

Inconsistent Rulings From London & Paris in Enforcing Arbitration Agreements Against Non-Signatories

After an ICC arbitral tribunal in Paris, France, ruled that it had jurisdiction over Pakistan even though it was not a signatory to the agreement containing the arbitration clause, the UK Supreme Court refused enforcement of the resulting US\$20 million arbitration award against non-signatory Pakistan, who under Article V(1)(a) of the New York Convention had claimed there was no valid agreement to arbitrate (*see* prior posting on <http://connonwood.com/publications/articles>). In the latest twist to this saga, the Paris Court of Appeals recently came to the opposite conclusion, refusing Pakistan's request to annul the award, thus showing the paramount importance and pitfalls inherent in choosing where and when to seek recognition and enforcement of an arbitration award. Notably both courts applied French law as the law of the seat of the arbitration, absent a contractual choice of law clause.

In *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* (2010 UKSC 46), November 3, 2010, a company (Dallah) operating in Saudi Arabia tried to enforce in England a US\$20 million ICC arbitration award against the Government of Pakistan. The UK Supreme Court refused to recognize and enforce the award concluding that because Pakistan was not a named party or signatory to the arbitration agreement there was no "common intention" by the parties for Pakistan to be bound. The Court supported its ruling by noting that (1) Pakistan had created a separate entity – a Trust – to contract with Dallah and (2) that it had been advised by a law firm during negotiations and so should have understood that its agreement was with the Trust and not with Pakistan.

Recently, the Paris Court of Appeal (Case No. 09/28533, February 17, 2011), where Pakistan had sought to annul the arbitral award, ruled the opposite. The Court of Appeal upheld the award and ordered Pakistan to also pay the full amount of Dallah's legal fees. The Court concluded that the Trust was established for "purely formal" reasons and that the "common intention" of the parties was self-evident by Pakistan's own conduct acting as a de facto party to the agreement. Unlike the UK Supreme Court, the Paris Court of Appeal conducted its factual analysis stretching back to the very beginning of the project, including the negotiations, instead of focusing primarily on whether a party expressly consented to arbitration in writing. The Court of Appeal concluded that Pakistan was Dallah's real economic counterparty and cited the following facts to support its conclusion, (1) Pakistan was Dallah's sole negotiating party throughout the project with all correspondence from Pakistan issued on official governmental letterhead, (2) the contract was subject to the approval of Pakistan, (3) the rights under the contract could be assigned or transferred to Pakistan without prior written consent from Dallah, (4) Pakistan served as the guarantor of the Trust, (5) Pakistan's civil servants were actively involved in the project compared to the obvious absence of Trust representatives, and (6) the contract's notice of termination was also on Pakistan's letterhead.

Notably both courts freely reviewed the arbitral tribunal's jurisdiction to bind a party who refuses to appear or participate in the arbitration on the basis that it is not a signatory to the arbitration agreement, holding that jurisdiction ultimately is for a court to decide anew. The differing results, while on the same facts and applicable (French) law, appear the result of the UK court's common law-inspired view of French law (in particular its reluctance to accord significant weight to the contractual negotiation phase), as well as its apparent failure to accord full weight to Article V of the New York Convention which places the burden of proof on the party (Pakistan) resisting enforcement of an arbitral award.

While it remains to be seen whether Pakistan will appeal the decision to the French Supreme Court (Cour de Cassation), the case highlights a number of important factors to consider. First, given the possible complications in enforcing arbitration awards, parties will do well to strategize accordingly. Had Dallah sought recognition (exequatur) in France prior to, and not after, starting the English enforcement proceeding – even though under the New York Convention this is no longer required – the UK court may have had the benefit of the Paris Court's interpretation of French law. As it was, Dallah's request to stay the UK enforcement proceeding was denied and the UK court formed its own view of French law. Second, defensively, the arbitration clause could have explicitly excluded jurisdiction over non-signatory Pakistan.

For Further Information, Please Contact:
Robert A. de By, Chair, International Arbitration Practice Group;
Tel:+ 44.20.3328.9010 (UK) & +1.626.638.1762 (US)