* **Chapter 9 *The award – challenge and enforcement,* from the book by Greenberg, Kee and Weeramantry; and**
* **The British and the French courts' judgments Dallah.**
  + **British Supreme Court, 3 November 2010**
* The Government of Pakistan was not party to the arbitration agreement

This appeal arises from steps taken by the appellant, Dallah Real Estate and Tourism Holding Company (“Dallah”), to enforce in England a final award dated 23 June 2006 made in its favour in the sum of US$20,588,040 against the Government of Pakistan (“the Government”) by an International Chamber of Commerce (“ICC”) arbitral tribunal sitting in Paris. The Government has hitherto succeeded in resisting enforcement on the ground that “the arbitration agreement was not valid… under the law of the country where the award was made” (Arbitration Act 1996, s.103(2)(b), reflecting Article V(I)(a) of the New York Convention), that is under French law. Dallah now appeals.

The central issue before the English courts is whether the Government can establish that, applying French law principles, there was no such “common intention” on the part of the Government and Dallah as would make the Government a party.

A further three day hearing led to the Court of Appeal’s dismissal of Dallah’s appeal on 20 July 2009 ([2009] EWCA Civ 755; [2010] 1 AER 592), against which the present appeal lies.

**LORD MANCE**

9. Dallah invoked ICC arbitration against the Government on 19 May 1998, nominating Lord Mustill as its arbitrator. It is common ground that the Government has throughout the arbitration denied being party to any arbitration agreement, maintained a jurisdictional reservation and not done anything to submit to the jurisdiction of the tribunal or waive its sovereign immunity. The ICC under its Rules appointed Justice Dr Nassim Hasan Shah to act as the Government’s arbitrator and Dr Ghaleb Mahmassani to chair the tribunal. Terms of Reference, in which the Government refused to join, were signed by the arbitrators and Dallah in March 1999 and approved by the ICC in April 1999. The tribunal issued its first partial award on its own jurisdiction on 26 June 2001. A second partial award on liability was issued on 19 January 2004 and the final award on 23 June 2006.

11. The “validity” of the arbitration agreement depends in the present case upon whether there existed between Dallah and the Government any relevant arbitration agreement at all. Dallah’s case is that the Government has at all times been an unnamed party to the Agreement containing the arbitration clause. Before the English courts, this case has been founded on a submission that it was the common intention of the parties that the Government should be such a party to the Agreement.

The issue regarding the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a United Kingdom court under provisions of national law which are contained in the Arbitration Act 1996 and reflect Article V(1)(a) of the New York Convention.

12. The issue regarding the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a United Kingdom court under provisions of national law which are contained in the Arbitration Act 1996 and reflect Article V(1)(a) of the New York Convention. The parties’ submissions before the Supreme Court proceeded on the basis that, under s.103(2)(b) of the 1996 Act and Article V(1)(a) of the Convention, the onus was and is on the Government to prove that it was not party to any such arbitration agreement. This was so, although the arbitration agreement upon which Dallah relies consists in an arbitration clause in the Agreement which on its face only applies as between Dallah and the Trust. There was no challenge to, and no attempt to distinguish, the reasoning on this point in *Dardana Limited v Yukos Oil Company* [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819, paras 10-12, and I therefore proceed on the same basis as the parties’ submissions.

***(a) The law of the country where the award was made*.**

It is common ground that the award was made in France and French law is relevant.

(…)

In the light of the common ground between the parties, it is also unnecessary to engage with the competing representations of international arbitration lucidly discussed in Gaillard’s *Legal Theory of International Arbitration* (2010) pp. 13-66. Whatever the juridical underpinning or autonomy of their role from the viewpoint of international arbitrators, the present case involves an application to enforce in the forum of a national court, subject to principles defined by s.103 of the 1996 Act and Article V of the New York Convention, upon the effect of which there is substantial, though not complete, agreement between the parties now before the Supreme Court.

***(b) The provisions of that law as regards the existence and validity of an arbitration agreement*.**

“According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract and any disputes which may result therefrom, provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not signatories of the contract containing it”.

This then is the test which must be satisfied before the French court will conclude that a third person is an unnamed party to an international arbitration agreement. It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.

19. Aikens J recorded that the experts were also agreed that: (i) “when the court is looking for the common intention of all the potential parties to the arbitration agreement, it is seeking to ascertain the subjective intention of each of the parties, through their objective conduct. The court will consider all the facts of the case, starting at the beginning of the chronology and going on to the end and looking at the facts in the round” (para 87); (ii) “when a French court is considering the question of the common intention of the parties, it will take into account ‘good faith’” (para 90); and (iii) under French law a state entering into an arbitration agreement thereby waives its immunity, both from jurisdiction (as under English law: State Immunity Act 1978, s.9(1) and *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529; [2007] QB 886) and (unlike English law) also from execution (para 91). However the experts disagreed as to whether the last point had any relevance when considering whether a state had entered into such an agreement. In the light of their conflicting evidence on this point, Aikens J found that: (iv) “the correct analysis of French law is that when the court is ascertaining the subjective intention of the potential state party to the arbitration agreement, it will bear in mind the fact that the potential state party to the arbitration agreement would lose its state immunity if it were to become a party to the arbitration agreement” (para 91)

***(c) The nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law, and***

***(d) the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction*.**

20. These questions are here linked.

23. In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the Government’s deliberate decision not to institute proceedings in France to challenge the tribunal’s jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the Government’s recent application to set aside the tribunal’s awards in France. But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

29. None of this is in any way surprising. The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal’s activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to *both* parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No. 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

*The application of the above principles*

32. The above principles have already been applied to the facts of this case at two previous instances. Not surprisingly, therefore, most of the emphasis of Dallah’s written case and oral submissions before the Supreme Court was on the submissions of principle which have already been considered. In the circumstances and in the light of the careful examination of the whole history in the courts below, it is unnecessary to go once again into every detail. Each of the courts below has paid close attention to the arbitral tribunal’s reasoning and conclusions, before concluding that the tribunal lacked jurisdiction to make the final award now sought to be enforced. Their examination of the case took place by reference to the same principles that a French court would, on the expert evidence, apply if and when called upon to examine the existence of an arbitration agreement between Dallah and the Government: see paras 17-20 above. It took account of the whole history, including the Government’s close involvement with and interest in the project from the original proposal onwards, the negotiation and signature of the MOU with the Government, the creation by the Government of the Trust and the re- structuring of the project to introduce the Trust, the negotiation and signature of the Agreement between Dallah and the Trust, the subsequent correspondence, the three sets of proceedings in Pakistan and the arbitration proceedings.

36. In the context of the award as a whole, the last paragraph must be a statement by the tribunal of one of the “transnational general principles and usages reflecting the

(…)

In the context of the award as a whole, the last paragraph must be a statement by the tribunal of one of the “transnational general principles and usages reflecting thefundamental requirements of justice in international trade and the concept of good faith in business”, to which the tribunal had earlier referred in section III(I)(4).

37. In this light, the tribunal examined in turn the position prior to, at signature of, and during performance of the Agreement, and during the period after the Trust lapsed. At each point, it focused on the Government’s conduct. It considered that it was “clearly established” that the Trust was organically and operationally under the Government’s strict control, that its financial and administrative independence was largely theoretical, and that everything concerning the Agreement was at all times “performed by the [Government] concurrently with the Trust” and that “the Trust functions .... reverted back logically to” the Government, after the Trust ceased to exist (section III(III)(12-1).

38. The tribunal went on (para 12-2) to say that the Government’s behaviour, as “in actual fact the party that was involved in the negotiation, implementation and termination of the Agreement .... before, during and after the existence of the Trust”, “shows and proves that the [Government] has always been – and considered itself to be – a true party to the Agreement ....”. The tribunal acknowledged (para 13) that “Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section”, but it recorded that Dr Mahmassani believed that, when looked at “globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement”, and that “While joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line”. In paragraph 14, the tribunal recorded a further divergence of view, with Dr Mahmassani believing that “the general principle of good faith” “comforts the conclusion that the Trust is the alter ego of the Defendant”, but Dr Shah and Lord Mustill “not convinced that in matters not concerning the conduct of proceedings but rather the identification of those who should be participants in them, a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such”.

40. More fundamentally, if and so far as the tribunal was applying a test of common intention, the test which it expressed in section III(III)(6) differs, potentially significantly, from the principle recognised by the relevant French case-law on international arbitration. Although the tribunal must have viewed its test as a transnational general principle and usage, it appears likely that it also had the French case-law in mind. This is suggested by its use of the words “directly involved in” and “presumption”, by its earlier mention of the *Dalico* case (see para 18 above), and by its letter dated 29 November 2000 written (after the oral hearings before it on jurisdiction) raising the possibility that reasoning embodied in the French *Pyramids* case might be relevant on the issue of jurisdiction. In any event, in Dallah’s submission, the tribunal applied principles which accord “broadly” with French law. But, the French legal test, set out in para 18 above, is that an international arbitration clause be may extended to non-signatories directly involved in the performance of a contract:

*“provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope”*.

*Analysis of the history*

41. I turn to the conduct of the Government and the events on which the tribunal relied. As to the Ordinance, the tribunal said that it regarded the Government’s “organic control” of the Trust as “an element of evidence as to the true intention of the Defendant to run and control directly and indirectly the activities of the Trust, and to view such Trust as one of its instruments”. Miss Heilbron accepts that Dallah cannot rely on the last ten words. Dallah is not advancing a case of agency, and the Ordinance does not support a case of agency. The tribunal’s comment at this point is on its face also inconsistent with the tribunal’s earlier references to the normality of the control established by the Ordinance (para 35 above).

42. As to the negotiations leading up the Agreement, the courts below were in my view correct to observe that the fact that the Government was itself involved in negotiations and in the MOU and remained interested throughout in the project does not itself mean that the Government (or Dallah) intended that the Government should be party to the Agreement deliberately structured so as to be made, after the Trust’s creation, between Dallah and the Trust. It does not appear that a French court would adopt any different attitude to governmental interest and involvement in the affairs of a state entity. An illustration of the careful analysis required in this context is provided by the decision of the Court of Appeal of Paris in the *Pyramids case.*

43. Here, the structure of the Agreement made clear that the Government was distancing itself from any direct contractual involvement

(…)

The tribunal confined itself in relation to the Agreement to statements that (a) it was the Government which decided to “delegate” to the Trust the finalisation, signature and implementation of the Agreement, (b) the Government was “contractually involved in the Agreement”, as the Government was “bound”, under Article 2, to give its guarantee and (c) clause 27 authorised the Trust to assign its rights and obligations to the Government without Dallah’s prior approval, such a clause being “normally used only when the assignee is very closely linked to the assignor or is under its total control ....” (no doubt true, but on its face irrelevant to the issue). The “delegate” and “bound” tend to beg the issue, and nothing in these statements lends any support to Dallah’s case that the Agreement evidences or is even consistent with an intention on the part of either Dallah or the Government that the Government should be party to the Agreement. Nowhere did the tribunal address the deliberate change in structure and in parties from the MOU to the Agreement, the potential significance of which must have been obvious to Dallah and its lawyers, but which they accepted without demur.

44. The Government’s position and involvement in all these respects is clear but understandable, and again adds little if any support to the case for saying that, despite the obvious inference to the contrary deriving from the Agreement itself, any party intended or believed that the Government should be or was party to the Agreement.

49. Dallah invoked ICC arbitration against the Government on 19 May 1998, on the basis that the Government was party to the Agreement.

56. The arbitral tribunal regarded the letter dated 19 January 1997 as “very significant because it confirmed in the clearest way possible that the Defendant [the Government], after the elapse of the Trust, regarded the Agreement with the Claimant as its own and considered itself as a party to such Agreement”

57. Several features of the arbitral tribunal’s reliance on the letter are notable. First, the tribunal did not put the letter in its context. It did not mention the first set of proceedings at all in addressing the letter’s significance.

58. Secondly, the tribunal rejected any idea that Mr Mufti was, when writing the letter, acting in a manner which was “absolutely unauthorised, illegal and of no legal effect”.

59. Thirdly, the tribunal’s comments on the letter assume that the Government or Mr Mufti on its behalf was aware of the “elapse of the Trust” and believed that this ended any possibility of the Trust taking any legal stance or proceedings. That, for reasons I have indicated, cannot have been the case. He must at least have believed that it was still possible for action to be taken in the Trust’s name in respect of matters arising from the Agreement.

60. Fourth, the tribunal, in this context as in others, did not address Dallah’s state of mind, or its objective manifestation - an important point when considering a test based on common intention.

61. The letter dated 19 January 1997 and faxed on 20 January 1997 cannot be read in a vacuum, particularly when the issue is whether the parties shared a common intention, manifested objectively, to treat the Government as a or the real party to the Agreement and arbitration clause. Read in the objectively established context which I have indicated, it is clear that it was written and intended as a letter setting out the Trust’s position by someone who believed that the Trust continued either to exist or at least to have a sufficient existence in law to enable it to take a position on matters arising when the Ordinance was in force. This is precisely how the plaint of 20 January 1997 put the matter when it said that the “repudiation was accordingly accepted by the plaintiff [i.e. the Trust] vide its letter dated 19.01.1997”. It makes no sense to suppose that Mr Mufti on one and the same day sent a letter intended to set out the Government’s position and caused proceedings to be issued by the Trust on the basis that the letter was intended to set out the Trust’s position. That Dallah also believed that the Trust continued to exist, certainly in a manner sufficient to enable it to pursue the proceedings, is confirmed by Dallah’s application to stay the Trust’s proceedings pending arbitration and is also (as I understood her) admitted by Miss Heilbron.

62. The arbitral tribunal also relied on the second set of Pakistan proceedings and on the Government’s letter dated 5 June 1998 to the tribunal. It saw Mr Mufti’s verification on oath of the plaint dated 2 June 1998 as an admission providing “another piece of evidence to be added to the other pieces, as to the fact that the [Government] has always been – and has considered itself – a party to the agreement”, and the letter as an admission “that it was a party to such Agreement and that it could accept repudiation of the Agreement by [Dallah]” (para 11-2). Aikens J and the Court of Appeal did not accept this analysis.

64. Further and in any event, a very short time afterwards on 15 August 1998 the Government wrote to the tribunal making clear also its current position that it had never been party to any contract or arbitration agreement with Dallah. Even if the Government could be treated in June as having made any relevant, short-lived admission, it would in context and in the overall course of events be incapable of giving rise to any real inference that the Government had always intended or been intended to be a party to the Agreement.

65. Finally, the search for a subjective common intention under the principle recognised by the French courts must be undertaken by examining, and so through the prism of, the parties’ conduct. Account will in that sense necessarily be taken of good faith.

66. In my view, the third re-examination by this court, in the light of the whole history, of the issue whether the Government was party to the Agreement, and so to its arbitration clause, leads to no different answer to that reached in the courts below. The arbitral tribunal’s contrary reasoning is neither conclusive nor on examination persuasive in a contrary sense. As to the law, it is far from clear that the tribunal was directing its mind to common intention and, if it was, it approached the issue of common intention in terms differing significantly from those which a French court would adopt. In any event, as to the facts, there are a number of important respects in which the tribunal’s analysis of the Government’s conduct and the course of events cannot be accepted, and this is most notably so in relation to the significance of the letter dated 19 January 1997 and the second set of proceedings in Pakistan. The upshot is that the course of events does not justify a conclusion that it was Dallah’s and the Government’s common intention or belief that the Government should be or was a party to the Agreement, when the Agreement was deliberately structured to be, and was agreed, between Dallah and the Trust.

69. The factors relied upon by Dallah in support of its suggestion that a discretion should be exercised to enforce the present award amount for the most part to repetition of Dallah’s arguments for saying that there was an arbitration agreement binding on the Government, or that an English court should do no more than consider whether there was a plausible or reasonably supportable basis for its case or for the tribunal’s conclusion that it had jurisdiction. But Dallah has lost on such points, and it is impossible to re-deploy them here. The application of s.103(2) and Article V(1) must be approached on the basis that there was no arbitration agreement binding on the Government and that the tribunal acted without jurisdiction. General complaints that the Government did not behave well, unrelated to any known legal principle, are equally unavailing in a context where the Government has proved that it was not party to any arbitration agreement. There is here no scope for reliance upon any discretion to refuse enforcement which the word “may” may perhaps in some other contexts provide.

*Conclusion*

70. It follows that Aikens J and the Court of Appeal were right in the conclusions they reached and that Dallah’s appeal to this Court must be dismissed.

**LORD COLLINS**

77. Although Article V(1)(a) (and section 103(2)(b)) deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.

78. In this case, because there was no “indication” by the parties of the law to which the arbitration agreement was subject, French law as the law of the country where the award was made, is the applicable law, subject to the relevance of transnational law or transnational rules under French law.

79. A central part of this appeal concerns the authority to be given to the decision of the arbitral tribunal as to its own jurisdiction, and the relevance in this connection of the doctrine of Kompetenz-Kompetenz or compétence**-**compétence. These terms may be comparatively new but the essence of what they express is old.

84. So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependant upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re- examined by the supervisory court of the seat in a challenge to the tribunal’s ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.

86. Consequently in most national systems, arbitral tribunals are entitled to consider their own jurisdiction, and to do so in the form of an award. But the last word as to whether or not an alleged arbitral tribunal actually has jurisdiction will lie with a court, either in a challenge brought before the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad. The degree of scrutiny, particularly as regards the factual enquiry, will depend on national law, subject to applicable international conventions.

88. In France the combined effect of articles 1458, 1466 and 1495 of the New Code of Civil Procedure (“NCPC”) is that, in an international arbitration conducted in France, the tribunal has power to rule on its jurisdiction if it is challenged. If judicial proceedings are brought in alleged breach of an arbitration agreement the court must declare that it has no jurisdiction unless the jurisdiction agreement is manifestly a nullity: Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (ed Gaillard and Savage 1999)

89. But the position is different once the arbitral tribunal has ruled on its jurisdiction. Its decision is not final and can be reviewed by the court hearing an action to set it aside. The French Cour d’appel seised of an action for annulment of an award made in France for lack of jurisdiction, or seised with an issue relating to the jurisdiction of a foreign tribunal or an appeal against an exequatur granted in respect of a foreign award, has the widest power to investigate the facts: Fouchard, Gaillard, Goldman

95. The position in England under the Arbitration Act 1996 as regards arbitrations the seat of which is in England is as follows. By section 30(1) of the 1996 Act, which is headed “Competence of tribunal to rule on its own jurisdiction” the arbitral tribunal may rule on its own substantive jurisdiction, including the question whether there is a valid arbitration agreement.

98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal’s jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought.

***Arbitration agreements and non-signatories: groups of companies/State-owned entities and States***

105. One of the most controversial issues in international commercial arbitration is the effect of arbitration agreements on non-signatories: among many others see, eg, Hanotiau, *Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law*, in *International Arbitration 2006: Back to Basics?* (2007, ed van den Berg), p 341; Park, *Non-signatories and International Contracts: An Arbitrator’s Dilemma*, in *Multiple Party Actions in International Arbitration* (ed Macmahon, Permanent Court of Arbitration, 2009), p 1.

106. The issue has arisen frequently in two contexts: the first is the context of groups of companies where non-signatories in the group may seek to take advantage of the arbitration agreement, or where the other party may seek to bind them to it. The second context is where a State-owned entity with separate legal personality is the signatory and it is sought to bind the State to the arbitration agreement. Arbitration is a consensual process, and in each type of case the result will depend on a combination of (a) the applicable law; (b) the legal principle which that law uses to supply the answer (which may include agency, alter ego, estoppel, third-party beneficiary); and (c) the facts of the individual case.

107. One of the decisions in the field of groups of companies best known internationally is the *Dow Chemical* case in France (…)

The arbitrators (Professors Sanders, Goldman and Vasseur: (1984) 9 Yb Comm Arb 131) decided that non-signatory companies in a group could rely on an arbitration clause in contracts between Isover St Gobain and two Dow Chemical group companies. The tribunal said that a group of companies constituted one and the same economic reality (*une realité économique unique*) of which the tribunal should take account when it ruled on its jurisdiction. It decided that it was the mutual intention of all parties that the group companies should have been real parties to the agreement. They relied in particular on the fact that group companies participated in the conclusion, performance and termination of the contract, and on the economic reality and needs of international commerce. The Paris Cour d’appel rejected an application to set aside the award

112. In the *Dalico* case (*Municipalité de Khoms El Mergeb v Soc Dalico*, 20 December 1993, 1994 Rev Arb 116) the Cour de cassation was concerned with an application to set aside an award in which an arbitral tribunal had upheld the existence and validity of an arbitration clause in a document annexed to a works contract between a Libyan municipal authority and a Danish company (“Dalico”). The main contract was subject to Libyan law and stipulated standard terms and conditions, amplified or amended by an annex, which formed part of the contract. The standard terms and conditions conferred jurisdiction on the Libyan courts, but the annex amended them by providing for international arbitration. Dalico referred the dispute to arbitration and obtained an award against the Libyan municipal authority.

113. An action to set aside the award was brought before the Paris Cour d’appel. The court dismissed the application to set aside, relying in particular on the fact that the principle of the autonomy of the arbitration agreement “confirms the independence of the arbitration clause, not only from the substantive provisions of the contract to which it relates, but also from a domestic law applicable to that contract”. The court held that the wording of the documents revealed the parties’ intention to submit their dispute to arbitration.

120. The principle as expressed in the jurisprudence of the Paris Cour d’appel is as follows: “Selon les usages du commerce international, la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d’en étendre l’application aux parties directement impliquées dans l’exécution du contrat et les litiges qui peuvent en résulter, dès lors qu’il est établi que leur situation contractuelle, leurs activités et les relations commerciales habituelles existant entre les parties font présumer qu’elles ont accepté la clause d’arbitrage dont elles connaissaient l’existence et la portée, bien qu’elles n’aient pas été signatoires du contrat qui la stipulait”.

121. The principle applies equally where a non-signatory seeks the benefit of an arbitration agreement, as in *Dalico* itself and in *Dow Chemicals*.

122. The common intention of the parties means their subjective intention derived from the objective evidence. M le Bâtonnier Vatier, the Government’s expert, confirmed in his oral evidence that under French law the court must ascertain the “genuine,” subjective, intention of each party, but through its objective conduct, and M Yves Derains, Dallah’s expert, agreed. M Derains confirmed that in order for an act (such as the letter of termination) of the Government to have the effect of establishing the subjective intention on the Government’s part to be bound by the arbitration agreement, it would have to be a “conscious, deliberate act by the government”; that “anything less than a conscious and deliberate act of the government might make the letter less relevant”; and that the letter would not be relevant if it was written by mistake.

132. The crucial facts have been set out fully by Lord Mance. The essential question is whether the Government has proved that there was no common intention (applying the French law principles) that it should be bound by the arbitration agreement.

147. Aikens J rejected the argument that the discretion should be exercised in favour of enforcement because of the Government’s failure to challenge the award in the French courts: Dallah had not submitted that the Government was estopped from challenging the jurisdiction of the tribunal; and the discretion would not be exercised where, as in this case, there was something unsound in the fundamental structural integrity of the ICC arbitration proceedings, namely that the Government did not agree to be bound by the arbitration agreement in clause 23 of the Agreement. There was no error of principle and the Court of Appeal was right not to interfere with the judge’s exercise of discretion.

**LORD HOPE**

148. The essential question in this case, as Lord Mance and Lord Collins explain in paras 2 and 132 of their judgments, is whether the Government of Pakistan has proved that there was no common intention (applying French law principles) between it and Dallah that it should be bound by the arbitration agreement. This is a matter which goes to the root of the question whether there was jurisdiction to make the award. As such, it must be for the court to determine. It cannot be left to the determination of the arbitrators.

149. For the reasons set out in the opinions of Lord Mance and Lord Collins, I agree that the facts point inevitably to the conclusion that there was no such common intention. As Lord Mance says in para 66, the agreement was deliberately structured to be, and was agreed, between Dallah and the Trust. I also agree that the Court of Appeal was right not to interfere with the judge’s exercise of his discretion to refuse enforcement of the award. I too would dismiss the appeal.

**LORD SAVILLE**

150. In his judgment Lord Mance has set out in detail the facts of this case and no purpose would be served by repeating them in this judgment.

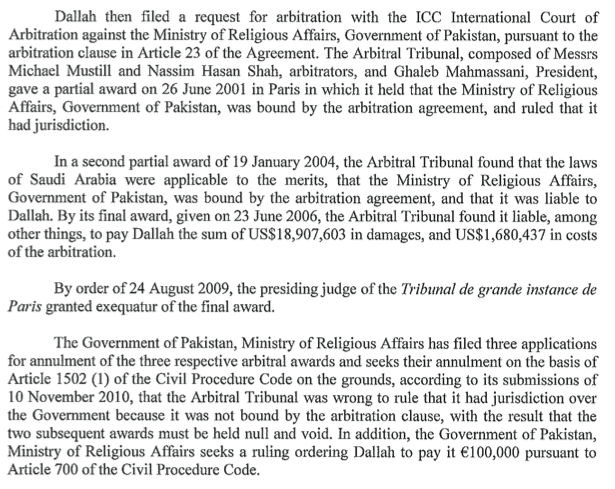
151. The case concerns an application by Dallah Real Estate and Tourism Holding Company to enforce in this country an ICC arbitration award dated 23rd June 2006 against the Ministry of Religious Affairs of the Government of Pakistan. The amount of the award was US$20,588,040. The application was opposed by the Ministry of Religious Affairs on the grounds that there was no arbitration agreement between the parties, so that the award was unenforceable.

162. In the present case, for the reasons given by Lord Mance and Lord Collins (and the courts below), the Ministry of Religious Affairs has succeeded in showing that no arbitration agreement existed to which it was party and that there were no other grounds for enforcing the award. I would accordingly dismiss this appeal.

**LORD CLARKE**

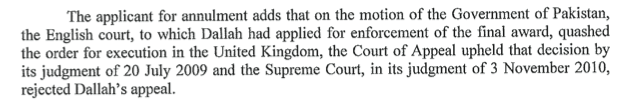
163. I agree that this appeal should be dismissed for the reasons given by the other members of the court. Both Lord Mance and Lord Collins have analysed the relevant principles so fully and so expertly that it would be inappropriate self- indulgence for me to attempt a detailed analysis of my own.

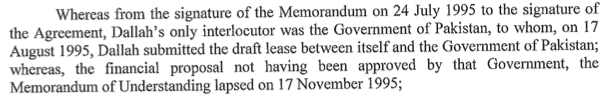
* + **French decision, dated 7 February 2011**
* The arbitration agreement can be extended to the Government of Pakistan

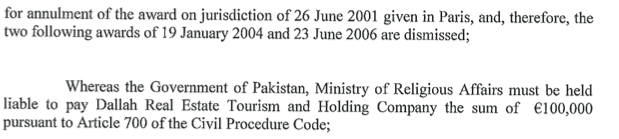


AT found that the ministry of Religious Affairs was merely a ministerial department, with no autonomous legal personality of its own

The Government of Pakistan: the Memorandum of Understanding and the Agreement are totally independent and it was neither the intention nor the common wish of the parties that the Government of Pakistan should be a party to the agreement : 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





Macintosh HD:Users:sophiaallouache:Desktop:Capture d’écran 2014-12-01 à 15.43.47.png

Version FR:

En faisant dénoncer le 19 janvier 1997 la défaillance contractuelle de Dallah par (un) haut fonctionnaire, le Gouvernement de la République, ministère des Affaires religieuses, s'est comporté comme si le contrat était le sien (...) ; cette implication du Gouvernement de la République, ministère des Affaires religieuses, sans qu'il soit fait état d'actes accomplis par le *Trust*, comme son comportement lors des négociations précontractuelles confirment que la création du *Trust* était purement formelle, et que le Gouvernement du Pakistan, ministère des Affaires religieuses, comme Dallah en convenait, s'est comporté comme la véritable partie pakistanaise lors de l'opération économique (...) ; en conséquence, le moyen pris de ce que le tribunal arbitral a étendu à tort la clause d'arbitrage au Gouvernement du Pakistan, ministère des Affaires religieuses et s'est déclaré compétent, est infondé.

* **Recherches**

**Lextenso, Cahiers de l'arbitrage, 01 avril 2011 n° 2, Divergence d'appréciation entre juges français et anglais du contrôle sur l'existence d'une convention d'arbitrage, Gilles CUNIBERTI**

En vérité, la question fondamentale était celle de savoir si, par-delà ces aspects formels, le Pakistan ne s'était pas comporté comme une partie au Contrat au cours de son exécution. De ce point de vue, les éléments de fait étaient contradictoires, de sorte que des thèses opposées pouvaient certainement être légitimement soutenues. Il n'est donc pas totalement surprenant que les deux juges aient pu arriver à des conclusions opposées. L'événement le plus important était sans aucun doute que le Contrat avait été résilié par un fonctionnaire pakistanais agissant au nom de l'État. À la lecture de cette seule lettre, il semblait possible de conclure que les affaires du Trust avaient en vérité été gérées par l'État pakistanais lui-même, et que son existence était purement formelle. C'est l'argument mis en avant par le juge français. Mais, pour le juge anglais, il n'était pas possible d'apprécier cet élément hors de son contexte. Ce contexte, c'était tout d'abord le fait que ledit fonctionnaire avait à la fois une fonction au sein de l'État pakistanais et au sein du Trust. En d'autres termes, si le Contrat avait été rompu par le Trust lui-même, l'action aurait été menée par la même personne physique. En outre, à la suite de cette résiliation, une action judiciaire avait été intentée devant le juge pakistanais afin de le voir juger que le Contrat était effectivement résilié. Or, cette action avait été intentée au nom du Trust, et non au nom de l'État pakistanais. Dès lors, il fallait déterminer lequel de ces deux événements était important, et lequel devait être négligé. Pour le juge français, la lettre de résiliation était particulièrement révélatrice d'une implication de l'État pakistanais que la période pré-contractuelle ne faisait que confirmer. Devant ce faisceau d'indices, l'introduction d'une action contractuelle au nom du Trust apparaissait comme quantité négligeable. Pour le juge anglais, au contraire, c'est bien cette action judiciaire qui, ajoutée à la désignation formelle du Trust comme partie au Contrat, révélait l'absence d'implication réelle du Pakistan dans l'exécution du Contrat, et la qualité annoncée par l'auteur de la lettre semblait bien être une erreur sans conséquence, et certainement incapable de transformer à elle seule le Pakistan en une partie au Contrat.

(…)

À titre liminaire, on observera que la contradiction relevée ne rend pas pour autant les deux décisions inconciliables. Leur objet était en effet différent. La décision française devait se prononcer sur la validité des trois sentences arbitrales rendues dans cette affaire. La décision anglaise, en revanche, tendait à vérifier si la troisième sentence pouvait être exécutée au Royaume-Uni. L'ordre juridique anglais était en conséquence appelé à se prononcer sur la seule question de l'effet en Angleterre de la sentence, et en particulier sur un éventuel recours à la contrainte sur son territoire. À la différence des décisions d'annulation des sentences, à prétention universelle, les décisions d'exequatur sont les manifestations de souverainetés locales, qui ne se prononcent que par rapport à celle-ci. C'est la raison pour laquelle les décisions d'exequatur ne sont pas à même de circuler internationalement : exequatur sur exequatur ne vaut

Il n'en demeure pas moins que, pour ne pas être inconciliables, les deux décisions commentées sont certainement contradictoires, et que cette contradiction, même si elle n'a pas de conséquence juridique directe, ne semble pas satisfaisante. L'harmonie internationale des solutions est l'un des objectifs du droit international privé. Il est vrai que sa priorité a toujours été d'éviter que des décisions contraires coexistent dans un même ordre juridique, ainsi qu'en témoigne le droit commun de la litispendance, qui ne voit un problème dans le conflit de procédures que lorsque celui-ci est susceptible de se traduire par un conflit de décisions dans l'ordre juridique du for

**Lextenso, Petites affiches, 14 novembre 2011 n° 226**

La réponse de la cour d'appel de Paris à cette argumentation était d'autant plus attendue que le Pakistan l'avait victorieusement développée devant les juridictions anglaises, saisies par Dallah d'une demande d'exécution des sentences en cause dès 2006. Après un succès initial obtenu au terme d'un examen non contradictoire, Dallah échoua devant la High Court de Londres, laquelle, par un jugement du 1er août 2008, annula l'autorisation d'exécution des sentences en jugeant que les arbitres n'étaient pas compétents *ratione personae* envers le Pakistan qui n'était pas partie au contrat. Ce jugement fut confirmé par la cour d'appel de Londres le 20 juillet 2009puis par la Cour suprême du Royaume-Uni le 3 novembre 2010. La position des juridictions anglaises était d'autant plus remarquable qu'elles avaient entendu statuer en application du droit français de l'arbitrage. Elles avaient retenu à cet égard que l'existence d'une convention d'arbitrage s'appréciait, en droit français, non pas au regard des règles posées par une loi étatique qui régirait ladite convention et aurait été désignée par une méthode de type conflictualiste, mais directement, en vertu d'une règle matérielle, au regard de la commune volonté des parties de recourir à l'arbitrage ; cette volonté pouvant être explicite (pour les parties signataires du contrat) ou implicite (pour les parties non signataires). Or les juridictions anglaises n'ont pas trouvé en l'espèce une telle commune intention de Dallah et du Pakistan de conclure le contrat et d'être liés par la clause d'arbitrage qu'il contenait. D'où leur constat de l'absence de consentement du Pakistan à l'arbitrage et leur refus corrélatif d'accepter l'exécution, sur le territoire du Royaume-Uni, des sentences obtenues par Dallah à l'encontre du Pakistan.

Pour adopter la solution inverse de celle qu'avaient retenue les juges anglais, la cour d'appel de Paris délaisse, à première vue, la recherche subjective de la commune intention des parties (Dallah et le Pakistan) qui était au cœur du raisonnement tenu Outre-Manche, pour se livrer à une analyse objective du rôle du Pakistan dans la négociation, l'exécution et la résiliation du contrat. Elle relève d'abord qu'à compter de la signature du MoU, le 24 juillet 2005, jusqu'à la signature du contrat, le 10 septembre 2006, « le seul interlocuteur de Dallah fut le Gouvernement du Pakistan ».