

Translation

Engrossed originals delivered
to the parties on:

**FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE**

COURT OF APPEAL OF PARIS

Pole 1 – Chamber 1

JUDGMENT OF 17 FEBRUARY 2011

(No... 7 pages)

Number recorded in the General List: **09/28533**
(Joined with Nos. **09/28535** and **09/28541**)

Decisions referred to the Court: Arbitral awards of 26 June 2001, 19 January 2004 and 23 June 2006 of the International Court of Arbitration of the International Chamber of Commerce, Paris, composed of Dr Ghaleb Mahmassani, Chairman, Lord Michael Mustill and Dr Nassim Hasan Shah, arbitrators.

APPLICANT IN THE APPLICATION FOR ANNULMENT:

**THE GOVERNMENT OF PAKISTAN, MINISTRY OF
RELIGIOUS AFFAIRS**

Plot # 20, Ramna G-6 Markaz,
4000 Islamabad,
(Pakistan)

Represented by SCP FISSELIER CHILOUX BOULAY, *avoués* before the Court
assisted by Maître Jean ROUCHE, *avocat* at the Paris Bar, pleading for SELARL FLEURY
MARES DELVOLVE ROUCHE, Court box no. P35

RESPONDENT IN THE APPLICATION FOR ANNULMENT:

DALLAH REAL ESTATE AND TOURISM HOLDING COMPANY
in the person of its legal representatives

Dallah Tower, Palestine Street,
P.O. Box 430, Jeddah 21411
(Saudi Arabia)

Represented by SCP DUBOSCQ PELLERIN, *avoués* before the Court
assisted by Maître Laurence KIFFER, *avocat* at the Paris Bar, pleading for SCP TEYNIER
PIC & ASSOCIES

COMPOSITION OF THE COURT:

The case was argued on 18 January 2011, in public hearing, and the report heard before the Court composed of:

President MATET
Appellate Judge GUIHAL
Appellate Judge DALLERY

Who deliberated on it.

Clerk of the Court at the hearing: Mme PATE

JUDGMENT:

- After hearing both parties
- Handed down upon being made available by the Clerk of the Court to the parties, who had been given prior notice on the terms laid down in Article 450, second paragraph, of the Civil Procedure Code.
- Signed by President Matet and Mme Pate, the Clerk of the Court present when the judgment was handed down.

Dallah Real Estate and Tourism Holding Company (Dallah) is a company incorporated under the laws of Saudi Arabia, a subsidiary of the Albaraka Group, a major Islamic financial institution.

By letter of 16 February 1995, the Dallah Group contacted the Ministry of Religious Affairs of the Government of Pakistan, to propose a long-term lease of buildings intended as accommodation for Pakistani pilgrims to Mecca. On 24 July 1995, the President of the Islamic Republic of Pakistan and Dallah signed a Memorandum of Understanding, whereby Dallah undertook to acquire land in Mecca and construct housing there for the Pakistani pilgrims.

Following the Ordinance of 31 January 1996, officially published on 14 February 1996, the President of the Islamic Republic of Pakistan established a Trust, called the Awami Hajj Trust, the main purpose of which was to collect savings from pilgrims, invest them and take measures designed to facilitate their going on the pilgrimage. In accordance with Article 89 of the Constitution of Pakistan, a Presidential ordinance expires at the end of four months if it is not put before Parliament, unless it is repromulgated. It was repromulgated on 2 May and 12 August 1996 but not on 12 December 1996, the date on which the Trust ceased to have legal identity.

Prior to that, on 10 September 1996, an agreement (the Agreement) was entered into between the Trust and Dallah for the projected construction of accommodation in Mecca for 45 000 Pakistani pilgrims and its lease by Dallah to the Trust for a 99 year term; that contract contained the disputed clause for ICC arbitration.

Mr Luftallah Mufti, who was at the same time Secretary to the Ministry of Religious Affairs and Secretary to an organ of the Trust, denounced Dallah's breach of its contractual obligations on 19 January 1997, which amounted to repudiation, and then on 20 January applied to the Pakistani courts for a ruling that Dallah was in breach.

Dallah then filed a request for arbitration with the ICC International Court of Arbitration against the Ministry of Religious Affairs, Government of Pakistan, pursuant to the arbitration clause in Article 23 of the Agreement. The Arbitral Tribunal, composed of Messrs Michael Mustill and Nassim Hasan Shah, arbitrators, and Ghaleb Mahmassani, President, gave a partial award on 26 June 2001 in Paris in which it held that the Ministry of Religious Affairs, Government of Pakistan, was bound by the arbitration agreement, and ruled that it had jurisdiction.

In a second partial award of 19 January 2004, the Arbitral Tribunal found that the laws of Saudi Arabia were applicable to the merits, that the Ministry of Religious Affairs, Government of Pakistan, was bound by the arbitration agreement, and that it was liable to Dallah. By its final award, given on 23 June 2006, the Arbitral Tribunal found it liable, among other things, to pay Dallah the sum of US\$18,907,603 in damages, and US\$1,680,437 in costs of the arbitration.

By order of 24 August 2009, the presiding judge of the *Tribunal de grande instance de Paris* granted exequatur of the final award.

The Government of Pakistan, Ministry of Religious Affairs has filed three applications for annulment of the three respective arbitral awards and seeks their annulment on the basis of Article 1502 (1) of the Civil Procedure Code on the grounds, according to its submissions of 10 November 2010, that the Arbitral Tribunal was wrong to rule that it had jurisdiction over the Government because it was not bound by the arbitration clause, with the result that the two subsequent awards must be held null and void. In addition, the Government of Pakistan, Ministry of Religious Affairs seeks a ruling ordering Dallah to pay it €100,000 pursuant to Article 700 of the Civil Procedure Code.

In its submissions of 6 January 2011, Dallah asks for the rejection of the three applications for annulment, which it claims are unfounded, and seeks to have the Government of Pakistan, Ministry of Religious Affairs held liable to pay it €100,000 pursuant to Article 700 of the Civil Procedure Code. Dallah argues, in essence, that the extension of the arbitration clause to the Government of Pakistan, Ministry of Religious Affairs is well founded.

As to which,

Whereas the proper administration of justice requires the joinder of the three actions listed under numbers 2009/28541, 2009/28535 and 2009/28533;

On the sole argument for annulment based on the absence of an arbitration agreement (Article 1502(1) of the Civil Procedure Code)

The Government of Pakistan, Ministry of Religious Affairs, contends that the arbitration clause in the Agreement of 10 September 1996 is not binding on it and that the Arbitral Tribunal was in error in ruling that it had jurisdiction over it in finding that under transnational principles the Ministry of Religious Affairs was merely a ministerial department, with no autonomous legal personality of its own, of the Government of Pakistan which was, moreover, the Pakistani party to the Memorandum of Understanding that preceded the Agreement. The Government of Pakistan, Ministry of Religious Affairs disputes that, pointing out that the Memorandum of Understanding of 24 July 1995 and the Agreement of 10 September 1996 are totally independent, that the Memorandum, which had lapsed before the establishment of the Trust, was replaced by the Agreement, that it was neither the intention nor the common wish of the parties that the Government of Pakistan, Ministry of Religious Affairs should be a party to it; that arbitration clauses must be strictly interpreted, and that the Agreement was signed only by the Trust, established by the Government of Pakistan to provide financial and material arrangements for pilgrimages to Mecca by its nationals.

The Government of Pakistan, Ministry of Religious Affairs maintains that Award No. 1 reveals divergences among the arbitrators and that Messrs Shah and Mustill subscribed only after hesitation to the conclusion that it was a party to the Agreement and thus to the dispute.

The applicant for annulment adds that on the motion of the Government of Pakistan, the English court, to which Dallah had applied for enforcement of the final award, quashed the order for execution in the United Kingdom, the Court of Appeal upheld that decision by its judgment of 20 July 2009 and the Supreme Court, in its judgment of 3 November 2010, rejected Dallah's appeal.

Whereas, by letter of 16 February 1995 [informal partial English translations have been made of the documents, which have not been disputed by the parties] Dallah informed the Ministry of Religious Affairs of the Government of Pakistan that the King of Saudi Arabia and the Guardian of the Holy Places had made it responsible for the upkeep of those sites and that it was authorised to offer Islamic governments the long-term lease of buildings designed as accommodation for pilgrims, and offered to allocate several sites at Mecca to the Government of Pakistan on which Dallah would construct the buildings, with Dallah to provide the financing; whereas on 15 July 1995 Dallah provided to the Ministry of Finance the terms of financing for the project, which took concrete shape with the signature of a Memorandum of Understanding on 24 July 1995 entered into, on the one hand, by the President of the Republic of Pakistan, for whom Mr Luftallah Mufti, Secretary of the Ministry of Religious Affairs, signed, and on the other by Dallah, signed by Mr Nackvi;

Whereas by the terms of that Memorandum of Understanding Dallah undertook to purchase land at Mecca and build accommodation on it for Pakistani pilgrims, intended to be leased to the Government of Pakistan for a 99-year term, with Dallah also providing financing for the operation as provided in its offer of 16 February 1995; whereas according to Article 14 of that Memorandum, Dallah was, within 90 days, to submit the terms and conditions of the lease for approval to the Government of Pakistan as well as the financing plan, and, under Article 5, the financing was to be the responsibility of a borrower to be designated by the Government of Pakistan; whereas, pursuant to Article 28, the Government of Pakistan

reserved the option to entrust the management and upkeep of the buildings to one or more individuals or legal entities or to a Trust which would be the Borrower;

Whereas from the signature of the Memorandum on 24 July 1995 to the signature of the Agreement, Dallah's only interlocutor was the Government of Pakistan, to whom, on 17 August 1995, Dallah submitted the draft lease between itself and the Government of Pakistan; whereas, the financial proposal not having been approved by that Government, the Memorandum of Understanding lapsed on 17 November 1995;

Whereas the President of the Islamic Republic of Pakistan promulgated an ordinance on 31 January 1996, officially published on 14 February 1996, setting up a Trust called the Awami Hajj Trust, a statutory corporation under Pakistani law, the essential purpose of which was to "mobilize savings from members" [pilgrims], "defray the expenses" of the pilgrimage, invest the pilgrims' savings in ways "yielding maximum returns", and "adopt measures for facilitating the performance of Hajj by members"; whereas Article 10 of the Ordinance provided that the Trust would have a fund, the Awami Hajj Fund, financed by the pilgrims' savings, donations and investment income, managed by a Trustee Bank, which would be responsible for collecting savings and investing the fund's assets; whereas the Trust had legal personality, with the Ministry of Religious Affairs, the Secretary of the Ministry of Religious Affairs, Mr Luftallah Mufti, and the Minister of Finance being members of the Board of Trustees;

Whereas, during the pre-contractual phase that lasted more than six months, Dallah set out, in a series of letters, the roles assigned to its future contracting partners, the collection of pilgrims' savings and donations by the Trust, the advance granted to the Trust by Dallah, and the guarantee by the Government of Pakistan of the repayment of the financing facility of €100 million provided by Dallah; whereas, thus, by letter of 29 February 1996 from Mr Nackvi and Annex A thereof, Dallah set out its financing plan and expressly offered the Government of Pakistan a second option, for a period of five years with effect from signature of the Agreement, for the construction of additional housing for 45,000 pilgrims; whereas the Ministry of Religious Affairs put questions to it about that proposal, by letter of 4 April 1996;

Whereas the Government of Pakistan, Ministry of Religious Affairs further relies on a letter of 15 March 1996 to the Al Rajhi Banking and Investment Group, in which Dallah presented the Fund, mentioning the Trust as the Pakistani contracting partner, to maintain that Dallah had accepted the Trust as its sole contracting partner;

Whereas, however, on 4 April the Ministry of Religious Affairs wrote to the chairmen of certain banks inviting them to express their interest in acting as Trustee Bank, stating that the Government "wishes to appoint ... as the Trustee Bank", and Albaraka Islamic Investment Bank, from the Dallah Group, submitted its candidature on 14 April 1996 to the Ministry of Religious Affairs, which acknowledged receipt thereof on 23 April, inviting Mr Nackvi to attend the Ministry's offices to present his proposals; whereas, after an exchanges of several letters, including a letter from Dallah of 23 May 1996 to the Ministry of Religious Affairs describing the discussions that had been held with the Ministry of Finance, the Ministry of Religious Affairs informed Dallah on 30 July 1996, on Government of Pakistan letterhead, of the appointment of the Albaraka Bank and confirmed its agreement to the "Plan B" proposed by Dallah, for the accommodation, free of charge, of 12,000 pilgrims for "the Government of Pakistan", with "the Government of Pakistan" to pay "395 US dollars per pilgrim for the rest of the pilgrims"; whereas, admittedly, in submitting the contractual terms to its lawyers

responsible for drawing up the agreement, Dallah mentioned the Trust as the Pakistani contracting partner, but the negotiations took place exclusively between Dallah and the Ministry of Religious Affairs, but not the Trust, up to the eve of signature of the Agreement [letter of 8 September 1996 from Dallah to the Ministry]; whereas, in addition, on 30 July 1996 Mr Nackvi clearly indicated to the Chairman of the Dallah Group that it was for the Ministry to approve the economic operation contemplated, and told him that the Minister would be holding a meeting on that subject on 15 June; whereas, in fact, a newspaper article of 17 July 1996 gives an account of the meeting of the Board of Trustees chaired by the Prime Minister of Pakistan, who was, however, not a member of it;

Whereas the Government of Pakistan, Ministry of Religious Affairs contends that since the Trust, which had legal and financial independence, entered into the Agreement with Dallah, including submitting to an arbitration clause, "the acts of the Trust are not attributable to the Government of Pakistan", which rules it out as "the true party to the Agreement", and that such was the common intention of the parties;

Whereas, however, in the period of performance of the Agreement, two officials of the Ministry of Religious Affairs, who held no office in the Trust, wrote letters to Dallah, at an interval of six weeks, on 26 September and 4 November 1996, on the one hand concerning the savings plans to be offered to the pilgrims, and on the other, announcing the advertising campaign that Albaraka Islamic Investment Bank would be launching to inform the public that it was the Trustee Bank, and lastly requesting a copy of the agreement between that bank and the Muslim Commercial Bank about the use of its branches to collect savings; whereas there were no reasons to justify the intervention by those two State officials; whereas, moreover, after the Trust had ceased to have any legal existence as of 12 December 1996 in the absence of a new promulgation of the Presidential decree, Mr Luftallah Mufti notified Dallah on 19 January 1997, on Ministry of Religious Affairs letterhead, that: "Pursuant to the above mentioned Agreement for the leasing of housing facilities in the holy city of Makkah... you were requested within ninety (90) days of the execution of the said Agreement to get the detailed specifications and drawings approved by the Trust. However, since you have failed to submit the specifications and drawings for the approval of the Trust to date you are in breach of a fundamental term of the Agreement which tantamounts to a repudiation of the whole Agreement which repudiation is hereby accepted"; whereas there is no confusion arising from the fact that Mr Luftallah Mufti was also secretary to the Board of Trustees or that the Trust did not have its own letterhead, as everything in that letter indicates that he was acting on behalf of the Ministry in accepting the repudiation of the Agreement; whereas, in that regard, it is a matter of indifference that Mr Luftallah instituted proceedings in the Islamabad court on behalf of the Trust because, in having that senior official denounce Dallah's breach of contract on 19 January 1997, the Government of the Republic, Ministry of Religious Affairs, was acting as if the Agreement was its own; whereas, without listing the acts of the Trust, this involvement of the Government of the Republic, Ministry of Religious Affairs, like its conduct during the pre-contract negotiations, confirms that the creation of the Trust was purely formal, and whereas the Government of Pakistan, Ministry of Religious Affairs, as Dallah acknowledged, behaved as if it were the real Pakistani party during the economic operation;

Whereas, consequently, the argument to the effect that the Arbitral Tribunal was wrong to extend the arbitration clause to the Government of Pakistan, Ministry of Religious Affairs and find that it had jurisdiction is unfounded; whereas, consequently, the applications

for annulment of the award on jurisdiction of 26 June 2001 given in Paris, and, therefore, the two following awards of 19 January 2004 and 23 June 2006 are dismissed;

Whereas the Government of Pakistan, Ministry of Religious Affairs must be held liable to pay Dallah Real Estate Tourism and Holding Company the sum of €100,000 pursuant to Article 700 of the Civil Procedure Code;

For these reasons

[The Court]

Orders the joinder of the cases listed under numbers 2009/28541, 2009/28535 and 2009/28533,

Dismisses the application for annulment of the awards given in Paris on 26 June 2001, 19 January 2004 and 23 June 2006,

Orders the Government of Pakistan, Ministry of Religious Affairs to pay Dallah Real Estate and Tourism Holding Company the sum of €100,000 pursuant to Article 700 of the Civil Procedure Code,

Orders the Government of Pakistan, Ministry of Religious Affairs to pay the costs of the proceedings and grants SCP Dubosq & Pellerin the benefit of Article 699 of the Civil Procedure Code.

The Clerk of the Court

The President