27 October 2021

PRESS SUMMARY

Kabab-Ji SAL (Lebanon) (Appellant) v Kout Food Group (Kuwait) (Respondent)
[2021] UKSC 48
On appeal from: [2020] EWCA Civ 6

JUSTICES: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Leggatt

BACKGROUND TO THE APPEAL

The appellant ("**Kabab-Ji**"), a Lebanese company, entered into a Franchise Development Agreement ("**FDA**") with Al Homaizi Foodstuff Company ("**Al Homaizi**"), a Kuwaiti company, granting Al Homaizi a licence to operate its restaurant franchise in Kuwait for ten years. In 2005, Al Homaizi became a subsidiary of the respondent, Kout Food Group ("**KFG**"), following a corporate reorganisation. A dispute arose under the FDA and linked Franchise Agreements, which Kabab-Ji referred to arbitration under the rules of the International Chamber of Commerce in Paris. The arbitration was commenced against KFG only, not Al Homaizi.

KFG argued that it was not a party to the FDA, the arbitration agreements contained in the FDA, or the Franchise Agreements, and that they took part in the arbitration under protest. The majority arbitrators found that, applying French law, KFG was a party to the arbitration agreements. They also found that, applying English law, KFG was an additional party to the FDA by "novation by addition" and was in breach of the FDA and linked agreements. They made an award against KFG for unpaid licence fees and damages in the principal sum of US$6.7 million. KFG applied to the Paris Court of Appeal to set aside the award. Soon afterwards, Kabab-Ji issued proceedings in the Commercial Court in London to enforce the award. KFG made a cross application for an order that recognition and enforcement be refused.

On a trial of preliminary issues relating to the FDA (which would be determinative of the like issues arising under the linked agreements), the Commercial Court held that the validity of the arbitration agreement in the FDA was governed by English law and that, subject to a point left open, as a matter of English law KFG was not a party to the FDA or the arbitration agreement. The court postponed making a final decision on enforcement pending the decision of the Paris Court of Appeal. Both parties appealed to the Court of Appeal which upheld the judge's decision, save that it held that the judge should have made a final determination. It held that that there was no real prospect of it being shown that KFG became a party to the arbitration agreement and that summary judgment should be given refusing recognition and enforcement of the award.

Kabab-Ji appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal on all issues. It holds: (i) that the arbitration agreement is governed by English law (the "**choice of law issue**"); (ii) that in English law there is no real prospect of a court finding that KFG became a party to the arbitration agreement (the "**party issue**"); and (iii) that, procedurally, the Court of Appeal was right to give summary judgment refusing recognition and enforcement of the award (the "**procedural issue**"). Lord Hamblen and Lord Leggatt give the sole joint judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The choice of law issue

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the Convention**"), which contains provisions that have been transposed into English law by Part II of the Arbitration Act 1996 (the "**1996 Act**"). This provides a limited and exclusive list of grounds on which the recognition and enforcement of an award may be refused. The grounds relevant to this case are (i) that the award is based on an invalid arbitration agreement and (ii) that the award has been set aside or suspended by the competent authority of the country in which, or under the law of which, it was made. Because the Paris Court of Appeal, the competent authority in this case, has not annulled the award, KFG's only ground for resisting enforcement is the alleged invalidity of the arbitration agreement **[10]-[16]**.

As discussed in the Supreme Court's recent judgment in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] USKC 38 at para 128, Article V(1)(a) of the Convention establishes two uniform international conflict of laws rules. First, that the validity of the arbitration agreement is governed by "the law to which the parties subjected it" – i.e. the law chosen by the parties. Second, where no law is chosen, the applicable law is that of "the country where the award was made" - generally the place of the arbitration seat. When assessing whether an agreement exists or is valid the Court uses the law that would apply if it exists or is valid **[26]-[27]**. As stated in *Enka* at para 129*,* a general choice of law to govern a contract containing an arbitration clause will normally be a sufficient "indication" of the law to which the parties subjected the arbitration agreement for the purposes of Article V(1)(a) **[35]-[36]**. The principles for identifying the applicable law should be the same whether the question is raised before or after an award has been made.

Applying these principles to the present case, the effect of the relevant clauses in the FDA is plain. The FDA's governing law clause provides that "this Agreement" shall be governed by English law and this clearly extends to the arbitration agreement **[39]**.

Kabab-Ji advanced two arguments against this conclusion. First, that a reference in the FDA to the arbitrator applying "principles of law generally recognised in international transactions" (i.e. UNIDROIT Principles of International Commercial Contracts) meant that the arbitration clause was governed by a composite of national law and international principles, which did not qualify as "law" for the purposes of the Convention and the 1996 Act. The present case, however, is concerned with what law governs the validity of the arbitration agreement, not the rules of law to be applied by the arbitrators to the merits of the dispute **[40-48]**. Second, that because the parties should be presumed to intend that the arbitration agreement will be valid and effective, where applying English law would invalidate that agreement, one should infer that the choice of English law does not extend to it. The validation principle, however, is a principle of contractual interpretation which presupposes that an agreement has been made. It does not apply to questions of validity in the expanded sense in which that concept is used in article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act to include an issue about whether any contract was ever made between the parties to the dispute **[49-52]**.

The party issue

Kabab-Ji contends that KFG became a party to the arbitration agreements by becoming a party to the FDA by novation because of the parties' conduct and the performance by KFG of various contractual obligations over a sustained period of time. It cannot, however, point to any agreement in writing to this effect between itself and Al Homaizi. The FDA contained a number of provisions which prescribe that it may not be amended save in writing signed on behalf of both parties – "No Oral Modification Clauses". As held by the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, such provisions are legally effective. The provisions apply to the termination of the FDA which would be necessary for there to be a novation as well as to the requirement of consent. The contractually agreed procedure for the provision of consent to any modification of the contract was required to be followed, unless a relevant estoppel could be established. No evidence to support the making of the requisite representation for an estoppel has been identified and even if there was such evidence it would not necessarily affect the position of KFG. The No Oral Modification clauses are therefore an insuperable obstacle to the claimant's case of novation by addition, quite apart from the difficulty of establishing the terms of any such novation and when and how it was purportedly made **[62-69].** UNIDROIT principles cannot be relied upon to contradict the requirements of English law **[70-72].** Reliance on the No Oral Modification Clauses is not contrary to the obligation of good faith and fair dealing in clause 2 of the FDA **[73-74]**.

The procedural issue

The Convention and the 1996 Act require a party resisting enforcement of an award to "furnish proof" of a ground of refusal **[76]**. When a party argues that there was no valid, binding arbitration agreement, the English court must determine the issue for itself, in accordance with its own procedural rules. The Court rejects Kabab-Ji's submission that this requires a full evidential hearing and trial of the issue. A summary approach is suitable where it is appropriate and proportionate **[77]-[83]**. The Court of Appeal was also correct to overturn the judge's decision to adjourn the decision on recognition and enforcement under Article VI of the Convention and section 103(5) of the 1996 Act. In circumstances where the French court will apply French law to the question in issue whilst the English court will apply English law, the risk of contradictory judgments cannot be avoided. Nor, in those circumstances, would the French court decision be relevant to the determination of the English court, a consideration ignored by the judge **[87]-[91]**.

The appeal must therefore be dismissed.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html