INTERNATIONAL ARBITRATION | NOVEMBER 2021

GOVERNING LAW, THE UK'S SUPREME COURT GIVES FURTHER GUIDANCE

Following on from its judgment in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb* **in 2020,[1] the UK Supreme Court has recently ruled that English law should govern an arbitration agreement, despite the choice of the seat being Paris. The judgment in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*[2] also examines the application of a No Oral Modification (NOM) clause, and the approach the English courts will take on summary judgment, which will please those seeking a fast track enforcement process.**

The judgment is of equal importance to those drafting dispute resolution clauses and to those interpreting and enforcing them.

The background

A dispute arose under a Franchise Development Agreement (**FDA**) and related franchises between Kabab-Ji SAL (Lebanon) (**Kabab-Ji**) and Al Homaizi Foodstuff Company (**Al Homaizi**). Al Homaizi became a subsidiary of Kout Food Group (Kuwait) (**KFG**) following a corporate restructure. The FDA contained an English governing law clause, had an ICC arbitration clause with the seat in Paris, and a NOM clause.

- **Paris Arbitration and court proceedings**

Kabab-Ji referred the dispute to ICC arbitration in Paris. The arbitration was commenced against KFG, but not Al Homaizi. KFG participated in the arbitration under protest, claiming it was not a party to the franchise agreements or the FDA.

The tribunal decided that whether KFG was bound by the arbitration agreement was a question of French law, as the seat of the arbitration was Paris. However, the tribunal relied on English law to decide that KFG was an additional party to the FDA on the basis of "*novation by addition*". KFG was held to be in breach of the FDA and the associated franchise agreements, and ordered to pay Kabab-Ji US$6.7 million, as the principal amount. It is noteworthy that the only English-qualified lawyer on the panel dissented and found that under English law, KFG was not a party to the contract, as under the NOM this would have required written consent (more on which below under the English proceedings).

KFG applied to the Paris Court of Appeal to set aside the award.

The Paris Court of Appeal dismissed KFG's appeal to set aside the award. It was not persuaded that the parties intended to apply English law to the arbitration agreement, consequently finding that French law was applicable, as the law of the seat. KFG has appealed to the French Court of Cassation, which appeal is yet to be determined.

- **English court proceedings**

Kabab-Ji issued proceedings in the English Commercial Court to enforce the award, which KFG contested.

The Commercial Court held that English law governed the question of whether the arbitration agreement in the FDA was valid, and applying English law principles, found that KFG was not a party to the FDA, or the arbitration agreement, but resisted making a final decision on enforcement until the French Court of Appeal had published its decision.

---

[1] [2020] UKSC 38

[2] [2021] UKSC 48

Both Kabab-Ji and KFG appealed to the English Court of Appeal. In summary, the Court of Appeal agreed that there was no real prospect of KFG being found to be a party to the arbitration agreement and gave summary judgment refusing recognition and enforcement of the ICC arbitration award.

In terms of timings, the English Court of Appeal published its judgment granting summary judgment and refusing to enforce the award on the basis that the parties had chosen English law to govern the arbitration agreement before the Paris Court of Appeal ruling (referenced above) was published, the timing is important for the reasons given below.

The Supreme Court decision

Kabab-Ji appealed to the Supreme Court, before whom the issues were:

1. Choice of law: had the Court of Appeal erred in finding that the parties had made an express choice of English law, rather than finding that that there was an implied choice of French law governing their arbitration agreement?

Ruling: the arbitration agreement was governed by English law.

(a) When examining the choice of law issue, the Supreme Court looked at another Supreme Court judgment in the case of *Enka v Chubb* in which and as no arbitration had taken place, that court needed to consider how to address the conflicts of law issues. It noted that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**NYC**) had two international conflict of laws rules, which provided that the validity of an arbitration agreement is governed by "*the law to which the parties subjected it*"; and in cases where no governing law has been chosen, the applicable law is that of "*the country where the award was made*", usually the place of the arbitral seat.

The court also found that in determining whether an agreement is valid, the relevant law one should look to in order to determine the question, is the law that would have applied if it was valid, and that the parties' choice of law for the main contract will be persuasive in concluding the parties' intentions in terms of the law to apply to the arbitration.

(b) In this instance there was an award, therefore, the court needed to review the principles for rejecting recognition and enforcement of an award as set out in the NYC, incorporated into English law under the Arbitration Act 1996 (**AA96**) ad not simply the position under conflicts of laws.

Two questions arose:

(i) did the award arise from an invalid arbitration agreement? The Supreme court found the FDA's governing law clause to be clear - it provided that "*this Agreement*" shall be governed by English law. As discussed above, the court held that this extended to the arbitration agreement.

(ii) had the award had been set aside or suspended? Clearly, the answer here was that no, it had not. It was still under consideration by the Paris Court of Appeal, as the competent authority of the country in which it was made.

(b) The court also considered the two arguments that Kabab-Ji put forward and dismissed them both as follows:

(i) although the FDA referenced the tribunal applying "*principles of law generally recognised in international transactions*" (UNIDROIT Principles of International Commercial Contracts), this was directed more at how the tribunal should proceed in the arbitration, and not whether there was a valid arbitration agreement.

(ii) the contractual interpretation question on whether English law, if applied, would invalidate the agreement, does not apply to questions of whether there was an actual agreement between the parties.

2. Party issue: was there any real prospect of an English court finding that KFG had become a party to the arbitration agreement?

Ruling: there was no real prospect of a court finding that KFG had become a party to the arbitration agreement.

(a) The court held that under English law, KFG would not be held to be a party to the agreement, as there was no agreement in writing to this effect – a formality required as a result of the inclusion of the NOM clause in the FDA (as confirmed by the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd.*[3]*).*

3. Procedural issue: had the Court of Appeal erred in giving summary judgment refusing recognition and enforcement of the award?

Ruling: the Court of Appeal was correct to give summary judgment

[3] [2018] UKSC 24

(a) Under the NYC and the AA96, it is necessary for the party resisting enforcement to put forward proof supporting the grounds on which it relies. However, the English court will determine the issue in accordance with its own procedural rules. Therefore, a trial on the issues is not always required and a summary approach will be suitable where the court considers it appropriate and proportionate.

(b) The Supreme Court agreed with the Court of Appeal in overturning the Commercial Court's decision to adjourn the decision on recognition and enforcement. The reasoning being that the French decision would have no bearing on the outcome of the English proceedings, as a different legal approach would have been taken.

HFW Comment

This judgment gives clear direction on the way in which the English courts will interpret arbitration agreements that do not expressly specify the governing law applicable to them. It follows on from the decision in *Enka v Chubb*, and will be helpful to those drafting dispute resolution clauses and to those interpreting or enforcing them. That said, parties would be well advised to draft their dispute resolution clauses with care.

The court's review of and guidance on NOM clauses is particularly helpful, as this is an area in which disputes can easily arise. In particular, the court's dismissal of the suggestion that a novation by conduct or by addition, will succeed in the face of a NOM clause is a point that parties will wish to keep in mind if they seek to change terms caught by a NOM clause.

This judgment ends the story in this jurisdiction at least for now. However, we await to see how the Court of Cassation, France's highest appellant court, determines the issues before it and what this will mean for the parties. We will publish an update when their judgment is available.

For more information, please contact the author(s) of this alert

NICOLA GARE
Disputes Professional Support Lawyer.
London
T **+44 (0)20 7264 8158**
E **nicola.gare@hfw.com**

DAMIAN HONEY
Partner, London
T **+44 (0)20 7264 8354**
E **damian.honey@hfw.com**