Kluwer Arbitration Blog

A Third-Party, One Arbitration Agreement, Two Approaches: The French Courts' Views on the Law Applicable to the Arbitration Agreement in Kabab-Ji v. Kout Food Group

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Almost a decade after the *Dallah* saga, the French and English courts are once again considering the enforcement of the same award yet reaching conflicting solutions.

On 29 March 2019, the High Court of England and Wales, followed on 20 January 2020 by the England and Wales Court of Appeal both refused to enforce an award on the basis that it was rendered against a non-party to the relevant arbitration agreement. Meanwhile, on 23 June 2020, the Paris Court of Appeal refusing to be bound by the English decisions, dismissed the application to set-aside the same award in *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [CA Paris, 23 June 2020, n°17/22943]. It thus confirmed the arbitral tribunal's findings upholding its jurisdiction over a third party to the arbitration agreement.

The English decisions have already been commented on the blog, here and here. This post provides an analysis of the French law perspective on the salient issues in dispute, *i.e.* the determination of the applicable law to the arbitration agreement and the extension of an arbitration agreement to a third party.[1)]

Facts

In July 2001, Al-Homaizi Foodstuff Co WWL (AHFC), a Kuwaiti company, and Kabab-Ji, a Lebanese company, entered into a Franchise Development Agreement (FDA). In the FDA, Kabab-Ji licensed its know-how over its restaurant chain to AHFC, while AHFC would develop the Kabab-Ji brand in Kuwait. AHFC was subsequently restructured, leading to the creation of a holding company Kout Food Group (KFG). Kabab-Ji agreed to the creation of KFG, provided that it would not affect the "terms and conditions of agreements already signed" with AHFC.

The FDA was governed by the laws of England. It contained an arbitration clause providing for ICC arbitration. The parties agreed that the seat of arbitration would be Paris but did not mention any governing law for the arbitration agreement.

In March 2015, Kabab-Ji filed a request for arbitration against KFG. In particular, it alleged that KFG had failed to fulfill its development obligations under the FDA and had appropriated know-

how without the consent of Kabab-Ji to develop its own restaurants. The tribunal rendered its award in September 2017, upholding Kabab-Ji's claims against KFG and ordering it to pay over USD 7 million to Kabab-Ji, plus interest.

Kabab-Ji sought the recognition and enforcement of the award in England. In parallel, KFG sought to set aside the award before the Paris Court of Appeal.

Arguments and decision of the Paris Court of Appeal

The parties disagreed on the law applicable to the arbitration agreement. On the one hand, KFG argued that the tribunal "should have applied English law to the arbitration agreement and, consequently, found that it had no jurisdiction over KFG" [para. 14]. Kabab-Ji, on the other hand, supported the tribunal's choice to apply French law, the law of the seat, to interpret the arbitration agreement. The Paris Court of Appeal upheld Kabab-Ji's argument and confirmed the tribunal's finding that French law governed the arbitration agreement.

KFG further claimed that, even though French law would be applicable to the arbitration agreement, it could not be bound by the arbitration agreement as the contractual requirements for the extension of the arbitration agreement had not been met. Kabab-Ji replied that the tribunal rightly extended the arbitration agreement contained in the FDA to KFG. The Paris Court of Appeal again confirmed the tribunal's finding that KFG was bound by the arbitration agreement, as it had directly been involved in the performance of the FDA.

Analysis

The analysis conducted by the Paris Court of Appeal of the proper law to the arbitration agreement is unsurprisingly in line with French case law. In the absence of an express choice of law applicable to the arbitration agreement in the contract, the Paris Court of Appeal applied the well-known French law substantial rule of international arbitration recognizing the full autonomy of the arbitration agreement. On the contrary, the English courts followed the *Sulamerica* standard applying the English conflict of laws rules, which require to consider (i) whether the parties expressly chose a law governing the arbitration agreement; (ii) if they did not, whether the parties made an implied choice of such law; and (iii) in the absence of either choice, which system of law has the "closest and most real connection" with the arbitration agreement.

French law posits that an arbitration clause is independent from the agreement containing it and therefore survives the potential invalidity or inapplicability of this agreement. This principle was first recognized by the Court of cassation in 1963 (Court of cassation, 7 May 1963, *Gosset v. Carapelli*) and is enshrined in Article 1447 of the French Civil Procedure Code.[2)] It is also endorsed by English law, as confirmed by the England and Wales Court of Appeal in this case: "The concept of the separability of an arbitration agreement now enshrined in section 7 of the Arbitration Act 1996…it ensures that the disputes resolution procedure chosen by the parties survives the main agreement becoming enforceable…". [para 66]

But French law goes a step further and acknowledges that the arbitration clause is also independent from any domestic law. This independence is the result of a series of decisions of the Court of

cassation. Indeed, in 1972, it held that an arbitration agreement could be governed by another law than the law governing the underlying contract (Court of cassation, 4 July 1972, *Hecht v. Buisman's*). And, in 1993, it admitted that an arbitration agreement was independent from any domestic law (Court of cassation, 20 December 1993, *Dalico v. Khoms et El Mergeb*).

In its decision relating to KFG's set-aside application, the Paris Court of Appeal adopted the same reasoning and stated that: "[p]ursuant to a substantive rule of international arbitration law, the arbitration clause is legally independent from the underlying contract in which it is included either directly or by reference, and its existence and validity are interpreted, subject to the mandatory rules of French law and international public policy, according to the common will of the parties, without the need to refer to any national law." [para. 25]

Furthermore, it held that the choice of English law as the *lex contractus* was not sufficient to "establish the common will of the parties to submit the arbitration clauses to English law" and to derogate from the substantive rules of international arbitration applicable at the seat of arbitration [para. 27]. By doing so, the Paris Court of Appeal gave full force to the Parties' agreement as to the seat of arbitration.

However, the Court also prudently confirmed that its approach could only apply in cases where the parties did not choose in the contract the arbitration agreement's governing law: "…no express provision was agreed between the parties which would designate English law as governing the arbitration clause…". [para. 29][3] This is where judges on both sides of the channel fundamentally differ: while the English judge found 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" [para. 62] and therefore applied the FDA's governing law clause to the arbitration clause (just as it would to any other clause contained therein), the French judge considered the arbitration clause as separable from the rest of the contract, and thus, could not apply automatically the governing law clause's choice in favour of English law when interpreting it. Instead, it held that the parties' choice in the governing law could not override their ulterior choice in favour of Paris as the seat of arbitration, and French law as (i) the law applicable at the seat of arbitration; and (ii) thus, to the arbitration agreement.

The solution adopted by the Paris Court of Appeal with respect to the extension of the arbitration agreement to a non-signatory is also fully in line with French case law.

As soon as 1988, the Paris Court of Appeal recognized that a third-party could be bound by an arbitration clause if it was involved in the performance of the contract, and to the extent that it could be presumed that it had knowledge of the existence and scope of the arbitration clause (Paris Court of Appeal, 30 November 1988, *Sté Korsnas Marma v. Sté Durand-Auzias*). This solution was recently confirmed (Paris Court of Appeal, 18 December 2018, *Société New Europe Corporate Advisory Ltd. et al. v. Innova 5/LP*).

The Paris Court of Appeal later went further and acknowledged that mere participation of a non-signatory in the performance of the contract was sufficient (Paris Court of Appeal, 28 November 1989, *Cotunav v. Comptoir commercial André*). This solution was confirmed by the Court of

cassation (Court of cassation, 27 March 2007, *ABS v. Amcor Technology*).

In its decision relating to KFG's set-aside application, the Paris Court of Appeal unsurprisingly followed this approach and stated that: "…the arbitration clause…must be extended to the parties directly involved in the performance of the contract and in any disputes arising out of the contract, provided that it is established that their contractual situation and their activities give rise to a presumption that they accepted the arbitration clause, the existence and scope of which they were aware of irrespective of the fact that they were not signatories to the contract containing the arbitration agreement." [para. 34]

The French judge then assessed KFG's role in the execution of the FDA and concluded that: "…the arbitral tribunal rightly, and without the need to reach a decision on the transfer of the arbitration clause from AHFC to KFG, found that the said clause extended to bind KFG." [para 47]

Conclusion

The differing approaches adopted on each side of the channel have as much to do with the contractual parties' lack of choice of the law applicable to the arbitration agreement, than with their express choice of English law as the law applicable to their contract. Indeed, English law's rigorous approach to contract interpretation and its relative indifference towards the concept of good faith were bound to place a greater emphasis on the terms of the FDA rather than on the actual circumstances of the performance of the contract. The trickled down effect of this choice also generated significant consequences on the interpretation of the scope of the arbitration clause and the possibility to extend it to a non-signatory party, whether these issues were considered by English or French judges. The lesson should therefore be that great care must be exercised in both the choice of the *lex contractus* and of the arbitration agreement's applicable law. And the current debate remains open and unsettled: on 8 July 2020, the UK Supreme Court agreed to hear Kabab Ji's appeal of the decision of the England and Wales Court of Appeal while KFG has four-months to appeal the decision of the Paris Court of Appeal before the Court of cassation. *La suite au prochain épisode.*

The views expressed in this post are the authors' own.

References

?1 A French commentary of the Paris Court of Appeal decision can be found here.

?2 Article 1447 of the French Civil Procedure Code is applicable to international arbitration (Article 1506 of the French Civil Procedure Code).

?3 This possibility was admitted by the Court of cassation in *Uni-kod v. Ouralkali*, 30 March 2004.

This entry was posted on Tuesday, September 8th, 2020 at 8:00 am and is filed under Applicable Law, Arbitration Agreement, Conflict of Laws, France, French Law, International arbitration, Non-signatory, Third Party
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