Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*

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ABSTRACT

This case note explores the recent ground-breaking decision rendered in Kabab-Ji, which saw the Supreme Court break with the rest of the world with regards to its interpretation of the separability of the arbitration agreement from the underlying contract (and the subsequent choice of law analysis that follows). It is ultimately argued that the English approach in Kabab-Ji is correct by tracing through the prior conceptions of the separability and demonstrating that the newer approach is more in line with what parties intend.

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INTRODUCTION

Long before the merits of a cross-border dispute can be examined, a common – and often lengthy[1] – dispute between the parties arises as to which court has jurisdiction and what law applies. Although parties attempt to pre-empt this by incorporating exclusive jurisdiction clauses, choice of law clauses, and arbitration agreements,[2] the question of choice of law can arise nevertheless. For example, when an arbitration clause is disputed, parties often challenge the law applicable to determine the validity thereof.

This problem is compounded by the now-trite principle that the arbitration agreement is presumed to be separable, such that its invalidity does not automatically follow from the alleged or actual demise of the underlying contract.[3] How this 'separability principle' relates to the arbitration agreement, and how this affects the choice of law relating thereto, has in turn generated much controversy globally, with much of the debate concerning the strength of the separability presumption.[4]

While *Kabab-Ji* seemed like one among many such disputes regarding the law applicable to the arbitration agreement, the Supreme Court's decision

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[1] *Vedanta Resources PLC and another (Appellants)* v *Lungowe and others (Respondents)* [2019] UKSC 20 [7]; *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 [82]-[83].
[2] Queen Mary University of London, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (*Queen Mary University of London*, 2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 19 November 2022, 5-6; Ardavan Arzandeh, 'Exclusive Jurisdiction Clauses in International Trust Deeds' (2021) 41 Legal Studies 527; Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) 31(5) Journal of International Arbitration, 19-45.
[3] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 375; Margaret L. Moses, 'The Arbitration Agreement,' *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 21; Nigel Blackaby and others, *International Arbitration* (6th edn, Oxford University Press 2015) 104-107; Emmanuel Gaillard and John Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 197, 210.
[4] Born (n 3) 383-385, 387-389.

overturned orthodox thought by disregarding the separability presumption altogether.

This essay will first examine the relevant facts and legal principles emerging from the Supreme Court's decision. Then, after exploring the differing interpretations of the separability principle, it will be concluded that the UK's approach is wholly compatible with the separability principle as it should be properly understood. Further, the Court's treatment of the choice of law clause and how it interacts with the separability principle of the arbitration agreement is more in line with what parties intend. This is for three reasons. First, the broad interpretation of separability goes further than necessary and is conceptually unsound. Second, the principle of separability does not actually require the premise that a governing law clause can never, without more, act as an express choice extending to the arbitration agreement as well. Finally, while this approach would be more beneficial and adhere to what parties intended, given that arbitral tribunals look at the entire corpus of law around the world, the *Kabab-Ji* approach requires more support globally before it can be relied on in tribunals outside England.

I. THE RELEVANT PRINCIPLES IN KABAB-JI V KFG

Kabab-Ji, a Lebanese company specialising in Lebanese and Middle Eastern cuisines, signed a Franchise Development Agreement ('FDA') with Al Homaizi, allowing the latter to operate a franchise in Kuwait.[5]
The relevant clauses of the FDA were as follows:

> Art. 1: This Agreement consists of the foregoing paragraphs, 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.

[5] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 [3].

> Art. 14: any dispute … with respect to any issue arising out of or relating to this Agreement or breach thereof [shall be settled in the International Chamber of Commerce, with the seat in France].
>
> Art. 15: This Agreement shall be governed by and construed in accordance with the laws of England.[6]

Al Homaizi was then acquired by Kout Food Group ('KFG').[7] In a subsequent dispute, Kabab-Ji brought KFG to arbitration under Art. 14 of the FDA.[8] KFG attempted to contest that the tribunal did not have jurisdiction over themselves, as the arbitration agreement only relates to any disputes between Al Homaizi and Kabab-Ji, *not* KFG.[9]

The tribunal held that the law applicable to the arbitration agreement was French law and KFG was bound by the arbitration agreement, ultimately finding that KFG was in breach of the FDA.[10] In parallel proceedings, while KFG sought to annul the award at the seat of arbitration in France, Kabab-Ji attempted to enforce it in England.[11]

This is where the courts diverge. Prior to the judgment by the UK Supreme Court, the Cour d'Appel found no express choice of law applicable to the arbitration agreement. Thus, absent any choice of law, they found that French law, being the law of the seat of arbitration, governed the agreement.[12] Across the Channel, the Court of Appeal in England instead not only held that it was English law that applied, but it did so as a matter of express choice.[13] Although Flaux LJ reaffirmed the presumption that an express choice of law clause cannot be an express choice extending to the arbitration agreement as well,[14] this presumption was overturned on these facts by the terms of the FDA.

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[6] ibid [37].
[7] ibid [4].
[8] ibid [5].
[9] ibid [20].
[10] ibid [6].
[11] ibid [8].
[12] ibid [9]; Cour d'appel de Paris (2020) Case n°17-22943 [26], [47].
[13] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 [62].
[14] ibid [66].

The use of the phrase 'This Agreement' in Art. 1 made clear that it was intended to encapsulate all the terms of the contract; the same phrase, 'This Agreement', was also used when determining the governing law in Art. 15. When read together, an express choice of law for the underlying contract also expressly included the arbitration agreement.[15]

The Supreme Court however went a step further: they unanimously held that Art. 15 *alone* as 'ordinarily and reasonably understood' should include all terms of the contract *including* the arbitration agreement,[16] making no mention of separability in its judgment. Subsequent to the Supreme Court's decision, the Cour de Cassation affirmed the decision of the Cour d'Appel, leaving the two jurisdictions at an irreconcilable crossroads.[17]

II. SEPARABILITY

To appreciate why the Supreme Court's decision was so surprising, two concepts must be understood: the rule on how to determine what law applies to an arbitration agreement, and the separability principle.

The rule to determine what law applies to an arbitration agreement is found in Article V.1(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). Although strictly dealing with the validity of arbitration awards, it has been interpreted by courts worldwide as also being the choice of law rule to determine what law applies to the arbitration clause.[18] It lays out a three-stage test. First, whether the parties made an express choice of law applying to the arbitration agreement. Second, failing that, whether there were any indications thereon. Third, if neither were present, then the default is the law where the award is made, which is the law of the seat.

On the other hand, the separability principle, which forms the cornerstone of arbitration, states that the validity of the arbitration agreement is

[15] ibid [62].
[16] *Kabab-Ji UKSC* (n 5) [39].
[17] Cour de Cassation (2022) n°20-20260.
[18] ibid [26]; *Enka v Chubb* [2020] UKSC 38 [128]; *Kabab-Ji Cour d'Appel* (n 12); Gaillard and Savage (n 3) 218-219; Born (n 3) 529.

assessed separately from the underlying contract.[19] Without it, parties could easily escape from their obligation to arbitrate by alleging that the underlying contract was void. As a result, courts have found that different laws can apply to the arbitration clause and the rest of the contract.

The way in which the separability principle affects the rule in Art.V(1)(a) has proven difficult. First, both common and civil jurisdictions agreed that a general choice of law clause cannot, without more, also be an express choice of law for the arbitration agreement.[20] However, whether it could constitute an implied choice of law was less clear. The case law is divided across the world,[21] with two interpretations which will be referred to as the 'narrow' and the 'broad'. While civil law jurisdictions endorsed the 'broad' interpretation, common law jurisdictions have typically supported the 'narrow' view. [22]

The 'narrow' interpretation states that the arbitration agreement must be subject to a separate choice of law analysis from the underlying contract for the purpose of determining its validity.[23] The arbitration agreement can therefore, but not necessarily, be subject to a different law from that of the underlying contract.

In the UK, the Court of Appeal in *Sulamérica* held that the separability principle only presumes that parties intend for their dispute resolution mechanisms to remain effective when the underlying contract would be void.[24] Otherwise, if an arbitration tribunal finds that the underlying contract is invalid, the clause which conferred jurisdiction on that same tribunal is also ineffective. The tribunal would then paradoxically have no authority to declare its lack of jurisdiction. Conversely, if the fate of the arbitration agreement is automatically tied to the underlying contract, then any party could simply avoid an arbitration agreement by impugning the existence of the underlying contract. The 'narrow'

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[19] Born (n 3) 376; Blackaby and others (n 3) 106; Moses (n 3) 21.
[20] Born (n 3) 375-376; *BNA v BNB* [2019] SGHC 142 [17]; *BCY v BCZ* [2016] SGHC 249; *Sulamérica CIA Nacional de Seguros S.A. v Enesa Engenharia S.A.* [2012] EWCA Civ 638 [26]-[27]; 'Cyprus Case' OGH 3 Ob 153/18y; 'Transformer Case' 18 OCg 6/18h; *Kabab-Ji Cour d'Appel* (n 12).
[21] *Kabab-Ji UKSC* (n 5) [32]; *Enka v Chubb* (n 18) [55].
[22] Born (n 3) 378-379.
[23] *Enka v Chubb* (n 18) [61].
[24] *Sulamérica v Enesa Engenharia* (n 20) [26].

conception therefore states that it should be presumed that the arbitration agreement is separable, which must give way to any contraindications.[25] However, even under the 'narrow presumption', there were doubts as to whether an express choice of law could serve as an *implied* choice of law for the arbitration agreement. While *Enka v Chubb* answered this in the affirmative, its applicability was limited only to the UK's domestic choice of law rules,[26] and still preserved the notion that an 'express choice of law' regarding the arbitration clause can only exist if it is found within the clause itself.[27]

Under the 'broad' interpretation, the separability principle instead requires that the arbitration agreement be autonomous for all purposes by operation of law.[28] Consequently, where a contract only has an express choice of law to the underlying contract, it cannot – without more – be an express choice and rarely be an implied choice of law for the arbitration agreement.[29] Instead, the law of the seat applies as either an implied choice or the default option under Art. V(1)(a) of the New York Convention.[30]

In a way then, *Kabab-Ji* was both unsurprising and shocking at the same time. On one hand, this was merely a direct extension of the principles enunciated in *Enka* to Art. V(1)(a). On the other hand, *Kabab-Ji* did not treat the express choice of law of the main contract as an implied choice for the arbitration agreement, but an express choice as well.[31] Further, unlike the domestic context of *Enka, Kabab-Ji* has to interact and contend with international jurisprudence on Art. V(1)(a). Nevertheless, it will be argued that the Supreme Court's judgment was ultimately a better interpretation of the separability principle with reference to its purpose.

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[25] *Enka v Chubb* (n 18) [60].
[26] ibid [27], [129]. In that case, it must also be noted that there was *no* express choice of law clause for the general contract.
[27] ibid [193].
[28] Judgment of 7 May 1963*, Ets Raymond Gosset v. Carapelli*, JCP Ed. G 1963, II, (French Cour de Cassation civ. 1e); Tribunal fédérale [TF] Sept. 2, 1993, DFT 119 II 380, 384; Born (n 3) 378.
[29] Gaillard and Savage (n 3) 212; *Kabab-Ji Cour de Cassation* (n 17).
[30] Born (n 3) 547-549; *Judgment of 28 September 1995*, XXII Y.B. Comm. Arb. 762, 765 (Rotterdam Arrondissementsrechtbank) (1997).
[31] *Kabab-Ji UKSC* (n 5) [39].

III. DISPROVING THE BROAD INTERPRETATION OF SEPARABILITY

The broad interpretation of separability argues that the arbitration agreement is seen as 'autonomous' or independent for all purposes.[32] This is an approach particularly endorsed by the French courts, where *Gosset* held that the arbitration agreement has 'full legal autonomy'.[33] However, this interpretation must be rejected. Not only is this conceptually unsound, but its immutability also means that it can go against what the parties intended in fact. This is especially problematic as arbitration is founded on the consent of both parties.[34] Despite this, however, the broad approach has stood unquestioned for the past decades in civil law jurisdictions.[35]

Historically, there have been two ways to justify the separability of the arbitration agreement: its 'procedural' or 'judicial' nature, as well as it reflecting the will of the parties. However, neither requires the total autonomy of the agreement.

With regards to the theory that the arbitration agreement is somehow an ancillary 'procedural' contract, this is not a settled matter and, in any case, does not require the total autonomy of the clause. While the classification of the arbitration agreement has been contested, what is indisputable is that its *formation* still concerns normal contractual principles. Rather, the so-called procedural elements of the contract concern, *inter alia,* the appointment of arbitrators and the admission of evidence. Similarly, and as mentioned below, the seat only has the power to apply its procedural rules on the fairness of the tribunal and its composition, *not* its substantive rules on contract formation. In both cases therefore, the purported *sui generis* nature of the arbitration agreement is insufficient to warrant its total autonomy in all cases.

On the other hand, the argument that the broad conception reflects the 'will of the parties' is also inaccurate. This justification has been deployed by

[32] Born (n 3) 376-377; Gaillard and Savage (n 3) 216.
[33] *Ets Raymond Gosset v. Carapelli* (n 28).
[34] Born (n 3) 251; Blackaby and others (n 3) 71.
[35] Born (n 3) 376; Gaillard and Savage (n 3) 206; Y *Derains 'Les Tendances de la Jurisprudence Arbitrale Internationale'*. (1993) 120 Journal du Droit Intl 829; *Ets Raymond Gosset v. Carapelli* (n 28).

civil law jurisdictions such as France and Germany by reference to their own jurisprudence. The French courts, for example, declared that an agreement to arbitrate is valid by the will of the parties 'without any reference to the law governing that agreement', which they claim is a principle of international law. However, while this view has its merits and demerits, there is no such international law which supports this 'delocalised' theory of arbitration; instead, as Moses points out, the delocalised approach has not found much favour across the world.[36]

Gaillard & Fouchard nevertheless attempt to justify the broad conception by stating that it reflects the will of the parties:

> [as] arbitration rules derive their authority from the intentions of the parties … where parties have referred to arbitration rules which enshrine the principle of the autonomy of the arbitration agreement, those parties are presumed to have intended that the arbitration agreement be treated separately from the main contract.[37]

However, this assumes that the arbitration agreement is autonomous – itself a contentious claim – as well as the fact that the parties are aware of this. Reasonable businesspeople, and indeed as a matter of ordinary contractual interpretation, would intend for a single choice of law clause - with 'this Contract' or similar language - to encompass the entire contract, as they expect their contracts to be internally consistent. Since separability is a specific legal fiction pertaining to arbitration agreements which is not known to businesspeople, it is difficult to accept that the principle should apply to insulate the arbitration clause from their choice of law clause when they had given little or no thought to separability at all. Thus, the notion that the broad conception somehow reflects the 'will of the parties' becomes illusory. Nonetheless, the Cour de Cassation has, in their judgment, repeated the reasoning that 'by virtue of a substantive rule of the law of international arbitration', an arbitration

[36] Moses (n 3) p 65; Born (n 3) 1674-1675; Blackaby and others (n 3) 179-182; L. Collins (ed.), *Dicey, Morris and Collins on The Conflict of Laws* (16th edn, Sweet & Maxwell) 16-008; *Star Shipping AS v. China National Foreign Trade Transp. Corp.* [1993] 2 Lloyd's Rep. 445, 452; Judgment of 20 December 1993, *Municipalité de Khoms El Mergeb v. Dalico*, 1994 Rev. Arb. 116 (French Cour de Cassation Civ. 1).

[37] Gaillard (n 18) 199-200.

agreement is legally independent of its underlying contract, assessed by reference to the will of the parties without the need for any state law.[38]

The broad conception is made more unattractive when considering that it redirects focus to the law of the seat instead. This is done by two ways: either by claiming that the express choice of seat is important enough to displace or militate against a single choice of law clause, or by claiming that a difference in seat and location of choice of law is enough to justify resorting to the default option under Art. V(1)(a). However, this exaggerates the importance of the seat. Art. V(1)(a) states that the default law of the seat is only triggered when 'failing any indication thereon'. This is a low bar, which a clear and uncontested choice of law clause should satisfy by virtue of it being evidence that parties have given thought to the matter. Conversely, the argument that the arbitration agreement only has power by the seat's permission is also increasingly outdated, especially given how many signatories there are to the New York Convention. Rather, the better view is that parties freely agree to arbitration, and that states respect party autonomy by giving effect to what the parties agreed. Additionally, the argument that the seat is where the obligation to arbitrate is 'performed' does not hold weight. There is no obligation that the seat of arbitration be where the arbitration is physically heard, as evidenced by the fact that many arbitrations now allow online hearings due to the pandemic. Nowadays, the seat is merely the legal place where the award originates, which in turn entitles the seat to only apply its procedural laws in discharging their supervisory jurisdiction over the arbitration. The function of the law of the seat as a last-resort option also demonstrates this point: it is only when there is a total absence of party choice that courts and tribunals resort thereto.

Thus, the broad separability principle is wholly unnecessary for what it purports to do, as well as overemphasises the importance of the seat. Per Gaillard & Fouchard, the consequence of the autonomy of the arbitration agreement is that its validity is not affected by that of the contract, and that it can be governed by a different law from the main contract.[39] However, and as will be seen below, both are achieved via the narrow separability principle without the need for such an expansive reading.

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[38] *Kabab-Ji Cour de Cassation* (n 17) [7].
[39] Gaillard and Savage (n 3) 209.

IV. REMOVING UNNECESSARY PRESUMPTIONS

While the narrow conception is better in that it does not force the independent and autonomous nature of the arbitration agreement, it nevertheless presumes that an express choice of law cannot automatically apply as an express choice for the arbitration agreement. However, as seen in *Kabab-Ji*, this presumption is unnecessary. This is because the *kompetenz-kompetenz* principle – that the tribunal has power to rule on its jurisdiction – has become so prevalent that it has force on its own.

First, the objective of the narrow interpretation is to protect the validity of the arbitration agreement from the demise of the underlying contract. However, this does not necessarily relate to applicable law. To illustrate this, the initial tribunal which was called upon to settle the dispute in *Kabab-Ji* was the International Chamber of Commerce, whose rules state:

> Article 6(9): Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

Under these rules, if KFG instead sought to contest that the entire underlying contract was void, regardless of whatever law they claim it was invalid under, this would still be irrelevant. This is because the separability principle is now so widely accepted that it essentially operates *prior to* choice of law.[40] In other words, rather than recognising that separability derives force from a specific national court, a better view is that it has become such a necessary part of arbitration that it has force on its own. Indeed, it is impossible for a tribunal to not provide for some version of separability, because it would effectively have no jurisdiction, as seen by the fact that rules providing for

[40] Gaillard and Savage (n 3) 199.

kompetenz-kompetenz can be found in those of other major tribunals.[41] Therefore, the presumption that the validity of the arbitration agreement and underlying contract can still be upheld without the tribunal having to determine the law applicable to the arbitration agreement.

By doing away with the presumption of separability and treating express choice of law as including the arbitration agreement by default, this approach would firstly be more faithful to the text of the contract and what parties intended. While what the parties intended during the contractual negotiation phase may be subjective and differ, the contract is what conclusively reflects the *shared* intentions of the parties. Given that it is more accurate to work from the premise that businesspeople do not intend for a single line in their dispute resolution clauses to escape their broader choice of law,[42] the requirement should be for the disputing party to positively prove that the parties intended that a separate law should apply to the arbitration agreement. This is also helpful where a contract is concluded orally. In such contexts, while parties may have agreed on the applicable choice of law, they may neglect to specify or even consider the choice of law applicable to the arbitration clause. In such scenarios, the better explanation is that the parties intend for their choice of law clause to govern the entire arbitration agreement. This is also more persuasive, as the alternative is applying the law of the seat, which may have never been in contemplation. In any case, even where parties expressly choose their seat, they do not intend for the law of the seat to determine the substantive validity of the arbitration clause; the factors which influence the choice of seat are an established reputation, greater support from the judiciary, and neutrality of the legal system.[43] Clearly, these considerations do not concern the substantive law of the seat, but rather its procedural laws such as those on evidence, replacing arbitrators or challenging awards. Conversely, it is difficult to see how choosing a seat can be seen as accepting its substantive law.[44]

One concern is that the abolishment of the presumption would make it difficult to resist the conclusion that a choice of law clause could be anything but an express choice applying to the arbitration agreement. However, such

[41] LCIA Arbitration Rules (1 October 2020) art 23.2; HKIAC Administered Arbitration Rules (1 November 2018) art 19.2.
[42] *Enka v Chubb* (n 18) [39], [43].
[43] Queen Mary University of London (n 2) 7, 8.
[44] Blackaby and others (n 3) 166.

concerns are unfounded. Suppose the entire contract including the arbitration and choice of law clauses were negotiated as inseparable and then contained within one document; the conclusion that the choice of law also applies to the arbitration agreement would be fair, as the parties clearly contemplated both the arbitration clause and choice of law clause together. Conversely, there are also scenarios when extending an express choice of law to the arbitration clause would be less tenable, such as where the parties clearly did not contemplate arbitration at the time of concluding the contract but opted to include it subsequently.

Another counterargument is that one should not adopt the viewpoint of reasonable businesspeople when interpreting arbitration clauses, but rather the view of lawyers who draft these clauses. Indeed, if any lawyer were to open a textbook or practitioners' guide (pre-*Kabab-Ji*), they could assume that their express choice of law for the underlying contract would not include the arbitration agreement; they may even assume that it is instead the law of the seat that applies.

However, this takes too artificial a view of the parties. First, if all lawyers knew of separability, they would have also been aware of the ongoing debate on whether the choice of law clause can be an implied choice as well. They would have then properly written out two choice of law clauses for the arbitration agreement and the underlying contract separately. Regardless, lawyers are agents of the parties, and their interpretation, mistakes, omissions, or deviations from the party's intentions should not easily factor into interpretation. This is also in line with English principles of contractual interpretation: contractual language is to be interpreted by what a reasonable person with all the background knowledge would understand the words to mean, with a view to the natural and ordinary meaning of the words, disregarding subjective evidence of parties' intentions.[45]

Finally, this change would not radically alter outcomes. In both civil and common law jurisdictions, it is increasingly held that the law of the underlying contract, rather than the law of the seat, is an implied choice for the

[45] *Arnold v Britton* [2015] UKSC 36 [15]-[23].

arbitration agreement.[46] Nevertheless, recognising the choice of law as including the arbitration agreement would not only save time and litigation costs, it would also mean that the conceptual lens by which the priority of separability is interpreted going forward is corrected.

In summary, the separability presumption does not even require the presumption that an express choice of law is barred from being an express choice applying to the arbitration agreement as well. Instead, treating an express choice of law as *including* the arbitration agreement *ab initio* – barring any obvious contraindications – would be more faithful to what the parties intended. Thus, the decision in *Kabab-Ji*, which followed the narrow interpretation while disregarding the unnecessary presumption, was ultimately satisfactory.

V. PRACTICAL ISSUES & CONCLUSION

Some practical issues remain, however. As tribunals are expressly not bound by one system of law,[47] *Kabab-Ji* is not a decisive authority, especially when it stands alone in the face of overwhelming and opposing authority from other jurisdictions.[48] Parties therefore face an uphill battle convincing tribunals to adopt the view in *Kabab-Ji*, especially if the arbitrators are from civil jurisdictions.

For now, parties should always have two choices of law clauses, indicating separately the applicable law to the contract and the arbitration clause even if they would be the same. The risks of not doing so can mean that an award can either be set aside at the seat or not recognised at the place of enforcement. The facts of the current dispute are illustrative: while the award has been upheld at the seat, the Supreme Court refused the recognition of that award in the jurisdiction where the losing party had their assets, rendering it moot. Unsurprisingly, the Cour de Cassation affirmed the decision of their lower court, meaning other courts may be less hesitant to refuse enforcement of the award in their own jurisdictions as the award has been affirmed at the seat.

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[46] *BNA v BNB and Another* [2019] SGCA 84; *BCY v BCZ* (n 20); 'Cyprus Case' (n 20); 'Transformer Case' (n 20).
[47] Born (n 3) 313.
[48] *Ets Raymond Gosset v. Carapelli* (n 28); 'Cyprus Case' (n 20); 'Transformer Case' (n 20); *Kabab-Ji Cour d'Appel* (n 12).

In conclusion, the Supreme Court's decision in *Kabab-Ji* is both more faithful to the language of the contract and better accords with what businesspeople intend. By overturning the heretofore unquestioned assumption that an express choice of law for the contract can never be an express choice to the arbitration agreement, the Supreme Court's approach now accurately reflects the purpose of the separability principle without going unnecessarily further. As the judgment did not directly address separability, this essay attempts to elucidate the conceptual foundations and proper scope of the principle following the *Kabab-Ji* decision. Ultimately, it is hoped that other jurisdictions will take inspiration from *Kabab-Ji* and arrive at the same conclusion that the Supreme Court did: that a legal fiction should not take precedence over what the parties intended in fact.