Kluwer Arbitration Blog

Eyes Wide Shut: Why the UKSC Should Have Considered French Law in the Kabab-Ji Case

Akash Karmarkar · Wednesday, February 16th, 2022

The recent judgment of the United Kingdom Supreme Court (the **UKSC**) in Kabab-Ji v Kout Foods (the **Kabab-Ji judgment**) has reopened issues concerning the differing approaches of English and French courts to determining the law governing arbitration agreements.

The Kabab-Ji saga provides a case study on the English-French law divide and has been discussed at length on this Blog (here, here, here, and here). The central controversy is simple. In a contract where the parties have not expressly provided the law applicable to the arbitration agreement, English courts apply the law governing the underlying contract and French courts apply the law of the seat.

UKSC's rationale for not considering the approach of French courts

In deciding the Kabab-Ji case, the UKSC had the benefit of two preceding decisions – first, its judgment in Enka v Chubb (the **Enka v Chubb judgment**) (discussed on the Blog here and here), and second, the Paris Court of Appeal's decision upholding the Kabab-Ji award (discussed on the Blog here).

The UKSC's Kabab-Ji judgment places substantial reliance on the Enka v Chubb judgment but does not analyse or consider the French legal position or the decision of the Paris Court of Appeal. In this regard, the UKSC (para 32 of the Kabab-Ji judgment) has reasoned that since there is a lack of "*clear consensus*" among the courts of contracting states of the New York Convention regarding the interpretation of Article V(1)(a), English courts must "*form their own view based on first principles.*" The UKSC further concluded (at paras 87 to 90) that since French and English courts take "*a very different approach*" to deciding the law applicable to the arbitration agreement, English courts could not be bound by French court decisions and the risk of contradictory judgments was unavoidable.

This reasoning, though attractive, understates the importance of analysing the French legal position and its implications. There are compelling reasons why the UKSC should have analysed or at least considered French law while determining the law applicable to the arbitration agreement.

Why the UKSC should have considered the French approach

The parties' choice of a Paris-seated arbitration in Kabab-Ji has important implications. Other than the obvious consequence of granting supervisory jurisdiction to French courts, the choice of Paris as a seat may also connote an implied intention of the parties that certain legal provisions and settled jurisprudence of French law would apply. The UKSC, in the Enka v Chubb judgment, acknowledged this possibility and held that "*any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law*" may imply that the arbitration agreement was intended to be governed by the law of the seat. To illustrate, the UKSC referred to Section 48 of the Swedish Arbitration Act and Section 6 of the Arbitration (Scotland) Act 2010, which provide that in the absence of an express choice of governing law of the arbitration agreement, the law of the seat will apply.

Taken to its logical conclusion, this line of reasoning can be extended beyond statutory provisions to jurisprudence established by court decisions. This is theoretically possible since the Enka v Chubb judgment refers to "*any provision of the law of the seat"* and not just 'statutory provisions'. Moreover, the objective of looking at legal provisions of the seat is to identify an implied agreement of the parties to subject the arbitration agreement to the law of the seat. Such implied agreement can also arise from the settled and consistent judicial approach of the courts of the seat, particularly in agreements between sophisticated commercial parties who are aware of, or have been advised about, the approach of the courts of the seat.

French courts have consistently held in French seated international arbitrations that in the absence of express choice, mandatory rules of French law and international public policy (i.e., the law of the seat) govern the arbitration agreement, without a need for a reference to national law. This has been the position since the Dalico case (discussed on the Blog here) which was reiterated by the Paris Court of Appeal in the Kabab-Ji case. The UKSC in the Dallah v Pakistan case (discussed on the Blog here) (in para 15) found the above approach of French courts as "*being part of French law.*" Notably, the French approach is based on Article 1447 of the French Code of Civil Procedure regarding the separability of the arbitration agreement from the underlying contract, which is automatically applied to international arbitrations seated in France. French courts view Article 1447 as creating a complete separation of the arbitration clause from the underlying contract such that the law applicable to the underlying contract does not automatically extend to the arbitration agreement. Given this clear position of French courts, the parties in the Kabab-Ji case may have intended the French legal approach to apply to the arbitration agreement by choosing Paris as a seat. Moreover, since the French approach does not require a reference to any national law, the parties may have considered it unnecessary to specify a national law to govern the arbitration agreement, as the seat was Paris.

UKSC overlooked the arbitral tribunal's reasoning

In its Kabab-Ji judgment, the UKSC observed "*in passing*" (in para 46) that the arbitrators "*have given no reason for their view that they should apply the law of the seat to decide whether they had jurisdiction.*" However, this may not be entirely accurate. In paragraph 127 of the award (as quoted in para 26 of the Paris Court of Appeal decision), the arbitral tribunal noted that it would have to "*apply French law to determine whether it has jurisdiction over the Respondent, since the validity*

of the arbitral award in this case depends on the law prevailing at the seat of the arbitration. Any action by the losing Party to set aside the arbitral award would fall within the jurisdiction of the Court of Appeal of Paris and this Court would apply French law on this subject, i.e. the principles developed by the Cour de cassation itself."

The arbitral tribunal in the present case considered that the application of French law to the arbitration agreement is a necessary consequence of the seat being in Paris, based on previous decisions of French courts. The arbitral tribunal's reasoning is vindicated by the fact that it was upheld by the Paris Court of Appeal. Seen from this perspective, even the award alludes to the existence of a requirement under French law, as interpreted by French courts, that in the absence of express choice, the arbitration agreement is governed by French law or the French approach, where the seat of arbitration is in France.

Concluding Remarks

Considering this and following its Enka v Chubb judgment, the UKSC should have analysed the legal consequences of a French seat of arbitration in greater detail to determine the parties' intention. The UKSC's failure to consider French law affects its determination of the law applicable to the arbitration agreement. It also affects the UKSC's decision to permit a summary dismissal of the case without a complete trial to determine the law governing the arbitration agreement. Such a trial could have provided an opportunity to determine whether the parties wanted French law to apply to the arbitration agreement by choosing a French seat. This would have yielded a more accurate understanding of the parties' knowledge of the French approach and their intended choice of law.

It is pertinent to note that the UKSC's determination of the Kabab-Ji case is based significantly on the language of the contract and particularly the scope of the term 'Agreement' used in the governing law clause. The UKSC may therefore have reached a similar conclusion, even if it had considered French law. However, the above critique is directed at the UKSC's approach in reaching its conclusion in the Kabab-Ji case and the importance of paying proper heed to the law of the seat while deciding the law applicable to the arbitration agreement.

The differences between the English and French approaches in deciding the law applicable to the arbitration agreement have caused significant disharmony in international arbitration. The UKSC in the Enka v Chubb judgment upheld the importance of paying attention to provisions of the law of the seat which require that the arbitration agreement be governed by that country's law. In doing so, the UKSC has allowed English courts to analyse and if appropriate, follow the French approach in French seated arbitrations. The UKSC's observations thus provide a potential avenue for bridging this historic divide and mitigating contradictory judgments. The Kabab-Ji case was an apt opportunity to explore this avenue. By analysing French law in the Kabab-Ji judgment, the UKSC could have paved the way for greater comity between French and English courts, while remaining within the bounds of the English approach outlined in the Enka v Chubb judgment.

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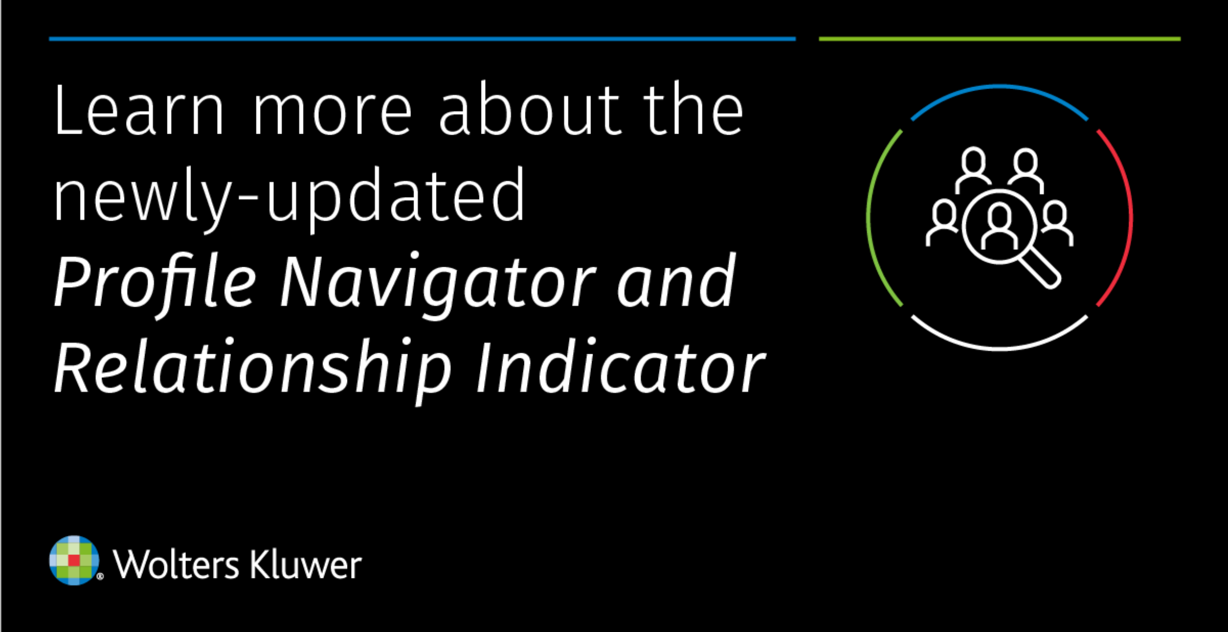

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