

KABAB-JI SAL V. KOUT FOOD GROUP DECISION
[2021] UKSC 48

LENNART VAZZOLER*

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I. INTRODUCTION

In the world of international arbitration, much like in the world of rugby, a rivalry exists between French and English courts. The *Dallah* saga, and the question of the existence of a valid arbitral agreement regarding third parties, is just one example.¹ More recently, however, there seems to be another disagreement between French and English courts: the question of the applicable law to an arbitration agreement. The 2020 decision in *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*² first signaled a distancing from other courts,

* Lennart Vazzoler is a French-German LL.M. Graduate (Class of 2022) in the International Business Regulation, Litigation, and Arbitration specialization. He is trained in French law and specializes in cross-border litigation and international arbitration. He would like to thank his wife Rebecca Caspar-Johnson for helping him by reviewing the article.

1. *See* *Dallah Real Est. & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pak.* [2010] UKSC 46 (appeal taken from Eng.); *see also* Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 17, 2011, 09/28533 (Fr.) (both deciding on the validity of arbitral agreements and third parties).

2. [2020] UKSC 38 (appeal taken from Eng.).

including other English courts.³ While some might have hoped that *Enka* was a simple error on the part of the U.K. Supreme Court (“UKSC”), a recent decision suggests that *Enka* was a turning point, rather than an anomaly, within English jurisprudence: *Kabab-Ji SAL v. Kout Food Group*.⁴

This commentary will look critically at the decision and its takeaway and analyze why this seemingly harmless change of jurisprudence matters.

II. BACKGROUND OF THE CASE

The facts of this case are relatively ordinary. A company, Kabab-Ji SAL (“Kabab”), entered into a Franchise Development Agreement (“Agreement”) with another company, Al Homaizi Foodstuff Company (“AHFC”). During the execution of the Agreement, Kout Food Group (“Kout”) became the parent company of AHFC. The Agreement contained an arbitration clause providing for arbitration before the International Court of Arbitration seated in Paris and a governing law clause setting English law as the general governing law.⁵ The latter did not, however, reference the arbitration clause specifically, and instead only stated, “This Agreement shall be governed by and construed in accordance with the laws of England.”⁶ After a dispute between the parties to the Agreement, Kabab commenced arbitration against Kout, but not against AHFC.

During the proceedings, Kout argued that it was not party to the Agreement.⁷ The tribunal, however, held that the law of the seat (French law) applied to the arbitration clause and that under French law, Kout could be brought to arbitration.⁸ The tribunal then held that Kout was bound by the substantive laws of the contract (English law) and rendered an award in favor of Kabab.⁹ Following this, Kout sought the annulment of the award in Paris, while Kabab sought its recognition and en-

3. *See* Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA (Civ) 638 (Eng.) (deciding on the applicable law to an arbitration agreement).

4. [2021] UKSC 48 (appeal taken from Eng.).

5. *Kabab*, [2020] UKSC at [37].

6. *Id.*

7. *Id.* at [5].

8. *Id.* at [6].

9. *Id.*

forcement in London.¹⁰ In France, the Court of Appeal held that French law was indeed the law governing the arbitration clause.¹¹ In England, however, things a different turn. While the first instance court declined enforcement until a final decision was reached by French courts, the Court of Appeal held that English law was applicable to the arbitration agreement and that, under English law and the English Arbitration Act of 1996, the arbitration clause was not valid against Kout.¹² The case was then brought to the UKSC.

The UKSC was confronted with three different questions, but this commentary will analyze only the first: which law was applicable to the arbitration clause? The UKSC came to the conclusion that the applicable law is English law, as it was the general law applicable to the contract.¹³ To justify its decision, the UKSC relied partially on its preceding judgement, *Enka*, where it held that a general choice of law to govern a contract was enough to also be applicable to an arbitration agreement, if no express choice had been made indicating otherwise.¹⁴ Furthermore, as this case was about the recognition and the enforcement of an award rendered outside of the United Kingdom, the UKSC relied on article V(1)(a) of the New York Convention, which considers the grounds of refusal, where the wording is as follows:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made¹⁵

Relying on the notion of “indication,” the UKSC held that a general choice of law was enough to be deemed an “indica-

10. *Id.* at [8].

11. *Id.* at [9] (noting that a *pourvoi*–appeal–to to the Cour de Cassation has been made).

12. *See Kabab-Ji SAL v. Kout Food Grp.* [2020] EWCA (Civ) 6 (Eng.) (deciding on the applicable law to the arbitration agreement).

13. *Kabab*, [2020] UKSC at [53].

14. *Id.* at [26], [28]-[29], [33]; *see also Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb*, [2020] UKSC 38, [170] (appeal taken from Eng.).

15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), Jun. 10, 1958, 21.3 U.S.T. 2517, 330 U.N.T.S 3 [hereinafter *New York Convention*]; *see also Kabab*, [2020] UKSC at [33].

tion” and, as such, is to be considered the expressly chosen applicable law to an arbitration agreement.¹⁶ Furthermore, the UKSC, in an attempt to maintain consistency with the *Enka* decision, held that the rule in *Enka*, which was applied to questions of the validity of an arbitration agreement, should be applied equally here, where the question arose when seeking enforcement of an award, in the name of consistency.¹⁷ Applying the above reasoning to the facts of the case, the UKSC held that English law was applicable to the arbitration clause.

III. CRITICAL ANALYSIS

The decision to follow the precedent set in *Enka* (and on a broader level with the precedent, itself) is problematic for several reasons: First, the reasoning of the UKSC is flawed insofar as it does not really consider the nature of an arbitration agreement, which is fundamentally different from a contract as a whole (I). Second, when looking at a potential applicable law, the reasoning is still flawed, as it not only lacks consideration of an arbitration agreement, but also fails to consider other, more reasonable options to determine the applicable law (II).

- A. *An arbitration agreement is, by nature, distinct from a main contract, and, as such, the two need to be looked at independently from each another.*

To understand the question at hand and the difference in position between the French and the English courts, we need to look at one of the most fundamental concepts of international commercial arbitration: the arbitration agreement. When signing a contract, parties who wish to submit disputes to international arbitration include a clause, the arbitration agreement, which vests an arbitral tribunal with the power to render a final decision (or award) in a dispute, within the scope of the arbitration agreement,¹⁸ and not beyond.¹⁹

16. *Kabab*, [2020] UKSC at [33].

17. *Id.* at [35].

18. See, e.g., New York Convention, *supra* note 15, at art. II; see also UNCITRAL Model L. on Int'l Com. Arbitration 1985 with Amendments as Adopted in 2006 art.7, U.N. Comm'n on Int'l Trade L., https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf [hereinafter UNCITRAL Model Law]; see also GARY B.

An arbitration agreement is, thus, a component of a main contract and the two should not be conflated. A main contract (or substantive contract) is an agreement between the parties of the rights and obligations associated with a transfer of ownership; an arbitration agreement (or “*proceedings contracts*”²⁰) is an agreement to arbitrate a dispute based on a conflict with the substantive contract.²¹ In other words, an arbitration agreement is a separate contract, both in nature and in practice, from the substantive contract in which it is contained.²² It is for this reason that many national laws include (international) arbitration within their procedural codes and not their substantive law codes.²³ This is also why different conventions, such as the Rome Convention and Regulation, exclude arbitration agreements from their scope of application.²⁴ Finally, this is also a position that has been adopted by courts.²⁵

This difference in nature provides the foundation for what is commonly known as the doctrine of separability. Described as “one of the conceptual and practical cornerstones

BORN, INTERNATIONAL COMMERCIAL ARBITRATION 266-320 (3d ed. 2021); *see also* FRANCO FERRARI & FRIEDRICH ROSENFELD, INTERNATIONAL COMMERCIAL ARBITRATION – A COMPARATIVE INTRODUCTION 21 (2021); *see also* Stefan Kröll, *Schiedsklauseln in internationalen Kaufvertr. . .gen: Fragen des anwendbaren Rechts* [Arbitration Clauses in International Sales Contracts: Issues of Applicable Law], 21 INTERNATIONALES HANDELSRECHT [INTERNATIONAL COMMERCIAL LAW] 177, 180-181 (2021) (all discussing the purpose and scope of an arbitration agreement).

19. *See, e.g.*, New York Convention, *supra* note 15, at art. V(1)(c) (enumerating as a ground for annulment of an award an award beyond the scope of an arbitration agreement).

20. *See* Kröll, *supra* note 18, at 180 (referring to “*Prozessvertr. . .ge*” which would translate to “proceedings contracts”).

21. *See, e.g., id.*

22. In fact, it is even possible to include an arbitration agreement, written in another document, by reference.

23. *See, e.g.*, Code de Procédure Civile [CPC] [Code of Civil Procedure] art. 1442-1449 (Fr.); *see also* Zivilprozessordnung [ZPO] [Code of Civil Procedure], art. 1029-1040 (Ger.) (legislating on arbitration agreements).

24. *See* 2008 O.J. (L 177/6) art. 1(2)(e); *see also* 1980 O.J. (L 266/1) art. 1(2)(d); *see also* Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb, [2020] UKSC 38, [42] (appeal taken from Eng.); *see also* Kröll, *supra* note 18, at 181 (all addressing the exclusion of arbitration agreements from the scope of certain conventions).

25. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 26, 2020, I ZR 245/19, juris (Ger.) (addressing the issue of arbitration agreements).

of international arbitration,”²⁶ the doctrine is simple: there is a total separation of an arbitration agreement and a substantive contract such that, in the case of a claim of invalidity or nullity of a substantive contract, the validity or existence of the arbitration agreement, which is the basis of the legitimacy of the arbitral tribunal, is not affected.²⁷ This does not mean that an arbitration agreement cannot be invalid;²⁸ rather, it simply confers an additional layer of protection on an arbitration agreement to promote the unfolding of arbitral proceedings.

Beyond recognition of their differences, the fundamental question is the following: how far does the separation reach? Some authors have argued that the doctrine of separability is a legal fiction created to favor arbitration, which should be limited to the question of the competence of the arbitral tribunal.²⁹ There is a certain strength to this argument. Both a narrow reading of article 16(1) of the UNCITRAL Model Law on International Commercial (“UNCITRAL Model Law”)³⁰ and the idea that the consequences of a legal fiction should not be extended beyond its intended purpose,³¹ support this argument. Nevertheless, I disagree because this argument fails to recognize the fundamental difference in nature between the two contracts (i.e., whether the contract is a substantive or proceedings contract). Furthermore, a narrow reading of article 16(1) of the UNCITRAL Model Law, which establishes the doctrine of separability for the purposes of the determination of jurisdiction, fails to recognize that the wording does not establish an exclusive application of the principle.³²

An arbitration agreement should not be considered part of a main contract, but rather viewed as a “contract within a

26. BORN, *supra* note 18, at 376.

27. *See, e.g.*, TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE 125-134 (7th ed. 2019) (discussing the doctrine of separability).

28. *See, e.g.*, Premium Nafta Products Ltd. v. Fili Shipping Co. [2007] UKHL 40 (appeal taken from Eng.) (addressing the validity of an arbitration agreement).

29. *See Enka*, [2020] UKSC at [41], [232]-[233].

30. *See* UNCITRAL Model Law, *supra* note 18, at art. 16(1).

31. *See, e.g., Enka*, [2020] UKSC at [41].

32. The article reads: “For that purpose. . .” and not “For that sole purpose. . .”

contract,”³³ with each looked at independently. In other words, different judicial systems are at play when it comes to arbitration. There are in fact three different judicial systems: The law of the substantive contract (*lex contractus*), the law of the arbitral proceedings (*lex arbitri*), and the one applicable to the arbitral agreement.³⁴ The fact that three different judicial systems exist does not mean that the applicable law is necessarily different, but rather that determining the law applicable to each of the different components of the arbitral proceedings needs to be done independently from one another.

A failure to recognize the difference in nature between each, and to therefore complete the analysis of the applicable law independently for each judicial system, is precisely the shortcoming of the UKSC decisions – both in *Enka*, where the issue was raised before an arbitration, and in *Kabab*, where the issue was raised in an annulment proceeding. Because of the difference between a contract and an arbitration agreement, one needs to do a different conflict-of-law analysis of the applicable law.

B. *The applicable law to the arbitration agreement in Kabab should have been French, not English law.*

In *Kabab*, the UKSC did not conclude that a choice of law for an arbitration agreement is invalid, but rather that a general choice of law clause in a contract equally applies to both the substantive contract and the arbitration agreement in the absence of a specified agreement on the applicable law to the arbitration agreement.³⁵ But, as outlined above, the law applicable to the Agreement and the law applicable to the arbitration clause need to be determined independently. Therefore, the question remains: what law should have applied to the arbitration clause in *Kabab*?

33. JULIO C. RIVERA, *ARBITRAJE COMERCIAL INTERNACIONAL Y DOMÉSTICO* [INTERNATIONAL AND DOMESTIC COMMERCIAL ARBITRATION] 157 (2d ed. 2014).

34. Julio C. Rivera, *El Derecho Aplicable a la Existencia y Validez Sustantiva del Convenio Arbitral* [The Law Applicable to the Existence and Substantive Validity of the Arbitral Tribunal], 1 *REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES* [JOURNAL OF COMMERCIAL ARBITRATION AND INVESTMENTS] 55, 56 (2021).

35. See *Kabab-Ji SAL v. Kout Food Grp.* [2021] UKSC 48, [53] (appeal taken from Eng.); cf. *Enka*, [2020] UKSC at [170].

To determine which law is applicable to the arbitration clause, a conflict of laws analysis needs to be done. In *Kabab*, the UKSC held that there was an “indication” which sufficed as an express choice of law under article V(I) (a) of the New York Convention.³⁶ However, it is a stretch to claim that a general choice of law clause is an express choice of the parties on both the *lex contractus* and the law applicable to the arbitration clause. It is unlikely that though the parties did not explicitly state their choice of law in the arbitration clause, the judges were able to read and interpret the Agreement so clearly that the choice of law for the arbitration clause was considered “express.” There might have been an implicit choice, as the parties assumed, or perhaps simply ignored, that their choice of law would apply to both equally. But, if the parties knew about the difference between a substantive contract and an arbitration agreement, it seems odd that they actively chose to not clearly state the applicable law for both. In other words, either the parties were negligent, or the parties were ignorant, but it cannot be said that the parties made an express choice rather than implicit one. Either way, an implicit choice would mean that the criterion of an express choice of law, as provided by article V(1) (a), was not met, thus triggering other provisions of the article (discussed below), potentially barring English law from applying to the arbitration agreement.

The proper resolution can be found within the international conventions (i). Apart from the international conventions, the UKSC also overlooks its own established precedent (ii).

i. *International Conventions*

Both France and the U.K. are parties to the New York Convention.³⁷ Article II addresses arbitration agreements, but it does not address the question of the applicable law to an arbitration agreement. Article V enumerates the grounds for refusal to recognize and enforce an award, and subsection (1) (a) provides that one of the grounds for refusal is the invalidity of the arbitral agreement under the law to which the par-

36. See *Kabab*, [2021] UKSC at [33].

37. *Contracting States*, N.Y. ARBITRATION CONVENTION, <https://www.newyorkconvention.org/countries> [https://perma.cc/AU57-9WQJ] (last visited Mar. 23, 2022).

ties have subjected it,³⁸ or in its absence, the law of the seat (*lex arbitri*).³⁹ Article V must be read in conjunction with article II—in fact it refers to it explicitly—as both articles were meant to achieve the same objective.⁴⁰ This, then, dictates that absent an express choice of law in an arbitration agreement, the governing law is the law of the seat. A different reading of the two articles would not only lead to a different reading of the same arbitration agreement in different courts, but also to a different reading of the same arbitration agreement at different stages of the arbitral proceedings.⁴¹ This is because article V relates to the grounds for refusal of an award (something that occurs once an award has been rendered), while article II relates to the recognition of the existence of an arbitration agreement (which can occur even before the arbitral proceedings begin).⁴² Similar approaches exist in other international instruments, sometimes even more explicitly.⁴³ Finally, court decisions support this reading by analogy of article V and article II of the New York Convention.⁴⁴

The decision in *Kabab* is erroneous because the UKSC fails to effectively apply article V(1)(a) of the New York Convention, to which England is a party, by looking first at the governing law of the Agreement, rather than the arbitration clause, and then at the law of the seat.

ii. *Implied Choice and Closest Connection Test*

Even if one takes issue with the reading of the New York Convention, or if a country is not party to the New York Convention, the reasoning applied by the UKSC is still lacking. The *Kabab* decision reverses an approach the UK courts have correctly used in the past. In *Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, the Court of Appeals of England

38. Which the parties have not done, as there is, as seen, no clause on the applicable law to the arbitration agreement, only to the contract.

39. See New York Convention, *supra* note 15, art. V(1)(a).

40. See BORN, *supra* note 18, at 528-529, 533.

41. See BORN, *supra* note 18, at 529, 533-534.

42. See *Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb*, [2020] UKSC 38, [130], [136] (appeal taken from Eng.) (citing van den Berg).

43. See European Convention on International Commercial Arbitration art. VI(2)(b), Apr. 21, 1961, 484 U.N.T.S 364 (mandating which law is applicable to the arbitration agreement).

44. See, e.g., BGH, I ZR 245/19 (Ger.).

and Wales favored a three-step approach to determine the applicable law of an arbitration agreement: (a) an express choice of law; in its absence (b) an implied choice of law; and in the absence of both (c) the closest and most real connection.⁴⁵

An express choice of law is always favorable. But in its absence, rather than automatically applying the law of the seat of arbitration, an arbitrator looks for the implicit choice of law. This reading favors the intent of the parties because the arbitrator will look at the different actions that the parties undertook at the different stages of a contract in order to interpret what the parties might have wanted.⁴⁶ Furthermore, because some arbitration agreements do not specify an arbitral seat (instead applying one after the fact, often not according to the will of the parties), considering the intention of the parties is even more important. This method puts party autonomy at the center of the decision-making process.

In *Kabab*, applying the *Sulamérica* doctrine might have still led the UKSC to decide that English law governed the arbitration clause because a general law clause is a strong indicator for an implicit choice.⁴⁷ However, the method used in *Kabab* to reach that same conclusion, pushing for an express reading under article V of the New York Convention, was erroneous and does not comply with precedent. If the UKSC believed there was no implicit choice, though unlikely, it might have looked at the closest connections to the case. This could have gone in any direction depending on the importance given to the facts by the arbitrator and the judges, but would also have allowed for other factors, usually not considered by courts, to play a role. This test is present both in *Enka* and *Kabab*, but omits the implied choice of law, which would have allowed for an additional layer of predictability.⁴⁸

45. See *Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638, [25] (Eng.).

46. See generally *Sulamérica*, [2012] EWCA at [26]-[31].

47. Something already recognized in *Sulamérica*, [2012] EWCA at [26].

48. See *Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb*, [2020] UKSC 38, [170] (appeal taken from Eng.); see also *Kabab-Ji SAL v. Kout Food Grp.* [2021] UKSC 48, [36] (appeal taken from Eng.).

IV. CONCLUSION

The decision in *Kabab* will have far-reaching consequences. First, there is a gap in the reasoning which affects all subsequent reasoning on which it tries to build. When looking at questions of arbitral agreements, judges must be conscious of the fact that an arbitral agreement is separate from the substantive contract for all purposes, thus requiring a separate analysis. Furthermore, due to the primacy of the international conventions and the widely accepted reading of articles II and V of the New York Convention, the applicable law to an arbitration agreement can only be the express choice of law, formulated in an express and clear way, and in its absence, the law of the seat. It may also be prudent to include considerations of implied choice of law as in *Sulamérica* in this age when parties' intentions are more and more relevant, so that the analysis is fair and balanced, taking into account all the different existing interests.

With the *Kabab* decision, the UKSC is following a concerning trend sure to create many complications when trying to determine the applicable law to an arbitration agreement. Hopefully, the UKSC will one day change course. But until then, as in rugby, the rivalry between French and English courts will remain.