Neutral Citation Number: [2020] EWCA Civ 6

Case No: A4/2019/0944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
SIR MICHAEL BURTON (Sitting as a Judge of the High Court)
CL-2017-000792

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE FLAUX
and
SIR BERNARD RIX

- -

Between:

KABAB-JI S.A.L. (LEBANON)	**Appellant**
- and -	
KOUT FOOD GROUP (KUWAIT)	**Respondent**

- -
- -

Nicholas Tse and Ravinder Thukral (instructed by **Brown Rudnick LLP**) for the **Appellant**
Ricky Diwan QC (instructed by **RPC**) for the **Respondent**

Hearing dates: 3, 4 and 5 December 2019

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Approved Judgment

Lord Justice Flaux:

Introduction

1. This appeal, which is brought with the permission of Males LJ against the Order dated 8 April 2019 of Sir Michael Burton sitting as a Judge of the High Court in the Commercial Court, raises issues (i) as to the governing law of an arbitration agreement which provides for arbitration in Paris but which is contained in a main agreement which is expressly governed by English law and (ii) as to whether the respondent became a party to the main agreement and/or the arbitration agreement notwithstanding the presence of No Oral Modification provisions in the main contract. The respondent cross-appeals, again with the permission of Males LJ, against the judge's decision not to reach a final determination of the particular preliminary issue which is the subject of the appeal.

Factual and procedural background

2. The appellant, a Lebanese company, entered into a Franchise Development Agreement dated 16 July 2001 for a period of 10 years with Al Homaizi Foodstuff Company ("AHFC"), a Kuwaiti company, as Licensee. In 2005 AHFC became a subsidiary of the respondent (which I will refer to as "KFG") following a corporate reorganisation. A dispute arose under the FDA which the appellant referred to arbitration before the ICC in Paris pursuant to Article 14 of the FDA (the relevant provisions of which are set out at [8] below). That arbitration was only commenced against KFG, not AHFC.

3. The arbitrators had to consider a jurisdictional issue as to whether KFG had become an additional party to the FDA and thus the arbitration agreement in Article 14 and went on to consider issues on the merits as to whether there had been a breach of the FDA and claims for remedies and relief (an application by KFG to bifurcate having failed). By an Award dated 11 September 2017, the majority arbitrators (Professor Dr Mohamed Abdel Wahab and M Bruno Leurent, neither of whom is an English qualified lawyer) found that the question of whether KFG was bound by the arbitration agreement was a matter of French law, but the issue of whether a transfer of substantive rights and obligations took place was governed by English law. They went on to conclude that, as a matter of English law, a 'novation' was to be inferred by the conduct of the parties adding KFG as the main franchisee. They determined that, on the merits, KFG was in breach of the FDA.

4. The dissenting third arbitrator Mr Klaus Reichert SC, who is an English qualified lawyer, agreed that French law applied to the issue of validity of the arbitration agreement, but dissented by concluding that the appellant's case should fail because, applying English law, KFG never became a counterparty to the FDA which meant that it owed no obligation to the appellant under the FDA and that the appellant had sued the wrong party.

5. Following the publication of the Award, on 13 December 2017, KFG filed an annulment application before the French courts, Paris being the seat of the arbitration. That application is due to be heard by the Cour d'appel de Paris in February 2020. On 21 December 2017, the appellant issued proceedings in the Commercial Court in London under section 101 of the Arbitration Act 1996 for enforcement of the Award

as a judgment. On 7 February 2018, Popplewell J made an order ex parte for the Award to be enforced as a judgment. On 1 March 2018, KFG applied under section 103(2)(a) and (b) of the Arbitration Act 1996 for an order that recognition and enforcement of the Award as a judgment be refused and an order setting aside the order of Popplewell J. It also sought case management directions including in respect of the trial of preliminary issues.

6. At a case management conference on 15 June 2018, Teare J made an order for the trial of certain preliminary issues. He also ordered that the appellant's applications for an adjournment of the enforcement proceedings in England pending the determination of the French proceedings and for security for the Award be dealt with by the Court at the same hearing as the preliminary issues.

7. These applications all came before Sir Michael Burton for hearing on 12 to 14 March 2019. On the third day of the hearing, with the agreement of the parties, the judge reformulated the preliminary issues, as ordered by Teare J, as follows:

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

(2) What is that law?

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

(4) What is the law governing the capacity of the Defendant to join the arbitration agreement?

The terms of the FDA

8. Before considering the judgment of Sir Michael Burton, it is necessary to set out the terms of the FDA which were relevant to his decision and which are relevant to the present appeal:

> "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 2: Good Faith and Fair Dealing
>
> 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.

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 14: Settlement of Disputes

…

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

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

14.4 Nothing contained herein shall in any way deprive LICENSOR of its rights to seek and obtain a temporary restraining order, preliminary/permanent injunction or other equitable relief from a court of competent jurisdiction under any applicable law. All remedies provided in this Agreement are cumulative and not exclusive of any remedies provided by law.

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.

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 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 25: Survival of Terms and Conditions of Agreement
>
> The rights and obligations contained in the following provisions of this Agreement shall survive the expiration or termination of this Agreement: articles 10, 11.2, 13, 15, 16, 18, 20, 23, 25, 26, 27, 28.2, 29, 30 and 33.
>
> 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."

The judgment below

9. The judge noted at [8] of the judgment, by reference to the decision of the Supreme Court in *Dallah Real Estate v Ministry of Religious Affairs* [2010] UKSC 46; [2011] 1 AC 763, that an application such as was being made by KFG under section 103(2) was dealt with as a complete rehearing before the Court.

10. In relation to the first preliminary issue, the judge noted at [10] of the judgment that there was no issue between the parties that the law governing the validity of the arbitration agreement governs the question of whether KFG became a party to the arbitration agreement. As to the second preliminary issue of what that law is, the judge said at [11] that this was simply a matter of applying section 103(2)(b) of the Arbitration Act 1996 which provides:

> "(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
>
> …
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made…"

11. The judge then determined that the wording "the law to which the parties subjected [the arbitration agreement]" and "any indication thereon" allowed not simply for an express but an implied choice of law, which is clearly correct. This was no longer disputed by the appellant before this Court, so that it is not necessary to consider the point further.

12. The judge then considered what he described as "the competing views" as to the application of an implied choice of law between the law of the 'host' agreement and the law of the seat of the arbitration. He cited what Lord Mustill said in *Channel Tunnel Group Ltd v Balfour Beatty Ltd* [1993] AC 334 at 357-8, that it would be exceptional for the proper law of the arbitration agreement to be different from an express choice of law for the host contract. The judge also quoted [26] of the judgment of Moore-Bick LJ in *Sulamerica v Enesa Engelharia* [2012] EWCA Civ 638; [2013] 1 WLR 102, to the effect that where the arbitration agreement forms part of the substantive contract an express choice of law to govern that substantive contract is "an important factor to be taken into account" and "likely…to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion".

13. At [15], the judge then quoted [22] of the judgment of Longmore LJ in *C v D* [2007] EWCA Civ 1282; [2008] All ER (Comm) 1001 which said:

> "The question then arises whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of the arbitration. It seems to me that …the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract."

14. The judge said at [16] that, however, Steven Chong J in the High Court of Singapore in *BCY v BCZ* [2016] 2 Lloyd's Rep 583 at [65] had said that, adopting *Sulamerica*: "the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point."

15. The judge also cited what Andrew Smith J said in *Arsanovia v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep 235 at [21]: "The governing law clause is, at the least, a strong pointer to their intention about the law

governing the arbitration agreement, and there is no contrary indication other than choice of a London seat for arbitration."

16. At [17] the judge concluded that there had been an express choice of English law as governing the arbitration agreement in Article 14, in these terms:

> "17. However, whereas there would therefore be a powerful case for English law as being the implied choice in any event, by virtue of its governing the host agreement, I am satisfied that there is no need to resort to such implied agreement in this case, as there is an express choice. Article 15 provides for the laws of England as the governing law of the FDA. Article 14, the Settlement of Disputes clause, expressly states by clause 14.3, that *"the arbitrators shall apply the provisions contained in the agreement"*, which is the FDA, and Article 1 provides that *"This Agreement ...shall be considered as a whole."* Article 14 (3) then continues (with my underlining) *"the arbitrators shall* <u>also</u> *apply principles of law generally recognised in international transactions. The arbitrators may have to take into consideration some mandatory provisions of some countries."* It is clear to me that, on the clear construction of Article 14.3, the provisions which the Arbitrators were thus required to apply included the provisions <u>as to law</u> in Article 15, because by Article 14 (3) they must *also* apply certain other principles of law."

17. The judge went on to conclude at [20] that irrespective of the approach of the arbitrators, who concluded that French law was the governing law of the arbitration agreement, English law governs the validity of the arbitration clause and the issue of whether KFG ever became a party to it.

18. He then dealt with the third preliminary issue, whether as a matter of English law, KFG became a party to the FDA and, if different, the arbitration agreement. He referred to the various ways in which Mr Nicolas Tse for the appellant had put his case as to novation before the arbitrators and before the judge. It is not necessary to examine the detail of this on the appeal since before this Court Mr Tse essentially put his case on the basis that KFG had become an additional party to the FDA by conduct with the express or implied consent of the existing parties which is what the judge considered at [27] onwards of his judgment.

19. The judge referred to the provisions of the FDA particularly relied upon by Mr Tse, including the Good Faith and Fair Dealing provision in Article 2, which the judge said at [29] may have a role to play. He also noted that the majority of the arbitrators had referred to the UNIDROIT Principles of International Commercial Contracts 2016 but concluded that: "because any reference to such principles is expressly governed by the terms of Article 14.3, whereby *"under no circumstances shall the Arbitrators apply any rules that contradict the strict wording of the agreement* ", they cannot add anything to Article 2."

20. The judge then referred to the various other provisions, Articles 3, 17, 19, 24 and 26 which, as he said at [30]: "are plainly in the context of imposing a strict interpretation

of, and strict limits to, the obligations of both licensor and licensee (as per the strict wording referred to in Article 14.3)." He then noted at [31] that since the decision of the arbitrators, English law had been clarified in relation to so-called No Oral Modification clauses by the decision of the majority of the Supreme Court in *MWB Business Exchange Centres Limited v Rock Advertising Limited* [2018] UKSC 24; [2019] AC 119. The judge quoted [16] of the judgment of Lord Sumption JSC:

> "16. The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Limited v International Glass Engineering INGLEN SpA* [2003] 2 AC 54, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."

21. The judge went on to consider at [34] and following the facts upon which the appellant relied, as found by the majority of the arbitrators, to constitute joinder/novation by addition. He then referred again at [50] to *Rock Advertising*, which he said "makes it at English law even more difficult to surmount and evade the strict provisions of such a contract as the FDA at English law".

22. At [51] he concluded that: "*'Behaving in such a manner that Claimant considered that* [K] *had become the Licensee'* (paragraph 205 of the Award), would in any event be unlikely to be sufficient, within *MWB* at least, without *'some words or conduct unequivocally representing that the* [transfer of rights and obligations to it] *was valid, notwithstanding its informality'*". At [52] he dealt with the impact of Article 2 of the FDA in these terms:

> "52. The question is whether Article 2 makes any difference by providing that (i) the provisions of the FDA shall be *interpreted*

> *in good faith* (ii) Z [AHFC] must *act in accordance with good faith and fair dealings* (K [KFG] will only have to do that once a party to the Agreement). Mr Tse pointed, by way of exemplifying a good faith obligation, to the recent decision in *Al Nehayan v Kent* [2018] EWHC 233 (Comm). However, in that case Leggatt LJ was considering whether he could identify *"two forms of furtive or opportunistic conduct, which seem to be incompatible with good faith in the circumstances of the case."* Nothing like that was suggested to occur in this case."

23. The judge continued at [53]:

> "53. Against this background, in that (1) conduct of itself is plainly not enough, (2) there was some room for argument about the requirement for consent in writing being " *interpreted in good faith* ", I invited Mr Tse to refer to any documents which he asserted could support a case that there had been anything approximating to consent in writing by the Claimant and/or by Z. He identified four documents, of which only two survived the most cursory examination, to which he added, after such investigation as could be carried out by reference to documents which were before the Arbitrators but not in the bundles before the court, a further two. The four were:
>
> (i) a letter dated 22 May 2006, sent by Mr Zeine, the Chief Executive Officer of Z and of K, on K note paper to the Claimant:
>
> (ii) an email dated June 3 2006, sent by the Claimant to Mr Zeine at Z, enclosing a copy of minutes of a meeting on the Claimant's headed note paper dated May 29, 2006:
>
> (iii) a letter dated June 6, 2006 from Mr Zeine, on K headed note paper to the Claimant.
>
> (iv) an email dated 7 November 2006, from the Claimant to Mr Zeine, attaching a draft unsigned MOU between the Claimant and K for his comments.
>
> It is necessary to add that the May/June 2006 exchanges (i) to (iii) were followed by an FOA dated 4 July 2006, expressly between the Claimant and Z as Operator: and the November 2006 email and draft was followed by a chain of emails between the Claimant and K, referring to the fact that *"until further notification we are still operating under Z in regard to imports."*"

24. In relation to the third preliminary issue he concluded at [54]:

> "54. It is these documents, and any others which Mr Tse says the Claimant may be able to locate from amongst the

> documents before the Arbitrators, as interpreted by Article 2, upon which the remnant of his case must depend. Only if he can make such a case will he be able to resist the otherwise clear answer to Preliminary Issue 3, namely that at English law K did not become a party to the FDA or, consequently, to the arbitration agreement."

25. The judge then dealt with the fourth preliminary issue with which we are not concerned on this appeal, before turning at [60] to the issue of whether he should adjourn the application at the behest of the appellant. He noted that applications for an adjournment under section 103(5) of the Arbitration Act 1996 are normally made by the judgment debtor anxious to avoid enforcement and referred to the well-established set of authorities beginning with the decision of the Court of Appeal in *Soleh Boneh International v Uganda* [1993] 2 Lloyd's Rep 208. At [62] he said that in that case Staughton LJ identified two important factors to be considered on such an application, the first of which was the merits. He had concluded here that the award creditor's merits, the prospects of the appellant ever enforcing the award in this jurisdiction, were very slim. The second factor was ease of enforcement and whether delay would render it more difficult which did not apply here where it was the award creditor seeking an adjournment.

26. At [64] he noted that the adjournment was sought because the appellant wished to leave adjudication to the law of the seat. Mr Tse had mentioned the risk of inconsistent judgments. The judge continued

> "It is common ground that there is no risk of issue estoppel here because the French court is not bound by this judgment, but I would hope that the firm opinion that I have expressed and am expressing as to the effect and impact of English law will not go unnoticed in the French courts, given that on any basis English law is central to the decision. I am very nearly persuaded by the Defendant to pursue the issue which I have taken to the brink in paragraph 54 above, in order to be in a position to set aside the enforcement and to give a firm answer to Preliminary Issue 3 by reference to English law, which at this moment I have left slightly unanswered."

27. At [65] he set out his reasons for not making a final determination, which so far as relevant to this appeal were:

> "(1) What Teare J ordered was the hearing of Preliminary Issues, though in the event not the ones I have heard, but nevertheless Preliminary Issues, and not the final resolution of this application.
>
> (2) That would of itself not prevent my proceeding to make an order if I was satisfied it was just to do so on it appearing that there is no prospect of success for the Claimant's application, but Mr Tse has submitted that his submitted list of documents relied upon was only completed during the course of the hearing, and there may be more.

> (4) It is just possible that the examination of the four (or any more) documents, and any evidence given, by way of rehearing, might establish that there was something approximating to a consent in writing by the parties in accordance with the conclusions I have reached, unlikely though that may seem."

28. Accordingly, in relation to this Preliminary Issue 3 the judge gave his answer in these terms at [66]:

> "(3) At English law, has the Defendant become a party (i) to the FDA (ii) if different, the arbitration agreement? No to either agreement, subject only to the unlikely possibility that a further consideration by reference to English law, in accordance with my judgment above, might give a different answer. If the Award is not set aside in Paris, and the Claimant wishes to pursue enforcement in the English courts, the matter can be restored for determination of the issues I have left outstanding."

29. At the very end of the judgment, at [68] the judge said:

> "…but for my having given a 'last chance' to the Claimant for the reasons I have given, I would have concluded that, as against K at English law, the Claimant has and ought to have no prospect of success in enforcing this Award."

30. The answer to preliminary issue 3 in [66(3)] of the judgment was then reflected in the judge's order, paragraph 1(3) of which provided:

> "At English law (subject to paragraphs 53, 54 and 66(3) of the judgment…) the Defendant did not become a party to the FDA or the arbitration agreement of the FDA, the two questions raising the same issue".

Paragraph 3 of the order then adjourned the appellant's enforcement application and stayed the judgment with liberty to restore the matter for determination of any outstanding issues following the decision of the Cour d'appel de Paris.

31. During the course of argument, all three members of the Court indicated to both counsel that we had great difficulty in understanding the judge's rationale in deciding not to make a final determination and to adjourn the matter until after the decision of the Cour d'appel de Paris. Given his findings on the evidence and his conclusion that, as a matter of English law, the No Oral Modification clauses in the FDA would mean that KFG was not a party to the FDA or the arbitration agreement unless the appellant could satisfy the conditions for estoppel or preclusion set out by Lord Sumption JSC at [16] of *Rock Advertising* (which on his findings the appellant could not), it is difficult to see what further evidence the judge was envisaging could emerge after the decision of the French Court. It may be, as Sir Bernard Rix suggested, that he had in mind the possibility that some further evidence would be adduced before the French Court which had not been before the arbitrators or the judge. However, it remains unclear what relevance the judge thought his own decision on English law would have

for the French Court given that the French Court will apply French law without regard to any principles of conflicts of laws: see *Poudret and Besson: Comparative Law of International Arbitration* 2nd edition [300] and [301]. I will return to the question whether the judge should have granted the adjournment in the context of the cross-appeal later in this judgment.

The grounds of appeal and cross-appeal

32. The appellant was given permission to appeal by Males LJ on only one ground of appeal which was Ground 2:

> "The Judge erred in the following respects:
>
> (a) The Judge failed to apply French law to the question of whether KFG was bound by the relevant arbitration agreements, and failed to find that KFG had become a party to the arbitration agreements as a result of its conduct and performance of the host contracts;
>
> (b) The Judge, erroneously applying English law to find that the Respondent had not become a party to the arbitration agreements, or to the host contracts, because he ruled that the contracts required an agreement in writing to add the Respondent. On a proper and true construction of the relevant arbitration agreements and the host contracts, there was no such requirement under the relevant contracts."

33. Males LJ also gave KFG permission to pursue the arguments in Section 6 of the Respondent's Notice which were, in summary:

(1) The judge had erred in law at [53] of the judgment in saying that there was "some room for argument" that the effect of the good faith interpretation clause in Article 2 whilst it could not dispense with the requirement for written consent under the No Oral Modification clauses, might mean that that requirement had to be interpreted in good faith, without identifying what that meant in practice. The No Oral Modification clauses were clear and unambiguous and incapable of being altered by Article 2 as a matter of interpretation. In any event, as the judge found, the appellant could point to no written consent of any description.

(2) The judge had erred in law in failing to apply the test for summary judgment to the application to enforce. Where, as here, the award debtor establishes a New York Convention defence under Article V (as enacted in section 103(2) of the Arbitration Act 1996) and/or the appellant has no realistic prospect of resisting the defence, recognition and enforcement should be refused without the need for any further or fuller rehearing.

(3) Had the judge applied the summary judgment test correctly, he would have made a final determination that KFG was not a party to the FDA or the arbitration agreement and refused recognition and enforcement without leaving open the possibility of further evidence and argument at a later stage.

Summary of the parties' submissions

34. On behalf of the appellant, Mr Tse submitted first that, on the true construction of the FDA and the arbitration agreement, there was no express choice of English law as the governing law of the arbitration agreement. The FDA itself was governed by English law supplemented by the obligation of good faith and fair dealing in Article 2 and by "principles of law generally recognised in international transactions" (Article 14.3) which included the UNIDROIT principles. In the remainder of this judgment I will refer to English law as so supplemented as "English law plus". Mr Tse submitted that this supplementation meant that the arbitration agreement could not be governed by pure English law. It was not possible for it to be governed by English law plus as the common law required the law applicable to an arbitration to be the law of a country, not some hybrid: see *Russell on Arbitration* 24th edition [2-119].

35. Further, the fact that the arbitration agreement in Article 14 referred to this supplementation was a contra-indication to English law being the express governing law. Mr Tse submitted that the judge had been wrong to conclude that there was anything in the wording of Article 14 (and specifically 14.3) which supported the case for an express choice of English law as governing the arbitration agreement. The Article was concerned with how the arbitrators should determine substantive disputes, so that the first sentence of 14.3 was saying no more than that the arbitrators should apply the provisions contained in the Agreement to substantive disputes. Contrary to the judge's conclusion at [17] of the judgment, the word "also" in the second sentence did not mean in addition to English law but in addition to the first sentence. He submitted that the third sentence was also important since the mandatory provisions to which the arbitrators might have to give consideration could include mandatory provisions of French law as the law of the seat of the arbitration, for example as to the circumstances in which there could be a challenge to an award. Mr Tse placed particular emphasis on the fact that the words "English law shall apply to this arbitration agreement" were absent from Article 14 which did not mention England or English at all. This was in contrast to the position in *Arsanovia* where the express reference to the Indian Arbitration and Conciliation Act 1996 in the arbitration clause pointed to an express choice of Indian law.

36. Mr Tse also relied upon the fact that, under Article 25, the arbitration agreement in Article 14 was one of the Articles which would not survive termination of the Agreement. I should say at once that I do not see how this has any bearing on what is the governing law of that arbitration agreement. In any event Article 25 is very odd since it refers to Articles 28.2, 29, 30 and 33 when there are only 27 Articles in the FDA, suggesting it has come from another agreement, further support for which is that one would normally expect an arbitration clause to be one of the clauses which survived termination, given that there might be outstanding disputes. After all, this is the rationale for the concept of separability, given statutory effect by section 7 of the Arbitration Act 1996 (as to which see further below). If in fact the numbering is awry and it was intended that the arbitration agreement survives, there would be nothing at all in this point.

37. Where there is no express choice of the law governing the arbitration agreement, in the case of domestic agreements providing for London as the seat of the arbitration, the Court will next enquire whether there is an implied choice and if it finds there is none, it will determine with which system of law the arbitration agreement has its

closest and most real connection. Those enquiries are not completely separate since the question of closest and most real connection may be relevant to the determination of an implied choice: see per Moore-Bick LJ in *Sulamerica* at [25].

38. Mr Tse submitted that the express choice of a governing law in the host contract was no more than a starting assumption that the parties intended the whole of their relationship (including the arbitration agreement) to be governed by that system of law: see per Moore-Bick LJ in *Sulamerica* at [11] and per Longmore LJ in *C v D* at [23], who said it was not "automatic" that the answer to the enquiry was that the arbitration agreement was governed by the same system of law as the main agreement. He submitted that, where there were indications to the contrary, the arbitration agreement would not be governed by the same system of law as the main agreement.

39. One such indication to the contrary was where, as here, the seat of the arbitration was in a different country from the country whose law governed the main agreement. The courts of the country of the seat of the arbitration would be the supervisory courts for the arbitration and proceedings on an award were only those permitted by the law of the seat: see per Longmore LJ in *C v D* at [16]-[17]. Mr Tse relied upon what Longmore LJ said at [23] about the earlier judgment of Mustill J in *Black-Clawson v Papierwerke* [1981] 2 Lloyds Rep 446 at 483: "Mustill J was, however, saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place (or seat) of the arbitration." The fact that the seat of the arbitration was in a different country from the country whose law governed the main agreement was an "important factor" pointing away from the law governing the main agreement being an implied choice of law governing the arbitration agreement: see per Moore-Bick LJ in *Sulamerica* at [29].

40. In cases of enforcement of foreign arbitration awards, the test under Article V(1)(a) of the New York Convention (as enacted in section 103(2)(b) of the Arbitration Act) differed from the test applicable to domestic awards in only one respect: where there is no express or implied choice of governing law the arbitration agreement will be governed by the law of the place where the award is made rather than the law of the country with which the arbitration agreement has the closest and most real connection. However, in practical terms this would amount to the same thing. If, as is almost always the case, the award is made in the place of the seat of the arbitration, the law of the seat is the system of law with which the arbitration agreement has the closest and most real connection.

41. Mr Tse submitted that what Steven Chong J said in *BCY v BCZ* at [55] to the effect that, although in *Sulamerica* the choice of seat was accepted as one of the factors pointing away from the main agreement's choice of law, it would be insufficient on its own to negate the presumption that the parties intended the governing law of the main agreement to govern the arbitration agreement, was wrong. That was not what *Sulamerica* decided at [29]-[32]. He submitted that any implied choice of English law as the governing law of the arbitration agreement was thus negatived by the fact that the seat of the arbitration was Paris and the judge should have concluded either that the implied choice of law governing the arbitration agreement was French law or, in default of any such choice, French law applied as the law of the place where the Award was made.

42. Even if the judge was right that the governing law of the arbitration agreement was English law, he had erred in concluding that consent in writing was required for KFG to become an additional licensor under the FDA. English law plus included the express provision as to good faith and fair dealing in Article 2 and the UNIDROIT principles which were mandated by the third sentence of Article 14.3. Mr Tse relied in particular on the following UNIDROIT principles:

> "Article 1.7 (Good faith and fair dealing)
>
> (1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.
>
> Article 1.8 (Inconsistent behaviour)
>
> 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.
>
> Article 2.1.1 (Manner of formation)
>
> A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.
>
> Article 2.1.18 (Modification in a particular form)
>
> 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."

43. He submitted that all these provisions taken together meant that under English law plus, the extensive conduct of KFG and unequivocal performance by KFG of the FDA were sufficient to override the formality of the No Oral Modification clauses and make KFG an additional party to the FDA. He relied in particular upon (i) unequivocal conduct by KFG in performing the contract such as paying invoices for royalty payments (which were apparently addressed to KFG) for some 30 months; (ii) the exercise of and claim to contractual rights under the FDA by KFG, in relation to which he relied upon the materials referred to by the judge in [53] of the judgment and the evidence of what was said by the parties at meetings in May 2006; (iii) evidence of silence amounting to acquiescence on the part of KFG. He asserted that there had been a great deal of evidence before the arbitrators which had led to the majority of the tribunal determining this issue in favour of the appellant at [198] to [206] of the Award. Not all the evidence had been before the judge, since this had been a trial of preliminary issues which Teare J at least had envisaged would deal with issues of law without a full rehearing of the evidence.

44. Mr Tse also submitted that what the evidence showed was inconsistent behaviour by KFG contrary to Article 2 of the FDA and Articles 1.7 and 1.8 of the UNIDROIT principles. In the light of that inconsistent behaviour, the judge had been wrong to conclude that consent in writing was required before KFG could become an additional party to the FDA. In any event, this Court should not allow the cross-appeal and make a final determination but should permit the appellant to adduce whatever evidence it had before the Commercial Court at a further hearing.

45. The primary submission of Mr Ricky Diwan QC in relation to governing law was a simple and straightforward one, that the combination of Articles 1 and 15 of the FDA was, as a matter of construction, an express choice of English law as the governing law of the entire FDA including the arbitration agreement. Article 1 made clear that "This Agreement" consisted of all the terms of agreement then set out (which must include Article 14) and each of the documents (including therefore the document containing those terms of agreement) was an integral part of "This Agreement". Article 15 then made clear that "This Agreement" (again capitalised) was governed by English law which must mean all of "This Agreement" including the arbitration agreement.

46. These two Articles on their own established an express choice of English law as governing the arbitration agreement, but if there was any doubt it was removed by the first sentence of Article 14.3: "The arbitrator(s) shall apply the provisions contained in the Agreement." The "Agreement" (again capitalised) must include Article 14 itself and Article 15, the governing law clause. Mr Diwan QC did not place the emphasis which the judge had on "also" in the second sentence as meaning in addition to Article 15. "Also" could equally mean in addition to the first sentence of Article 14.3, but the result was the same as that arrived at by the judge. The first sentence confirmed that, for all purposes, the Agreement included Articles 14 and 15 so that the governing law clause also governed the arbitration agreement.

47. Mr Diwan QC submitted that this approach to construction was supported by the decision of Andrew Smith J in *Arsanovia*, who noted at [22] that counsel had felt constrained [by the decisions of the Court of Appeal in *C v D* and *Sulamerica*] to argue at first instance that the choice of law was implied rather than express, although he reserved the right to argue for express choice on any appeal. The judge continued:

> "It seems to me that Mr Hirst might have been too diffident: that a case for an express choice might have been available even before me. When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that these foreign companies are to be taken to have known about

> the developments in 2008 when they concluded the SHA). The governing law provisions in the agreements in the two Court of Appeal authorities referred to "the policy" and "this Policy" being governed by the internal laws of New York and Brazilian law respectively, and the word "policy" might naturally be taken to connote to obligations and rights more directly relating to the insurance than the arbitration agreement."

48. In relation to separability of an arbitration agreement from the main agreement for which section 7 of the Arbitration Act 1996 now provides by statute, Mr Diwan QC submitted that this did not assist Mr Tse. Section 7 provides as follows:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

49. Mr Diwan QC submitted that this confirms that the concept of separability is designed to protect an arbitration agreement where the main agreement is invalid etc. so as to ensure that any dispute as to such invalidity is determined by arbitration. It does not follow that the arbitration agreement is a separate agreement from the main other agreement for other purposes such as construction. This is precisely the point Moore-Bick LJ was making in *Sulamerica* at [26] when he said:

> "The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes."

50. If, contrary to Mr Diwan QC's primary case, there was no express choice of governing law of the arbitration agreement, he submitted that there was an implied choice of English law by virtue of the FDA being expressly governed by English law. He relied upon the analysis of Moore-Bick LJ in *Sulamerica* at [26] in the passage immediately after that just quoted:

> "In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion."

51. At [29] Moore-Bick LJ said: "Although there are powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement, two important factors point the other way." These were (i) that the seat of the arbitration was London and (ii) that as a matter of Brazilian law, whether or not to arbitrate was at the option of the assured. However, Mr Diwan QC submitted, when Moore-Bick LJ returned at [31] to the question of whether there was an implied choice of Brazilian law, it was only that second factor which led him to conclude: "I do not think that in this case the parties' express choice of Brazilian law to govern the substantive contract is sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement, because (if the insured are correct) there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement." He went on to consider the separate question: in the absence of any express or implied choice of law, with which system of law does the arbitration agreement have its closest and most real connection? It was only in that context that he considered the first factor, determining at [32] that in consequence of the seat of the arbitration being London, the arbitration agreement had its closest and most real connection with English law.

52. Mr Diwan QC relied upon this analysis in support of his submission that the fact that the seat of the arbitration is in a different country to that whose law expressly governs the main agreement will not, without more, displace the strong indication that there is an implied choice of English law to govern the arbitration agreement by virtue of the FDA being expressly governed by English law. Mr Diwan QC submitted that this conclusion was supported by the judgment of Andrew Smith J in *Arsanovia* at [19]. It was also supported by the summary of the principles to be derived from the authorities, culminating in *Sulamerica* and *Arsanovia*, at [101] of the judgment of Hamblen J (as he then was) in *Habas Sinai v VSC Steel Company Limited* [2013] EWHC 4071 (Comm):

> "(4) Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties' intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary.
>
> (5) The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract."

53. During the course of argument, there was some discussion between Mr Diwan QC and the Court as to the basis for the implication of a term into the arbitration agreement that it should be governed by English law, like the FDA. Mr Diwan QC submitted that the test of implication set out in *Sulamerica* and the later first instance decisions he relied upon, did not depend upon showing that the term to be implied was necessary for business efficacy. It seems to me that the problem with that submission is that it is quite clear from the decision of the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities* [2015] UKSC 72; [2016] AC 742, where the law on the implication of terms was authoritatively restated by Lord Neuberger PSC at [14] to [32], that (save of course where terms are implied as a matter of law) a term will only be implied into a contract if it is necessary for business efficacy.

54. Later in his submissions, Mr Diwan QC sought to argue for implication as a matter of law by analogy with *Ali Shipping v Trogir* [1999] 1 WLR 136 where the Court of Appeal held that an implied term as to confidentiality in an arbitration agreement was not to be implied to give business efficacy but as a matter of law because of the nature of the relationship. That argument can be dismissed immediately. Whilst it may be that, as a matter of law, an arbitration agreement has to have a governing law, the question of what that law is, is one of interpretation of the agreement, and terms will not be implied into the agreement as a matter of law.

55. In relation to the second part of the appeal which proceeded on the basis that the governing law of the arbitration agreement is English law, Mr Diwan QC submitted that the FDA contained what he described as a "double lock": the requirement for (i) a written document executed by duly authorised representatives of both parties to the FDA for any amendment to it to be effective (Article 26) and a written document signed by both parties for any consent to be effective (Article 24); and (ii) that any waiver of the first set of locks requires the written signed consent of both parties (Article 17). He submitted that, on any view the addition of KFG to the FDA for which the appellant contends is a "change" within Article 24 and an "amendment" within Article 26.

56. He relied upon the analysis of Lord Sumption JSC in *Rock Advertising* at [12] as to the sound commercial reasons for No Oral Modification clauses:

> "There are at least three reasons for including 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. These are all legitimate commercial reasons for agreeing a clause like clause 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law."

He submitted that by the double lock provisions to which they had agreed, the parties to the FDA had obviously been trying to achieve a high level of business certainty.

57. Mr Diwan QC submitted that, contrary to Mr Tse's submissions, the UNIDROIT principles (and specifically Articles 1.7 and Article 2.1.18) could not be relied upon to establish some amendment or change to the FDA by reason of the conduct of KFG since this would contradict the double lock in the No Oral Modification clauses in the FDA. Application of any such broad principle would contradict the strict terms of the No Oral Modification clauses in the FDA which was not permitted by the last sentence of Article 14.3. The judge had clearly been right to conclude that conduct alone could not be sufficient to effect a change or variation such as the addition of a

party to the FDA. Something more was required. He submitted that what would be required to override the No Oral Modification clause was an estoppel as identified by Lord Sumption JSC at [16] of *Rock Advertising*: "(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". Absent such words or conduct amounting to an unequivocal representation, a variation would only be effective if it complied with Articles 24 and 26.

58. Mr Diwan QC submitted that the appellant's entire case before the arbitrators had been conduct based. There were no documents other than conduct based documents, none of which would satisfy the requirements of the No Oral Modification clauses or of the estoppel required to override those clauses, as the judge correctly found. He described as a "phantom submission" the submission on behalf of the appellant that there were or might be any more documents not referred to by the judge which would have a bearing on the legal requirements of the FDA or satisfy Lord Sumption's test for estoppel. Whilst there had been invoices from the appellant in relation to the royalty payments paid by KFG which were not before the Court, the royalty payments had been reimbursed by AHFC. As I pointed out in the course of argument, this would make the invoices equivocal, in the sense that KFG could have been paying them as agent for its subsidiary AHFC, which was the point the judge made at the beginning of [47] of his judgment. Mr Diwan QC submitted that if his submissions as to the construction of the double lock and the limited override of No Oral Modification clauses permitted by *Rock Advertising* were correct, there was no basis for reopening the judge's factual assessment of the documents before him.

59. Mr Diwan QC submitted that, having reached the conclusions that he did at [47] to [53] of the judgment, to the effect that the materials relied upon by the appellant did not satisfy the requirements of the No Oral Modification clauses or give rise to an estoppel, the judge should have made a final determination refusing recognition and enforcement and not given the appellant a last chance. He accepted that, under section 103(5) of the Arbitration Act 1996, the Court has the discretion to adjourn its decision on the recognition or enforcement of an award "if it considers it proper". Guidance as to when it would be appropriate to exercise that discretion is provided by the judgment of Mance LJ in *Dardana Limited v Yukos Oil Company* [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819. That was another case where, unusually, it was the applicant for enforcement which was seeking the adjournment. At [23], Mance LJ gave examples of the circumstances where a court might adjourn an application of its own motion:

> "…a court might conclude of its own motion that the determination of an application under s. 103(2) would be an inappropriate use of court time and/or contrary to comity or likely to give rise to conflict of laws problems, when there were concurrent proceedings which would be likely to resolve the issue in the country in which or under the law of which the award was made (cf. *Soleh Boneh v Republic of Uganda* [1993] 2 Lloyds Rep 208)."

As appears from [24] the adjournment was granted by the judge at first instance because issues of Swedish law arose which were best determined by the Swedish courts. That exercise of discretion was upheld by the Court of Appeal.

60. In the present case, Mr Diwan QC submitted, there was no question of the inappropriate use of Court time, as Sir Michael Burton had heard the application over three days. No problems of comity or conflict of laws arose because, on the basis that both the FDA and the arbitration agreement were governed by English law, the English Court must be more appropriate than the French Court to determine issues of English law. Given that the French Court would apply French law of the will of the parties rather than a conflicts of laws analysis, issues of comity would not be resolved by an adjournment. What the French court decided was irrelevant to what the judge had to decide, so that he should not have granted an adjournment.

61. Mr Diwan QC submitted that, before the Court should have granted the appellant a "last chance" to put forward further evidence in support of its application, the judge should have asked himself whether the appellant satisfied what is in effect the summary judgment test, whether the appellant had a real prospect of successfully establishing a case for enforcement of the Award under section 103(2), if there were a further hearing after the decision of the Cour d'appel de Paris. As authority for that approach, he relied upon the judgment of Ramsey J in *Honeywell International v Meydan Group* [2014] EWHC 1344 (TCC); [2014] 2 Lloyd's Rep 133 at [68] and [69(vi)]. He submitted that the judge should have concluded, applying the test laid down by Lord Sumption JSC in *Rock Advertising*, that the appellant could not satisfy the minimum summary judgment threshold and, therefore, should not have granted an adjournment, but made a final determination.

Analysis and conclusions

62. In my judgment, Mr Diwan QC is correct that Articles 1 and 15 of the FDA in themselves provide for the express choice of English law to govern the arbitration agreement in Article 14. Article 1 makes it clear that "This Agreement" (capitalised) includes all the terms of agreement then set out, which include Article 14. Because Article 15 provides that: "This Agreement [again capitalised] shall be governed by and construed in accordance with the laws of England" it is making clear that all the terms of the Agreement, including Article 14, are governed by English law. The answer to the suggestion that, if this analysis were correct, there would be an express choice of governing law of the arbitration clause in every contract which contains a governing law clause is essentially that given by Andrew Smith J in *Arsanovia* at [22]. Governing law clauses do not necessarily cover the arbitration agreement. This one does because of the correct construction of the terms of Articles 1 and 15 taken together.

63. Contrary to Mr Tse's submissions, the terms of Article 14 itself do not militate against the conclusion that the governing law provision in Article 15 also encompasses the arbitration agreement in Article 14. On the contrary, as Mr Diwan QC submitted, the first sentence of Article 14.3 supports the conclusion that, on the true construction of the FDA as a whole, there is an express choice of English law to govern the arbitration agreement. That sentence provides: "The arbitrator(s) shall apply the provisions contained in the Agreement." In my judgment, that means that the arbitrators must apply all the provisions, including the governing law clause in Article

15, not just to substantive disputes (as Mr Tse suggested) but to any dispute as to their own jurisdiction, so that English law governs the resolution of any dispute as to their jurisdiction and is thus the governing law of the arbitration agreement.

64. I agree with Mr Diwan QC that "also" in the second sentence of Article 14.3 probably means in addition to the first sentence rather than, as the judge thought, in addition to Article 15, but this construction still points to an express choice of English law as the governing law of the arbitration agreement. The arbitrators are directed to "apply principles of law generally recognised in international transactions", in other words for present purposes UNIDROIT principles, in addition to applying all the provisions of the Agreement including the governing law clause, which will also determine the governing law of the arbitration agreement, for the reasons I have given.

65. So far as the "English law plus" provisions are concerned, they do not assist Mr Tse's argument on this part of the appeal, in the sense that they do not point to some different system of law (specifically French law) as governing the arbitration agreement than English law plus. The first sentence of Article 2 is concerned with how the parties carry out their obligations under the FDA and has nothing to say about what law governs their arbitration agreement. The second sentence provides that the provisions of the Agreement are to be interpreted in good faith but that also tells one nothing about the governing law of the arbitration agreement. In any event, the fact that the provisions are to be interpreted in good faith cannot justify an interpretation which goes beyond what has been agreed or which seeks to rewrite the Agreement: see per Lord Bingham of Cornhill at [19] of *R v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1, albeit in the context of the interpretation of international treaties in good faith. Likewise, the UNIDROIT principles, upon which Mr Tse placed so much reliance, are silent as to which system of law governs any agreement, let alone the arbitration clause in an agreement.

66. The concept of the separability of an arbitration agreement now enshrined in section 7 of the Arbitration Act 1996 does not assist Mr Tse in this context. The rationale of separability is that it ensures that the dispute resolution procedure chosen by the parties survives the main agreement becoming unenforceable for example because of fraud or misrepresentation. As Moore-Bick LJ said in *Sulamerica* at [26]: "Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes." In other words it does not preclude the arbitration agreement being construed with the remainder of the main agreement as a whole, *a fortiori* where the clear intention is that the main agreement should be construed as a whole and where, as here, there is nothing in the wording of the arbitration agreement which suggests that it is intended to be construed in isolation from the remainder of the main agreement; quite the contrary, as the first sentence of Article 14.3 demonstrates for the reasons I have given.

67. Likewise, there is nothing in Mr Tse's point that Article 14 does not contain the express words: "This arbitration agreement shall be governed by English law". As Andrew Smith J said in *Arsanovia* at [22]: "Express terms do not stipulate only what is absolutely and unambiguously explicit". If, as I have held, the express words the parties have used in Articles 1 and 15 and the first sentence of Article 14.3, demonstrate a clear intention that the entire FDA including the arbitration agreement, is to be governed by English law, it matters not that this is not spelt out expressly in Article 14 itself.

68. That express choice of English law as governing the entire FDA including the arbitration agreement is not affected by the fact that Article 14.5 provides that the seat of the arbitration is to be Paris. Whatever impact that provision might have on an implied choice of the governing law of the arbitration agreement, it cannot overcome the clear effect of the express terms of the FDA that Article 15 covers not only the FDA but the arbitration agreement.

69. Likewise, I do not consider that the appellant gains any assistance from the third sentence of Article 14.3: "The arbitrator(s) may have to take into consideration some mandatory provisions of some countries *i.e.* provisions that appear later on to have an influence on the Agreement." Contrary to Mr Tse's submission set out at [35] above, it does not seem to me that the sentence is focusing on mandatory provisions of French law as the seat of the arbitration. The words "may" and "appear later on" suggest that what is in contemplation is something which may happen after the FDA is made, for example, it suddenly becoming illegal under the law of Kuwait to sell these particular food products. Even if that third sentence has the meaning for which Mr Tse contends, the mandatory application of French law as the supervisory law of the arbitration because its seat is Paris cannot overcome the clear express choice of English law as the governing law of the arbitration agreement.

70. Accordingly, in my judgment, the judge was correct in his determination that there was an express choice of English law as the governing law of the arbitration agreement. That conclusion means that it is not necessary to consider KFG's alternative case that there was an implied choice of English law, thereby avoiding deciding the questions whether the correct analysis of *Sulamerica* is the one for which Mr Diwan QC contends and how the requirement of necessity for business efficacy before a term can be implied can be satisfied in any given case where there is a fallback position of either the law of the country with which the arbitration agreement has its closest and most real connection or the law of the country where the award is made. Since those questions do not require to be answered, it seems to me better to leave them for determination in another case where they are a necessary part of the determination to be made by the Court.

71. The second part of the appeal proceeds on the basis that the governing law of the arbitration agreement is English law. The appellant contends that the judge should have applied Articles 1.7 and 2.1.18 of the UNIDROIT principles and concluded that KFG had become a party to the arbitration agreement by virtue of its inconsistent behaviour and its conduct as identified at [43] above. On behalf of KFG Mr Diwan QC submits that the judge was correct to conclude that the appellant's evidence fell short of establishing that KFG should be precluded from relying on the No Oral Modification clauses, but erred in adjourning the application rather than making a final determination not to enforce the Award.

72. The important starting point for consideration of these issues is that, prior to the decision of the Supreme Court in *Rock Advertising*, the weight of authority in the Court of Appeal was that No Oral Modification clauses were not effective: see the cases referred to by Lord Sumption JSC at [9] of his judgment and the decision of the Court of Appeal in *Rock Advertising* itself. In his judgment, at [13], Lord Sumption discussed the fact that the UNIDROIT principles did recognise in the first sentence of Article 2.1.18 that No Oral Modification clauses are effective although the second sentence went on to provide an exception to the application of that rule: "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."

73. Lord Sumption JSC returned to that exception in Article 2.1.18 of UNIDROIT at [16] of his judgment where he said: "In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel." He then went on to set out the test of what English law would require at the least before a party could be precluded from relying on a No Oral Modification clause.

74. What emerges is that there is little difference between the UNIDROIT approach and the English approach through the doctrines of estoppel. This is borne out by the example of the exception in the second sentence of Article 2.1.18 given in the Comment on the UNIDROIT Principles:

> "Yet there is an exception to the general rule. In application of the general principle prohibiting inconsistent behaviour (see Article 1.8), this Article specifies that a party may be precluded by its conduct from invoking the clause requiring any modification or termination to be in a particular form to the extent that the other party has reasonably acted in reliance on that conduct.
>
> Illustration 2.
>
> A, a contractor, contracts with B, a school board, for the construction of a new school building. The contract provides that the second floor of the building is to have sufficient bearing capacity to support the school library. Notwithstanding a "no oral modification" clause in the same contract, the parties orally agree that the second floor of the building should be of non-bearing construction. A completes construction according to the modification and B, who has observed the progress of the construction without making any objections, only at this point objects to how the second floor has been constructed. A court may decide that B is not entitled to invoke the "no oral modification" clause as A reasonably relied on the oral modification, and is therefore not liable for non-performance."

75. As I pointed out during the course of argument, the oral agreement postulated involves an unequivocal representation that the second floor does not have to be of load-bearing capacity, upon which the contractor relies by building according to that oral modification. In those circumstances, the school board could not rely upon the No Oral Modification clause. The illustration is a classic example of what Lord Sumption JSC said at [16] of his judgment was required by way of estoppel. In other words, Lord Sumption JSC is setting out how English law interprets this UNIDROIT principle and is not saying anything different from UNIDROIT.

76. Even if, contrary to that conclusion, the UNIDROIT principles are enunciating some broader test for preclusion than that laid down by Lord Sumption JSC, those principles cannot be used to override the No Oral Modification clauses in the FDA.

That would be to contradict the strict wording of the FDA, which is prohibited by the last sentence of Article 14.3. In my judgment, that strict wording, here the terms of the No Oral Modification clauses, can only be overridden to the extent permitted by English law as the governing law of the FDA, that is to the extent that the test for an estoppel stated in *Rock Advertising* is satisfied. The argument by Mr Tse that, because Article 14.3 provides for English law plus, some broader principle derived from UNIDROIT can be applied to override the No Oral Modification clauses is misconceived. Article 2.1.18 of UNIDROIT does not advocate some principle which is broader than the estoppel test set out in *Rock Advertising*.

77. Similarly, the principle of good faith and fair dealing, whether in Article 2 of the FDA or Article 1.7 of the UNIDROIT principles, cannot be used to override the clear wording of the No Oral Modification clauses to a greater extent than identified by Lord Sumption JSC. The first sentence of Article 2 is focusing on good faith and fair dealing in the performance by the parties of their obligations under the FDA. It cannot be used to make someone a party to the FDA who would not otherwise be a party as a matter of English law, assuming that there was no estoppel precluding reliance on the Oral Modification clauses. The second sentence of Article 2 refers to interpretation of the provisions of the FDA in good faith, but in my judgment that sentence cannot enable the appellant to override the No Oral Modification clauses on broader grounds than laid down in *Rock Advertising* for two reasons. First, I consider that the analogy with the interpretation of treaties considered by Lord Bingham in the *Immigration Officer at Prague Airport* case is an apt one. Interpretation in good faith cannot be used to rewrite the FDA so as to dilute the strict wording of the No Oral Modification clauses. The second, related, reason is that to use interpretation in good faith as justifying the overriding of the No Oral Modification clauses in wider circumstances than laid down by *Rock Advertising* would be to apply a rule which contradicts the strict wording of the FDA, contrary to the last sentence of Article 14.3.

78. Furthermore, although Mr Tse sought to make much of the reference in the second sentence of Article 14.4 to the remedies provided by the FDA being "cumulative", I do not consider that provision assists his case. Article 14.4 is preserving the right to apply for injunctive relief under any applicable law and is making clear that this is permissible, as the full sentence reads: "All remedies provided in this Agreement are cumulative and not exclusive of any remedies provided by law." In that context, it is not entirely clear what is intended to be conveyed by saying that the remedies under the FDA are "cumulative", but whatever it means, it cannot cut across the prohibition in the last sentence of Article 14.3 or permit some broader overriding of the No Oral Modification clauses than permitted by application of the *Rock Advertising* test.

79. Accordingly, given that there was no question of the addition of KFG as a party having been agreed in writing or of any consent in writing to their addition, the No Oral Modification clauses in the FDA would mean that KFG did not become a party to the FDA or the arbitration agreement unless, applying the *Rock Advertising* test there were "(i)…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." It is clear from the judge's findings of fact, particularly at [50] to [53] of his judgment that the appellant cannot begin to satisfy the *Rock Advertising* test. Furthermore, none of the matters now relied upon by the appellant as set out at [43] above, satisfy that test.

80. At various points in the submissions he made to this Court, Mr Tse sought to take the Court to the documents upon which he had relied before the judge. Quite apart from the fact that no permission was granted for an appeal on the facts, so that this Court could not go behind the judge's findings, it is clear that, at most, the documents relied upon are consistent with KFG treating itself as if it were the licensee, but as the judge correctly concluded for the reasons he gave in [51] of his judgment, that would not be enough. Furthermore, at most that would equate to "the informal promise itself" and would come nowhere near being an unequivocal representation that the variation of the FDA to add KFG as a party was valid notwithstanding that the formal requirements of the No Oral Modification clauses had not been complied with.

81. In my judgment, given that the appellant could not satisfy the *Rock Advertising* test, the judge should have made a final determination that KFG was not a party to the FDA or the arbitration agreement, so that the Award was not enforceable against KFG under section 103(2) of the Arbitration Act 1996. I consider that in failing to make that final determination but adjourning the appellant's application for enforcement for a possible further hearing after the determination of the issue of annulment by the Cour d'appel de Paris, the judge erred in principle and in law in two respects. First, 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. I suppose the only possible relevance of the decision of the French Court would be if it annuls the Award, so that in effect the English proceedings become academic, but 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.

82. The second error the judge made is that he failed to make any assessment as to whether, in the event that the application was restored for further hearing after the determination by the French Court, the appellant had a real prospect of successfully establishing that KFG was a party to the FDA and the arbitration agreement and thus of enforcing the Award as a judgment in this jurisdiction under section 101 of the Arbitration Act 1996. In other words the judge should have considered whether the appellant could satisfy the summary judgment test, in accordance with *Honeywell*.

83. In his submissions before this Court, Mr Tse sought to argue that the preliminary issues as ordered by Teare J were intended to be issues of law and that it had been contemplated that, after their determination, there would be a further full hearing on the merits with evidence. This seems to me to be unrealistic. It is quite clear that what took place before Sir Michael Burton was a three day hearing at which the appellant referred the judge to the evidence before the arbitrators upon which it relied to establish that KFG was a party to the FDA and the arbitration agreement. As the judge noted, the decision of the Supreme Court in *Rock Advertising* came after the Award was published. In the light of that decision, it was for the appellant to establish that it could satisfy the *Rock Advertising* test for estoppel, as if it did not the No Oral Modification clauses made it quite clear that the formal requirements for KFG to have become a party to the FDA or the arbitration agreement were not satisfied.

84. To the extent that the appellant was arguing for an adjournment until after the determination of the French Court, it was incumbent on the appellant to demonstrate

that at a further hearing before the Commercial Court the appellant had a real prospect of successfully enforcing the Award. It is obvious from the judge's findings, particularly at [47] to [53], that, on the material before the judge, there was no such prospect given that the appellant could not begin to satisfy the *Rock Advertising* test. The error in the judge's approach in nonetheless granting the adjournment is that he does not seem to have given any consideration to what additional material or evidence would, or even might, emerge during the proceedings before the French Court or otherwise before any further hearing before the Commercial Court, which would give the appellant a real prospect of satisfying the *Rock Advertising* test and thus of being entitled to enforce the Award as a judgment. On the contrary, the judge appears to have considered the prospect of any further evidence improving the appellant's position as remote. In [54] he referred to the "remnant of the [appellant's] case" and at [66(3)] to "the unlikely possibility that a further consideration by reference to English law…might give a different answer".

85. The appellant did not make any attempt either before the judge or this Court to particularise what further evidence it contended would or even might be available at a further hearing, let alone how that evidence would satisfy the *Rock Advertising* test. In those circumstances, this whole part of the appellant's case that it should have a "last chance" at a further hearing was no better than Mr Micawber's hope that something would turn up. In my judgment the judge should have concluded, in view of his conclusion that the prospect of a different decision being reached at a later hearing was remote, that an adjournment should not be granted and that he should have made a final determination refusing recognition and enforcement of the Award.

86. Accordingly, I consider that the correct outcome in this case should be that the appellant's appeal is dismissed and the cross-appeal in the Respondent's Notice is allowed. An order will be made setting aside the ex parte order of Popplewell J and refusing enforcement and recognition of the Award as a judgment.

Sir Bernard Rix

87. I agree.

Lord Justice McCombe

88. I also agree.

Judgment Approved by the court for handing down. Kabab & Kout