MAYER·BROWN

France:
Dallah, a whole new law and the Tecnimont decisions

ASA below 40 Summer Retreat

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Paris Court of Appeal – 17 February 2011
Gov. of Pakistan v. Dallah

- Setting the French stage: timing, proceedings, grounds for annulment and position of the parties
- A different style altogether
- The French Court rejected the request for annulment and upheld the award:

> *« (…) the Government of Pakistan, Ministry of Religious Affairs, as Dallah agreed, has acted as the real Pakistani party in the economic operation.*
>
> *As a result, the ground that the arbitral tribunal wrongfully extended the arbitration clause to the Government of Pakistan and recognised its jurisdiction, is unfounded and, as result, the request for annulment of the award on jurisdiction of 26 June 2001 (…) is rejected »*

Paris Court of Appeal – 17 February 2011
Gov. of Pakistan v. Dallah

- French law's approach to a request for annulment of an award on the grounds that the Arbitral Tribunal did not have jurisdiction (Art. 1502(1) Code of Civil Procedure)?

  "*if the role of the Court of Appeals (…) is limited to the examination of the grounds listed in [the articles of the Code regarding annulment of awards], there is no restriction upon the power of the court to examine as a matter of law and in consideration of the circumstances of the case, elements pertinent to the grounds in question. (…) In particular, it is for the court to construe the contract in order to determine itself whether the arbitrator ruled in the absence of an arbitration clause*"

  Cour de cassation, 6 January 1987, Southern Pacific Properties v. Egypt

- Conclusion: the so-called "reverence" that French courts would have towards arbitral awards may be overstated

Paris Court of Appeal – 17 February 2011
Gov. of Pakistan v. Dallah

- The French law analysis of the extension of the arbitration clause to non-signatories was initially that of the Dalico and Orri cases:

  "*an arbitration clause in an international contract has a validity and an effectiveness of its own, such that the clause must be extended to parties directly implicated in the performance of the contract and in any dispute arising out of the contract, provided that it has been established that their contractual situation, their activities and commercial relations raise the presumption that they have accepted the arbitration agreement, being aware of its existence and scope, irrespective of the fact that they did not sign the arbitration agreement*"

  (Paris Court of Appeals 11 January 1990, *Orri v. Elf Aquitaine*)

- But French law no longer requires a test of "intention", but an objective test of "involvement" of a party "acting as the real party to the contract"

Paris Court of Appeal – 17 February 2011
Gov. of Pakistan v. Dallah

- Paris Court of Appeals analysis of the facts of the case concluding that the Government "*behaved as if the contract was its contract*" and "*as the real Pakistani party in the economic operation*":
  - Pre-contractual negotiations which were conducted between the Government and Dallah are taken into account;
  - Repeated occurrences of instances where Government officials wrote to Dallah during the life of the contract, with no other justification than the fact that they were "involved" in contract;
  - The key letters by which the contract was declared terminated were drafted by an Government official, in that capacity, on Government letterhead.

The reform of France's law on arbitration
Decree of 13 January 2011

- Context:
  - The previous legislation dates back to 1981 as codified then in the code of civil procedure.
  - Considerable case law was rendered on the basis of the previous arbitration law and it was said to be making the French law on arbitration difficult to apprehend for foreign practitioners.
  - Willingness to present Paris an attractive "arbitration-friendly" jurisdiction, with a modern law, in a competitive international environment (UK, Switzerland, Dubai).

The reform of France's law on arbitration
Decree of 13 January 2011

> "*After thirty years of practice, it has become necessary to reform the statute in order to (1) consolidate the benefits of case law that developed on its basis, (2) provide certain complements to the statute in order to improve its efficiency and (3) include certain provisions inspired by certain foreign laws which have proved to be useful*"
>
> Report of the Prime Minister on Decree n°2011-48 of 13 January 2011 on the reform of arbitration

- Formally the decree consists in full rewriting of the articles the French Code of Civil Procedure on arbitration, both domestic and international (Art. 1442-1527).

The reform of France's law on arbitration
Decree of 13 January 2011

- Further liberalization of the arbitration agreement
  - Requirement to have an agreement in writing
  - Group of contracts
  - New provisions in case the arbitration agreement does not provide for the method of designation of arbitrators
- Competence-Competence reaffirmed
  - Autonomy of the arbitration agreement including when the contract is inexistent, void or terminated
  - Negative effect of the principle of competence-competence
- Institution of a "*Juge d'appui*"
  - Constitution and composition of the tribunal (incl. challenges) and extension of the proceedings

The reform of France's law on arbitration
Decree of 13 January 2011

- Introduction of estoppel
  - in the context of a party having knowledge of an irregularity but failing to raise it before the Arbitral Tribunal, deemed to have waived its right to raise the irregularity
- Allows recourse to the courts to obtain production of documents from third parties
- Enhanced enforcement and challenges procedures
  - Exequatur proceedings confirmed as an ex-parte proceeding
  - Requests for setting aside awards are no longer admissible only one month after the award is notified
  - Setting aside proceedings no longer suspends the execution of the award save for the intervention of a judge

The *Tecnimont v. Avax* decisions
Paris Court of Appeal (2009) / Cour de cassation (2010)

- Paris Court of Appeal - 12 February 2009: Annulment of award for irregularity in the constitution of the Arbitral Tribunal
  - the chairman of the Arbitral Tribunal, a well-known arbitrator from a large international law firm, failed to fulfill his obligation to reveal circumstances that could affect his independence due to the nature of the links existing between his law firm and TECNIMONT.
  - The Paris Court of Appeals noted that an arbitrator must reveal to the parties all circumstances that could affect his judgment and could instill a reasonable doubt in a party's mind as to the arbitrator's impartiality and independence.
  - The Court decided that this "bond of confidence" must be continuously preserved throughout the proceedings