Kluwer Arbitration Blog

Can’t Budge: The Curious Case of Kabab-Ji and the New York Convention

Leila Kazimi (Assistant Editor) · Monday, November 15th, 2021

On 27 October 2021, the Supreme Court of the United Kingdom (the ***Court***) issued a judgment in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48. The Court upheld the earlier decision of the Court of Appeal finding that the law applicable to the arbitration agreement was the English choice of law for the whole agreement, and not the French law applicable as the law of the seat, despite arbitrators’ findings to the contrary.

Background of the Proceedings

The Court was asked to consider what law governs the validity of the arbitration agreement. The appeal was brought by Kabab-Ji asking the Court to overturn the Court of Appeal’s decision (discussed on the Blog here) and grant enforcement of an award. The earlier judgment of the Court of Appeal determined that English law governed the arbitration agreement making the award not enforceable against a non-signatory – Kout Food Group (***KFG***). The arbitral tribunal in the case unanimously agreed that French law, as the law of the seat, would apply to the arbitration agreement and bind KFG to pay the damages awarded.

It is not the first time English and French courts had to decide on the enforceability of the same award and questions of validity of the arbitration agreement. And they have again landed at diverging decisions. The award was upheld by the Paris Court of Appeal which dismissed the annulment action holding that under French law the arbitration agreement extended to KFG. That decision was appealed by KFG and is currently pending before the Court of Cassation. This left Kabab-Ji in a rather uncertain situation where the award was held valid in France, but not enforceable in England.

Choice-of-Law Rules under Article V(1)(a) of the New York Convention

Article V(1)(a) of the New York Convention sets out a two-limb choice-of-law rule for determining the law governing the arbitration agreement:

1. The first limb, or the basic rule, provides that the validity of the arbitration agreement is determined pursuant to the “*law to which the parties* [have] *subjected it*” – the law chosen by the

parties.

2. The second limb, or the default rule, comes into play where no choice has been indicated and the applicable law is that of "*the country where the award was made*" – the law of the seat.

The Court evaluated both limbs noting that although "*the conflict rule contained in article V(1)(a) New York Convention … has developed into a truly transnational conflict rule for the determination of the law governing the substantive validity of the arbitration agreement*", there is still a lack of uniformity, as demonstrated in the present case, which "*makes no sense and results in … uncertainty*". Nevertheless, the Court shed some light on the application of the choice-of-law rules under Article V(1)(a).

The Basic Rule: Parties' Choice of Law

Choice-of-Law for the Contract Extends to the Arbitration Agreement

The Court, recalling its ruling in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38 (discussed on the Blog here and here) noted that "[w]*here 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*".

In this case, the Franchise Development Agreement (***FDA***) contained a governing law clause which specified a choice of English law. The dispute resolution clause, at the same time, was silent on any other law to be applied to the arbitration agreement separately. On this basis, the Court noted that a general choice-of-law clause will usually be sufficient to satisfy the first limb of Article V(1)(a) of the New York Convention. The Court further noted that it "*would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made*". The key rationale behind this is to have consistency of interpretation of the arbitration agreement.

On the other hand, French commentators underline that such "forced" extension would not be possible because the parties may have not given a separate thought to the law applicable to the arbitration clause, and it would therefore be "*going too far to interpret such clauses as containing an express choice of law governing the arbitration agreement*". This is in line with French judgments where the courts have not agreed that the choice-of-law of the whole contract should extend to the arbitration agreement. With this in mind, the Paris Court of Appeal's decision to apply French law as the law of the seat of arbitration – under the default rule – has a valid reason.

UNIDROIT Principles and their Effect on the Arbitration Agreement

Kabab-Ji, to resist the application of English law, argued that reading the FDA as a whole does not indicate which law should apply to the validity of the arbitration agreement. Therefore, this is where the default rule (i.e. second limb) under Article V(1)(a) of the New York Convention comes into effect and French law becomes applicable. Kabab-Ji relied on Articles 1.7, 1.8, 2.1.1 and 2.1.18 of the UNIDROIT Principles of International Commercial Contracts (which both parties agreed to be referred to: "[t]*he arbitrator(s) shall also apply principles of law generally recognised in international transactions*") to prove that KFG consented to becoming a party to the arbitration agreement through conduct and therefore no written consent was needed. Kabab-Ji argued that the parties were free to agree to the application of the UNIDROIT Principles under Article 21(1) of the

ICC Rules (2012) which allows the parties to "*agree upon the rules of law*" to be applied by the arbitral tribunal "*to the merits of the dispute*".

The Court, however, found that Kabab-Ji was wrong to assert that the UNIDROIT Principles could be considered "*rules of law*" or rules of a national system. The Court noted that the latter is a broader term and that UNIDROIT Principles cannot substitute national law. Furthermore, the Court noted that the case related to the issue of establishing the law which determines validity of the arbitration agreement, and not the merits of the dispute.

The Validation Principle and the Formation of the Arbitration Agreement

"*Where there is a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective, it may be inferred that a choice of law to govern the contract does not extend to the arbitration agreement*" – relying on the essence of the validation principle, Kabab-Ji argued that should English law apply, the arbitration agreement, allegedly entered between Kabab-Ji and KFG, would be invalid. However, the Court noted that the validation principle does not apply to the questions of "*validity in the expanded sense in which that concept is used in article V(1)(a) of the Convention*". The very purpose of the validation principle is to determine validity of an *existing* arbitration agreement, and not to address matters of its *formation* and to "*create an agreement which would not otherwise exist*".

The Default Rule: Law of the Seat

The second limb of the choice-of-law rule provides that in cases where parties have not agreed on the law applicable to the arbitration agreement, the law of the seat – as the parties' implied choice of law – would apply by default under Article V(1)(a) of the New York Convention.

The Court, however, in its recent judgment, preferred the choice of law rule over the law of the seat rule. In contrast, the Paris Court of Appeal did the opposite and applied the default rule when deciding to uphold the award, though this was mandated by French law, and not the New York Convention. In holding so, the Paris Court of Appeal underlined the separability of the arbitration agreement, which is a long-established principle under French law, and its subsequent evaluation under the mandatory rules of French law.

In general, this default rule is a widely recognised approach also reflected in such major international instruments as the Inter-American Convention (Article 4), the European Convention (Article 58), UNCITRAL Model Law (Articles 34 and 36), and the Hague Convention (Article 9(a)). It is therefore a generally recognised default route for when the parties' intentions on the law governing the arbitration agreement are unclear.

Concluding Remarks

The Court's decision is another illustration after *Enka v Chubb* of how choice-of-law rules under Article V(1)(a) of the New York Convention may operate in practice. This does not however mean that this approach will be reflected uniformly across jurisdictions (at least not at the moment), and the Paris Court of Appeal's decision is proof of that. Having observed the finale of Kabab-Ji's

English “story”, we shall now await the French Court of Cassation’s decision and observe what the finale of Kabab-Ji’s French “story” will be.

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