# *Kabab-Ji S.A.L v Kout Food Group*

## RPC represents party in key case for establishing the governing law of arbitration agreements.

**In the recent case of *Kabab-Ji S.A.L v Kout Food Group*, RPC and Ricky Diwan QC (Essex Court) represented Kout Food Group before the Court of Appeal. In an important judgment, the Court established that on the proper construction of the relevant contract there was an express choice of English law governing the arbitration agreement despite that agreement providing for any arbitration to be seated in Paris.**

This article does not cover all aspects of the case but focusses on the Court's finding on the governing law of the arbitration agreement.

### Relevant background and contractual provisions

In 2001 Kabab-Ji and Al Homaizi Foodstuff Company (**AHFC**) entered into a 10-year Franchise Development Agreement (**FDA**) as licensor and as licensee, respectively.

The FDA contained the following (non-exhaustive) provisions:

> "Article 1: Content of the Agreement
>
> This Agreement consists of the foregoing paragraph, the terms of agreement set forth herein below, the documents stated in it, and any effective Exhibit(s), Schedule(s) or Amendment(s) to the Agreement or to its attachments which shall be signed later on by both Parties. It shall be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others.
>
> ...
>
> Article 14: Settle of Disputes
>
> ...
>
> 14.3. The arbitrator(s) shall apply the provisions contained in the Agreement. The arbitrator(s) shall also apply principles of law generally recognised in international transactions. The arbitrator(s) may have to take into consideration some mandatory provisions of some countries *i.e.* provisions that appear later on to have an influence on the Agreement. Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement.
>
> ...
>
> 14.5. The arbitration shall be conducted in the English language, in Paris, France.
>
> ...
>
> Article 15: Governing Law
>
> This Agreement shall be governed by and construed in accordance with the laws of England."

In 2005, AHFC became a subsidiary of Kout Food Group (**Kout**).

A dispute arose under the FDA which Kabab-Ji referred to arbitration against Kout alone and not its subsidiary AHFC. The Tribunal (by majority) determined that the question of whether KFG was bound by the arbitration agreement was a matter of French law, but the issue of whether there was a transfer of substantive rights and obligations was governed by English law. They concluded that, as a matter of English law, Kout had become a party to the FDA (and the arbitration agreement) by conduct and that it was in breach of its obligations under the FDA.

After publication of the arbitral Award (and an as-yet undecided annulment

application by Kout in the French courts), Kabab-Ji issued enforcement proceedings in London. Popplewell J made an order to enforce the Award as a judgment *ex parte* and, shortly afterwards, Kout applied for recognition and enforcement to be refused and for the order of Popplewell J to be set aside.

At a case management conference, Teare J made an order for, *inter alia*, the trial of certain preliminary issues, one of which was concerned with which law governed the arbitration agreement in order to establish whether Kout became a party to that agreement (and therefore whether the arbitration proceedings were brought against the correct party).

Having heard the parties' submissions during a three-day hearing in March 2019, Sir Michael Burton found that, as a matter of construction, there had been an express choice of English law governing the arbitration agreement and therefore the issue of whether Kout became a party to that agreement was to be decided in accordance with English law.

## Court of Appeal decision on the law governing the arbitration agreement

Lord Justice Flaux, Lord Justice McCombe, and Sir Bernard Rix sitting in the Court of Appeal upheld Sir Michael Burton's decision that English law governed the arbitration agreement.

The Court held that, taken together, Articles 1 and 15 of the FDA provided an express choice of English law to govern the arbitration agreement contained in Article 14. Article 1 made clear that "This Agreement" included all the terms that followed it (including Article 14). Article 15 provided that English law was to govern "This Agreement" and, by virtue of Article 1, that included Article 14 as well.

The Court was also of the view that the first sentence of Article 14.3 ("The arbitrator(s) shall apply the provisions contained in the Agreement") meant that the arbitrators must apply all provisions of the FDA, including Article 15, to all disputes. That covered disputes as to their own jurisdiction as well as substantive disputes.

The Court found that there was nothing in the fact that Article 14 did not contain any express words that English law was to govern the arbitration agreement. Citing Andrew Smith J in *Arsanovia*[1] that "[e]xpress terms do not stipulate only what is absolutely and unambiguously explicit", the Court held that Articles 1, 15, and the first sentence of Article 14.3 demonstrated a clear intention that the entire FDA, including the arbitration agreement, was to be governed by English law and, as a result, it did not matter that that was not spelt out expressly in Article 14 itself.

The choice of Paris as the seat of arbitration was not relevant to establishing the governing law of the arbitration agreement because "it [could] not overcome the clear effect of the express terms of the FDA that Article 15 covers not only the FDA but the arbitration agreement."[2] Accordingly, the Court did not need to address KFG's alternative case that, where there is no such express choice of governing law of the arbitration agreement, the choice of law could be implied. Nor did the Court need to address the submission that where there is an absence of any express or implied choice of law, the system of law to which the arbitration agreement has the closest and most real connection should be considered. In those circumstances, the courts may consider the seat of arbitration as a relevant factor in establishing the governing law of the arbitration agreement, but it will not necessarily be decisive.[3]

## Comment

This important judgment provides a useful example of when a governing law clause in the substantive contract will establish an express choice of governing law in the associated arbitration agreement.

It balances the well-established principle of the separability of arbitration agreements with the common-sense acknowledgment that those agreements most often sit within 'host' contracts with which they are read as a whole. Where there is a clear intention that the two be construed together and where there is no indication in the arbitration agreement that it was intended to be interpreted in isolation, the principle of separability will not insulate the arbitration agreement from construction alongside its 'host'.

1. *Arsanovia v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [22]
2. [68]
3. See, for instance, *Sulamerica v Enesa Engelharia* [2012] EWCA Civ 638



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