

Arbitration and National Courts

Stephanie M. Sarzana

Wilmer Cutler Pickering Hale & Dorr LLP



WILMER CUTLER PICKERING HALE AND DORR LLP ®



Overview

- I. Introduction**
- II. The Dallah case**
 - A. Background**
 - B. The dispute**
 - C. Parallel proceedings in the UK and in France**
 - D. How did the courts reach different conclusions?**
 - E. Could these results have been avoided?**

Introduction



- Arbitration awards are rendered outside the realm of a national legal system
- Several national laws come into play
 - Law of the seat of the arbitration
 - Law of the country where the arbitral award is enforced
- Clashes between these competing legal orders have the greatest consequences at the recognition and enforcement stage



Example: Dallah v. Pakistan

- Dallah Real Estate and Tourism Holding Company (“Dallah”) v. The Ministry of Religious Affairs (“MORA”), Government of Pakistan (“Government”)
 - Practical example of an international arbitration where the parties sought in parallel annulment and enforcement in two separate countries
 - This led to separate - but contradictory – results



Background

- Dallah is a Saudi Arabian company that provides services to Muslim pilgrims
- In July 1995, Dallah signed a Memorandum of Understanding (“MoU”) with the Government regarding the construction of housing facilities that Dallah would lease to the MORA, and that would be used by pilgrims from Pakistan
- In September 1996, Dallah entered into an Agreement with the Trust (created by an Ordinance from the President of Pakistan)
- This agreement provided for ICC arbitration in Paris as method of dispute resolution



The dispute

- The Agreement was never fulfilled
- In early 1997, the Government repudiated the Agreement (the Trust had lapsed)
- Dallah commenced ICC arbitration proceedings in Paris against the Government in 1998
- In a partial award, the tribunal ruled that it had jurisdiction (based on alter ego theory and common intent of the parties)
- Finally, a final award was issued in Dallah's favour
- Dallah sought enforcement in the UK and the Government initiated annulment proceedings in France



Parallel proceedings in the UK and in France

- Dallah was faced with two parallel proceedings in two separate countries, both
 - reviewing the same set of facts already debated before the arbitral tribunal, and
 - Applying the same test under French law (common intent) as the law of the seat



Parallel proceedings in the UK and in France

- The UK Supreme Court found that the Government and the Trust did not have the common intent to be bound – the arbitration award could not be enforced against Pakistan
- The French Cour d'Appel, found the exact opposite – under French law, the parties had the common intent to be bound



How did the courts reach different solutions? Same legal standards, different applications

- UK courts adopted a formal approach, attaching more importance to the bargain struck by the parties as it was expressed in the agreement (actual parties to the agreement, fact that there was a different arbitration clause in the MoU and the Agreement).
- UK Supreme Court applied local sensibilities to the French standard (**Lord Collins, regarding the applicable test under French law**: “It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.”)



How did the courts reach different solutions? Same legal standards, different applications

- French courts used a more holistic approach, placing more importance on the parties' behaviour not only at signature but also during the pre-contractual negotiations, performance, and termination of the contract
- **CA Paris, 10/02/2011:** “The Government of Pakistan ... behaved as if the contract was its own;...[the government's] behaviour during the pre-contractual negotiations, confirm that the creation of the trust was purely formal and that [the Government] was in fact the true Pakistani party to the economic transaction.”)
- The Cour d'Appel found it unfair that the Government could rely on its failure to renew the Ordinance and let the Trust lapse to escape liability



Could these contradictory results have been avoided?

- Did the UK Supreme Court improperly apply the New York Convention?
 - Article VI and the authority to stay an enforcement action pending the outcome of annulment proceedings
 - Article V(1) and burden of proof – party resisting enforcement bears the burden of proof



Conclusion

- **No influence of enforcing courts on courts of the seat:** When a party seeks enforcement before the award is challenged at the seat, the decision of the enforcing court does not influence the court of the seat in its assessment (Dallah)
- **Query regarding influence of courts of the seat on enforcing courts:** Which decision will prevail if Dallah seeks enforcement in another jurisdiction
- Query regarding level of deference to be given to an arbitral tribunal's findings



Many thanks!

**Stephanie M. Sarzana
Wilmer Cutler Pickering Hale & Dorr LLP**



WILMER CUTLER PICKERING HALE AND DORR LLP ®