

Kabab-Ji and the Law of the Arbitration Agreement: French and English Courts Clash Once Again

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In June 2020, the Paris Court of Appeal upheld a Paris-seated arbitration award that the English Court of Appeal had refused to enforce six months earlier on the grounds that the tribunal had wrongly asserted its jurisdiction. The Paris Court of Appeal found that the arbitration agreement was governed by French law, while the English Court of Appeal concluded that it was governed by English law; the Paris court held that a non-signatory was bound by the clause, while the English court held it was not. While the contradiction may be resolved on appeal, the conflicting decisions illustrate the potentially significant consequences of failing to specify the law applicable to the arbitration agreement where the law governing the substance of the contract is not the same as the law of the seat of the arbitration.

BACKGROUND

Al Homaizi Foodstuff Company ("AHFC"), a Kuwaiti operator of fast-food franchises, and Kabab-Ji SAL ("Kabab-Ji"), a Lebanese company, entered into a Franchise Development Agreement (the "FDA") in 2001. The agreement provided that it was governed by and would be construed in accordance with English law. The agreement contained an arbitration clause providing that disputes under the agreement would be settled by ICC arbitration seated in Paris, France. The arbitration clause made no express reference to the law governing the agreement to arbitrate.

A dispute arose under the FDA and, on 27 March 2015, Kabab-Ji referred the matter to arbitration under the ICC Rules. Following a corporate reorganization in 2005, AHFC had become a subsidiary of Kout Food Group ("Kout"). Kabab-Ji commenced arbitration against Kout, the new parent of AHFC, despite Kout not being a signatory to the FDA.

Kout objected to the ICC tribunal's jurisdiction, among other things, on the basis that it was not a party to the arbitration agreement. In an award dated 11 September 2017 (the "Award"), the tribunal concluded that French law governed the arbitration agreement,

while English law governed the parties' substantive rights and obligations.¹ The majority of the tribunal found that, as a matter of French law, Kout was bound by the arbitration agreement in the FDA and, further, as a matter of English law, Kout had been added to the FDA as the main franchisee. On the merits, the majority found that Kout was in breach of its obligations under the FDA, awarding Kabab-Ji US\$6.7 million plus interest.

SET-ASIDE AND ENFORCEMENT PROCEEDINGS

On 13 December 2017, Kout filed an application for set-aside before the Paris Court of Appeal. Less than two weeks later, Kabab-Ji issued proceedings in London seeking to enforce the Award.² Kabab-Ji later sought adjournment of enforcement of the Award (pursuant to section 103(5) of the Arbitration Act 1996) pending determination of the French proceedings.³ Referring to the risk of inconsistent judgments, Kabab-Ji argued that adjudication of the matter should be adjourned pending resolution of the French proceedings, the court of the seat, rather than being heard in English courts.⁴ Kout made a cross application seeking to have enforcement of the Award set aside.⁵

English Courts

In March 2019, the High Court held that English law applied to the arbitration agreement on the basis of the parties' express choice of English law as the governing law of the FDA.⁶ Although the court declined to decide the issue, it also observed that under English law and on the basis of the record before it, Kout had not become a party to the FDA or to the arbitration agreement.⁷ Nevertheless, the High Court adjourned the

¹ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [18].

² *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [5] states that "on 21 December 2017, the appellant [Kabab-Ji] issued proceedings in the Commercial Court...under section 101 of the Arbitration Act 1996 for enforcement of the Award as a judgment."

³ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [1]. Pursuant to the Arbitration Act 1996, section 103(5), "where an application for the setting aside or suspension of the award has been made to such a competent authority... [of the country in which, or under the law of which, it was made]..., the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award."

⁴ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [64].

⁵ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [1].

⁶ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [20].

⁷ Despite his view that Kabab-Ji had "no prospect of success," the High Court ultimately opted to leave the question of whether Kout had become a party to the FDA and arbitration agreement open "subject only to the unlikely possibility that a further consideration by reference to English law, in accordance with the above, might give a different answer." See *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [54], [66]-[68].

enforcement of the Award and stayed the proceedings pending the outcome of the hearing in French courts.⁸

On appeal, in January 2020, the English Court of Appeal agreed that the parties had expressly chosen English law to govern the arbitration agreement based on the FDA's governing law clause and its definition of what constituted the "Agreement".⁹ This conclusion was not disturbed by the selection of Paris as the seat.¹⁰ On that basis, the Court of Appeal concluded Kout had never become a party to the arbitration agreement (or the FDA,) and therefore, that the Award could not be enforced against Kout pursuant to section 103(2) of the Arbitration Act.¹¹

The Court of Appeal also held that the High Court erred in granting Kabab-Ji's application for adjournment as it failed to acknowledge that the decision of the French court was not relevant to questions of English law and facts before the High Court. Even if the English proceedings were restored after the French courts had made a determination, Kabab-Ji had no real prospect of showing that Kout was party to the FDA and arbitration agreement and therefore of enforcing the Award under section 101 of the English Arbitration Act.¹²

The Court of Appeal dismissed Kabab-Ji's appeal and allowed Kout's cross-appeal to set aside the Award¹³ and gave no leave for appeal of its decision.¹⁴

Paris Court of Appeal

Six months later, on 23 June 2020, the Paris Court of Appeal handed down its decision on Kout's application for set-aside. In an apparent reference to the parallel English decision, the Paris Court of Appeal observed that its power to review the arbitrator's jurisdiction *de novo* as the court of the seat was not limited by the existence of foreign judgments interpreting the arbitration clause.¹⁵

⁸ *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm) at [67].

⁹ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [8], [62].

¹⁰ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) at [62], [68].

¹¹ The Arbitration Act 1996, section 103(2), provides limited circumstances in which recognition or enforcement of the award may be refused.

¹² *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) [81] – [82]. Pursuant to the Arbitration Act 1996, section 101, a New York Convention award shall be recognised as binding on the persons as between whom it was made and may, by leave of the court, be enforced in the same manner as a judgment or order of the court.

¹³ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (20 January 2020) [85] – [86].

¹⁴ CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.3.

¹⁵ CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.5. ("Finally, the powers of the judge making the decision to set aside the award, when hearing a case on the basis of Article 1520

The Paris Court of Appeal then ruled that there was no express choice of English law to govern the arbitration clause and that in the absence of such express choice, the proper law of the arbitration agreement was French law as the law of the arbitral seat.¹⁶

Accordingly, the Paris Court of Appeal held that the tribunal rightly applied French law to determine whether it had jurisdiction over Kout. It agreed with the majority that Kout's participation in the performance of the contract was sufficient under French law to make it bound by the arbitration clause. Further, the Paris Court of Appeal considered that the issue of the transfer to Kout of substantive rights and obligations under the FDA was beyond the scope of the set-aside proceedings.¹⁷ As a result, the Paris Court of Appeal dismissed Kout's application to set aside the Award.

ANALYSIS

The Kabab-Ji case is not the first time that the UK and French courts have reached different conclusions about an arbitral tribunal's jurisdiction. Ten years ago, in *Dallah Real Estate v Ministry of Religious Affairs* [2010] UKSC 36; [2011] 1 AC 763, the UK Supreme Court denied enforcement of an award against the Government of Pakistan on the basis that the Government was not bound by the relevant contract, despite the tribunal's findings to the contrary. Shortly thereafter, the Paris Court of Appeal reached the opposite conclusion, rejecting the Pakistani Government's jurisdictional objection and confirming the arbitral tribunal's award. In *Dallah*, however, both the UK and English courts determined that the arbitration agreement was governed by the same law: French law.

The *Kabab-Ji* saga demonstrates the issues that can arise when parties choose an arbitral seat that is different from the governing law of the contract, and those two laws may adopt different approaches to determining jurisdiction.

First, the safest course to minimize the risk of inconsistent outcomes is to expressly stipulate the law governing the arbitration agreement. If the English Supreme Court grants permission to appeal, the case may join others, for example *Enka v Chubb* [2020]

¹⁶° of the Civil Procedure Code, cannot be limited by the existence of foreign decisions interpreting the Agreements and the arbitration clause and applying English law to them.”)

¹⁷ CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.5. (“No express provision was agreed between the parties which would designate English law as governing the arbitration clause, and so, applying the substantive law of the place of the seat of arbitration, in accordance with generally recognized principles of law, the arbitral tribunal did not apply a rule that would contradict the strict wording of the Agreements.”)

¹⁷ CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal) (English translation) at p.7.

EWCA Civ 574 (on which we reported [here](#)), in providing guidance on the proper process under English law for determining the law of the arbitration agreement.

Second, parties should remember that different jurisdictions apply different tests to determine whether or not a non-signatory party can be deemed party to an arbitration agreement. This, too, can be expressly addressed in the arbitration agreement itself.

It remains to be seen whether the position of the English and French courts will be reconciled on appeal. There are reports that Kabab-Ji has sought leave to appeal to the UK Supreme Court the finding that English law was the express choice of law governing the arbitration agreement. Kout has four months to appeal the French Court of Appeal's decision to the French Cour de Cassation.¹⁸

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¹⁸ French Code of Civil Procedure, Articles 612 and 643(2), available at: <https://www.legifrance.gouv.fr/>



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