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The Walking Dead: Double Life of the Kabab-Ji Award

Leila Kazimi (Assistant Editor) · Wednesday, November 16th, 2022

The epic finale of the Kabab-Ji saga has arrived. On 28 September 2022, the French Court of Cassation has delivered its long-awaited decision in ***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*** (Court of Cassation, Appeal No. 20-20.260) less than a year following the United Kingdom Supreme Court's (***UK SC***) final say in the case's unsuccessful enforcement proceeding. In its judgment, the French Court of Cassation upheld the Paris Court of Appeal's ruling that the law of the seat, and not the law of the main contract, governed the arbitration agreement, which thereby extended to the non-signatory, Kout Food Group (***KFG***). With this, the Kabab-Ji award happens to live a "double life" where, on the one hand, it is ultimately held as valid at the seat of arbitration, but nonetheless not enforceable in England.

Kabab-Ji Award's Failure to "Survive" in England

As previously discussed here, it cannot go unnoticed (which is precisely the reason why this case attracted the international community's attention) that the UK SC arrived at a diagonally contrasting conclusion to that of the French courts'. In particular, that the law of the main contract sufficiently demonstrated the implied choice of the parties to subject the arbitration agreement to the same, noting that the designation of the seat of arbitration did "*not by itself justify an inference that the contract (or the arbitration agreement)* [was] *intended to be governed by the law of that place*". Because of this, the arbitration agreement could not be extended to KFG and therefore the enforcement proceeding was not successful in England.

In coming to this decision, the UK SC relied on the conflict-of-laws rule provided in Article V(1)(a) of the New York Convention. Here, as the arbitration agreement was silent on the law applicable to the matters of its validity, the UK SC deemed the wording of the main contract clear enough to conclude that by subjecting the whole contract to English law, the parties impliedly intended to extend this choice of law to the arbitration agreement. By doing so, the UK SC stayed true to the long-standing position under English law requiring analysis of the precise wording of the contract to give context to the parties' intentions as to the law they (impliedly) desired to apply to the arbitration agreement. This approach was also, in the words of the UK SC, "*sufficient to satisfy the first rule in article V(1)(a)*".

Notably, such a "forceful" extension of the law of the main contract to the arbitration agreement was put to numbers in the Special Issue of the Journal of International Arbitration published earlier this year. In the empirical research study conducted by Prof. Dr. Maxi Scherer and Dr. Ole Jensen on the *Alleged Invalidity of Arbitration Agreements: Success Rates and Applicable Law in Setting*

Aside and Enforcement Proceedings, the numbers showed that out of 171 analysed court decisions only 3 considered the choice of law of the main contract as an implied choice of law governing the arbitration agreement. These numbers are quite striking to observe though are nevertheless understandable. The reason behind this "not so popular" tendency (of extending the law of the main contract to the arbitration agreement) may be the conflict of such an approach with the widely accepted presumption of the arbitration agreement's separability. Although this presumption means that the choice of law of the main contract would not *automatically* apply to the arbitration agreement given their independence from each other, the first could nevertheless provide some *guidance* as to the parties' intentions.

It is particularly relevant in England which, as prominent scholars opine, historically "*expressed caution regarding the 'independence' of an arbitration clause from the parties' underlying contract*". Since under English law an arbitration agreement is considered to be part of the main contract (although this approach has recently changed, having English judiciary and practitioners describe the arbitration agreement as a "*self-contained contract collateral or ancillary to the* [main] *agreement*"), nevertheless, as was provided in *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co. Ltd* [1992], it is "*imperative* [to] *giv*[e] *effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so*". And when giving effect to the wishes of the parties, the UK SC has turned to the plain wording of the main contract. As a result, following its reasoning in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38 where the UK SC held that "*it does not follow from the separability principle that an arbitration agreement is generally to be regarded as 'a different and separate agreement' from the rest of the contract or that a choice of governing law for the contract should not generally be interpreted as applying to an arbitration clause*", the UK SC indeed did not see any "compelling reasons" of why the parties' general choice of law could not be extended to the arbitration agreement. Given this, the Kabab-Ji award failed to "survive" the enforcement proceeding in England.

Nevertheless, precisely the separability presumption – a deeply rooted principle in French arbitration law and practice – lies at the heart of the French courts' decisions in this case.

Kabab-Ji Award's "Life" in France

In challenging the Paris Court of Appeal's decision, KFG argued that the Court wrongly concluded that (a) the contract lacked any express provision "anchoring" English law as the one applicable to the arbitration agreement; and, in any case, (b) KFG failed to provide evidence demonstrating the parties' common intention to subject the arbitration agreement to English law. The Court of Cassation in a concise and straightforward manner has addressed both points of appeal, which it ultimately rejected.

First, the Court of Cassation has underlined that, in contrast to the interpretation approaches applied by the English courts, the "*choice of English law as the law governing the contracts* […] *is not sufficient to establish the common will of the parties to submit the effectiveness of the arbitration agreement to English law, in derogation of the substantive rules of the seat of arbitration expressly designated by the contracts*". By coming to this conclusion, the judges have once again not only stressed on the separability of the arbitration agreement, but also the importance of the parties' express intentions when it comes to the law applicable to the arbitration agreement. The rationale behind this reasoning primarily stems from the French practice and law. The French had expressly adopted the separability presumption almost 60 years ago in *Ets*

Raymond Gosset v. Carapelli (Court of Cassation, 1963) and codified it in Article 1447 of the French Code of Civil Procedure. Ever since, this presumption was widely applied in France. Although this presumption is also contained in Section 7 of the 1996 English Arbitration Act, the practice of its application visibly differs from that in France. Such a strong legal tradition may be the reflection of the French legislators' intention to "guard" the arbitration agreement's validity in case of the main contract's invalidity. This all to ensure that the arbitration agreement would indeed "survive"; while in England there were instances where an arbitration agreement, in contrast, did not "survive" the invalidity of the main contract (e.g., *Fiona Trust & Holding Corp. v. Privalov* [2007] EWCA).

And second, flowing from the above finding the judges stressed that KFG failed to provide evidence which would "*establish unequivocally the common will of the parties to designate English law as governing the effectiveness, transfer or extension of the arbitration agreement*". Such a determination naturally underscores the importance of the designation of the seat of arbitration, which under French law would have the closest connection to the arbitration agreement at instances when it is silent on the law governing it. And in such case, as leading scholars state, it would be "*almost always and inevitably an implied choice*" of the parties.

For these reasons, the Kabab-Ji award continues to "live" in France.

Lessons Learnt

This case is a bright example of when two systems of law – French and English – stay true to their legal traditions and principles, even if this brings to diverging results. Although such a precedent demonstrates the inconsistent practice of how the law applicable to the arbitration agreement may be determined, this case nevertheless shows that there is no "right" or "wrong" approach. The only natural conclusion to make in such circumstance would be to keep in mind these diverging approaches as early as at the stage of drafting an arbitration agreement. Even though the Kabab-Ji "story" has come to an end, it has marked its place as an important precedent on which the international community may reflect and learn.

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