Kabab-Ji and the Law of the Arbitration Agreement: Supreme Court Refuses to Enforce Paris-Seated ICC Award

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On 27 October 2021, the Supreme Court of England and Wales issued its highly anticipated decision upholding the Court of Appeal's refusal to enforce a Paris-seated award on grounds that the tribunal wrongly asserted its jurisdiction. The complete background and analysis of the *Kabab-Ji* cases can be found in our previous Debevoise In Depth. Here, we briefly summarise the relevant facts, analyse the Supreme Court's analysis in detail and consider the implications of this latest development in the *Kabab-Ji* saga.

Background

The underlying dispute arose out of a Franchise Development Agreement (the "FDA") between a Lebanese company, Kabab-Ji SAL ("Kabab-Ji"), and a Kuwaiti company, Al Homaizi Foodstuff Company ("AHFC"). AHFC became a subsidiary of Kout Food Group ("Kout") following a corporate reorganisation in 2005. In 2015, a dispute arose between the parties, and Kabab-Ji commenced proceedings against Kout referring the matter to ICC arbitration for resolution.

The FDA provided for English law as the governing law of the contract. The arbitration clause specified Paris as the seat of arbitration but made no express reference to the law governing the agreement to arbitrate. Kout took part in the arbitration under protest, objecting to the ICC tribunal's jurisdiction on grounds (*inter alia*) that it was not a party to the arbitration agreement.[1]

On 11 September 2017, the ICC tribunal (Professor Dr Mohamed Abdel Wahab, Bruno Leurent and Klaus Reichert SC) issued an award upholding its jurisdiction over Kout. The tribunal found that, while English law governed the parties' rights and obligations under the FDA, French law governed the arbitration agreement, and Kout was bound by that agreement as a matter of French law (the "Award"). A majority of the tribunal

[1] Kout also made an application to bifurcate proceedings, which was denied by the ICC tribunal. *See*, *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [3].

found that Kout was in breach of its obligations under the FDA, awarding Kabab-Ji US$6.7 million plus interest.[2]

On 13 December 2017, Kout filed an annulment application before the Paris Court of Appeal.[3] On 21 December 2017, Kabab-Ji issued proceedings in the Commercial Court in London to enforce the Award and later sought an adjournment of that application pending determination of the French proceedings.[4] Kout made a cross application seeking to have the enforcement of the Award set aside under section 103(2)(a) and (b) of the Arbitration Act 1996.[5]

As detailed in our In Depth, parallel proceedings have been ongoing before the English and French courts which have resulted in contradictory results. The Paris Court of Appeal agreed with the tribunal that French law governs, and that Kout is bound by, the arbitration agreement. An appeal is currently pending before the French Court of Cassation.

In England, the High Court and Court of Appeal concluded that English law governs the arbitration agreement and that Kout is not bound by the arbitration agreement. Kabab-Ji appealed, and the details of the UK Supreme Court's 27 October decision are set out below.

Supreme Court's Decision

In the English courts' final word on the Kabab-Ji matter, the Supreme Court decided on three main issues: (i) what law governs the validity of the arbitration agreement; (ii) if English law governs, whether there is any real prospect that a court might find, at a further hearing, that Kout became a party to the arbitration agreement; and (iii) whether the Court of Appeal was justified in giving summary judgment refusing recognition and enforcement of the Award.[6]

On the first issue, the Supreme Court noted that section 103(2)(b) of the 1996 Act—incorporating article V(1)(a) of the United Nations Convention on the Recognition and

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[2] Mr Reichert dissented on the basis that Kout never became a counterparty to the FDA under English law, and therefore owed no obligations to Kabab-Ji. *See*, CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.3; *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [4].

[3] CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.3.

[4] Pursuant to section 103(5) of the Arbitration Act 1996. *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [25].

[5] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [5].

[6] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [22].

Enforcement of Foreign Arbitral Awards (the "New York Convention")—applies to determining whether Kout became a party to the arbitration agreement.[7] It also noted that the provision—which refers generally to "the law to which the parties subjected [the arbitration agreement]"—does not itself actually determine the applicable law.[8]

In this context, the Court held that, although it would be desirable for national courts to uniformly interpret and apply article V(1)(a) of the New York Convention, there was "nothing approaching a consensus on this question", and as a result, "the English courts must form their own view based on first principles".[9]

Next, the Supreme Court referred to its decision in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] USKC 38 (on which we reported), stating that the *Enka* principles apply to a determination under section 103(2)(b) of the 1996 Act as to whether the parties have chosen the law which is to govern their arbitration agreement.[10] These principles state (*inter alia*) that (i) when an English court is asked to determine which law governs an arbitration agreement, it should apply the English-law rules of contractual interpretation to determine whether the parties have expressly or impliedly agreed upon a particular law; (ii) where the parties have not specified the law governing the arbitration agreement, a choice of governing law for the main contract will generally apply to the arbitration agreement; (iii) the choice of a different jurisdiction as the seat of the arbitration agreement is not, in and of itself, sufficient to negate the inference that the choice of law for the main contract was intended to apply to the arbitration agreement.

The Supreme Court then considered the following provisions of the FDA: articles 1 ("[t]his Agreement consists of the foregoing paragraphs … [and] shall be construed as a whole"), 14.3 ("the arbitrator(s) shall apply the provisions contained in the Agreement … [and shall]…also apply principles of law generally recognised in international transactions … [and] may have to take into consideration some mandatory provisions of some countries…that have an influence on the Agreement…[but]…[u]nder no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement"), 14.5 ("[t]he arbitration shall be

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7 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [25].

8 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [30].

9 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [32].

10 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [36]. These principles are set out in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38, at [170] of the Court's judgement ("…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…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.").

conducted in the English language, in Paris, France") and 15 ("[the] Agreement shall be governed by and construed in accordance with the laws of England").

Applying the *Enka* principles to the facts, the Supreme Court held that the effect of these contractual provisions was unambiguous. The FDA's governing-law provision—article 15—referred to *all* provisions incorporated in the contractual document, including the FDA's arbitration clause, and there was "no good reason to infer that the parties intended to except" the arbitration clause from their "choice of English law to govern all terms of their contract".[11]

The Court further rejected Kabab-Ji's argument—based on the direction in the FDA's arbitration clause that the tribunal shall apply "principles of law generally recognised in international transactions", i.e., the UNIDROIT Principles of International Commercial Contracts[12]—that the parties failed to designate a "law" within the meaning of article V(1)(a) of the New York Convention and section 103(2)(b) of the Arbitration Act 1996. The Court held that this provision concerned the rules of law the arbitrators were bound to apply to the merits of the case, and even if the FDA provided that the arbitration agreement was to be governed by both the law of England and the UNIDROIT Principles, that would not have led to the conclusion that French law governs the arbitration agreement.[13]

The Supreme Court also rejected Kabab-Ji's argument based on the "validation principle"— whereby contractual provisions should be interpreted so as to give effect to the presumed intention that an arbitration agreement will be valid—as seeking to extend the principle beyond its proper scope.[14] The Court held that "the validation principle presupposes that an agreement has been made [and is not] a principle relating

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11 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [39].

12 The Supreme Court summarised Kabab-Ji's position as follows "[t]he 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." *See*, *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [43].

13 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [45]–[48].

14 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [51]. Kabab-Ji argued that the application of English law would lead to the conclusion that there was no valid arbitration agreement between Kabab-Ji and Kout.

to the formation of contracts which can be invoked to create an agreement which would not otherwise exist".[15]

On the second and third issues, the Supreme Court held that the Court of Appeal was entitled to conclude that there was no real prospect that a court might find at a further hearing that Kout became a party to the arbitration agreement in the FDA as a matter of English law[16] and that it was therefore justified in giving summary judgment refusing recognition and enforcement of the Award.[17]

Conclusions

The Supreme Court's decision further entrenches the divide between the French and English courts' approaches to arbitral tribunals' jurisdiction and highlights the consequences of failing to specify the law applicable to the arbitration agreement where the law governing the substance of the contract differs from the law of the seat of the arbitration.

The Supreme Court's decision in this case, as well as its decision in *Enka*, provides useful guidance on the process under English law for determining the law of the arbitration agreement. As such, parties should specify the law governing the arbitration agreement to avoid the risk of contradictory outcomes in different jurisdictions.

In this context, parties should also be mindful that different jurisdictions apply different tests to determine whether or not a non-signatory party can be deemed party to an arbitration. This, as with the issue of governing law, can be addressed explicitly in the arbitration agreement.

As indicated above, Kout has lodged an appeal against the decision of the Paris Court of Appeal with the Court of Cassation, so it remains to be seen whether the French courts will close the divide or confirm it.

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We continue to track and report on this dispute and please do not hesitate to contact us with any questions.

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15 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [51]. Kabab-Ji argued that the application of English law would lead to the conclusion that there was no valid arbitration agreement between Kabab-Ji and Kout.

16 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [75].

17 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, at [92].

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