WHITE & CASE

**Insight:** International Arbitration

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# In *Dallah*, the Paris Court of Appeal and UK Supreme Court reach contrary decisions applying same law to same facts

On 17 February 2011, in *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533), the Paris Court of Appeal rejected an application by the Government of Pakistan (the "**Government**") to set aside three ICC awards delivered in Paris, holding that the arbitral tribunal was correct in finding it had jurisdiction over the Government despite its not being a signatory to the arbitration agreement. These very same awards, however, only last November, were refused enforcement by the UK Supreme Court[1] – which applied French law to the matter – on the basis that the same tribunal had incorrectly decided it had jurisdiction.

## Facts of case

Dallah is a Saudi Arabian company which provides services for pilgrims travelling to the Holy Places in Saudi Arabia. In July 1995, Dallah signed a memorandum of understanding ("**MoU**") with the Government in relation to the construction of certain housing for Pakistani pilgrims. In September 1996, Dallah entered into a contract ("**Contract**") with the Awami Hajj Trust ("**Trust**"), a body which had been established by an Ordinance promulgated by the President of Pakistan. The Contract contained an arbitration agreement, under which all disputes were to be referred to ICC arbitration in Paris.

The Government was not a signatory to the Contract, although the Contract made reference to a guarantee to be provided by the Government and included a provision by which the Trust could assign its rights and obligations to the Government without the permission of Dallah.

The housing project never came to fruition and, following a change of government in Pakistan, the Trust ceased to exist as a legal entity. In May 1998, Dallah commenced ICC arbitration proceedings against the Government. In the arbitration, Dallah convinced the arbitral tribunal – composed of three well-known arbitrators – that the tribunal had jurisdiction over the Government. The arbitral tribunal issued three awards (successively on jurisdiction, applicable law and the merits) and awarded Dallah approximately USD$20 million in damages and legal costs. Dallah then endeavoured to enforce the final award in the UK. The Government opposed enforcement before the UK Courts and commenced annulment proceedings against all three awards before the Paris Court of Appeal.

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1 Confirming the decisions of both the UK Court of Appeal and the High Court.

## The 3 November 2010 UK Supreme Court decision

The UK Supreme Court was faced with the question of whether the Government, which was not a signatory to the Contract, should be considered a party to the arbitration agreement (as an ICC tribunal sitting in Paris had found), or whether enforcement of the tribunal's award could be refused under Article V(1)(a) of the New York Convention because a proper application of French law led to the conclusion that the Government was not a party to the arbitration agreement.

The UK Supreme Court held that, on a proper interpretation of the New York Convention, whenever a party resists enforcement under Article V(1)(a) of the New York Convention (*i.e.*, by claiming that the arbitration agreement was invalid), the Court is bound to "revisit the tribunal's decision on jurisdiction". The Supreme Court also endorsed the position of the Government that the reviewing court "may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them".

The UK Supreme Court, in applying French law, purported to follow the reasoning of the French Court of Cassation in the well known *Dalico* case[2] (see further below) to the extent that it analysed the common intention of the parties. It concluded that "there was no material sufficient to justify the tribunal's conclusion" that the Government was a party to the arbitration agreement and therefore refused to enforce the award in the UK.

See further our Insight of November 2010

## The 17 February 2011 Paris Court of Appeal decision

The Paris Court of Appeal followed the *Dalico* doctrine whereby (1) an international arbitration agreement is not governed by any national law but by French "material rules" (*règles matérielles*)[3] of international arbitration, and (2) the issue of whether a party is bound by an arbitration clause has to be solved by a factual enquiry, i.e. the court must assess whether the parties intended to go to arbitration.

Following *Dalico*, the Paris Court retraced in detail the successive steps of the project in order to analyse the dealings between the parties.

The Paris Court noted that during the entire period prior to the conclusion of the Contract, the Government was Dallah's sole counterpart/negotiating partner. In particular, the Court noted that the Government directly negotiated the Contract, although the signatory, from a legal standpoint, was the Trust.

The Paris Court then emphasized that the Government was also involved during the performance of the Contract, as evidenced, in particular, by the direct involvement of two employees of the Government in the organization of savings plans and advertising campaigns related to the project.

Finally, the Court stressed that the Government directly handled the termination of the Contract.

In light of the above, the Paris Court of Appeal concluded that: "[...] [The Government] *behaved as if the Contract was its own*;[...] *this involvement of* [the Government], *in the absence of evidence that the Trust took any actions, as well as* [the Government's] *behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and that* [the Government] was in fact the *true Pakistani party in the course of the economic transaction*" (free English translation).

The Court thus rejected the Government's request, and even ordered the Government to pay the full amount of legal fees claimed by Dallah, that is €100,000, under Article 700 of the French Code of Civil Procedure.

## Similar approaches regarding scope of judicial review of arbitrators' jurisdiction

It is striking to note that both the UK and French Courts concluded that they had authority to conduct a full review of the arbitrators' decision on jurisdiction. As regards French law, this decision is consistent with well-established case law. In a recent decision dated 6 October 2010, the French Court of Cassation thus confirmed that, in the context of the control of arbitrators' jurisdiction in enforcement or annulment proceedings, French courts are entitled to conduct a review of "*all legal and factual elements that are relevant to determine the reach of the arbitration agreement and draw the corresponding conclusions regarding the arbitrators' compliance with their mission*".[4]

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2 Cour de Cassation, First Civil Chamber, *Municipalité de Khoms El Mergeb v. Dalico*, 20 December 1993, JDI 1994, 432, note E. Gaillard.

3 Certain rules that are applied by a French court without a conflict of laws analysis.

4 Cour de Cassation, First Civil Chamber, Fondation Albert Abela Family Foundation (AAFF) et. al. v. Fondation Joseph Abela Family Foundation (JAFF), Revue de l'Arbitrage (2010), p. 813 et seq.

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## Contrary findings when applying French law to the facts

The French and UK Courts applied French law to the same facts but reached different conclusions.

The UK Supreme Court was in particular swayed by the following:

- the clear change in the proposed transaction from an agreement with the Government (the MoU) to a contract with the Trust;
- the deliberate structuring of the Contract to be between Dallah and the Trust; the Government's only role under the Contract was to guarantee the Trust's loan obligations and to receive a counter-guarantee from the Trust;
- Dallah had been advised throughout the transaction by lawyers who must have understood the difference between an agreement with a state entity and an agreement with the state itself;
- the Trust was established as a body corporate capable of holding property and of suing and being sued; and
- it was the Trust that commenced proceedings against Dallah in Pakistan.

In contrast, as seen above, the Paris Court of Appeal found that the involvement of the Government during the pre-contractual negotiations, the life of the contract and its termination confirms that the Government acted like the real party and that the creation of the Trust was purely formal. This conclusion was reinforced by the absence of any actions by the Trust.

## Next steps

It remains to be seen whether the Government will appeal the Paris Court of Appeal's decision before the French Court of Cassation.

## Comments

The UK Supreme Court applied French law in a manner which required a high standard of proof that the Government had actually consented to arbitrate, whereas the Paris Court of Appeal was prepared to take the surrounding context of the Contract (including the pre-contractual negotiations) into account. In so doing, it appears that although the Supreme Court intended to apply French law, it did so using "English spectacles" and may have been influenced by traditional English notions of privity and separate legal personality in finding the *Dalico* test was not satisfied.

Some may also view this matter as an illustration of the competition between London and Paris with respect to international arbitration. Indeed, it is striking that the UK Courts decided to proceed with the matter and to apply French law, when annulment proceedings had already been initiated before the Paris Court of Appeal as the court of the seat of arbitration. One wonders whether the UK Courts would have decided differently had the French Court ruled first.

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