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by
Alexandre Malan

*BELOT MALAN & Associés
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Commentary

Arbitration without consent in commercial arbitration: What the case *Dallah v/ Pakistan* tells us about evolution of French case law in arbitration

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Alexandre Malan

[Editor's note: Alexandre Malan is a member of the Paris Bar, founding partner of BELOT MALAN & Associés, a boutique law firm located in Paris specialized in international arbitration and litigation. Copyright © 2013 by Alexandre Malan. Responses are welcome.]

Dallah v. Pakistan blatantly illustrates the discrepancy between French and British approaches to the question of extension of arbitration clauses to third parties – such as assignee, sub-contractor, companies within the same group of companies, representative - and evidences the liberalism of French Courts accepting this extension in cases where such third parties have not clearly expressed their consent to be bound by the arbitration clause contained in contracts they have not initially signed.[1]

In this specific case, a contract was signed between *Dallah*, a Saudi company, and a trust constituted by the President of Pakistan, for the construction of a building for the lodging of Pakistani pilgrims in the Mecca (hereafter the "Contract"). A board had been appointed as trustee, the Minister of Religious affairs of Pakistan acting as secretary of the board. The trust had been instituted for a limited period of time with further renewal. This period had elapsed and the trust had then ceased to exist. Notwithstanding this, the Minister of Religious affairs addressed a termination letter to *Dallah*, and the following day summoned it to appear before the Pakistani Court on behalf of the trust. *Dallah* introduced an arbitration claim against the Pakistani State (considering that the trust was not existing any more) on the basis of the ICC clause contained in the contract. The Pakistani government maintained that it was not a party to the contract and contested the applicability of the arbitration clause.

In its award, the arbitral Tribunal considered that the arbitration clause was to be extended to the Pakistani State. The seat of the Tribunal being in Paris, the Pakistani State sought annulment of the award before French Courts. The Court of Appeal of Paris refused to annul the award, and stated that *"The State which created a trust with juristic personality to handle a project and which, in parallel and after the end of this trust, continues to interfere in the execution of the Contract and acts as if the Contract was its own, without mentioning that it was acting on behalf of the trust – the signing party - and which during pre-contractual negotiations had already behaved the same way, confirms by such behaviour that the constitution of a trust was purely formal, and that it was the true party to the economic operation".* The Court consequently ruled that the arbitral Tribunal was right to apply ("to extend" as mentioned by the Court) the arbitration clause to the Pakistani government.

The case illustrates how French Courts extend arbitration clauses to third parties even in cases where they have not expressed their will to be bound by the arbitration clause, but basing on an analysis of the behaviour of the third party. The route followed by French Courts up to now illustrates a progressive departure from the notion of acceptance, to get to a point where the only criterion considered by the Court is the behaviour of the third party.

The first decisions rendered on this subject illustrate that Courts were initially reluctant to depart from the

acceptance of the third party, even if such acceptance was not express. The case *Dow Chemical* rendered by the Court of Appeal of Paris on 21 October 1983 based its decision on the "common intention of the parties involved".[2] Dow Chemical was followed by *Orri v/ Sté des Lubrifiants Elf Aquitaine* where the Court of Appeal of Paris inferred the third party acceptance of the arbitration clause from its behaviour, without requiring an express acceptance of the clause.[3] In this case, the Court of Appeal of Paris decided on January 11, 1990 that *"The arbitration clause has an autonomous validity which commends to extend it to third parties having interfered in the execution of the contract, where it is evidenced that their contractual situation, their activity and the commercial relations existing between the parties, lead to presume that they have accepted the arbitration clause, which existence they were aware of, although they have not signed the contract containing it"*.[4] In those two cases, the Court of Appeal of Paris still kept considering the condition of acceptance of the clause, although it admitted that this acceptance could be tacit and be inferred from the behaviour of the third party and the context of the case. Indeed, in those two cases there were group of companies, and the arbitration clause was extended from the signatory company to the company which actually executed the contract. In *Orri v/ Sté des Lubrifiants Elf Aquitaine*, the Court added to the above quoted sentence that *"This undertaking finds its roots in the notion of group of companies whereas it is evidenced that the defendant was always in business relations with a person who was the president of a group of companies which were one economic entity"*.

Progressively, it could be seen that keeping on requiring acceptance as a condition to the extension proved in many situations to be a difficult task for the Courts. The case *Abela* considered by the Cour de cassation on October 6, 2010 illustrates this, showing that although the Court still referred to the notion of acceptance the facts did not speak for themselves.[5] In this case, a holding company was owned by a family, and some members of the family owned their shares indirectly through a foundation. The memorandum of incorporation of the company contained an arbitration clause. The Court considered that the shareholders were bound by this arbitration clause, even if their shareholding was owned indirectly via the foundation. The Court considered that they had "implicitly accepted" the arbitration clause by interfering into the company business notwithstanding the fact that they had no management responsibilities within the company. In this specific case, it is hardly understandable how the Court can infer the acceptation from the interference of the shareholder into the company's affairs, insofar as no knowledge of the existence of the arbitration clause by the third party is examined by the Court as a condition of such acceptance.

Hence, in the most recent cases, the Courts did not make any reference to the acceptance, and focused only on the behaviour of the third party, sometimes having mentioned that the third party had knowledge of the existence of the arbitration clause.

This is illustrated in the chains of contracts issue where the Cour de cassation ruled in 2001 in *Peavey Company v/ Organisme Général pour le fourrage et autres* that the arbitration clause contained in the contract signed between the manufacturer and the dealer was to be extended against the final buyer of the goods, notwithstanding the fact that no contract binds this buyer to the manufacturer and that the sales contract signed between the final buyer and the dealer did not contain the same clause.[6] This was confirmed a few years later in the *Sté ABS c/ Sté Amkor Technology* in the same context of a chain of contracts where the arbitration clause was contained in the initial sales contract and was successfully opposed to the final buyer.[7] [8] No consent or even knowledge of the arbitration clause is required as a condition to its applicability to third parties.

The same is observable for the application to the consignee of the arbitration clause contained in a bill of lading, where the Cour de cassation decided in 2005 in *Axa Corporate Solutions v/ Nemesis Shipping* that the arbitration clause was applicable against the consignee where it was shown that he had knowledge of the existence of the clause and executed the contract (for instance by accepting the goods at delivery or paying the transport), notwithstanding the fact that he was not a party to the transportation contract materialized by the bill of lading.[9]

In those cases, the arbitration clause is not assigned to third parties together with a contract: the sub-buyer enters into a different contract than the initial sale contract; the consignee is neither a party to the transportation contract nor an assignee. Thus the application to the sub-buyer or to the consignee of the arbitration clause cannot rely on the assignment of the contract

which contains the arbitration clause. Neither is the arbitration clause applicable on the grounds of the acceptance of the third party to be bound by it. Hence, those two judgments find other grounds to justify this applicability to third party, i.e the transfer of the clause as an accessory of the sold goods; the execution of the contract in knowledge of the existence of the arbitration clause contained in it.

Besides the issue of chains of contracts, in a recent case *Sté Constructions Mécaniques (CMN) v/ Sté Fagerdala Marine Systems AB* the Cour de cassation held that the arbitration clause contained in the main contract should be applied to a sub-contractor without setting any condition of knowledge of this clause by the sub-contractor.[10] This case was much criticized by some authors noticing that the sub-contractor, although aware of the existence of the arbitration clause contained in the main contract, did not necessarily accept to be bound by an arbitration clause.[11] Indeed, mere knowledge of the existence of an arbitration clause does not mean the same as acceptance to be bound by this clause. As underlined by Professor Mayer, the criterion is not the consent but an objective criterion linked to the mere fact to interfere in the execution of the contract.[12]

The wording of "implication" used by the French courts shall be interpreted broadly. The judges analyse all factual criteria that can be considered as an implication of the third party in the contract. Factual situations encountered demonstrate that such implication can be of several kinds:

-the third party did not sign the contract but did actively **participate in its negotiation**. The contract was then signed by another party (in *Dallah* the State negotiated the contract which was signed by a trust set up by it); however, this criterion might not be considered as sufficient by itself, and should be completed by another one. In *Dallah*, the Court of Appeal also noted that the State had sent the termination letter on its letterhead and had interfered personally several times during the execution of the contract;

-the third party is not bound by the contract but actually **executes it**, either in addition or instead of one initial party. This was the case in *ABS v/ Amkor*,[13] where subsidiaries had executed the contract in lieu of their holding company. The same was decided by the Cour de cassation in the recent case *Amplitude v/ Iakovoglou et Oebe*, where the Court held that the arbitration clause shall be extended to the party which was directly involved in the execution of the contract;[14]

-the third party is not bound by the contract, but by a **subcontract** entrusting it to implement part or all of the work which is the subject of the main contract. This was the case in *Sté Constructions Mécaniques (CMN) v/ Sté Fagerdala Marine Systems AB*;[15]

-the third party **represents a party to the contract**, but omits to mention in all instances that it is acting as the representative and not *in personam*. That was the case in *Dallah*, where the Court of Appeal noted that the State had interfered in the contract several times without mentioning that it was acting as a trustee. In several instances, the Minister of Religious affairs had signed documents without mentioning that he was acting as the Secretary of the Board of trustees of the Trust. The Court held that the State, through the Ministry of Religious affairs, had acted as if it were a party to the contract.

It is interesting to note that in *Dallah* the Supreme Court of United Kingdom applied French law to this question, but did not follow the same path as the Court of Appeal of Paris in the same case. The Court of Appeal of Paris stressed on the importance of the fact that the Pakistani Government had actively participated in the pre contractual negotiations, and then had sent a termination letter on letterhead of the Government. Conversely, the Supreme Court of United Kingdom concentrated on the contract. It held that the contract was clear as to the fact that the Pakistani State acted as a representative of a trust, and not *in personam*. It refused to consider where the State either acted before the trust was created (i.e during pre-contractual negotiations) or after the trust ceased to exist. Although the Supreme Court declared applying French law, it tried to search what had been the intent of the Pakistani Government (§ 42: *"the fact that the Government was itself involved in negotiations and in*

the MOU and remained interested throughout the project does not itself mean that the Government should be party to the Agreement deliberately made, after the Trust's creation, between Dallah and the Trust"), whereas intent is not a criteria retained as such by French Courts, as seen above. The English approach is based on a subjective analysis of the facts of the case, whereas the French approach is objective. The Supreme Court tries to find out all elements evidencing what could have been the intent of the Pakistani party, whereas French judges rely on factual elements showing the implication of the representative of the State into the contract (negotiation of the contract with the minister of Religious affairs, letter of termination sent by the same Minister after the end of the Trust, signature on the letterhead of the Ministry).

It is obvious that the Supreme Court of United Kingdom was far away from approving the French approach, and that although it meant to apply French law, it strongly diverted from the path followed by the Court of Appeal of Paris in the same case. Besides, this difference appears quite clearly under the signature of Lord Mance, who so qualified the French approach in § 18: *"It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however the international arbitration and transnational the principles applied"*.

It transpires clearly from these decisions, including the French judgment rendered in *Dallah* that the criterion lies not in an analysis of the will of the third party to be bound by arbitration, but in an objective search of all indications showing that this third party was aware of the existence of the arbitration clause and acted as if it was a party to the contract, or at least executed it, whatever his or her effective will to be bound by the arbitration clause is. A clear cut from the consensual basis which grounds the applicability of the clause to third parties could also be inferred from the judgment of the Cour de cassation admitting that the validity of the assignment of an arbitration agreement did not depend on whether the assignment of the main contract in which it was contained was valid.[16] This allows the arbitration clause to be opposed to the assignee even if the assignment of the main contract is void.

Some authors see it as a process of progressive objectification of the applicability of the arbitration clause, whereas the consent of the third party to be bound by the clause would not be required any more.[17] Along the lines of Lord Maunce in the *Dallah* case – some authors claim that it does not fit with the consensual basis of arbitration.[18] Seen within the evolution of case law, it represents a cut from the historically leading *Dow Chemical v. Isover Saint Gobain* case regarding application of the arbitration clause to third parties, where the Court of Appeal of Paris based the extension of the clause to a parent company on the *"common intention of the parties involved"*,[19] and in the *Orri* case, where the Court of Appeal of Paris based its decision on the consent of the third party, even if such consent was not expressly found but deduced from the facts of the case.[20] Unsurprisingly enough authors and practitioners who are more inclined to approve liberalization and development of arbitration tend to approve this process of objectification.[21]

Some authors have held the contrary and have focused on the fact that the wording "implication" (the same word in French, i.e "implication") used by the Courts to describe the different situations where the third party interferes in the contract, are indications that the third party actually *accepted* the arbitration clause. Thus, execution of the contract in knowledge of the existence of the clause would necessarily *imply the acceptance* by the third party of the arbitration clause. This analysis would be consistent with the wording used by the Court of Appeal of Paris in *Dallah*, where the Court underlined that the Pakistani State had acted *as if* it was a party to the contract, or acted *as the true party* to the contract. As commented by an author, this cannot be anything but clear indication of the intent of the State to accept the stipulations of the contract, among which the arbitration clause. On this basis, it is argued that the French judges have not left out the will as the criterion to be taken into account for extension of the arbitration clause to a third party, but absent written expression of that will they infer it from factual pieces of evidence.[22]

According to us, the real test is the following: would the third party be allowed to express a clear refusal to be bound by the arbitration clause, if this party becomes effectively aware of the existence of such arbitration clause? In *Peavey Company v/ Organisme Général pour le fourrage et autres* the Cour de Cassation gave to understand that the applicability of the arbitration clause to the third party in circumstances where the contract was assigned to it, or other similar

circumstances such as the ones described above (specifically where the third party interferes in the execution of the contract) was not automatic.[23] In this judgment already mentioned above the Cour de Cassation decided that *"each successive assignee is bound by the arbitration clause [contained in the main contract] unless evidence is adduced that it could not reasonably have been aware of it"*. The same could be understood from the case *Axa Corporate Solutions v/ Nemesis* above mentioned.[24] In practical terms, that would mean that the extension of the arbitration clause would be rejected if the third party could give sufficient evidence that it could not be aware of the existence of such clause, or object that although aware of its existence, it had expressly refused it in writing. A clear refusal in writing from the third party of the arbitration clause would then be effective and sufficient to set aside such clause. If such interpretation was true, one could deduce from it that French Courts still consider that the consent remains the basis for extending an arbitration clause to third parties, regardless the expression of factual elements of the case and the behaviour of the third parties in relation to the contract containing it.

Of course, the *Peavey Company* case is compatible with *Dallah*, but the most recent decisions do not reiterate the negative condition set by *Peavey*. The trend followed recently allows to think that even in cases where it would seem difficult to infer that the third party was effectively aware of such existence of the clause, the Courts would nevertheless have extended it for instance in situations where the third party did act as sub-contractor (*Sté Constructions Mécaniques (CMN) v/ Sté Fagerdala Marine Systems AB*) or final buyer in a chain of contracts (*ABS v/ Amkor*).[25]

As such, the route followed by French Courts is obviously more designed to favouring arbitration than to protecting the clear will of a party to be bound by arbitration. It may be justified to stick to facilitating the development of arbitration, but remains at odds with basic principle that arbitration, in order to gain in legitimacy, shall be fully accepted by the parties.

Endnotes

1. CA Paris, February 17, 2011, *Gouvernement du Pakistan / Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company*, Rev. Arb. 2012, p. 369, note F. X. Train.

2. CA Paris, October 21, 1983, *Dow Chemical c./ Isover Saint Gobain*, Rev. Arb. 1984, p. 98, note A. Chapelle.

3. CA Paris, January 11, 1990, *Orri c. / Société des Lubrifiants Elf Aquitaine*, Rev. Arb.1992, p.95, note D. Cohen.

4. Id. at *3.

5. Cass. civ. 1, October 6, 2010, *Fondation Albert Abela family Foundation (AAFF) et autres c. / Fondation Joseph Abela Family Foundation (JAFF)*, Rev. Arb. 2010, p. 813, note F. X. Train.

6. Cass. civ. 1, 6 February 2001, *Peavey Company c. / Organisme général des fourrages et autres*, Bull. civ. I, n°22; Rev. arb. 2001, p. 765, note D. Cohen; D. 2001, p. 1135, obs. Ph. Delebecque; JCP G, 2001, II, 10567, note C. Legros.

7. Cass. civ. 1, March 27, 2007, *Sté Alcaltel Business Systems et autre c. / Sté Amkor Technology et autres*, Rev. arb. 2007, p. 785, Petites Affiches, 2007, n°160, p. 60, note A. Malan.

8. It is worth noting that under French law the final buyer is entitled to sue the manufacturer solely or jointly with the dealer for the breach of express or implied warranty. In such a case the manufacturer incurs contractual (and not delictual) liability towards the final buyer and can oppose – except if it contradicts mandatory provisions of the law, such as consumer law – the clauses contained in the initial sales contract including the arbitration clause: see Cass. A.P., February 7, 1986, D. 1986, p. 293, note Bénabent; JCP, G, 1986, II, 20616, note Malinvaud; RTD Civ. 1986, p. 605, note Rémy; Cass. Civ. 1, October 28, 1991, D. 1991, p.549, note Ghestin.

9. Cass. civ. 1, November 22, 2005, *AXA Corporate Solutions* c. /*Nemesis Shipping*, Bull. civ., I, n°420; Petites Affiches, 2006, n°168, 4, note A. Malan.

10. Cass. civ. 1, October 26, 2011, *Sté Constructions Mécaniques (CMN) c. / Sté Fagerdala Marine Systems AB*, Journal du droit international (Clunet), 2012, p.662, note S. Sana-Chaillé de Néré.

11. Id. at *9 (quoting Journal du droit international (Clunet), 2012, p.662, note S. Chaillé de Néré).

12. P. Mayer, '*Extension of the arbitration clause to non-signatories under French law*', in Multiple party actions in international arbitration, PCA, 2009, p.195.

13. Id. at *6.

14. Cass. civ. 1, November 7, 2012, *Amplitude c. / Iakovoglou et Oebe*, Gazette du Palais, January 8, 2013, note D. Bensaude.

15. Id. at *9; it is interesting to note that 17 years ago, in the case *SMABTP*, the Court of Appeal of Paris held that since a number of contractors were involved in a construction project, either as joint main contractors, subcontractors or suppliers, an arbitration clause in one of the relevant contracts was not deemed to be incorporated into the other contracts: CA Paris March 22, 1995, *SMABTP*, Rev. Arb. 1997, p.550.

16. Cass. civ. 1, May 28, 2002, *Cimat c. / Société des Ciments d'Abidjan*, Rev. Crit. Dr. Int. Priv. 2002, p. 758, note N. Coipel Cordonnier; Rev. Arb. 2003, p.397, note D. Cohen.

17. Id. at *11; see also Seraglini, JCP, 2011, 1432 n°3.

18. V. Heuzé: '*Arbitrage international; quelle raison à la déraison?*' D. 2011, p.2880. déraison*?*' Recueil Dalloz 2011, p.2880.

19. Id. at *2.

20. Id. at *3.

21. Id. at *4 (quoting Rev. Arb. 2010, p. 813, note F. X. Train).

22. F.X. Train; Rev. Arb. 2012, p. 369, spec. p. 379.

23. Id. at *5.

24. Id. at *8.

25. See however in a recent case: CA Paris, October 23, 2012, *Cubana de Aviacion c. / Me Gorrias es qualité de liquidateur de Soleil de Cuba*, Gazette du Palais, January 8, 2013, note D. Bensaude, where the Court decided that the arbitration clause could not be extended to the subsidiary, although it had executed part of the contract, since it could bring sufficient evidence that it did not know the content of the contract (the contract was a confidential agreement). The factual context of this case does not seem to contradict our observations. ■

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