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Costa Rica's New Arbitration Law Continues the Arbitration Friendly Trend in Latin America

by Luis Enrique Graham and Salvador Fonseca



Introduction

Over the last twenty or so years, the tendency in a number of Latin American jurisdictions has been to become more and more supportive of international arbitration, both as regards the legislative framework and the approach of the local courts. There can be no doubt that positive progress has been made, as illustrated by the list of countries that have adopted national arbitration laws in line with the UNCITRAL Model Law, the international 'gold standard':

- Mexico (1993)
- Guatemala (1995)
- Peru (1996, 2008 with amendments as adopted in 2006)
- Venezuela (Bolivarian Republic of) (1998)
- Honduras (2000)
- Paraguay (2002)
- Chile (2004)
- Nicaragua (2005)
- Dominican Republic (2008)

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Costa Rica will now join this group of arbitration-friendly jurisdictions, as it will shortly adopt Law 17.593 on international arbitration¹, which is largely based on the Model Law. The Model Law, first produced by UNCITRAL in 1985, has stood the test of time: even looking beyond Latin America, over the past few years it is still being adopted by countries elsewhere².

This article considers some of the features of the new Costa Rican legislation on international arbitration.

The scope of the new Costa Rican law

The Legislative Assembly of Costa Rica decided to limit the scope of Law 17.593 to international arbitrations where the seat of the arbitration is in Costa Rica. Domestic arbitrations are still governed by other legislation, which may not reflect the principles underlying the Model Law.

With that qualification in mind, Law 17.593 follows the Model Law almost in its entirety, and what few differences there are do not represent departures from the fundamental core principles of the Model Law. However, there are some aspects and changes that are worth mentioning: we look at these below by reference to the corresponding Article of the Model Law.

Form of arbitration agreement (Article 7)

Costa Rica's new law does require that all arbitration agreements shall be in writing, but this requirement can be fulfilled in the flexible manner intended under Article 7 of the Model Law.

An arbitration agreement will be in writing, provided that its content is recorded in any form, including electronically. The agreement itself can have been reached orally or even by conduct.

Number of arbitrators (Article 10)

When the parties fail to determine the number of arbitrators, instead of adopting the default rule as established in the Model Law, the Legislative Assembly of Costa Rica changed the fallback rule to one arbitrator rather than three. Although parties are free to determine the number of arbitrators, Law 17.593 states that the number of arbitrators shall always be an odd number.

Power of arbitral tribunal to order interim measures (Article 17)

The current wording of Article 17 was adopted in 2006 by UNCITRAL (one of the main amendments in the Model Law) and it sets forth the possibility of granting interim measures "*whether in the form of an award or in another form*".

In Law 17.593, this amendment to the Model Law was not followed. Instead, while not requiring interim measures to be granted in the form of awards, Law 17.593 does require that all interim measures be 'reasoned'. It remains to be seen how arbitral tribunals will deal with this requirement. In any event, Law 17.593 does not impose a strict requirement of form (such as an award, order or a resolution) on the arbitral tribunal.

Matters subject to arbitration (Article 37)

The Model Law does not include a provision regarding arbitrability, a topic that is left for national laws to decide.

In Law 17.593, Costa Rica's Legislative Assembly seized the opportunity to state that, under the laws of Costa Rica, individuals may submit to international commercial arbitration only matters on which, based on Costa Rica's commercial and civil legislation, individuals are free to agree.

Foreign Arbitrators, Experts and Lawyers (Article 38)

The first draft of the new law that was discussed before the Legislative Assembly included a requirement for foreign practitioners to seek accreditation of their legal qualifications with the Costa Rican Bar authorities, before being permitted to act in international arbitration proceedings where Costa Rica is the seat.

While this was intended to be a 'one time registration', this requirement would nonetheless have caused practical difficulties. After consultations, the legislator agreed to remove it, a decision that has been very popular both in the local and international arbitration community.

Present status of Law 17.593

The new law was first raised for discussion more than a year ago, in November 2009. It has since been considered by a number of interested entities within Costa Rica, including the Supreme Court, the Costa Rican Bar and the Chamber of Commerce.

The last draft of the legislation, complete with comments, was approved by the Legislative Assembly in September 2010. The only remaining steps in the legislative process now are final deliberations, followed by publication in the Official Gazette, after which Law 17.593 will come into force. It is expected that this will happen in the near future.

¹ The name of law 17.593 is, in Spanish, "*Ley No. 17.593 Sobre Arbitraje Comercial Internacional Basada en la Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI)*".

² The more recent enactments of commercial arbitration regulation, based on the Model Law, took place in New Zealand (2007), Ireland (2008), Slovenia (2008) and Peru (2008).

Conclusion

The stated intention of the Legislative Assembly in adopting a law on arbitration based on the Model Law was to improve the legal framework in Costa Rica and try to encourage selection of Costa Rica as a seat for international arbitrations. The Model Law is internationally recognised, and with Law 17.593 following it so closely, practitioners and arbitration users from all over the world will, hopefully, feel instantly at home under the new legislation. If, as is hoped, the Costa Rican courts also apply the new law in the way the international arbitration community expects, then Costa Rica could become a new, attractive spot on the 'arbitration world map'. ☺

Dallah v Pakistan - French Courts Uphold the Award

by Melanie Willems and Markus Esly



The Christmas edition of the *Arbiter* came with a stocking filler: our note discussing the decision of the English Supreme Court in *Dallah v Pakistan* (as published by the Practical Law Company).

The Dallah Saga



In the *Dallah* saga, the High Court, the Court of Appeal and ultimately the Supreme Court ([2010] UKSC 56) refused enforcement in England of an ICC arbitration award, made in Paris, against the Government of Pakistan. The English courts found that Dallah's true (and only) counterparty had been a trust established

under Pakistani law specifically for the relevant transaction, but not Pakistan. The trust had subsequently ceased to exist as a legal entity, which according to the Supreme Court left Dallah with nobody to enforce the ICC award (worth US\$ 20 million) against.

On 17 February 2011, the Cour d'Appel in Paris disagreed. Dallah had also sought to enforce the award in France. The ICC arbitration having taken place in France, Pakistan had responded to Dallah's French enforcement action by asking the French Courts to set aside the award. The French courts, as the courts of the 'seat' of the arbitration, have the power to do so in the exercise of their 'supervisory jurisdiction' over the award, under the principles set out in Article 1502 of the French Civil Code. The Paris judges, however, upheld the award.

The courts of the seat of the arbitration are the only courts that can set aside any ensuing award. In that respect, in *Dallah* the French courts were really the 'supreme court'. But, as *Dallah* has shown, when it comes to enforcing an award in the

jurisdiction where the defendant's assets are, this supremacy in principle does not count for much.

After the decision of the Cour d'Appel, Pakistan's French assets could now be up for grabs. That, however, is always provided that under French law, the Government of Pakistan has waived its sovereign immunity from enforcement against state assets. In this article, we look at how the French and English courts have answered essentially the same question (on the same facts) differently. We also consider on what grounds a party like Dallah could enforce an award against the assets of a sovereign state.

Pro-enforcement

Before delving into the detail of *Dallah*, in practice it is rare for enforcement of international awards to be denied. The New York Convention 1958, an international treaty with more than 140 state parties (including England and France), requires the courts of one signatory state to enforce awards made in another signatory state, unless certain limited exceptions apply.

Generally, the New York Convention not only strongly favours enforcement of awards, but also upholding the validity of arbitration agreements. The objective of the New York Convention is to "*facilitate the resolution of disputes through arbitration*", as (for example) a Swiss Federal Tribunal stated in 1984 (*Tradax Export SA v Amoco Iran Oil Co.* - see further *Born on International Commercial Arbitration*, page 204).

Consistent with this 'overriding objective' of facilitating arbitration, Article II(1) of the New York Convention states:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Why then, it might be asked, was there a need for such a close review of the arbitration clause in *Dallah*? The answer, it is suggested, is simple: there was no 'agreement in writing', expressly made between the relevant parties, Dallah and the Government of Pakistan.

As we all know, arbitration is purely contractual. One of the accepted weaknesses of the process is that it does not bind third parties, who are not a party to the contract (and the arbitration clause it contains). Third parties should, and do, have the opportunity to resist enforcement of an award made against them by proving to the enforcing court that they never consented to the jurisdiction of the tribunal in question. Accordingly, one of the limited exceptions to enforcement of international arbitration awards in the New York Convention is:

"... 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."

See Article V(1)(a) of the New York Convention, implemented in England under Section 103(2)(b) of the English Arbitration Act 1996. That was the exception on which the Government of Pakistan relied in the English courts.

The New York Convention also recognises that enforcement may be denied where:

"... the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."

See Article V(1)(e) of the New York Convention. The English Arbitration Act 1996 also incorporates this exception (Section 103(2)(f)).

Enforcement and setting aside - what is the relationship?

One thing the New York Convention does not do, however, is explain the relationship between the enforcing court and the courts of the seat (who may set aside or suspend the award under Article V(1)(e)).

The *Dallah* case illustrates the practical issues that can arise in this context. Dallah had first sought to enforce the award in England, without success. Whilst appealing in England, Dallah also commenced enforcement proceedings in France, in August 2009. Pakistan resisted both the English and French proceedings. In England, Pakistan relied on the exception to enforcement under Article V(1)(a), that there was no binding arbitration clause. In France, Pakistan argued that the award should be set aside.

In January 2010, Dallah asked the Supreme Court to stay (Dallah's own) enforcement proceedings until the French courts had considered the question. This was refused, though the judgment of the Supreme Court does not give any reasons as to why no stay was granted, and it is not known precisely how Dallah put its application for a stay.

Generally, under the Civil Procedure Rules (which do not apply directly to the Supreme Court), the English courts have wide case management powers, which include the power to order a stay for a number of reasons (see CPR Rules 3.1(2)(f)).

Where there are concurrent proceedings in the courts of another jurisdiction, the English court may grant a stay to "ensure that related proceedings are tried in a particular order if there are very strong grounds for doing so" (Blackstone's Civil Practice, 54.5 and *Reichold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173). The English courts (in *Reichold*) have explained that where there are concurrent, related proceedings in different jurisdictions, a stay may be granted:

"... not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other."

A risk of irreconcilable judgments might be sufficient for granting a stay, although the existence of such a risk is not a decisive factor (see *Curtis & Anor v Lockheed Martin UK Holdings Ltd* [2008] EWHC 260). The courts will carefully weigh up the consequences of the stay and (on the assumption that it is normally a defendant who applies for a stay) will only do so where there are:

"... very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff..."

These principles may have been in the mind of the Supreme Court when a stay was refused. While there was, plainly, a risk of inconsistent findings, that risk was of Dallah's own making since Dallah had instigated the proceedings in both England and France. It is understandable that a claimant should not be allowed to request a stay for one set of proceedings that he himself brought (here, the English proceedings) where he has found these hard going, and decides that he would prefer to litigate somewhere else.

It has been asked whether English Supreme Court was somehow stepping over the mark by deciding the appeal, applying French law, when the French courts themselves (the courts of the seat) were considering the very question of the validity of the award at the same time. Such criticism is unwarranted, since there is no binding principle that requires the courts of one New York Convention state, who are asked to enforce an award, to defer to the courts of the seat if the award is being challenged there. If the courts of the seat have upheld an award following an application to set it aside, that too would not bind the courts of another New York Convention state. They could still refuse to enforce the award.

Perhaps the question that has generated the most debate is: what happens if the courts of the seat have set aside the award? Can it still be enforced elsewhere? The answer is it depends. The French courts certainly subscribe to the school of thought that an international arbitration award exists independently of any national judicial system.

The Supreme Court in *Dallah* commented on this oft-debated topic, though it did not need to decide the point in the case before it:

"Only limited assistance can be obtained from those cases in which awards have been enforced abroad (in particular in France and the United States) notwithstanding that they have been set aside (or suspended) in the courts of the seat of arbitration. In France a Swiss award was enforced in

France even though it had been set aside in Switzerland: "... the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside ..."
Thus ... in Soc PT Putrabali Adyamulia ... an award in an arbitration in England which had been set aside by the English court ... was enforced in France, on the basis that the award was an international award which did not form part of any national legal order."

Lord Collins did, however, explain the basis on which these decisions were reached (our emphasis):

"Those decisions do not rest on the discretion to allow recognition or enforcement notwithstanding that 'the award ... has been set aside ... by a competent authority of the country in which ... that award was made' ... They rest rather on the power of the enforcing court under the New York Convention ... to apply laws which are more generous to enforcement than the rules in the New York Convention."

What happened in Dallah?

The facts of *Dallah* were as follows. In July 1995, a memorandum of understanding had been signed for the project. The parties were "*the President of the Islamic Republic of Pakistan through the Ministry of Religious Affairs*". It was signed "*For and on behalf of The President of the Islamic Republic of Pakistan*". The memorandum of understanding was governed by the laws of Saudi Arabia, provided for arbitration in Jeddah and also included an express waiver of Pakistan's sovereign immunity. At that stage, the project was to cost US\$242 million. The Government of Pakistan was to guarantee Dallah's borrowing.

The Pakistani ordinance creating the trust that would eventually become Dallah's counterparty was enacted in January 1996, six months later. It gave the trust a 'life span' of four months - unless the ordinance was laid before the Pakistani parliament. That never happened, but some further ordinances extending the life of the Trust were enacted (the last in August 1996).

Pakistani government officials continued to represent the trust. The secretary of the Ministry acted as secretary of the trust, and as its managing trustee. In February 1996, *Dallah* proposed a larger project to the Ministry, with a total cost of around US\$345 million. A new contract was negotiated to replace the memorandum of understanding, and this was signed by Dallah and the trust on 10 September 1996.

Dallah's counterparty was: "*Awami Hajj Trust ...*" referred to as having been: "*... established under Section 3 of the Awami Hajj Trust Ordinance, 1996 (Ordinance No VII of 1996) ...*". The Ministry signed, but it did so for the trust. One of the trust's

obligations was to pay Dallah an advance of US\$100 million, provided Dallah set up a financing facility supported by guarantees given by "*the Government of Pakistan*". The contract also provided that:

"The Trust may assign or transfer its rights and obligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah."

The contract contained an ICC arbitration clause which the parties had amended to refer to "*Any dispute or difference of any kind whatsoever between the Trust and Dallah ...*". Previously, the clause was expressed in the standard ICC form, namely by reference to "*All disputes arising out of or in connection with the present contract ...*". There was no governing law clause in the final contract, an omission that should not be repeated.

Dallah's project failed to get off the ground. Two months after the signature of the contract, there was a change of government in Pakistan: Benazir Bhutto's administration fell from power and was replaced by Nawaz Sharif. *Dallah's* project was no longer in favour with the new government. No new ordinance was issued and the trust ceased to exist. Relations between Dallah and the new government broke down.

In January 1997 (after the trust had ceased to exist), the Ministry wrote to Dallah on behalf of the Trust, purporting to terminate the contract for breach by Dallah. The trust having ceased to have legal personality, in May 1998 Dallah commenced ICC arbitration proceedings against the Government under the contract, nominating Lord Mustill as its arbitrator. The Government of Pakistan objected to the jurisdiction of the tribunal and took no steps in the proceedings. Paris was designated by the tribunal as the seat of the arbitration proceedings.

By a partial award of 26 June 2001, the tribunal confirmed that it had jurisdiction over the Government. Subsequently, the tribunal awarded Dallah damages in excess of US\$20 million. Dallah sought to enforce the award in England.

What did the English Courts think?

Enforcement was refused by the High Court, the Court of Appeal and ultimately the Supreme Court. Before the English Courts, the question was whether the Government of Pakistan was bound by the arbitration clause. That question in turn was governed by French law. Because there was no governing law clause, the law of the place of the arbitration (France) applied to this crucial issue.

The Supreme Court reviewed the leading French authorities, having heard the evidence of eminent French experts on arbitration and contract law (foreign law being a question of fact in the English courts):

"Under French law, in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the said agreement and, as a result, by the arbitration clause therein. The existence of a common intention of the parties is determined in the light of the facts of the case. To this effect, the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement."

Of course, English law will not generally consider the conduct of the parties subsequent to entering into the contract, to see if this is consistent with what they say their obligations were in the first place.

The Supreme Court examined the matter and concluded that there had been no common intention, as required under French law, to give the tribunal jurisdiction over the Government because:

- the fact that the Government was involved in the negotiations and was interested in the project was not enough to make it a party to the arbitration clause;
- the Government was keeping its distance from the transaction, a deliberate step: it had signed the memorandum of understanding (and waived sovereign immunity) but it had not signed the contract. The Trust had, and the English Courts found that it had separate legal personality; and
- the conduct of the parties did not change the clear implication that the Trust was *Dallah's* counterparty – even though the Ministry had written to terminate the contract after the Trust had ceased to exist.

The French perspective

On 17 February 2011, the Paris Cour d'Appel, gave its judgment (the 'arret'), having considered the matter. The judgment is brief: it recites the facts (as recorded in the award), before dismissing the Government's application.

There has been much debate as to whether a national Court considering an international award at the enforcement stage should delve into the detail of the matter, in particular by considering the evidence that was before the tribunal. Under English law, if an award is challenged on the basis that the tribunal did not have jurisdiction (see Section 67 of the Arbitration Act 1996), the Courts will approach determining the question as a re-hearing rather than an appeal. This procedure is now "*well-established*", as the High Court noted in *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm). An

English judge will therefore look at the evidence that was before the tribunal, and will decide on that basis, without deference to what the tribunal thought the position was. The English approach is based on the fact that the New York Convention refers to 'proving' that the arbitration clause was not valid and binding.

While the Paris court may have been acting in a different capacity (as the court of the seat), in effect it considered the same question that had been before the English courts. The Paris court found that Pakistan was bound by the arbitration clause. Taking a step back, one could say that this is a common sense, or a 'just' decision. Why should the Government of Pakistan be allowed to create a trust that then evaporates into thin air, following a change of government, effectively depriving *Dallah* of its contract? If the Government had wanted to give its successors the option of cancelling the project, it could have insisted on a clause allowing termination for convenience. As far as we can tell from the numerous judgments that have considered *Dallah's* contract, there was no such clause.

The English Supreme Court did set out to establish the common intention of the parties by applying the principles of French law (as summarised above), in a manner that has been lauded by a number of international commentators. In applying the rules of French law to the facts, the Supreme Court started with the signature of the memorandum of understanding (with the Government) on 24 July 1995. In this, it was noted, *Dallah* was represented by legal counsel - the same firm that also represented *Dallah* when the contract was signed in September 1996:

"It must go without saying that the firm well understood the difference between an agreement with a State entity, on the one hand, and the State itself, on the other."

This appeared to weigh heavily with the Lord Mance and Lord Collins, who gave the leading judgments.

The Cour d'Appel on the other hand went further back, to the very beginnings of the ill-fated project. The recital of the facts in the French judgment starts by noting that in February 1995, *Dallah* informed the Pakistani Ministry of Religious Affairs that it was able, pursuant to a grant from the King of Saudi Arabia, to construct lodgings for pilgrims on land near the Holy Places in Mecca. Notably, *Dallah* seems to have stated that it had been authorised to offer terms to, and engage in projects with, 'Islamic governments'. In July 1995, *Dallah* set out the financial terms on which it would be able to offer the project in a communication addressed to the Pakistani Ministry of Finance. Following negotiations, *Dallah's* terms were ultimately reflected in the Memorandum of Understanding between *Dallah* and the Ministry of Religious Affairs.

While the Supreme Court focused on the fact that the Memorandum of Understanding had been signed in effect by the Pakistani State, in distinction to the final contract with the

trust that superseded it, the judgment of the Paris court records other terms of the memorandum that show the Government's central role in the further steps that the memorandum envisaged. The Cour d'Appel also noted a number of actions taken by Government officials in operating the contract, or asserting that there had been breaches of it, after the trust had already ceased to exist. The civil servants in question had never previously held any office under the trust's constitution. As the actions by the Government both before and after the contract were consistent in showing that it, and not the trust, was *Dallah's* real economic counterparty, the Cour d'Appel had little difficulty in approving the tribunal's conclusion that Pakistan was bound.

Enforcement against state assets

So let us assume that the state is a party to the contract, and the award is binding as a matter of jurisdiction since the state has submitted by accepting an arbitration clause. That is not the end of the matter. States, as sovereign entities, are not subject to the *enforcement* jurisdiction of the courts of other sovereign states when it comes to cashing in awards or judgments against state owned assets.

One still needs to ensure that any resulting judgment can be enforced against assets of the state. The respondent state needs to have both submitted to jurisdiction and also waived its sovereign immunity from enforcement. This concept of immunity reflects the notion, found in public international law, that states are equal and should not be subject to the jurisdiction of the courts of other states unless they have consented.

The English law of state immunity is found in the State Immunity Act 1978 (the "SIA"). This makes inroads into 'absolute immunity', but still provides that the English courts have no jurisdiction over states unless an exception applies. The general rule remains that states are immune both from jurisdiction and enforcement.

There are, however, four exceptions to immunity from being sued that matter in the commercial arena:

- The state in question submits to the jurisdiction of the UK courts (section 2, SIA 1978).
- The proceedings relate to a commercial transaction entered into by the state (section 3(1)(a)).
- The proceedings relate to a contractual obligation on the state that is to be performed wholly or partly in the UK (section 3(1)(b)).
- The state has agreed to submit the dispute to arbitration (section 9).

All these exceptions concern the state's immunity from being sued, and as one would expect, are satisfied by an ordinary arbitration or jurisdiction clause in a contract to which a state is party. But even where jurisdiction exists, the state's immunity from having decisions enforced against it remains to be dealt

with as a separate issue. In the commercial arena, immunity from enforcement is usually addressed through an express contractual waiver. One example of such a clause, upheld by the English courts, is:

"The Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)."

(*A Company v Republic of X* [1990] 2 Lloyd's Rep 520)

But what happens if you do not have a waiver in your contract? The SIA does provide an exception which overcomes the bar to enforcement. For the exception to apply, the state property that the award is being enforced against must be used 'exclusively for commercial purposes' (Section 13(4)). This depends on how the state's assets are used at the time the enforcement action is commenced (see *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357).

The following examples show what amounts to commercial purposes for the purpose of the exception,

- Money in a bank account used to meet the expenditure incurred in the day-to-day running of Columbia's diplomatic mission was not for "*commercial purposes*": *Alcom Ltd v Republic of Columbia* [1984] AC 580.
- Assets representing a national fund held in England by third party financial institutions on behalf of Kazakhstan's national bank were not within the exception. The assets were created to assist in the management of the economy and government revenues and that must constitute a sovereign activity: *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm).
- Funds in an account derived from oil revenues pursuant to a World Bank Revenue Management Program were within the exception. Chad's account had been operated specifically for the purpose of a commercial transaction; to receive the proceeds of a contract for the supply of goods or services and also to be part of a system specifically established for the purposes of repayment of the loans by the World Bank to Chad. The monies were not the London assets of a national fund of Chad: *Orascom Telecom Holding SAE v Republic of Chad* [2008] EWHC 1841 (Comm).

Separate entities - a further wrinkle

What happens if, as in *Dallah*, the counterparty is separate and distinct from the state, but still has a connection with the state? What does that mean for immunity?

In short, a separate entity will not be immune from being sued or from enforcement against its assets, unless the proceedings relate to something done by it "*in the exercise of sovereign authority*" (in the sense of doing an act that no private person could do). In that case, one still needs a waiver from the

separate entity just like from a 'proper' state.

A separate entity is distinct from the executive organs of government, and it is capable of suing and being sued in its own right. In *Trendtex Trading v Central Bank of Nigeria* [1977] 1 All ER 881, the Court of Appeal listed a number of factors that were relevant in determining whether a body was separate from government:

- The body's constitution, powers, duties and activities.
- The view of the government concerned as to whether the body is separate from the state (although this is not decisive).
- Whether the body in question is established by, and its functions governed by, statute (rather than being directed by the government).
- Whether the body in question possesses powers that the government does not.

A further twist relates to state banks, which call for particular attention. One cannot enforce against the funds held in a state bank even if those funds are used exclusively for commercial purposes. An express waiver is always necessary if awards, or judgments, are to be enforced against the assets of a state bank. They do not fall into either the commercial purposes exception, or the separate entity exception, as you might have expected that they would.

The decision in *Tsavliris Salvage (International) Limited v Grain Board of Iraq* [2008] EWHC 612 (Comm) illustrates what constitutes a separate entity. The Grain Board of Iraq was a separate entity, rather than a department of the Iraqi government. The Grain Board of Iraq was a state-owned and state-financed corporation, with separate legal personality. It was subject to certain statutory duties, and it was the Grain Board's own board of management that determined how to go about performing those duties. Gross J found that the fact of state ownership and state capitalisation would not necessarily indicate that an entity was an organ of government when the entity nonetheless "*possessed a separate identity, together with financial and administrative independence.*" He compared the relationship between the Grain Board and the relevant Iraqi government department to that of "*an autonomous subsidiary and a parent company*" rather than "*a head office and a branch office.*"

Conclusion

The *Dallah* case has shown how important it is ensure that arbitration clauses are properly drafted so that they capture the correct party. Even if certain jurisdictions, such as France, may take a more flexible approach to privity of contract, enabling to get behind special purpose vehicles at the party who really has the money (always depending on the concept of the 'common intention of the parties'), awards made against any party who is not an express signatory to the arbitration clause may be difficult to enforce in common law jurisdictions. The Supreme

Court may not have been able to shake off its innate reluctance to extend the arbitration agreement to an entity which had, quite deliberately, not signed up to it. Old habits may be hard to shake, even when applying legal principles that call for a different solution.

State entities, even if they are caught by the contract, can still plead immunity once the award is presented for enforcement against state assets. This second bite at the cherry in terms of avoiding a liability is well established in many jurisdictions, so that an express waiver clause that deals with enforcement should be included in all contracts where the counterparty has a connection with a state or government. ©

A little introduction to Almaty, Kazakhstan

by Alexandra Neovius



In December this year Kazakhstan will celebrate the 20th anniversary of its independence from the Soviet Union. There would be much to say about the legal and economic changes which the country has gone through during this period, but this is just a short introduction, a snapshot of Kazakhstan, and in particular of the city of

Almaty.

Kazakhstan's size may not be appreciated by everyone. It is huge, virtually the size of Western Europe, with a population of some 16 million. It has vast mineral resources which attract foreign investors, and will continue to. The landscape is varied. The eastern part of the country is mountainous, while central and western Kazakhstan are mostly steppe, where the majority of energy and mineral deposits are located. The north of the country features the most industrialised areas, and agriculture is centred in the fertile south, towards the border with Uzbekistan.

Kazakhstan's estimated Gross Domestic Product for 2010 was US\$ 197.7 billion, which puts the country in 54th place (according to the CIA World Factbook). Although Kazakhstan was not immune to the global financial crisis and suffered significantly, the local economy seems to be recovering relatively well. As the financial markets seized up in late 2007, the credit crunch spread into the Kazakhstan banking system. The fall in oil and commodity prices that followed during 2008 made matters worse, leading to a recession. In response, the government devalued the local currency, the Tenge, and injected just short of US\$ 20 billion into the economy by way of stimulus. As commodity prices rose again, Kazakhstan

recovered. Growth over 2010 was around 7%, and barring a fall in oil prices, this upward trend should continue. Despite these positive signs, the Kazakh government realises that the economy is overly reliant on energy and minerals extraction, and has stated its intention to strengthen more diverse industry sectors such as telecommunications, transport, pharmaceuticals, food and beverages and petrochemicals.

Kazakhstan's legal system is code-based and influenced by the major European civil law systems and its Soviet history. International arbitration is generally available to foreign investors to resolve disputes (although jurisdiction over some types of disputes, for example in respect of land, is reserved exclusively to the Kazakhstan courts). Kazakhstan is also party to a number of bilateral investment treaties. However, while Kazakhstan is a party to the New York Convention¹, it can be difficult as a matter of practice to have an award enforced by the Kazakhstan courts. The judgments of other states' courts are generally not enforceable in Kazakhstan unless a relevant treaty exists with that other state, and these are currently very limited in number. Working in the Kazakhstan legal environment as it develops requires creativity and flexibility from lawyers – and their clients.

Chadbourne's principal Kazakhstan office is located in Almaty at the foot of the Tien Shan mountain range in the south east of the country, close to the border with Kyrgyzstan. Almaty was the capital during Soviet times and remained so until the late 1990s, when President Nazarbayev shifted the political centre to Astana in the north. Almaty remains the business and financial capital. Although the oil & gas industry for which Kazakhstan is primarily known tends to be focused on Atyrau and other cities in the west of the country, the Kazakhstan (and often Central Asian) headquarters for many major domestic and international companies, banks, law and audit firms, as well as the Kazakhstan central bank and the financial market regulator, are all in Almaty.

The name Almaty is derived from the Kazakh word for apple – alma – and there are still apple orchards around the outskirts of the city which produce a glorious crop each autumn. The climate is typically continental – warm to hot summers and cold snowy winters, although (mercifully) not as cold as Astana's, which regularly see daytime temperatures of -40°C. The beauty of Almaty is in its mountain setting and its trees and parks – even the Soviet-era apartment buildings are softened by the explosive greenery each spring. In the warmer part of the year, the market vendors sell some of the finest fresh produce in the world from southern Kazakhstan and the surrounding countries – strawberries and raspberries in early summer, followed by stone fruits, tomatoes and melons in July-August, and then the

famous apples as the season changes.

Almaty's population of approximately 1.5 million is culturally and religiously diverse. Leaving aside the expatriate business, teaching and diplomatic communities, there are many different ethnicities in addition to the majority Kazakhs and Russians, which is reflected in the vibrant and tolerant cultural (and culinary) life of the city. The Kazakh language is increasingly used in Almaty alongside Russian, in line with the government's policies to promote the state language, but a variety of other languages can be heard too. As Kazakhstan's growing economy begins to move away from its reliance on natural resources and the country's infrastructure improves, there are significant opportunities to be had in this beautiful and exciting city – and no better time than the present to explore them.

Chadbourne's Almaty office has fourteen local and expatriate lawyers with renowned expertise in oil & gas, mining, banking and other key sectors. The disputes team are well known for their work advising investors before the Kazakhstan courts and in domestic and international arbitration. We also maintain a small office in Atyrau to support our work in that region. ☺

Alexandra is now based in Chadbourne's London office after spending four years in Almaty.

¹ 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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