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## THE EXTENSION OF THE ARBITRATION CLAUSE TO NON-SIGNATORIES — THE IRRECONCILABLE POSITIONS OF FRENCH AND ENGLISH COURTS

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One salient problem in Europe results from the different approaches, in France and in England particularly, regarding the possibility to extend the arbitration clause to non-signatories in specific circumstances. It results from various judgments of the Court of Appeal of Paris and the Cour de Cassation that a non-signatory who has been directly involved in the negotiation and/or performance and/or termination of a contract containing an arbitration clause becomes *ipso facto* a party to the arbitration clause.

The formulation of the rule varies slightly from one judgment to the other. Initially there was a certain insistence on the fact that when the non-signatory had participated in — generally — the performance of the contract, and had been aware of the existence of the clause, it was to be presumed that it had accepted to be bound by the clause. The Court of Appeal of Paris held in several judgments that:

[a]n arbitration clause inserted in an international contract has a distinct validity and force, which requires it to be applied to the parties directly involved in the performance of the contract and in the disputes which may result from it, once it has been established that they were aware of the existence and the scope of the arbitration clause, even though they were not signatories to the contract which contained it.<sup>1</sup>

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1. See, eg *Société Korsnas Marma v. Société Durand-Auzias*, CA Paris, Nov. 30, 1988 and *Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co*

I would call this the subjectivist trend.

But more recently a more objectivist trend has surfaced. For instance, in a decision of 2007,<sup>2</sup> the Cour de cassation briefly stated that “[t]he effect of international arbitration clauses extends to the parties directly involved in the performance of the contract and any disputes that may arise in connection therewith.”<sup>3</sup>

This is a slightly abbreviated restatement of the reasoning of the Paris Court of Appeal mentioned above. The Cour de cassation eliminated any reference to a supposed intent.

English courts have adopted a much more classical position: for a non-signatory to be bound by an arbitration clause, there must be positive acts that clearly establish the non-signatory’s intent to accede to the contract, and also the original parties’ acceptance of that accession. What is more surprising, and is obviously troublesome, is the fact that in a given case a French court on the one side, and three English courts on the other side, all purporting to apply French law, have come to diametrically opposite results. That case, which is recent and already famous, is the *Dallah* case.

In the *Dallah* case, a contract had been concluded between a Saudi company, Dallah Estate, and a Pakistani trust called Awami Hajj Trust, whereby Dallah agreed to build accommodations suitable for pilgrims travelling from Pakistan to Mecca. The negotiations had been led, on the side of Pakistan, by the Government, which ultimately decided to promulgate an ordinance providing for the establishment of the Trust, which would act as a vehicle to undertake the project. A few months after the execution of the contract by Dallah and the Trust, the Secretary of the Ministry of Religious Affairs, by a letter on the Ministry’s headed paper, put an end to the contract, alleging that

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Ltd et autres, CA Paris, Feb. 14, 1989, REV. ARB. p. 691 (1989), *comment* Tschanz; Société V 2000 v. Société Project XJ 220 ITD et autre, CA Paris, Dec. 7, 1994, RTD Com. p. 401 (1995), *comment* E. Loquin; REV. ARB. p. 245 (1996), *comment* Ch. Jarrosson; Dec. 17, 1997, RTD Com. p. 580 (1998), *comment* E. Loquin; *see also* SMABTP et autre v. Société Statinor et autres, CA Paris, Mar. 22, 1995, REV. ARB. p. 550 (1997).

2. Société Alcatel Business Systems (ABS), Société Alcatel Micro Electronics (AME) et Société AGF v. Amkor Technology et al. Cass 1<sup>o</sup> civ., Mar. 27, 2007, JCP [2007] I 168, No. 11, *comment* Christophe Seraglini; JCP [2007] II 10118, *comment* Catherine Golhen.

3. *Id.*

Dallah had breached certain fundamental obligations. Dallah started an ICC arbitration in Paris against the Government of Pakistan.

The Government rejected any suggestion that it was a party to the contract or that it had consented to the arbitration agreement, and denied the arbitral tribunal's jurisdiction on those bases. The tribunal decided that the question whether the Government of Pakistan was a party was to be determined "by reference to those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business."<sup>4</sup> More concretely, the tribunal observed that the arbitration agreement extended "to parties that did not actually sign the contract but were directly involved in the negotiation and performance of such contract . . . ." This last formula is a quotation from French case law as it was formulated at the time. The arbitral tribunal concluded that Dallah had demonstrated that the government of Pakistan had been, and considered itself to be, a party to the contract with Dallah. On the merits, the tribunal found that the government owed Dallah GBP 20 million in damages.

The claimant made an *ex parte* application to the Commercial Court for leave to enforce the award as a judgment of the High Court of England.<sup>5</sup> An order giving Dallah such leave was issued, which led in turn to an application by the Government to set aside the order on the ground that the arbitration agreement on which the award was based was not valid within the meaning of Section 103(2)(b) of the English Arbitration Act, which reflects Article V.1.a of the New York Convention. Article V.1.a provides, in so far as is material to this decision, as follows:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

. . . the agreement referred to in article II . . . is not valid under the law to

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4. Dallah Real Estate & Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, [2008] EWHC 1901 (Comm), [2008] App.L.R. 08/01 (1 August 2008), at ¶ 49 [hereinafter Dallah, High Court, [2008] EWHC 1901 (Comm)].

5. *Id.* ¶ 54.

which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Since the parties had not agreed on the law by which the arbitration agreement should be governed, the High Court and, on appeal, the Court of Appeal, found that it was subject to French law, as the law of the country where the award was made.<sup>6</sup> One could therefore hope that a convergence might be reached between the position that a French court would adopt, if seized of a request to set aside the award, and the position of the English court. What remained to be seen, however, was how the English courts would apply the principles of French law.

What the High Court and the Court of Appeal each understood in the application of French law is that:

in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether expressed or implied) to be bound by said agreement and, as a result, by the arbitration clause . . . . To this effect, the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement.<sup>7</sup>

The High Court therefore established that it would seek to ascertain the subjective intention of each of the parties through their objective conduct.<sup>8</sup> In doing so, it found that it was not the subjective intention of all the parties that the Government of Pakistan should be bound by the agreement or the arbitration clause:

In fact, I am clear that the opposite was the case from the beginning to end. That is why the GoP distanced itself from the contractual arrangements in the Agreement and that is why it sought to argue from the

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6. *Dallah*, High Court, [2008] EWHC 1901 (Comm), at para. 3.

7. *Id.*, at ¶ 85 (referencing the Joint Memorandum submitted by the parties to the High Court encapsulating the principles of French law which the parties agreed were applicable to the case). *See also* *Dallah*, Court of Appeal, [2009] EWCA Civ. 755, at para. 26.

8. *Dallah*, High Court, [2008] EWHC 1901 (Comm), at ¶ 87. *See also* *Dallah*, Court of Appeal, [2009] EWCA Civ. 755, at ¶ 27.

time of the Termination Letter that the Agreement was void and illegal.<sup>9</sup>

Similarly, the Court of Appeal found that this subjective intention — or implicit intention — was lacking. According to Lord Justice Moore-Bick, who wrote the lead opinion, there was no doubt that prior to the establishment of the Trust, the Government of Pakistan was the only party with which Dallah could negotiate. There was, however, a fundamental change in that position when the Government established the Trust and, most importantly, when the final contract was signed only between Dallah and the Trust. Lord Justice Moore-Bick therefore posited, in the most commonsensical fashion, that “[i]f it had been [the parties’] common intention, the Government would surely have been named as a party to the Agreement, or would at least have added its signature in a way that reflected that fact.”<sup>10</sup> As to the termination letter sent to Dallah on the Ministry of Religious Affairs’ letterhead, the Court of Appeal found it ambiguous as it was sent by the Secretary of the Ministry of Religious Affairs, who is evidently a civil servant of the State, but was also the chairman of the board of directors of the Trust (in spite of the fact that at that point it had already been dissolved).<sup>11</sup> The Supreme Court, by a decision of 3 November 2010,<sup>12</sup> confirmed the position taken by the High Court and the Court of Appeal. As a consequence, the English courts refused to grant Dallah leave to enforce the award.

A few months later, on February 17, 2011,<sup>13</sup> the Court of Appeal of Paris, seized of an appeal to set aside the award on the ground of lack of jurisdiction of the arbitral tribunal over the Government of Pakistan, dismissed the appeal (which entails that the award is enforceable in France). The main reasons for the judgment of the Court of Appeal are the following. First, the negotiations which led to the execution of the contract took place exclusively between Dallah and the Ministry of Religious Affairs, and not the Trust, until the day preceding the

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9. Dallah, High Court, [2008] EWHC 1901 (Comm), at ¶ 129.

10. Dallah, Court of Appeal, [2009] EWCA Civ. 755, at ¶ 32.

11. *Id.* at ¶ 34.

12. *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

13. Paris, pôle 1, ch. 1, 17 February 2011, RG 09/28533, *Gouvernement du Pakistan, Ministère des Affaires religieuses c/ Dallah Real Estate and Tourism Holding Company*.

execution of the contract. Secondly, the Ministry had sent two letters to Dallah during the period of performance of the contract (a fact that was mentioned in the judgment of the Supreme Court, only by Lord Mance, who found it irrelevant). Thirdly, although the person who had signed the letter purporting to terminate the contract on the headed paper of the Ministry was also the chairman of the board of the Trust, there was no ambiguity about the fact that he had acted in his capacity as Secretary of the Ministry, since the Trust had ceased to exist one month earlier for lack of a new presidential decree prolonging its existence. The Court adds that the creation of the Trust was purely formal, and that the Government had behaved as the actual Pakistani party during the economic operation, in particular when it notified the termination of the contract to Dallah.

The Dallah case shows that, even though the English courts honestly tried to follow the French approach to the problem, such approach is so alien to the English way of reasoning that they simply could not overcome the fact that, obviously, it had never been the intention of the Government of Pakistan to be bound by the contract. And they did not refer to the objectivist trend of the French case law, the existence of which made it obvious, for a specialist of French arbitration law, that the award would *not* be set aside.

Is the French position shocking? At first sight it is, since the consent of the parties to arbitrate is the cornerstone of arbitration, and the Government of Pakistan had made clear its intention *not to be* a party to the contract containing the arbitration clause. However, the refusal to recognize the award would have meant a denial of justice, since the Trust had disappeared and there was no other defendant against which Dallah could have acted than the Government. In addition, it is the Government's inaction that caused the Trust to cease to exist. The Government was under a good faith duty to keep the Trust alive. Having failed to do so, it is justified that it had to bear the consequences. One could object that a lack of good faith does not constitute in itself a valid ground to bind a person to a contract to which it never consented to be a party. A more specific theory is needed. One could suggest the following analysis. By not renewing the decree creating the Trust, the Government deprived Dallah of the possibility of performing the contract and/or of claiming damages. This constituted a tort, for which the Government was liable vis-à-vis

Dallah. The only adequate remedy was to decide that the proceedings could be brought against it and that it should (as a consequence) be exposed to an order for the payment of damages.