

Court of Appeal holds that a choice of law clause also determines the law of the arbitration agreement

By Richard Bamforth & Liz Williams

The Court of Appeal has held that an express choice of law to govern an agreement will also determine the law of an arbitration clause contained in it, in the absence of a clear indication that the arbitration clause is to be construed separately. On the facts of the case, the No Oral Modification clause contained in the contract also prevented a novation from arising by conduct.

Background

In *Kabab-Ji S.A.L (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, the underlying dispute arose out of a franchise agreement between Kabab, a Lebanese company, and AHFC, its Kuwaiti licensee. Following a corporate reorganisation, AHFC became a subsidiary of Kout Food Group, the respondent to the proceedings. The franchise agreement contained (i) an express choice of English law as the law of the main contract, (ii) an arbitration agreement providing for arbitration in Paris and (iii) a No Oral Modification clause. Kabab brought an arbitration in Paris in accordance with the contract. The arbitrators ruled that under English law, it was to be inferred from the parties' conduct that the franchise agreement had been novated to Kout, but that the question of whether Kout was also bound by the arbitration agreement was governed by French law.

First instance proceedings

Kout filed an application with the French court to annul the award. Meanwhile, Kabab applied to the English court for the award to be recognised and enforced as a judgment, which was granted. Kout applied to set this decision aside. At first instance, the court noted that there was a conflict in the previous authorities as to the governing law of an arbitration clause in circumstances where the

clause itself was silent. Some authorities had held that the parties should be taken to have chosen the law of the seat of the arbitration by implication, whereas others suggested that there was an implied choice of the governing law of the contract as a whole. However, Sir Michael Burton QC, sitting as a Judge of the High Court, found that he did not need to rule on which of these views was correct, since the choice of law clause in favour of English law constituted an express choice of law for the entire agreement, including the arbitration agreement.

Sir Michael also reached the provisional conclusion that the No Oral Modification Clause prevented a novation from occurring by conduct. Such a novation would have to satisfy the conditions for estoppel set out in *MWB Business Exchange Centres Limited v Rock Advertising* [2018] UKSC 23, namely:

- i. there would have to be some words or conduct unequivocally representing that the agreement to novate was valid notwithstanding its informality; and
- ii. something more would be required for this purpose than the informal agreement itself.

On the facts, Sir Michael took the view that Kabab could not satisfy these conditions. However, he thought it was possible that further evidence might emerge in the course of the French

proceedings which might alter this conclusion, and he therefore declined to make a final ruling on the point.

Both parties appealed.

Court of Appeal decision

The Court of Appeal agreed that the parties' express choice of English law to govern the main contract was also an express choice of the same law to govern the arbitration agreement. Where there was no indication that the arbitration agreement was to be construed separately from the rest of the contract, the contract should be construed as a whole and the express choice of law applied to all its articles. The express choice of Paris as the seat of the arbitration did not impliedly override this choice, since an implied provision cannot displace an express one.

The court also agreed with Sir Michael's view that the contract had not been novated. However, it held that he been wrong to refuse to make a final order. There was no real prospect that new evidence would come to light that would allow Kabab to satisfy the conditions for an estoppel. The recognition and enforcement of the award would be refused.

Comment

This is a commercial decision that recognises the reality that parties rarely distinguish between the arbitration agreement and the contract as a whole when deciding which governing law to choose for their agreements. It also provides a useful illustration of how the English courts will construe the scope of No Oral Modification clauses following Rock Advertising.

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