

# Kluwer Arbitration Blog

## 2023 Vietnam ADR Week Recap: Governing Law of The Arbitration Agreement – A Comparative Law Perspective

Thang Pham (YKVN) · Sunday, July 9th, 2023

The inaugural Vietnam ADR Week (“VAW”) took place in Ho Chi Minh City from 9 to 12 May 2023. As a sponsor of VAW, Vietnamese law firm, YKVN, organized a discussion panel on 10 May 2023 on a comparative analysis of the approaches taken by various national courts towards the governing law of the arbitration agreement. Panelists included Daryl Chew (Three Crowns, Singapore), Jennifer Lim (Sidley Austin, Singapore), Jonathan Lim (WilmerHale, London), Thomas Parigot (Gaillard Banifatemi Shelbaya Disputes, Paris) and Mahesh Rai (Drew & Napier, Singapore). The panel was moderated by Thang Pham, a YKVN partner based in Singapore.

### The Vietnamese Law Approach

Mr. Pham started the discussion by providing an overview of the Vietnamese legal position on the governing law of the arbitration agreement.

As a starting point, if the parties have expressly specified the governing law of the arbitration agreement, Vietnamese law will give effect to such choice. However, if the parties fail to specify the governing law of the arbitration, then Vietnamese law takes a bifurcated approach to determining the governing law of the arbitration agreement, depending on whether the arbitration is seated in Vietnam or outside of Vietnam.

If the arbitration is seated in Vietnam, the Vietnamese Law on Commercial Arbitration (the “LCA”) applies to the arbitration. The LCA contains a choice of law clause at Art. 14.2, which provides:

In a dispute that involves foreign elements, the Arbitral Tribunal shall [first] apply the law selected by the parties; if the parties have not agreed on the applicable law, the Arbitral Tribunal shall decide to apply the law it sees as most appropriate.

The phrase “law selected by the parties” is often interpreted as an express choice of law only. This is because the principle of independence formulated in Art. 19 of the LCA, which provides that an arbitration agreement is “absolutely independent” from the underlying contract, would preclude an implication that a general choice of law clause, if one exists, should apply also to the arbitration

agreement. Therefore, in the absence of an express choice of law provision included in the arbitration agreement, the tribunal will have the right to apply the law it deems most appropriate to the arbitration agreement (which will likely be the law of the seat).

On the other hand, if the arbitration is seated outside of Vietnam, the LCA would not apply. However, if the main contract contains a governing law clause providing for Vietnamese law, then under the general choice of law principles of the Civil Code, the law governing the arbitration agreement should be “the law of the country that has the closest connection to the civil relations involving foreign elements.” This probably means either the law of the contract (i.e., Vietnamese law) or the law of the seat, depending on the facts and circumstances of the case.

### **The Singapore Law Approach**

Mr. Pham then turned the floor over to Mr. Chew and Ms. Lim to present the Singapore perspective. Mr. Chew and Ms. Lim stated that Singapore adopts a three-stage test to determining the law of the arbitration agreement, as set out in *BCY v BCZ* [2016] SGHC 249 and recently affirmed in the Singapore Court of Appeal case of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1. Under the three-stage test, the Singapore courts first consider whether there is an express choice of law of the arbitration agreement. If there is no express choice of law, the Singapore courts then go on to consider whether the parties have made any implied choice of law. Finally, if there is no express or implied choice of law of the arbitration agreement, the Singapore courts will look at which law has the most real and substantial connection to the arbitration agreement.

### **The English Law Approach**

Mr. Lim and Mr. Rai next presented the English law approach as regards determining the law governing an arbitration agreement. In particular, they focused on the landmark case of *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, where the UK Supreme Court (“UKSC”) clarified the principles for determining which law governs an arbitration agreement where the parties have not made an express choice of law. The facts of the case can be found in this [blog post](#).

On the question of the law applicable to the arbitration agreement, the UKSC held in *Enka* that the law applicable to the arbitration agreement will be (a) the law expressly or impliedly chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected. Where the parties have not specified the law governing the arbitration agreement, but they have chosen a law governing the main contract, the choice of governing law for the contract will generally apply to the arbitration agreement. In this case, because the parties had not chosen a law to govern the main contract (or the arbitration agreement), the UKSC held that the arbitration agreement would be “governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected.”

Mr. Lim and Mr. Rai then touched on the case of *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (“*Kabab-Ji*”), previously discussed [here](#). The dispute arose from

franchise agreements that explicitly selected English law as the governing law and included an ICC arbitration clause with a seat in Paris. Kabab-Ji initiated arbitration against Kout Food Group (“KFG”) in Paris. The tribunal rendered an award against KFG, applying French law (as the law of the seat of arbitration) to establish KFG’s participation in the arbitration agreements.

KFG sought to set aside the award in French courts, arguing that it was not a party to the franchise agreements and therefore not bound by the arbitration clause. Simultaneously, Kabab-Ji sought enforcement in England. The English Court of Appeal denied enforcement and recognition of the ICC award as it found that English law governed the arbitration agreement, and under English law, KFG was not deemed a party to the arbitration agreement. Kabab-Ji then appealed to the UKSC, which was asked to consider what law governs the validity of the arbitration agreement, among other issues.

Mr. Lim and Mr. Rai explained that in *Kabab-Ji*, the UKSC recalled its ruling in *Enka* that typically, a choice of law clause in the main contract would be seen as a satisfactory indication of the law to which the parties intended the arbitration agreement to be subject. The UKSC then went on to hold that although *Enka* was a case that considered the validity and scope of an arbitration agreement *before* an arbitration had taken place and therefore applied English common law rules to the analysis of the law governing an arbitration agreement, whereas the issue of validity of an arbitration agreement arose after the award was rendered in *Kabab-Ji* where Section 103(2)(b) of the English Arbitration Act <sup>1)</sup> applies, the approach in *Enka* should be equally applicable. Accordingly, the UKSC held that since the parties expressly stated that English law would govern the franchise agreements as a whole, English law was also the governing law of the arbitration agreement and consequently, the law that governed the question of whether KFG became a party to the arbitration agreement. Under English law, it was unlikely that a court would find KFG to be a party to the arbitration agreement, leading the UKSC to dismiss the appeal.

### **The French Law Approach**

As stated above, the *Kabab-Ji* case involved not only enforcement proceedings before the English courts, but also setting aside proceedings before the French courts. The French courts were therefore also confronted with the question of determining the law governing the arbitration agreement in the *Kabab-Ji* case.

Mr. Parigot explained that, when confronted with a dispute as to the validity of an arbitration agreement (including the question of whether an arbitration agreement could bind a non-signatory of the main contract like in the *Kabab-Ji* case), the French courts do not resort to conflict of laws rules but directly apply substantive rules of French law that govern the situation at hand, unless the parties have expressly submitted the validity and effect of the arbitration agreement itself to a specific domestic law. In its decision, the Court of Cassation also held that, contrary to the approach taken by the English courts in *Kabab-Ji*, the general choice of English law as the governing law was insufficient to establish a common intent that the arbitration agreement itself would be governed by English law. The Court of Cassation then went on to find that since KFG was unable to demonstrate that the parties intended for English law to be the law of the arbitration agreement, the substantive rules of French arbitration law would apply. On that basis, the Court of Cassation upheld the decision of the Paris Court of Appeal that had applied French substantive rules of international arbitration to refuse to set aside the award.

Notably, Mr. Parigot pointed out that the Court of Cassation's decision was heavily influenced by the separability principle, a cornerstone of French law which provides that the arbitration clause is legally independent of the main contract. Therefore, the validity and effectiveness of an arbitration clause should be determined based on the common intention of the parties, as independently ascertained; the choice of governing law of the main contract does not give rise to an implication that the parties intended for the arbitration agreement to be governed by the same law.

## Conclusion

The various cases discussed by each of the panelists have been in the spotlight in recent years, given the significance of these cases in shaping the law in their respective jurisdictions. The panel discussion was highly informative as the panelists took participants through the rationale behind each national court's approach to determining the law of an arbitration agreement. As summarized by Mr. Pham in his concluding remarks, the Vietnamese law position is particularly unique because the approach differs depending on whether the arbitration is seated within or outside of Vietnam.

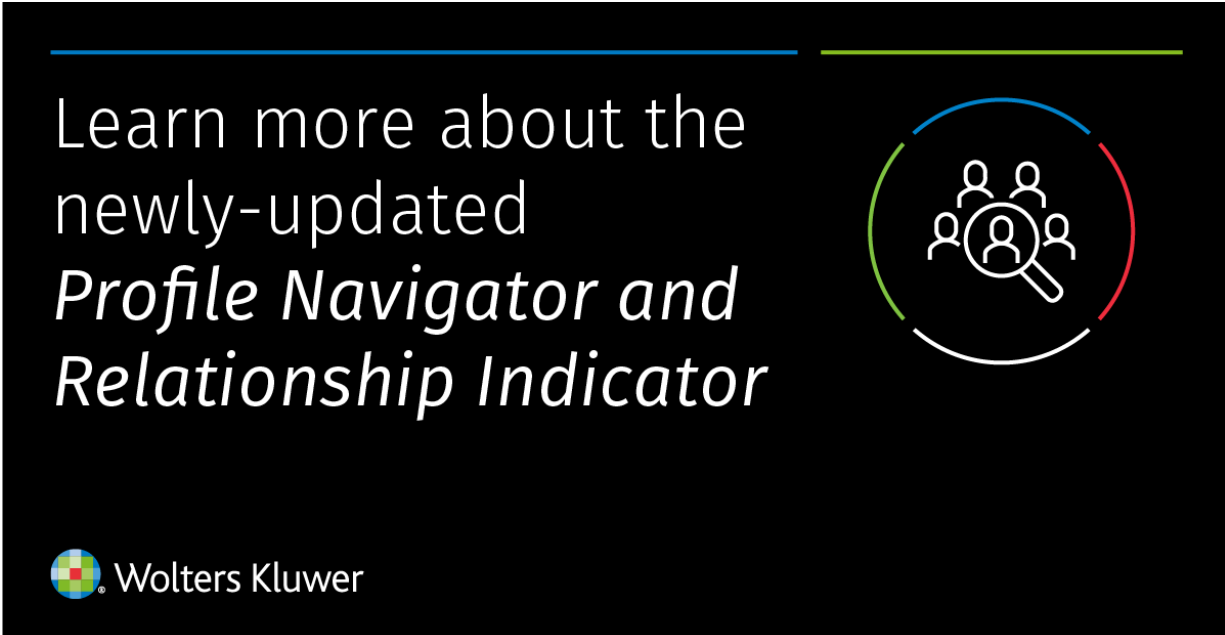
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## References

?1 Section 103(2)(b) of the English Arbitration Act 1996 provides that recognition and enforcement of an award can be refused if “*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.*” (emphasis added)

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