

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48



What law will apply to an arbitration agreement?

Andrew Rigden Green considers whether the UK Supreme Court decision in Kabab-Ji will be followed in Hong Kong.

Abstract

- **The Tribunal held that in the absence of an express choice of law, the law applicable to the arbitration agreement was the law of the seat, French law**
- **On enforcement in England, the Supreme Court upheld the Court of Appeal's decision that the governing law of the main contract would apply to the arbitration agreement, English law**
- **The Paris Court of Appeal upheld the Tribunal's decision**
- **The Court of Appeal's decision was not applied in the Hong Kong case of X v ZPRC, holding that, as a matter of construction the law of the seat may be the applicable law**
- **Two other cases in Hong Kong, that did not consider Kabab-Ji, held that the law applicable to the main contract would be the law applicable to the arbitration agreement**

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Background

The dispute arose out of a franchise agreement (the "Franchise Agreement") in which Kabab-Ji granted a licence to a licensee (the "Licensee") to operate restaurants in Kuwait. The Franchise Agreement contained an arbitration clause (the "Arbitration Agreement"). The salient terms of the Franchise Agreement and the Arbitration Agreement were:

- (1) the Franchise Agreement was governed by English law;
- (2) the seat of the Arbitration Agreement was Paris;
- (3) there was no provision stipulating the governing law of the Arbitration Agreement; and
- (4) any amendments to the Franchise Agreement were to be agreed in writing ("No Oral Modification Clause").

Subsequent to a corporate restructuring, the Licensee became one of the subsidiaries of Kout Food Group.

As a result of the breach of the Franchise Agreement, Kabab-Ji issued arbitral proceedings in France against Kout Food Group, instead of the Licensee.

The Tribunal made an award in favour of Kabab-Ji (the "Award"). The Tribunal held that as the law of the seat the Arbitration Agreement was French law, it must apply French law to determine whether Kout Food Group was bound by the Arbitration Agreement; it must also apply English law to decide whether Kout Food Group had acquired the rights and obligations under the Franchise Agreement. On this basis, under French

law, Kout Food Group was a party to the Arbitration Agreement and, under English law, Kout Food Group became an additional party to the Franchise Agreement by way of a novation of addition.

Kabab-Ji sought to recognise and enforce the Award before the English Courts.

Kout Food Group applied to the French Courts to set aside the Award.

The proceedings in France

In June 2020, the Paris Court of Appeal dismissed Kout Food Group's application and refused to set aside the Award taking a view consistent with that of the Tribunal that the law of the seat, French law, was the governing law of the Arbitration Agreement such that Kout Food Group became a party to the Arbitration Agreement.

Kout Food Group is appealing to the Court of Cassation, the highest court in France.

The UK Supreme Court's decision

Endorsing the decision of the Court of Appeal, the UK Supreme Court held that where there was no express provision that governs the law of an arbitration agreement, the governing law of the main agreement would be the governing law of the arbitration agreement to answer the question of whether a party became a party to the arbitration agreement. The underlying reason is that a choice of law governing an agreement will generally apply to an arbitration agreement which forms part of the agreement as a whole.

The UK Supreme Court agreed with the Court of Appeal that the governing law of the Franchise Agreement, English law, should be applied, to construe the Arbitration Agreement. As such, Kout Food Group had not become a party to the Franchise Agreement and hence to the Arbitration Agreement as Kabab-Ji failed to show that the Franchise Agreement and so the Arbitration Agreement had been amended in writing as required under the No Oral Modification Clause to include Kout Food Group as a party.

This decision is in line with the earlier decision of the UK Supreme Court in *Enka v Chubb* [2020] UKSC 38.

The English Courts therefore refused to recognise and enforce the Award.

Will Hong Kong follow Kabab-Ji

In Hong Kong, the reasoning of the Court of Appeal in *Kabab-Ji* was argued before the Court of First Instance in *X & Anor v ZPRC & Anor* [2020] HKCU 1014.

In that case, as in *Kabab-Ji v*, there was no express provision stipulating the governing law of the arbitration agreement. The law of the main agreement was English law and the seat of arbitration was Hong Kong. The issue was whether the Hong Kong Court had jurisdiction to make and continue an interim injunction. The Defendants argued that it did not because the governing law of the arbitration agreement was English law and that, in absence of indication to the contrary, the parties were assumed to have intended that the arbitration agreement should be governed by English law. Notwithstanding the English Court of Appeal's decision in *Kabab-Ji*, the Hong Kong Court held that (1) the designation of Hong Kong as the seat of arbitration as well as (2) the selection of the Hong Kong International Arbitration Center Adminstrated Arbitration Rules supported a good arguable case that Hong Kong law was the governing law of the arbitration agreement. Thus the Court could continue the injunction. By contrast in *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* [2020] 1 HKLRD 1217 and *Sea Powerful II Special Maritime Enterprise (ENE) v Bank of China Ltd* [2016] HKLRD 132, the Hong Kong Court held that the chosen governing law clause of the main agreement (in this context a charterparty) would be regarded as the applicable law of the arbitration agreement contained in the charterparty.

It is important to note that the judge in *X v ZPRC* was not required to make a final determination as to whether Hong Kong or English law was the law applicable to the arbitration agreement. The application

before the judge at that stage was on an interlocutory basis and in respect of the continuation of an interim injunction.

A matter of construction

It therefore appears that as a matter of HK law, the determination of the governing law of the arbitration agreement is a matter of construction. This was also held to be the case in *OCBC v Kai Sen* where the arbitration agreement is incorporated into another agreement (here a Bill of Lading) by reference.

Conclusion

Whilst decisions of the English Courts are not binding on the Hong Kong Courts, they are persuasive.

The Hong Kong Court in *X v ZPRC* did not consider the English Court's decision in depth in respect of the issue as there was no need to decide (at that stage) that Hong Kong law or English law applied. The Hong Kong Court was only required to satisfy itself that there was good arguable case that Hong Kong law may apply to grant/continue the interim injunction. Whether or not the Hong Kong Court will follow the English decision in *Kabab-Ji* remains therefore unsettled. The author is hoping to see further clarification and guidance from the Hong Kong Courts in the future.

When it is unclear that what governing law of an agreement including the arbitration agreement should be applicable on the face of the agreement, the Court will carry out an exercise of construction of the terms of the agreement to ascertain the parties' intention.

From the point of view of the drafters of commercial agreements, an express governing law clause of the arbitration agreement would remove any potential uncertainties.

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