

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 accommodation 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.

Annual Survey of French PIL of E-

Commerce

For several years, Professor Marie-Elodie Ancel (Paris Est Creteil Val de Marne University, formerly Paris 12) has published an annual survey on French private international law of E-commerce in the French monthly law review *Communication, Commerce Electronique*. 

The survey for 2009 has just been published in the first issue of the review for 2010. It discusses a variety of issues, including jurisdiction, choice of law and foreign judgments. It reports on both cases and legislation, French and European.

Communication, Commerce Electronique is available online for lexisnexus subscribers.

BIICL event: Private International Law - Challenges for Today's Markets

The British Institute of International and Comparative Law (BIICL) hosts an event titled "Private International Law - Challenges for Today's Markets" as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? This conference shall offer a platform to exchange views of different industry sectors on current Private International Law problems they encounter. The speakers will deal with various issues such as the difficult new rules in the Rome I regulation on financial market contracts, current Private International law problems arising in the field of Swaps and Derivatives and in the Energy sector and will look in a more general way at the pitfalls of Private International Law for business contracts between important market players.

Date: Tuesday 9 February 2010, 17:00 to 19:00

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London, WC1B 5JP

Chair: Lord Justice Rix, Royal Courts of Justice

Speakers: 1) Joanna Perkins, Secretary to the Financial Markets Law Committee, 2) Edward Murray, Partner, Allen & Overy London; Chair of the ISDA Financial Law Reform Committee, 3) Murray Rosen QC, Partner, Herbert Smith LLP, 4) Matthew Evans, Chief Counsel, BG Group plc

Books and Articles on Private International Law

Our readers will be interested to see that Dean Symeon Symeonides has compiled a list of books and articles published on the topic of private international law in the past year. See [here](#) for the list.

Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama Grand Est*. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable

law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue (*Harding v. Wealand's* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3)* [1996]1 WLR 387, held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the *lex fori*.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.

Haiti Earthquake and Intercountry Adoption

The Secretariat of the Hague Conference has posted an Information Note to States and Central Authorities on the *Haiti Earthquake and Intercountry Adoption of Children* on its website.

Are We Witnessing the Demise of Alien Tort Statute Litigation?

Over the past few months, various US federal courts have handed down opinions that may presage a more limited role for the Alien Tort Statute in US litigation. The Alien Tort Statute provides US district courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. In a series of cases starting with *Filartiga v. Pena-Irala*, US courts had been willing to give a robust reading to the statute, thus allowing recovery in cases that pushed the envelope for violations of customary international law. When the Supreme Court issued its most recent opinion on the statute in *Sosa v. Alvarez-Machain*, hope existed in some quarters that the statute would be more narrowly construed by US lower courts. Decisions following that case, however, continued to follow caselaw allowing for robust recovery.

We may be witnessing a subtle sea change in ATS litigation, which is surprisingly being accomplished not by the US Supreme Court but by US lower courts. In the past six months, five decisions in particular have changed the litigating landscape substantially and will make it harder for plaintiffs to plead and prove ATS cases. These decisions span various subject areas, but each contributes to reining in ATS cases. A short summary of these cases follows.

In *Sarei v. Rio Tinto*, the Ninth Circuit has been willing to consider applying

exhaustion of remedies requirements in ATS cases, thus allowing district court judges to dismiss ATS cases unless a plaintiff can show that all local legal remedies have been exhausted or that such remedies are unavailable, ineffective, or futile. In *Turedi v. Coca-Cola* and *Aldana v. Del Monte Fresh Produce*, the Second and Eleventh Circuits have been willing to affirm ATS dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit relied on heightened pleading standards enunciated in the Supreme Court's *Iqbal* and *Twombly* decisions, discussed here, to impose a higher standard of pleading on ATS claimants. Finally, and perhaps most importantly, the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, ruled that in order to find aiding and abetting liability under the ATS, a plaintiff must show "that a defendant purposefully aided and abetted a violation of international law." In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATS claims.

The upshot of these decisions is that from pleading to proof to discretionary doctrines like *forum non conveniens* US federal courts are perhaps closing the door on many ATS cases. While this movement will be favorable to defendants, at the level of process it is a surprising outcome for several reasons. Congress has known since *Filartiga* that there was potential for ATS abuse and has done nothing about it. In the wake of congressional silence, US courts had been hesitant for 28 years to restrict the statute's use, and rather looked to the US Supreme Court to provide guidance. The Supreme Court's guidance in *Sosa* was opaque at best. Faced with such minimal direction, US lower courts have been forced to make a choice regarding the ATS. Momentum appears to be gathering in favor of choosing to limit ATS litigation. As such, US lower courts have been forced to use discretionary judicial doctrines to cabin the reach of a congressional statute.

While it may be too soon to say that the death knell has sounded for ATS litigation, these developments show that we may be witnessing the demise of ATS litigation.

Choice of Law in American Courts 2009

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

“This is the Twenty-Third Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.

The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2009, and posted on Westlaw before the end of the year. Of the 1,490 conflicts cases meeting both of these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law – and particularly choice of law.

For the conflicts aficionados, 2009 brought many noteworthy developments, including the enactment of the second choice-of-law codification for tort conflicts in the United States, and a plethora of interesting cases, such as the following:

- Several cases brought under the Alien Torts Statute (ATS) involving human rights abuses in foreign sites, including Iraq’s Abu Ghraib prison, one case denying a Bivens remedy to a victim of “extraordinary rendition,” and one case allowing an ATS action against an American pharmaceutical company for nonconsensual medical experiments on children in Nigeria;
- Two cases holding that the Holy See was amenable to suit under the tortious activity exception of the Foreign Sovereign Immunity Act for sexual abuses allegedly committed by clergymen in the United States;
- Two cases declaring unconstitutional two California statutes (dealing with Nazi looted artwork and the Armenian Genocide, respectively) as infringing on the Federal Government’s exclusive power over foreign affairs;
- Several cases dealing with the recognition of same-sex marriages and their

implications on issues of parentage, adoption, and child custody; Several cases striking down (and a few enforcing) class-action or class-arbitration waivers in consumer contracts;

- A Minnesota case holding that Panama's blocking statute did not prevent dismissal on forum non conveniens grounds an action arising from events occurring in Panama; and

- A case of legal malpractice for mishandling a conflicts issue, a case involving alienation of affections and "criminal conversation," and the usual assortment of tort, product liability, and statute of limitation conflicts."

The full survey is available for free [here](#).

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

ERA Conference on European Contract Law

Much debated issue of harmonisation of the European contract law by means of the Common Frame of Reference is topic of the ERA conference taking place on 18 and 19 March 2010 in Trier, Germany. More precisely, the conference titled "European Contract Law: EU Consumer Law Revision and the CFR. Towards an optional instrument?" will address different aspects of adapting the academic DCFR to fit the purpose of the "political" CFR, the possibility for linking the CFR and the proposed Consumer Rights Directive, as well as the prospects of the CFR serving as an optional instrument.

The speakers at the conference include: **Mr Giuseppe Abbamonte**, DG Justice, Freedom and Security, European Commission, Brussels; **Professor Christian von Bar**, European Legal Studies Institute, University of Osnabrück; **Professor Hugh Beale**, University of Warwick; **Professor Eric Clive**, University of

Edinburgh; **Professor Bénédicte Fauvarque-Cosson**, University Panthéon-Assas, Paris; **Mr Rafael Gil Nievas**, Permanent Representation of Spain to the EU, Brussels; **Professor Piotr Machnikowski**, University of Wroclaw; **Dr Chantal Mak**, University of Amsterdam; **Professor Guillermo Palao Moreno**, University of Valencia; **Mr Patrice Pellegrino**, Senior Adviser, EuroCommerce, Brussels; **Ms Nuria Rodríguez Murillo**, Senior Legal Officer, BEUC, Brussels; **Professor Hans Schulte-Nölke**, European Legal Studies Institute, University of Osnabrück; **Professor Matthias E. Storme**, KU Leuven and University of Antwerp; **Ms Diana Wallis**, Vice-President of the European Parliament, Brussels/Strasbourg.

The conference web page is accessible [here](#).

Fraudulent alienation of foreign immovables and the Moçambique rule in the Western Australian Court of Appeal

Singh v Singh (2009) 253 ALR 575; [2009] WASCA 53, in the Western Australian Court of Appeal, was a dispute between two brothers, both resident in Western Australia. One, the plaintiff, claimed that the alienation by the other, the defendant, of real estate in Malaysia was made with the intent to defraud creditors, within the meaning of s 89(1) of the *Property Law Act 1969* (WA). (That section is the modern equivalent in Western Australia of the Elizabethan statute 13 Eliz c 5, which has been reproduced in all Australian states and the Commonwealth.)

The defendant owed the plaintiff money arising from the purchase of a restaurant in Western Australia. After the plaintiff commenced an action in Western Australia to recover the debt, the defendant transferred his interests in real estate both in Western Australia and in Malaysia to relatives. He transferred the

Malaysian property to his wife and daughter, also resident in Western Australia. The instruments of transfer were all executed in Western Australia. As to the Malaysian property, the plaintiff sought orders restraining the wife and daughter from dealing with the property and that they deliver up vacant possession for the property to be sold at auction. The defendant sought summary judgment on the basis that the Supreme Court of Western Australia had no jurisdiction under the *Moçambique* rule or alternatively that the proceeding should be stayed on the grounds of *forum non conveniens*. A Master dismissed the defendant's application and the defendant appealed to the Court of Appeal.

Pullin JA (with whom the rest of the Court of Appeal agreed) dismissed the appeal. Pullin JA held that the plaintiff's claims fell within an exception to the *Moçambique* rule, saying (at [22]):

The case does not concern the Moçambique rule itself. The [plaintiff]'s claim falls within an exception to the rule. This is because in this case the [plaintiff] does not deny that the [defendant] is the legal owner of the Malaysian land, ie the registered proprietor and does not seek an in rem judgment. His complaint is that the [defendant] became the registered proprietor by reason of the train of events beginning in Perth, when the [defendant] signed a transfer of the Malaysian land, and ending with the registration of the transfer in Malaysia. It was contended that this was an alienation of property with the intent of the appellant to defraud his creditors. The [plaintiff] having become aware of the alienation of the Malaysian property elected to exercise his right to avoid the alienation based on his allegation that the [defendant] had the intent to defraud. In the Supreme Court, he asks for declarations concerning the conduct of the [defendant] and the [wife and daughter] and in personam relief against [them]. If the [plaintiff]'s claims are upheld then the court will 'act upon the conscience' of the [defendant] and his wife and daughter. The jurisdiction is not over the property but over the person of each of [them].

His Honour referred to various cases in which claims in equity based on fraud provided an exception to the *Moçambique* rule and concluded (at [32]):

The Western Australian Parliament must be taken to have known of the equitable jurisdiction of its courts to make decrees to deal with fraudulent dealing of foreign immovable property by a person within the jurisdiction and it

is therefore clearly arguable that it must have intended to legislate to confer the right on a person, prejudiced by an alienation of foreign immovable property with intent to defraud creditors, to avoid such a disposition.

Pullin JA further considered that it was at least arguable that any judgment of the Supreme Court of Western Australia could be enforced in Malaysia. In any event, his Honour agreed with the plaintiff's submission that since the relief sought was *in personam* relief against the wife and daughter, this issue did not arise, because it could be enforced against them in Western Australia.

Pullin JA also rejected the defendant's submission that, for various reasons, the transfer of the Malaysian property did not fall within the terms of the Act. In particular, his Honour held that the Act was not confined to property in Western Australia, but extended to applications by persons resident in Western Australia to set aside alienations of foreign property by acts performed within the state by other persons resident in the state. This was not an extraterritorial operation of the Act because (at [75]): 'Parliament does not legislate extraterritorially if it legislates concerning fraudulent conduct (occurring in the state) by a person resident within the state.'

Finally, Pullin JA considered that the connections to Western Australia meant that the Supreme Court was not *forum non conveniens* (in the sense of a clearly inappropriate forum).