

CLIENT ALERT

# UK Supreme Court Refuses Enforcement of Arbitral Award in *Kabab-Ji SAL v Kout Food Group*

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### I. Introduction

It is rare for English courts to refuse enforcement of an arbitral award: English law is known for its staunchly pro-arbitration stance, and the Arbitration Act 1996 permits non-enforcement only in exceptional circumstances. *Kabab-Ji SAL v Kout Food Group* is one such exceptional case. Endorsing the views of both the High Court and the Court of Appeal, the UK Supreme Court unanimously concluded that there was no valid arbitration agreement binding the respondent. The decision stands out not just for its authoritative clarification of the law governing arbitration agreements, but also for its insightful analysis of related points of contract law. In its forceful defence of contract law orthodoxy, the Supreme Court demonstrated the practical benefits of legal certainty, predictability and party autonomy: principles that lie at the heart of English law and the enduring appeal of English law to sophisticated commercial parties across the world.

### II. Background

The dispute arose out of a Franchise Development Agreement (the “FDA”) between the claimant (“Kabab-Ji”) and Al Homaizi Foodstuff Company (“Al Homaizi”). In 2005, as a result of a corporate restructuring, Al Homaizi became a subsidiary of a newly established holding company, Kout Food Group (“KFG”), the respondent in this case.

Kabab-Ji commenced arbitral proceedings against KFG, purportedly invoking the arbitration clause set out in the FDA. KFG participated in the arbitration under protest, contending that it was not a party to the FDA and that it therefore could not be bound by the arbitration agreement contained in it. Following the final hearing in the arbitration, the tribunal applied

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French law, as the law of the seat, to decide whether KFG was a party to the arbitration agreement. By a majority, the tribunal held that KFG was bound by the arbitration agreement.

The arbitrators also considered whether KFG had assumed substantive rights and obligations under the FDA. Applying English law (as the governing law of the contract), the majority found that the parties' conduct had resulted in a "novation by addition", causing KFG to become an additional party to the FDA. The majority concluded that KFG had breached the FDA and ordered it to pay Kabab-Ji approximately USD 6.7 million in licence fees, damages and costs.

KFG subsequently sought annulment of the award in the French courts, arguing that it had never been a party to the arbitration agreement and that the tribunal therefore had no jurisdiction over it. In June 2020, the Paris Court of Appeal dismissed KFG's annulment application. An appeal against that decision is currently pending before the Court of Cassation.

### **III. The English Proceedings**

While the French proceedings were ongoing, Kabab-Ji applied to the English courts for enforcement of the award. At a preliminary issues hearing at first instance, Burton J held that the law governing the validity of the arbitration agreement – in this case, English law – also determined whether KFG became a party to the arbitration agreement. The judge considered that, under English law, KFG had not done so and was thus not bound by the arbitration agreement. However, he stopped short of finally deciding the issue, opting instead to adjourn that decision until the French annulment proceedings had concluded.

Both parties appealed against the first-instance judgment. The Court of Appeal unanimously held that the parties' choice of English law also extended to the arbitration agreement, and that, absent written consent (as required under the terms of the FDA) or estoppel, KFG could not have become a party to the FDA. On that basis, the Court of Appeal lifted the adjournment order and gave summary judgment in favour of KFG, refusing recognition and enforcement of the award.

### **IV. The Supreme Court Decision**

The UK Supreme Court upheld the Court of Appeal's judgment, thus bringing to an end Kabab-Ji's enforcement efforts in the English courts. In a unanimous decision, the Court agreed with the lower courts that the arbitration agreement was governed by English law for the purposes of section 103(2)(b) of the Arbitration Act 1996. The Court also found that, as a matter of English law, KFG had not become a party to the FDA. Moreover, the Supreme Court agreed with the Court of Appeal that there was "no real prospect" of a different conclusion being reached following a further hearing. In the circumstances, the Court found that the proceedings should not have been adjourned, and that the Court of Appeal had been right to grant summary judgment refusing recognition and enforcement of the award.

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### **V. Practical Points Arising from the Judgment**

The Supreme Court judgment is notable for its lucid exposition of a wide range of English law principles. Above all, while refusing enforcement of the award, the Court gave effect to party autonomy and emphasised the primacy of the terms of the parties' written agreement. In the course of its decision, the Court also clarified and confirmed important contract law issues that are of practical relevance to parties whose commercial transactions are governed by English law.

- **Determining the law of the arbitration agreement:** The Court settled the question of how to identify the law governing an arbitration clause for the purposes of enforcement. Echoing the principles set out in its seminal *Enka v Chubb* decision,<sup>1</sup> the Court held that, where the parties have chosen a law to govern their contract, that law generally extends to the arbitration agreement in the context of an enforcement application. This approach provides welcome clarity and ensures that arbitration clauses are interpreted consistently throughout the dispute, including after the award has been rendered. Parties can take advantage of this certainty by clearly and expressly stipulating the law they intend to apply to the arbitration agreement where it differs from the law they select to govern the contract. In the absence of such an express stipulation, the law governing the contract is also likely to govern the arbitration agreement therein and to determine the scope of the arbitration agreement and who is bound by it.
- **Upholding party autonomy and the importance of the parties' written agreement:** A common thread running through the judgment is its emphatic focus on the parties' written agreement. By enforcing the express terms of the contract, including its choice of law provisions, a "no oral modification" clause, a prohibition on the transfer of contractual rights and limitations on waiver, the Court affirmed that English law strives to give effect to the parties' bargain as reflected in their written agreement. The combination of these factors established beyond any doubt that, as a matter of English law, KFG could not have become a party to the FDA by conduct. One of the appeals of English law to many sophisticated commercial parties is the importance placed on the words actually used in the parties' written agreement. This emphasis promotes commercial certainty: whereas parties may have differing subjective views of the nature and consequences of their conduct beyond their written agreement, the words of their written agreement are in black and white and capable of objective ascertainment and interpretation. As a practical matter, parties whose commercial transactions are governed by English law should ensure that the rights and obligations they intend to create are clearly and expressly recorded in their written agreement.
- **Providing guidance on estoppel and good faith:** The Court applied and reiterated the principles it had previously articulated in *Rock Advertising Ltd v MWB Business Exchange Centres*.<sup>2</sup> In particular, the judgment confirmed the strict test that needs to be met under English law to circumvent contractual limitations, such as "no

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<sup>1</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

<sup>2</sup> *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

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oral modification” clauses or prohibitions on assignment, on grounds of estoppel by representation. In addition, the Court stated unequivocally that even where the parties have accepted a duty of good faith, the written terms of their agreement are decisive: “it is not contrary to good faith to interpret the terms of [a contract] in accordance with their express wording” (at para. 74). The judgment therefore reaffirms the practical value of including such provisions in a contract governed by English law in order to limit the scope for a counter-party to rely on alleged oral variations of a contract or variations by conduct.

- **Interpreting the scope of incorporated “soft law”:** Unusually, the FDA provided that, as well as English law, “the arbitrator(s) shall also apply principles of law generally recognised in international transactions”. The parties agreed that this was to be understood as a reference to the UNIDROIT Principles of International Commercial Contracts, a set of principles formulated by international scholars and published by an intergovernmental organisation. The Court found, by reference to the FDA’s express wording, that these principles only bound the arbitrators in addressing the merits of the dispute and had no effect on the arbitration agreement. In any event, the Court held that the UNIDROIT Principles would only *supplement* the national law chosen by the parties. The judgment is thus a strong indication that, where the governing law of a contract is inconsistent with incorporated “soft law”, the former will prevail.
- **Highlighting the benefits of summary determination:** The Court firmly rejected the argument that, as a matter of English procedural law, the question of whether KFG was a party to the arbitration agreement should only have been resolved after a further evidential hearing. In doing so, the Court emphasised the value of preliminary issue hearings, noting their potential for “significant savings in time and costs” (at para. 80). The decision reflects a growing trend, both in international arbitration and English litigation, to hold early hearings on specific points of law. In many cases, these summary determination hearings have the potential to narrow the issues in dispute or, occasionally, to dispose of the proceedings in their entirety.

In conclusion, the judgment in *Kabab-Ji SAL* marks a confirmation of, rather than a departure from, orthodox principles of English contract law and the Supreme Court’s earlier decision in *Enka v Chubb* on how the law applicable to the arbitration agreement should be determined. This confirmation provides additional certainty as to what commercial parties can expect when they select English law to govern their contracts and accentuates the importance of clear and precise drafting and close attention to the wording selected in contracts governed by English law.

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