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UK Ruling Evinces Conflict In Int'l Award Enforcement

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In Kabab-Ji SAL v. Kout Food Group, a U.K. Supreme Court bench unanimously dismissed an appeal by Lebanese restaurant chain Kabab-Ji and declined to enforce an International Chamber of Commerce award against Kuwait's Kout Food Group.[1]

The circumstances of the case revive a decade-old cautionary tale in Anglo-French judicial relations and the potential lack of consensus in the cross-border enforcement of international awards.

The judgment by Justice Nicholas Hamblen and Justice George Leggatt affirms principles from their majority judgment last year in Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb.[2]

English courts will continue to apply English law principles of interpretation to determine the governing law of arbitration agreements and hence the law applicable to these agreements' validity. They do so fully aware that other national courts, applying their own domestic law, might reach a different conclusion.

Kabab-Ji extends the Enka precedent from predispute determinations to the post-award context. Kabab-Ji also demonstrates English law's shift in recent years toward the international consensus of enforcing terms requiring contractual variations to be made in writing. Such terms will only be disregarded in certain narrow circumstances.

The Enka Principles Applied

Previous case law, including the Court of Appeal below in Enka itself, had suggested that, absent express choice of law of the arbitration agreement, English courts would interpret such agreements' validity under the law of the procedural seat of arbitration — with whatever outcome that had for the validity of the clause.

In Enka, disputing parties came to the English court to litigate the validity of their arbitration agreement when Chubb had sought an injunction against Enka pursuing proceedings in Russian court and to enforce an arbitration clause instead.

The Supreme Court held that English conflict of laws would take a pro-enforcement approach to arbitration clauses by the "principle that contracting parties could not reasonably have intended a significant clause in their contract, such as an arbitration clause, to be invalid."[3]

By taking this goal-oriented approach, the court concluded that, absent an express governing law provision for the arbitration agreement, the substantive law of a contract would usually impliedly govern an arbitration clause as long as the arbitration agreement was valid under that law; and the law of the seat may displace it to protect that validity.[4]

The court took this approach in a spirit of comity with international views on the New York Convention for the enforcement of arbitral awards, the pro-enforcement policy of the convention's Article Two, regarding enforcement of arbitration agreements, and Article Five, enforcement of arbitral awards, and a desire for English common law to conform to that spirit to reduce cross-border uncertainty.[5]

In Kabab-Ji, the context for the court's review was instead at the enforcement stage. In this case, as is typical, the award was to be enforced under Article Five of the New York Convention and domestic implementing legislation.

Ironically, given the court's fastidiousness the previous year in Enka in promoting the international support for arbitration found in the New York Convention, it now found that there is no international jurisprudential consensus on adjudicating conflicts of law regarding arbitral validity when determining the enforcement of awards under Article Five of the convention.[6]

The court was therefore moved to apply the Enka principles at the award enforcement stage.

In this case, the seat of arbitration in the relevant arbitration clause was Paris. Although the law of the seat was, therefore, French law, English law was the substantive governing law of the contract as a whole.[7] The court decided that validity of the arbitration agreement was determined by English law.[8] With further irony, this choice of law led to the invalidity of the arbitration agreement between the parties.

The outcome may seem surprising given the Enka principles discussed above. But in this case, the debate between the parties was whether Kout Food Group had become party to a franchise contract with Kabab-Ji after a corporate restructuring had made the original counterparty, Al Homaizi, its subsidiary.[9]

Thus, the debate here was not whether an arbitration agreement was valid as between two signatory parties. Rather, at issue was whether Kabab-Ji and Kout Food Group had agreed to any contract, including its arbitration clause, at all, given Kout Food Group had not signed the franchise agreement.[10]

No Oral Modification Clauses Apply to Arbitration Agreements

Having concluded that English law governed the arbitration agreement, one of the concerns leading to the outcome of invalidity was that the franchise agreement had an express clause requiring that modifications to the agreement be written and signed by both parties; further, any waiver of those writing requirements must also be written and signed by both parties.[11]

In MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd., Judge Jonathan Sumption had

previously moved English common law toward international and transnational consensus that clauses requiring contractual variations be reduced to writing should generally be enforced.[12]

The use of this principle to decline to enforce an arbitration clause against a nonsignatory is an innovation, albeit consistent with English common law principles.

English common law has generally been skeptical of extending arbitration agreements to contractual nonsignatories absent a specific transfer of legal rights such as assignment or insolvency administration. This is different from the approach taken under French law, which leads us to the final curiosity of this judgment.

English and French Approaches Clash: Dallah Revisited

As discussed, Articles Two and Five of the New York Convention enshrine a pro-enforcement policy for international arbitration awards — which often makes international arbitration advantageous over domestic litigation. It is also typical for the rules of arbitration, both the governing law of the procedure and any party-chosen procedural rules, to allow an arbitral tribunal to decide its own jurisdiction in the first instance.[13]

But, as the English courts and others around the world have asserted, the New York Convention leaves jurisdictional questions open to refreshed scrutiny at the enforcement stage. The Supreme Court put the point bluntly: "the arbitrators' decision on a matter which determines their own jurisdiction has no legal or evidential value and the court must consider and determine the question independently for itself."[14]

A decade ago in Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan, the Supreme Court had conducted this fresh examination using French law to determine whether a nonsignatory was bound to an arbitration agreement and thereby to an international award against it.[15] It decided the party was not bound.

Notoriously, the award was taken to France for enforcement, and the French courts decided precisely the reverse. French law invokes a concept of "international public policy" — notably, a creature of French domestic law — to encourage the arbitration of international disputes against nonsignatories who are found to have taken an important role in contract creation, substantive performance or termination.[16]

While the situation in Kabab-Ji was somewhat different, it continues to demonstrate a lack of international consensus. A French court had already ruled to enforce the award against Kout Food Group under the "international public policy" approach. Thus, the specter of Dallah returned and the English Supreme Court candidly acknowledged that "the risk of contradictory judgments cannot be avoided."[17] It was disinclined to play follow the leader, and held to its conflicts of law analysis to decide the validity question under English law.

On a practical level, the Kabab-Ji case underlines that, in international commercial relations, an express governing law provision in arbitration agreements is an often overlooked but simple expedient against future uncertainty and litigation.

The case also demonstrates, once again, the differing outcomes for both the pursuit of arbitration and the enforcement of arbitral awards with respect to nonsignatories, particularly as between the English

and French jurisprudential approaches.

Parties from integrated company groups in the Middle East or anywhere in the world may be advised against French-seated international arbitration if they wish to avoid tactical corporate veil-piercing by dragging related but contractual nonsignatory companies into disputes. The reverse may equally be true if flexibility to exploit that approach is desired.

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[1] Kabab-Ji SAL v. Kout Food Group [2021] UKSC 48.

[2] Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38.

[3] Enka, [106].

[4] Enka, [170].

[5] Enka, [129]-[136].

[6] Kabab-Ji, [32].

[7] Kabab-Ji, [37].

[8] Kabab-Ji, [39], [53].

[9] Kabab-Ji, [3]-[5].

[10] Kabab-Ji, [49]-[52].

[11] Kabab-Ji, [59].

[12] MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd [2018] UKSC 24. For some additional background on this issue, see our alert at https://www.crowell.com/NewsEvents/AlertsNewsletters/all/UK-Supreme-Court-Moves-English-Common-Law-Towards-International-Consensus-On-No-Oral-Variation-Clauses.

[13] See, for example, respectively, Section 30 of the English Arbitration Act 1996 and Article 6 of the ICC Rules of Arbitration 2021.

[14] Kabab-Ji, [79].

[15] Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46.

[16] See Municipalité de Khoms El Mergeb v Société Dalico [1994] 1 Rev Arb 116 (20 December 1993).

[17] Kabab-Ji, [90].