Alternate Dispute Resolution FOCUS

New Act helps establish Ontario as world centre for ADR

Enforcing arbitration agreements against non-signatory parties

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Serious problems can arise when a crucial party to a transaction has not signed the document which contains the agreement to arbitrate disputes.

Dallah Real Estate and Tourism Holding Company v. Government of Pakistan, [2010] UKSC 46, a recent decision of the new Supreme Court of the United Kingdom (replacing the function formerly served by the House of Lords), involved a contract between Dallah and a trust created by the government of Pakistan for the construction of housing for pilgrims to the Holy Places in Saudi Arabia. The trust was dependent for its continued legal existence on the passage of regulatory ordinances by the government at frequent intervals.

The obligations of the trust were guaranteed by the government, but the government did not sign the agreement that contained the arbitration clause, which only referenced disputes between the trust and Dallah. The trust did not have its own letterhead. It is clear that the government, through the Ministry of Religious Affairs, controlled the trust and conducted the trust's dealings with Dallah with reference to the project.

The trust ceased to exist when the government of Benazir Bhutto fell from power and the necessary ordinances to continue the existence of the trust were not passed by the new government. The government decided not to pursue the project, and started an action in the courts of Pakistan in its own name, seeking a declaration that Dallah, by its actions, had repudiated the agreement. Dallah pursued its rights by initiating an International Chamber of Commerce (ICC) arbitration. However, the government took the position that it was not a party to the agreement that contained the arbitration clause.

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The ICC arbitral tribunal, which conducted hearings in France as required by the arbitration clause, decided unanimously that it did have jurisdiction over the government on the basis that the involvement of the government in the negotiation and performance of the contract established a common intention of the parties that the government was the "true party" to the agreement. In reaching this conclusion, two members of the tribunal noted that the case fell "very close to the line" which requires that the separate juridical personalities of distinct legal entities be respected. They observed that, while the facts of the government's involvement taken individually may not have established a common intention to be bound, taken as a whole they were satisfied that such an intention had been established.

All of the judges in the three levels of English courts which considered the enforceability of the award disagreed with the conclusion reached by the tribunal. They held that the government was not bound by the agreement to arbitrate, and that a common intention of the parties to bind the government to the arbitration clause had not been established by the facts of the case.

Within the decision of the U.K. Supreme Court, the reasons of Lord Collins, who is also the modern editor of *Dicey, Morris and Collins on the Law of Conflicts*, provides a broad and illuminating review of many key aspects of English law and international practice pertaining to arbitration. These include the right of a tribunal to determine its own jurisdiction, the respective roles of the courts at the seat of the arbitration and in other jurisdictions in which the award is sought to be enforced, the law applicable to the issue of who is a party to an international arbitration agreement and the circumstances in which a non-signatory may be held to be bound by an agreement to arbitrate.

As with all of Lord Collins' legal expositions, time spent reading his decision is informative and rewarding. However, the stark conclusion that the government was not bound to arbitrate the dispute will leave many Can-

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Corporate lawyers should update their dispute resolution precedents

Non-signatory was a state entity

Non-signatories

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adian readers wondering whether a similar result would be reached by a Canadian court.

One may contrast the conclusion reached in *Dallah* with the decision of Ontario courts in *COTISA v. STET International* [1999] O.J. No. 3573, in which the principal of a group of companies was held to be bound by an agreement to arbitrate, although he did not sign the agreement himself. Possibly part of the distinction lies in the fact that the non-signatory in *Dallah* was a state entity.

Dallah serves as a colourful reminder of an obvious but frequently overlooked point. The failure to include all necessary parties to a dispute in an agreement to arbitrate can be a fatal error in an arbitration agreement. Even if one is ultimately successful in establishing a right to arbitrate against a non-signatory, the expenditure of time, money and effort to establish that result eliminates virtually all of the benefits of arbitration.

A failure to establish such a right may result in an aggrieved party having no effective remedy. In *Dallah*, the only other alternative would have been to sue the government of Pakistan in its own courts. ■

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