TWENTY ESSEX

A Tale of Two Choice of Law Rules: *Kabab-Ji SAL v Kout Food Group*

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The recent decision of the United Kingdom Supreme Court in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 will be of interest to arbitration lawyers around the world. It concerned enforcement of an ICC Award ("the Award"), which was resisted on the basis that the defendant was not party to the arbitration agreement. The issues were: (1) What law governed the arbitration agreement? (2) If English law governed, was there any real prospect of a court finding that the defendant was a party to the arbitration agreement? (3) What was the relevance of ongoing annulment proceedings in France, where the arbitration was seated?

The French and English proceedings

The defendant, Kout Food Group (KFG) brought proceedings in France to annul the Award, including on the basis that it was not party to the arbitration agreement.

In parallel, the claimant, Kabab-Ji SAL (KJ) sought to enforce the Award in England under section 101 of the Arbitration Act 1996 ("the 1996 Act"). KFG resisted enforcement on the basis that it was not party to the arbitration agreement, relying on section 103(2)(b) of the 1996 Act.[1] At first instance Sir Michael Burton adjourned enforcement under section 103(5) of the 1996 Act,[2] pending resolution of the French annulment proceedings. The Court of Appeal overturned that decision and granted reverse summary judgment to KFG, refusing recognition and enforcement of the Award.

Thereafter, on 23 June 2020, the Paris Court of Appeal dismissed KFG's action to annul the Award. It concluded that French law, as the law of the seat, governed the arbitration agreement, with the result that KFG was party to the arbitration agreement. KFG has lodged an appeal with the Court of Cassation, which remains outstanding.

1 Section 103(2)(b) provides that recognition or enforcement may be refused if "the arbitration agreement was not valid under the law to which the parties have subjected it . . ."

2 Section 103(5) provides: "Where an application for the setting aside or suspension of the award has been made to [a competent authority of the country in which, or under the laws of which, that award was made], the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award."

The UK Supreme Court's decision

On 27 October 2021 the UK Supreme Court upheld the English Court of Appeal's decision (Lords Hamblen and Leggatt, giving the judgment of the Court). The Supreme Court reached the following conclusions:

A. English law governed the arbitration agreement by reason of the general English governing law clause in the contract.

   The precise question was to what law had the parties "subjected" the arbitration agreement under section 103(2)(b) of the 1996 Act (which enacts Article V(1)(a) of the 1958 New York Convention, "the Convention"), assuming for this purpose that the arbitration agreement was valid (§27)? The Supreme Court emphasised that

the 1996 Act should have the same meaning as the Convention and that the Convention "should be applied by the courts of the contracting states in a uniform way" (§§31-32). However there was no relevant consensus among national courts and jurists (§32). Accordingly the Court returned to "first principles" and applied the approach that it had taken in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117, where the question of validity of an arbitration agreement arose before any arbitration had taken place and was determined under English common law conflict of law rules (§§2, 28-36). On that approach, where the law applicable to the arbitration agreement is not specified: (1) a choice of governing law for the contract will generally apply to an arbitration agreement in the contract; and (2) the choice of a different country as the seat of the arbitration does not on its own negate that inference (§§28, 37-39).

B. Applying English law on "No Oral Modification" clauses, there was no real prospect of a court finding that KFG was party to the arbitration agreement.

   The underlying contract contained various "No Oral Modification" clauses (§55). Applying the UK Supreme Court decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, those clauses were an "insuperable obstacle" to any argument that KFG had become party to an arbitration clause which on its face was between KJ and another entity (§§69-75).

C. The Court of Appeal had been entitled to grant reverse summary judgment on the basis that KFG was not party to the arbitration agreement and to refuse an adjournment.

   The Supreme Court reasoned that the party seeking to enforce "will be concerned to achieve a speedy decision" and therefore a summary procedure is "fully consistent with the pro-enforcement policy of the [Convention] . . ." (§80). Furthermore, the French annulment proceedings were not a reason to adjourn the English enforcement proceedings under the general discretion contained in section 103(5) of the 1996 Act (which enacts Article VI of the Convention). That was because the English and French courts applied different law to determine the issue of whether KFG was party to the arbitration agreement and accordingly the risk of contradictory judgments could not be avoided (§§88-90).

Comment

Following the *Kabab-Ji* decision the position may be summarised as follows:

1. Where enforcement of a Convention award with a foreign seat is resisted on the basis that "the arbitration agreement was not valid under the law to which the parties have subjected it" within the meaning of section 103(2)(b) of the 1996 Act/Article V(1)(a) of the Convention, an English court will determine the governing law of the arbitration agreement in accordance with the common law approach established in *Enka v Chubb*.

2. In practice this means that in many (but not all) cases, an English court will conclude that the governing law of the arbitration agreement is the same as the governing law of the contract.

3. For the purpose of the English court's determination: (1) the decision of the arbitral tribunal on its own jurisdiction has no legal or evidential value (§79); and (2) the English court is entitled to adopt a summary procedure (§80).

4. Where there is a parallel challenge to the award in the courts of the foreign seat, then:

   a. Where the grounds relied on under Article V for resisting enforcement of the award and the grounds relied on before the court of the seat to challenge the award are the same and governed by the law of the country of the seat, then ordinarily an English court will adjourn enforcement under section 103(5) of the 1996 Act/ Article VI of the Convention, because it is sensible to have the foreign court determine the issue of foreign law and to avoid conflicting judgments (§87).

   b. However, where the English court applies English law to determine the matter, then the considerations in favour of an adjournment do not apply (§87).

   c. If at the time of the English enforcement proceedings the court of the seat has set aside the award then recognition and enforcement may be refused under section 103(2)(f) of the Act, which enacts Article V(1)(e) of the Convention (§16).[3] However, a mere "future possibility" that the court of the seat will set aside the award is not generally a reason for an adjournment (§91).

5. All of this creates the potential for conflicting decisions between the English court (as the enforcing

3 Section 103(2)(f) provides that recognition or enforcement may be refused it is proved that "the award . . . has been set aside or suspended . . . by a competent authority of the country in which, or under the law of which, it was made."

court) and the court of the seat, as illustrated by the facts of *Kabab-Ji*.

6. The problems generated by this issue can to a large extent be avoided if lawyers draft contracts to include a provision which expressly stipulates the applicable law of the arbitration agreement.

7. The decision of the UK Supreme Court in *Kabab-Ji* may be of interest to other courts around the world where a Convention award is being enforced, given that the Supreme Court sought to achieve an interpretation of the 1996 Act which is consistent with the Convention.

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

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