Dallah, Part 2: French Court Reaches Opposite Conclusion

We knew that the English and the French do not drive on the same side of the road. We also knew that they do not perceive arbitration in the same way. We now will also know that, when looking at the same evidence, they reach opposite conclusions.

This is the lesson of reading together the judgments of the Paris Court of appeal and of the UK Supreme Court in *Dallah v. Pakistan*. Both courts wondered whether the Government of Pakistan, although it was not a signatory of the Agreement concluded between Dallah and the Awami Hajj Trust (for a summary of the facts of the case, see here), ought to be considered bound by the arbitration clause it contained. After looking at the same evidence, the English court concluded that it was not, while the French court concluded that it was.

The two judgments cannot be compared in other respects, because the French court does not discuss any other issue. It obviously does not discuss the application of the New York Convention, since it entertained annulment proceedings. It does not discuss choice of law either.

The two judgments are not easy to compare, but I think that their disagreement can be summarized as follows.

Pre-Contractual History

To begin with, the two courts interpreted differently pre-contractual events. Before the relevant Agreement was signed, Dallah had negotiated entirely with the state of Pakistan, so much so that Pakistan and Dallah had concluded a Memorandum of Understanding.

For the French court, this was evidence of the involvment of Pakistan from the start.

For Lord Collins, this was a contrario evidence that the parties to the Agreement really took seriously who the formal parties to each contract would be: Pakistan first, but the Trust only next.

Involvment of Pakistan in the Performance of the Agreement

The letter of Mr Mufti.

The key event was the fact that the Agreement was not terminated by its signatory, the Trust, but by a Pakistani official in a letter sent in his capacity of member of a Pakistani Ministry. This official, however, was also the head of the Trust. Furthermore, shortly after, judicial proceedings seeking a declaration that the Agreement had been terminated were initiated by the Trust, and not by Pakistan.

Evidence was contradictory, and could be interpreted both ways.

For the French court, the letter sent by Pakistan told it all. The fact that proceedings were shortly after initiated by the Trust was of little importance.

For Lord Mance, what mattered was the context of the letter. Given that proceedings had been initiated in the name of the Trust, the letter could be neglected.

Other Letters

This letter, however, was not the only one which had been sent to Dallah by Pakistan in the context of the performance of the Agreement. Two other letters had been sent by Pakistan giving instructions on how to perform the contract (issues addressed were setting up a saving scheme for the pilgrims and publicizing such scheme).

For the French court, this was critical. Added to the letter previously discussed, it clearly showed constant involvment of Pakistan in an Agreement that it had furthermore negotiated.

Remarquably, the Lords barely discussed this item. If I am not mistaken, only Lord Mance mentioned it. But, although he actually concluded that these showed involvment of Pakistan, he then most surprisingly wrote that these were unimportant.

> *44. As to performance of the Agreement, between April 1996 and September 1996, exchanges between Dallah and the Ministry of Religious Affairs ("MORA") of the Government culminated in agreement that one of Dallah's associate companies, Al-Baraka Islamic Investment Bank Ltd., should be appointed trustee bank to manage the Trust's fund as set out in each Ordinance (para 5 above), and in notification by letters dated 30 July and 9 September 1996 of such appointment by the Board of Trustees of the Trust. In subsequent letters dated 26 September and 4 November 1996, the MORA urged Mr Nackvi of the Dallah/Al-Baraka group to give wide publicity to the appointment and to the savings schemes proposed to be floated for the benefit of intending Hujjaj. By letter dated 22 October 1996 Dallah submitted to the MORA a specimen financing agreement for the Trust (never in fact approved or agreed), under one term of which the Trust would have confirmed that it was "under the control of" the Government. 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.*

Can these judgments be explained by any legal consideration? The Lords purported to apply French law. Did they get it wrong? Or was it all about assessing facts and evidence?

In any case, it is unclear whether there was an obvious solution to this case. But what is clear is that, in this hard case, the arbitral tribunal had found that there was an

arbitration agreement. To say the least, the English court did not demonstrate much arbitration friendliness by overruling the award on such a disputed point.