carried out.
80. There is nothing in the Convention or the 1996 Act which prescribes how the requisite "proof" is to be established and it is for the English court to decide how the "ordinary judicial determination" should be made in accordance with its own procedural rules, including the overriding objective under the Civil Procedure Rules ("CPR"). No doubt in some cases that may involve a full evidential hearing but there is no good reason why it should do so in cases which are appropriate for summary determination. It has long been recognised as a matter of English procedural law that summary determination may be in the interests of justice and achieve significant savings in time and costs. The overriding objective includes dealing with cases expeditiously and in a way which is proportionate and will save expense. There is no reason in principle why a summary approach should not be adopted to determinations required under section 103 of the 1996 Act. Indeed, there is every reason to do so, not least because in many cases the nature and extent of the relevant evidence will already be clear from the hearing before the arbitral tribunal and it will be the party seeking to enforce the award who will be concerned to achieve a speedy decision and who will benefit from the availability of summary procedure. The availability of such procedure is therefore fully consistent with the pro-enforcement policy of the Convention and its equivalent provisions in the 1996 Act.

81. Whether or not a summary procedure is suitable in any particular case must depend on the facts and circumstances of that case. Similarly, if there is to be a trial, the appropriate interlocutory and trial procedure will be case and fact specific. It may be possible, for example, depending on the nature of the dispute, to dispense with live witness evidence and rely on transcripts of oral evidence already given at the arbitration hearing along with other documentary evidence. It cannot be appropriate to mandate in advance a procedure for all cases, as the claimant suggested.
82. The CPR allow for summary judgment to be given against either a claimant or a defendant. If there is no real prospect of a party's case succeeding at trial, then it is generally appropriate to determine the issue summarily regardless of whether that party is the claimant or defendant or, in this context, the party seeking to enforce or the party resisting enforcement of the award. The claimant objected that this may involve the reversal of the normal burden of proof which lies on the party resisting recognition and enforcement of a Convention award. This is a false point. It is always for the party resisting recognition and enforcement to establish one of the stated grounds for doing so. It may be that, as happened in this case, that party is able to show that, on the material before the court, it has a good defence on one of the relevant grounds, in which case the evidential burden shifts to the claimant to indicate what evidence would or might be available at a further hearing which could enable its claim to succeed. That does not, however, affect or change the legal burden of proof under section 103.
83. The claimant further submitted that it was procedurally unfair for the Court of Appeal to dismiss its application to enforce the award on a summary basis in circumstances where the hearing before the judge had been for the trial of preliminary issues. The terms of those issues were, however, varied at the hearing before the judge with the agreement of the parties. The third issue was: "At English law, has [KFG] become a party to (i) the FDA and (ii) if different, the arbitration agreement?" If the governing law was held to be English law, it is obvious that the resolution of that issue would be likely to be decisive of the section 103 application. In any event, as already held, the claimant has been unable to show that an opportunity to adduce further evidence could make any realistic difference to the outcome. In the circumstances, there has been no unfairness.

    The grant of an adjournment

84. Finally, the claimant submitted that the Court of Appeal was wrong to overturn the judge's discretionary decision to adjourn any further hearing of the claimant's application pending the decision of the Paris Court of Appeal. Although this issue may be said to be moot in light of the fact that the Paris Court of Appeal has since made its decision, we shall briefly address it.
85. Article VI of the Convention, as enacted in section 103(5) of the 1996 Act, provides:
    "Where an application for the setting aside or suspension of the award has been made to [a competent authority of the country in which, or under the law of which, that award was made], the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award."

Article VI of the Convention and section 103(5) thus gives the court a discretion ("may") to adjourn enforcement proceedings if it considers it "proper" to do so pending a decision by the court of the seat whether to set aside the award.

86. In support of the judge's decision to grant an adjournment it was stressed that the French court is the court of the seat of the arbitration and therefore the court of supervisory jurisdiction and that it was desirable to avoid the risk of inconsistent decisions.
87. Where the grounds relied on under article V for resisting enforcement of the award and the grounds relied on before the court of the seat to set aside / annul the award are the same and governed by the law of the country of the seat, then, ordinarily, an English court is likely to grant an adjournment because it is sensible to have the foreign court determine the issue of foreign law and to avoid the potential of conflicting judgments on the same issue: see, for example, *Yukos Oil Co*. These considerations in favour of an adjournment do not, however, apply where the English court will apply English law to determine the matter. In such circumstances, if the court of the seat was to apply its own law then it would be addressing a different issue, so that there could be no issue estoppel. If, on the other hand, it were to apply English law, there would be good reason for the English court to provide the foreign court with the benefit of an English law judgment.
88. In the present case the article V defence and the grounds on which KFG relied in the annulment action raised the same issue of whether KFG was a party to an arbitration agreement with the claimant. However, the law applied by the English and French courts to decide that issue is different. For the reasons given earlier, the law which the English court must apply to decide that issue is English law. As described in a joint expert report in these proceedings, however, French law takes a very different approach to the determination of such questions. French case law has abandoned a conflict of laws approach of selecting a national law which governs the existence and validity of the arbitration agreement and has instead created "substantive rules of international arbitration" to govern the issue. As it was put by the Court of Cassation in the seminal case of *Municipalité de Khoms El Mergeb v Société Dalico* [1994] 1 Rev Arb 116 (20 December 1993):
"en vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et … son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique …"

"by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and validity of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law."

The only exception is where a choice of national law to govern the arbitration agreement is contained within the arbitration agreement itself.

89. As Lord Mance observed in *Dallah*, at para 15, as the substantive rules of international arbitration which the French courts apply are rules of their own creation, the reality is that the French courts determine questions about the existence and validity of an international arbitration agreement by reference to French law (albeit rules of French law which differ from those applicable to domestic agreements). Because the law which the French court will apply is different, under English law any decision by the French court about whether KFG became a party to an arbitration agreement with the claimant will not give rise to an issue estoppel: see, for example, *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, paras 150-151, 156. The English court cannot be bound by the decision of the French court because the English court must apply a different system of law to determine the issue.
90. In such circumstances the risk of contradictory judgments cannot be avoided and so that provides no reason for an adjournment. Nor would any French court decision be relevant to the determination of the questions which the English court had to decide. This important consideration was overlooked by the judge. As the Court of Appeal stated at para 81:
"he overlooked that the decision of the French Court was not relevant to the questions of English law and its application to the facts which were before the judge. This was a fortiori the position given that the French Court would not apply the article V(1)(a) of the New York Convention test in determining the law of the arbitration agreement, but internal French law."

91. This alone provided sufficient reason for the Court of Appeal to reconsider and overturn the judge's decision. The only circumstances in which a decision of the French court might have assisted would have been if it had decided to annul the award as that would have provided a separate ground for refusing enforcement, thereby avoiding the need for any further hearing of the article V(1)(a) defence. As the Court of Appeal pointed out, however, "that future possibility would be no reason for adjourning the English proceedings at the behest of the award creditor after three days of hearing on the merits of the application to enforce the award" (para 81).
Conclusion on Issue 3

92. For all the reasons outlined above, the Court of Appeal was justified in overturning the judge's decision to grant an adjournment and in giving summary judgment refusing recognition and enforcement of the award.
Conclusion

93. The law governing the validity of the arbitration agreement is English law. As a matter of English law, the Court of Appeal was right to conclude that there is no real prospect that a court might find at a further evidentiary hearing that KFG became a party to the arbitration agreement in the FDA. As a matter of procedure, the Court of Appeal was also justified in giving summary judgment refusing recognition and enforcement of the award. It follows that the appeal must be dismissed.
