Dallah, Renvoi and Transnational Law

In December, three members of the UK Supreme Court granted leave to appeal in *Dallah v. Pakistan*.

The case concerns the enforcement of an ICC arbitral award in the UK. In a nutshell, the Ministry of Religious Affairs of Pakistan had negotiated with Saudi company Dallah a contract whereby Dallah would provide services (building accomodation in particular) for Pakistani pilgrims visiting Mecca for the Hajj. But the contract was eventually signed by a Pakistani Trust which was to later on lose legal personality under Pakistani law. When the dispute arose, Dallah initiated arbitration proceedings against the Government of Pakistan.

The central issue was therefore whether the arbitral tribunal had jurisdiction over the Government of Pakistan, which was not a signatory of the contract including the arbitration clause. A distinguished arbitral tribunal sitting in Paris held that it had. Both the English High Court and the English Court of appeal disagreed and thus denied enforcement.

The debate before the English courts was and I guess will be about a variety of issues of English and international arbitration law that I will barely touch upon here, including discretion to refuse enforcement under the 1958 New York Convention or the standard of review of arbitral decisions on jurisdiction. But the case also raised a very interesting and arguably novel issue of choice of law. And it involved not only the English but also the French conflict of laws.

Choice of Law in England

The starting point of the reasoning was section 103(2)(b) of the English *Arbitration Act* 1996 , which provides that recognition or enforcement of a New York Convention award may be refused if the person against whom it is invoked proves that "…*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*." Section 103(2)(b) of the Act implements the second

part of Article V (a)(1) of the New York Convention in English law.

In the absence of any choice by the parties, the applicable statutory provision of the forum provided that the validity of the arbitration agreement was governed by the law of the seat of the arbitration, which was Paris, France. As a consequence, the English courts applied French law to determine whether Pakistan was bound by the arbitration agreement.

Choice of Law in France

This conclusion, however, was problematic for two reasons. The first is that the arbitral tribunal had actually not applied French law in order to decide the issue. It had applied "transnational principles". Under French law, it was perfectly entitled to do so. Even in the absence of any choice of law made by the parties, Article 1496 of the French Code of Civil Procedure provides that arbitrators may apply any "rules of law" that they deem appropriate. ICC rules, which were applicable, provide the same. In other words, the English courts decided to review the decision of the arbitrators on jurisdiction pursuant to a law (French law) that the arbitrators had not meant to apply, and had no obligation to apply according to the law of the seat of the arbitration.

Furthermore, when French courts review decisions of arbitrators on jurisdiction, they do not apply French law either. For almost 20 years and the *Dalico* decision in 1993, French courts have held that arbitration agreements are not governed by any national law, and that it is only necessary to assess whether the parties have actually consented to go to arbitration. This is only a factual enquiry. No national law applies.

***Renvoi* to Transnational Law?**

So, the French and the English do not have the same choice of law rules. Is that novel in private international law? Not really. For long, conflict lawyers have advocated to take into account foreign choice of law rules in order to coordinate legal systems. For some reason, even the English call it *renvoi*. So, in this case, the issue certainly arose as to whether English courts should have considered French choice of law rules.

The question was well perceived by Aikens J. in first instance. In his judgment of August 1st, 2008, he wondered:

> *78. … Does the phrase "within the law of the country where the award was made" in section 103(2)(b) include a reference to the conflict of laws rules of that country?*

Most unfortunately, however, the two French experts had written in their Joint Memorandum:

> *"Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".*

This statement was misleading. It is true that French law does not have a typical choice of law rule for the purpose of determining whether an arbitration agreement is valid. But French law cannot avoid having an answer to the question of when is an arbitration agreement valid in an international dispute. And the answer is the *Dalico* rule, which provides that no national law governs, and that it is only necessary to assess whether there was actual consent.

Indeed, the French law experts further wrote in their Joint Memorandum:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

Aikens J. understood this as follows:

> *93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. (…)*

Aikens J.'s understanding of French private international law was perfectly sensible. There is a French choice of law rule, and it provides for the application of a non national set of rules of decision. In other words, and although Aikens J. did not say so, there was a *renvoi* from French law to transnational law.

Applying French Substantive Law?

Both Aikens J. and the Court of appeal ruled that the English court should apply French law. One reason was of course the misleading statement of the French experts on the French conflict of laws. But other reasons were offered.

For the Court of appeal, Moore-Bick LJ held that the English court "was bound by section 103(2) of the Act to apply French law to the facts as he found them" (§ 25). It is true that neither the *Act* nor the New York Convention mention *renvoi*, but none of these norms provide that courts may not apply *renvoi* either.

In first instance, Aikens J. referred to the leading commentary of Van den Berg on the New York Convention which states that conflict of laws rules of the Convention "are to be treated as uniform". Although the English judge characterized Van den Berg's book as "authoritative", it must be recognized that quite a few scholars do not share this opinion. In particular, many Swiss conflict and arbitration scholars have submitted that *renvoi* should be accepted when the choice of law rule of the seat of the arbitration is more favourable than the rule of the New York Convention, which is the case of the Swiss rule since the Swiss conflict of laws was reformed in 1987. And, indeed, given that the New York Convention includes article VII which enables states to apply more favourable regimes, it seems hard to argue that the main point of the Convention was to lay down uniform rules.

Applying French Choice of Law Rules?

So, does this mean that the English court should have taken into account French conflict of laws rules? It is submitted that, in principle, the answer is yes.

- Yet, one should not overlook the difficulties, both practical and doctrinal, that this would create.

To begin with, one would have to determine the content of those transnational rules which French courts hold applicable. Certainly, the arbitral tribunal could

do so in this case. But how easily could an English court do it? Here is what Aikens J. had to say about it:

> *93 As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. (…) The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.*

Then, it would be necessary to find a legal ground for justifying taking into account French conflict of laws rules.

The first doctrine which comes to mind is obviously *renvoi*. But the forum is an English court, and I understand that the doctrine of "total renvoi" is not widely accepted in English law. An extension to the field of arbitration would be quite a novelty.

Another solution might be to take the French rules into account for the purpose of exercising discretion under Article V of the New York Convention. Article V provides that enforcing courts "may" deny recognition to awards when one of the grounds of Article V is established. English courts have held repeatedly that this means that they have discretion to still enforce an award when such a ground can be proved. They have also ruled, including in *Dallah*, that this discretion is not open or broad, but limited. It might be appropriate to use this discretion for allowing the enforcement of an award comporting with the law of the seat of the arbitration, including its conflict of laws rules.