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.

French Blocking Statute Still Unimpressive

We had reported earlier on the first French case applying of the French blocking statute criminalizing cooperation with US discovery procedures.

One interesting question that followed that case was whether US courts would then take the statute seriously.

Here is new evidence that this is not the case.

Issue 2010.4 Nederlands Internationaal Privaatrecht

The last issue of 2010 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Succession and Party Autonomy, European Cooperation and Child Maintenance, Brussels I and Contracts of Service and PIL aspect of Islamic Financing:

- Andrea Bonomi, Testamentary freedom or forced heirship? Blancing party autonomy and the protection of family members, p. 605-610. The conclusion reads:

Although targeting private international law issues, the proposed Regulation can be regarded as the expression of a quite liberal approach to successions. It is submitted that the choice of this approach for international cases can also, in the long term, have an indirect impact on crucial aspects of the domestic law of succession. Thus, the adoption of conflict rules favouring agreements as to succession will probably reinforce the opinion that the prohibition of such agreements, which still exists in several Member States, has outlived and favour substantive law reform. In the same way the adoption of conflict rules that reduce the effectiveness of forced heirship rights in international situations may also stimulate the existing debate on the possibility of making these traditional protection mechanisms more flexible in purely internal situations. As already noted in other areas of law, the European Union could, through the unification of the private international law of succession, have an influence on the development of the substantive laws of the Member States.

- Ian Curry-Sumner, Administrative co-operation and free legal aid in

international child maintenance recovery. What is the added value of the European Maintenance Regulation?, p. 611-621. The author provided the following summary:

The international recovery of child maintenance is one important piece in the larger puzzle that ensures that children receive the assistance they need and deserve. Having acknowledged the need for new legislation, both the Hague Conference and the European Union have drafted new instruments aiming to improve the functioning of the current system. Both instruments lay down the framework for the creation of a network of Central Authorities, forming the cornerstone of a future European and global system of administrative co-operation with respect to the international recovery of maintenance. Since both instruments are due to enter into force at the same time, the question arises whether it was indeed necessary to have two separate instruments dealing with this issue. This article, therefore, addresses the question of whether the provisions with respect to administrative co-operation in the European Maintenance Regulation have added value alongside the provisions contained in the Hague Maintenance Convention. The achievements of the Hague Conference and the European Union should not for one second be underestimated. The abolition of exequatur at EU level and the creation of a global free legal aid for international recovery cases are two achievements that will go down in the annals of legislative history as monumental achievements. Nevertheless, that does not make these instruments immune from criticism. As this article shows, the provisions with respect to administrative co-operation in the European Maintenance Regulation are far from impervious to disapproval.

- Jan-Jaap Kuipers, De plaats waar een dienstenovereenkomst dient te worden verricht als grond voor rechterlijke bevoegdheid, p. 622-628. The English abstract reads:

The European Court of Justice (ECJ) has recently been given the opportunity in a number of preliminary rulings to clarify where, for the purpose of establishing special jurisdiction, a service was or should have been provided within the meaning of Article 5(1)(b) Brussels I. The present article argues that the ECJ has been able to rectify the legal uncertainty that existed under the Tessili doctrine. Despite the fact that the case law sometimes lacks internal coherence and reaches results which are different from the Rome I Regulation, the ECJ has succeeded in developing simple and predictable criteria.

- Omar Salah, 'Nakheel Sukuk': internationaal privaatrecht in de VAE, p. 629-638. The English abstract reads:

In November 2009, Dubai World created a great deal of disturbance in the capital markets when it requested a restructuring of its debts, in particular with regard to Nakheel Sukuk (Islamic financial securities). Analyses by the lawyers of Dubai World and its creditors showed that the sukuk holders might not have the level of protection they had expected. This raised several questions with regard to private international law, more in particular concerning the recognition and enforcement of foreign judgments in the United Arab Emirates (UAE). The article deals with the legal aspects of Nakheel Sukuk with a focus on private international law. First, a main introduction to Islamic finance and to sukuk will be given. Taking the case study of Nakheel Sukuk as a starting point, the author discusses next (i) the choice of forum and the choice of law under English law; (ii) the legal system of Dubai and the UAE; (ii) the relevant rules on the choice of forum, choice of law, and recognition and enforcement of foreign judgements in the UAE under the Law of Civil Procedure and the Federal Civil Code of the UAE; and (iv) alternative solutions, such as the possibility for an arbitration clause under the laws of the UAE. All of the above provides an insight into the legal system of the UAE and its rules on private international law in particular, leading to a better understanding of how to structure transactions when dealing with this region in the future.

Publication: Baratta (Ed.), Dizionario di Diritto Internazionale Privato

The Italian publishing house Giuffrè has recently published a new book in the law dictionary series *Dizionari del diritto privato*, directed by *Prof. Natalino Irti*. The volume, ***Diritto internazionale privato***, edited by *Prof. Roberto Baratta*, is entirely devoted to Private International Law.

It contains more than 60 entries relating to conflict of laws and jurisdictions,

authored by prominent Italian PIL scholars. A detailed TOC is available here.

Title: Diritto internazionale privato, edited by *Roberto Baratta*, Giuffrè (series: Dizionari del Diritto privato), Milano, 2010, VI-566 pages.

ISBN: 978-88-14-15911-4. Price: EUR 65. Available at Giuffrè.

(Many thanks to Fabrizio Marongiu Buonaiuti, Univ. of Rome "La Sapienza", for the tip-off)

ICCS Convention No. 29 on the recognition of decisions recording a sex reassignment

On March 1, 2011, the ICCS Convention No. 29 on the recognition of decisions recording a sex reassignment, adopted by the Lisbon General Assembly on 16 September 1999, and signed at Vienna on September 12, 2000, will enter into force. Two States have so far ratified the Convention: Spain in October 2010, and the Netherlands in 2004.

Under the Convention final court or administrative decisions recording a person's sex reassignment issued by the competent authorities in a Contracting State shall be recognized in other Contracting States, when at the time when the application was made the applicant was national or habitually resident in the State in which the decision was taken.

There are three exceptions to this rule:

– if the physical adaptation of the person concerned has not been carried out and has not been recorded in the decision in question

– recognition is contrary to public policy in the required Contracting State

– the decision has been obtained by fraudulent means

The State which recognizes a resolution pursuant to the Convention shall update the birth certificate of the person concerned, on the basis of the resolution and in the manner prescribed by its domestic law.

Dallah: French Court Pays No Attention to Lords' Lecture

The Paris Court of Appeal ruled yesterday on the action introduced by the Government of Pakistan to set aside the award which had ordered it to pay over USD 20 million to Dallah.

The Court found that the arbitral tribunal had been right to retain jurisdiction in this case, and dismissed the action of Pakistan.

We had already reported on the English decisions which had denied enforcement of this award in the United Kingdom. Quite remarkably, the English Court of appeal and then the UK Supreme court held that, **under French law**, the arbitral tribunal did not have jurisdiction.

It seems that French judges were unimpressed by the lectures that Lord Collins and Lord Mance gave on the French law of arbitration at this occasion.

Someone must now find a solution to this mess: Twickenham?

More on the reasons of the French court soon.

First Issue of 2011's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes three articles, two of which explore conflict issues.

In the first article, a leading French public international lawyer, Professor Mathias Forteau (Paris Ouest Nanterre University), offers his views on the concept of transnational public policy (*L'ordre public « transnational » ou « réellement international » . – L'ordre public international face à l'enchevêtrement croissant du droit international privé et du droit international public*). The English asbtract reads:

> *While private international law and public international law get closer in the contemporary international society, especially due to the widening of the realm of European law, apparently some legal notions still belong exclusively to private international law and their definition and enforcement remain within States' exclusive jurisdiction. This seems to be the case of the « international public policy » exception which aims at protecting national values when domestic judges are requested to apply a foreign law incompatible with these values. Contemporary practice shows however that international public policy is subject to a process of internationalisation which impacts both its sources and the mechanisms through which it is enforced. Such trend is not restricted to transnational law (« transnational public policy »). International public policy is nowadays also regulated by public international law – and may therefore be undergoing a metamorphosis of its meaning and function in a way which is not yet clearly well-defined.*

In the second article, professor Benjamin Remy (Poitiers University) discusses the legitimacy of choice of court agreements (*De la profusion à la confusion : réflexions sur les justifications des clauses d'élection de for*). The English asbtract reads:

> *Various justifications are usually summoned to explain the admission of choice*

of forum clauses : forseeability of the judge, neutrality of the judge and the ability to choose a « better » judge. Unfortunately, this profusion leads to confusion when it comes to the definition of the appropriate rules governing such a clause. Firstly, ambiguities arise from the fact that most issues related to the choice of forum clauses are to be given different answers depending on the justification one has focused on. Therefore, the predictability of the rules governing the choice of forum clauses cannot be achieved. Secondly, the plurality of justifications seems to prevent any appreciation of their relevancy. Moreover, authors often use arguments which belong to different rhetorical systems, based on different justifications, leading to conclusions that cannot be reasonnably justified.

Articles of the *Journal* can be downloaded by LexisNexis Jurisclasseur's subscribers

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Tourism and Jurisdiction to take Centre Stage in Supreme Court of Canada

On March 21, 22 and 25, 2011 the Supreme Court of Canada will hear appeals in four private international law cases. Each is a case in which the Ontario court has held that it has jurisdiction to hear the dispute and that the proceedings should not be stayed in favour of another forum.

Two of the cases – *Van Breda* (information here) and *Charron* (information here) – involve Ontarians who were killed or severely injured while on holiday in Cuba. They now seek to sue various foreign defendants in Ontario. These cases involve tourists in the traditional sense of the word. Two of the cases – *Banro* (information here) and *Black* (information here) – involve claims for defamation over the internet and damage to reputation in Ontario. There is some allegation that these cases involve what has become known as "libel tourism", especially in

England and in the United States.

Several parties have already been granted leave to appear as intervenors and others are seeking such leave. The decisions in these four cases could be very important for the Canadian law on jurisdiction.

The Supreme Court of Canada now posts PDFs of the written submissions of litigants as they are received, so those wanting more details about the cases should click on the "factums" button for each case.

Canadian Case on State Immunity

In *Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196 (available here) the estate of Zahra Kazemi and her son, Stephan Kazemi, sued Iran and certain state officials in Quebec, alleging that in 2003 Ms. Kazemi was tortured and assassinated in Iran. The defendants argued that the claim could not succeed due to state immunity.

Much of the court's analysis involves the provisions of the *State Immunity Act*, R.S.C. 1985, c. S-18. The court has to consider whether this statute is a complete code on the issue of state immunity or whether it is open to courts to create exceptions to the statutory immunity beyond those listed in the statute. The court also has to address whether aspects of the statute are constitutional.

The court ends up concluding that the estate has no claim because the wrongs done to her occurred in Iran and so are covered by the immunity under the statute. However, the court allows the claim by Stephan Kazemi, a claim for his own losses arising from hearing the reports of what was done to his mother, to continue since his losses were suffered in Quebec, not Iran, and so the immunity does not cover them (see section 6 of the statute).

The decision is lengthy (220 paragraphs), and yet it does not mention the recent decision of the Supreme Court of Canada on state immunity: *Kuwait Airways Corporation v. Republic of Iraq* from October 2010.

Green Paper on the Free Movement of Public Documents

On December 14th, 2010, the European Commission issued a Green Paper exploring whether the circulation of public documents should be simplified: Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records.

Here are some of the possible reforms discussed by the Green Paper.

Public documents:

> *a) The abolition of administrative formalities for the authentication of public documents*
>
> *The administrative formalities relating to the presentation of public documents, originally based on consular and intergovernmental practices, are still causing problems for European citizens and no longer meet the requirements or correspond to the state of development of contemporary society, in particular in an area of common justice.*
>
> *The need for these formalities, which are not suitable for relations between Member States based on mutual trust or for increased mobility of citizens, can legitimately be questioned.*
> *(…)*
>
> *b) Cooperation between the competent national authorities*
>
> *The abolition of administrative formalities could be accompanied by cooperation between the competent national authorities.*
> *(…)*
>
> *c) Limiting translations of public documents*
>
> *In parallel with the administrative formalities such as legalisation and the*

apostille, the translation of a public document issued by another Member State is another procedure citizens may have to deal with. Just like the abovementioned administrative formalities, translation also represents a cost in terms of time and money.

Optional standard forms, at least for the most common public documents (for example a declaration of the loss or theft of identity papers or a wallet), could be introduced in a number of administrative sectors in order to cope with translation requests and avoid costs.
(…)

d) The European civil status certificate

European driving licences and passports already exist. A European certificate of inheritance has been proposed by the Commission. Thought might be given to introducing a European civil status certificate.

This would exist alongside Member States' national civil status records. It would be optional, not compulsory. Citizens could continue to ask for a national certificate. The European certificate would not therefore replace Member States' civil status certificates.

Civil Status Records:

Several solutions could be considered to ensure recognition of the effects of a civil status record or legal situation connected with civil status created in a Member State other than the one in which it is invoked. In this context, it is important to stress that the EU has no competence to intervene in the substantive family law of Member States. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules on, for instance, the attribution of surnames in the case of adoption and marriage or to modify the national definition of marriage. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.

Against this background, several practical problems arising in the daily lives of citizens in cross-border situations could be solved by facilitating recognition of the effects of civil status records legally established in other EU Member

> *States. The European Union has three policy options to deal with these problems: assisting national authorities in the quest for practical solutions; automatic recognition and recognition based on the harmonisation of conflict-of law rules.*

The consultation will take place from 14 December 2010 to 30 April 2011.

Many thanks to Bram van der Eem for the tip-off.