THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

2012/Vol. 23 Nos. 3-4

A Tribute to Professor Hans Smit

THE ISSUE OF NON-SIGNATORY STATES

*Bernard Hanotiau**

I. INTRODUCTION

Whether the scope of an arbitration clause extends not only to signatories of the arbitration agreement or underlying contract, but also to non-signatories, has become a classic problem in international arbitration.[1] This is attributable to the increasing volume and complexity of commercial transactions, the proliferation of national and international groups of companies and the fact that for financial, tax or other commercial reasons, there is not always symmetry between the individuals or companies that sign an agreement and those that perform it. Moreover, as this author demonstrated in his 2010 Freshfields lecture,[2] the fact that an individual or a company has not signed an agreement through its duly appointed representative does not mean *a priori* and *per se* that it is not a party to it or to the arbitration clause contained therein. Indeed, in most legal systems, the conduct of an individual or company's representative may provide conclusive evidence that it has consented to the relevant contract or at least to its arbitration clause. In many civil-law systems this can even be proven by post-contractual conduct.

The issue arises not only in relation to individuals and groups of companies but also in relation to states, in particular when a state entity is a signatory to an agreement. In this respect, there has been some debate as to whether the issues of extension to a state, on the one hand, and to a company, on the other, arise in the same terms. According to Fouchard, Gaillard and Goldman,[3] the answer is in the affirmative, notwithstanding that in relation to states the issue may raise additional problems such as immunity from jurisdiction. They submit that in both cases, it is the intention of the parties that is the main criterion in determining the scope *rationae personae* of an arbitration clause. Other authors, such as Professor Hans Smit[4] and Professor Roger Alford,[5] have expressed doubts over the suitability of applying the same reasoning to states as to groups of companies, for example by application of the *alter ego*, agency or third-party beneficiary theories.

---

* Member of the Brussels and Paris bars; Professor Emeritus at the University of Louvain; Member of the Governing Board of the International Council for Commercial Arbitration.

[1] *See* in particular BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, Ch. II, at 49 and following (2006).

[2] Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 ARB. INT'L 539 (2011).

[3] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 290 and following (Emmanuel Gaillard & John Savage eds., 1999).

[4] Hans Smit, *When is a Government Bound by a Contract, Including an Arbitration Clause, It Did Not Sign?*, 16 AM. REV. INT'L ARB. 323 (2005).

[5] Roger Alford, *Binding Sovereign Non-Signatories*, 19(3) INT'L ARB. REP. 14 (2004).

In a recent article,[6] Georgios Petrochilos expressed a nuanced view of the issue. On the one hand, he considers that the rules for non-signatory states and state entities are the same as for all parties. On the other hand, he suggests that there is a discrete spectrum of circumstances calling for the application of different or modified rules. In this respect, he points out that the state is a conglomerate by definition, an aggregation of a multitude of bodies and that it is a unitary conception only for purposes of international law. And in public international law, the rules of attribution acknowledge that if an entity with a separate legal personality, which is not formally an organ of the state, has acted either under the direction or control of the state or in furtherance of governmental powers given to it, then that entity's acts may be attributed to the state. Can it necessarily be inferred that a state-owned or state-controlled entity always acts ultimately for the benefit of the state, with the consequence that the benefit and burden of an arbitration agreement with such entity should be extended to the state? As indicated by the author, the answer to this question is in the negative. The rules of attribution operate in the field of international responsibility for breaches of public international law. They do not operate on the plane of contract or private law, which is the legal environment in which an arbitration agreement typically produces its effects.

Against this background, it is appropriate to examine how arbitrators and national courts have dealt with the issue of sovereign non-signatories in recent cases. This is the purpose of this article which the author devotes with great respect to one of the greatest American scholars of the twentieth century and a giant of international arbitration, his former Professor and colleague, Hans Smit.

As a preliminary remark, it should be noted that in most arbitrations, the non-signatory state has been called to the procedure as additional respondent. These cases will be analyzed in Section II. There have been very few cases where a state, although non-signatory of the arbitration clause, has decided to join the procedure as additional claimant. This second category will be examined in Section III.

II. THE NON-SIGNATORY STATE AS ADDITIONAL RESPONDENT

A. *The Pyramids case*

One of the first cases where a non-signatory state has been called to the arbitration procedure as additional respondent is the *Pyramids* case.[7]

---

[6] Georgios Petrochilos, *Extension of the Arbitration Clause to Non-Signatory States or State Entities: Does It Raise a Difference?*, *in* MULTIPARTY ARBITRATION, ICC Institute of World Business Law, Dossier No. VII, at 119 (Bernard Hanotiau & Eric Schwartz eds., 2010).

[7] ICC Case No. 3493, IX Y.B. COM. ARB. 111 (1984); 112 J. DROIT INT'L (CLUNET) 130 (1985); note Goldman, 1986 REV. ARB. 75; Phillipe Leboulanger, *Etat, Politique et Arbitrage – L'Affaire du Plateau des Pyramides*, 1986 REV. ARB. 3.

In that case, Southern Pacific Properties ("SPP," a Hong Kong company (second claimant)), the Ministry of Tourism of Egypt and the Egyptian General Organization of Tourism and Hotels ("EGOTH," a state-owned company), signed Heads of Agreement on September 23, 1974 concerning the edification of a tourist village on the Pyramids Plateau and a similar tourist town at Ras-El-Hekma on the Mediterranean coast. Under this agreement, EGOTH and SPP undertook to incorporate an Egyptian joint venture company for the projects. It was incorporated on December 4, 1975 as a joint venture between SPP Middle East ("SPP (ME)," first claimant, a wholly owned subsidiary of SPP) and EGOTH. The Heads of Agreement did not contain an arbitration clause. They were followed on December 12, 1974 by a second agreement between EGOTH and SPP. Following the signature of the parties, the words "*approved, agreed and ratified by the Ministry of Tourism*" appeared together with the signature of the Minister. The agreement contained an arbitration clause referring disputes relating to this agreement to ICC Arbitration. In 1976, EGOTH was transformed into a private company (second defendant). Subsequently, opposition to the Pyramids Oasis project developed and culminated in a series of Decrees in May 1978 that had the effect of cancelling the project.

SPP (ME) and SPP commenced an ICC arbitration claiming damages against the Arab Republic of Egypt (first defendant) and EGOTH. Egypt disputed the jurisdiction of the arbitral tribunal. The claimants' case was that the government had become a party to the December 1974 agreement in one of three ways: directly by the signature of the Minister; because EGOTH was acting not only on its behalf but also on behalf of the government; or because there was an essential governmental identity between EGOTH and the government. The claimants further pointed out that although the arbitration clause only expressly related to disputes arising out of the December 1974 agreement, there was such a close connection or even identity between the September and December agreements that the clause was apt to cover the obligations of the Government under both agreements. The Government on the other hand, disputed that it was a party to the December agreement. It contended that the signature of the Minister on that agreement had no contractual significance. The Minister signed in his capacity as supervisory authority and as chairman of the Assembly of EGOTH in order to indicate shareholders' approval. This did no more than to perfect the obligation of EGOTH.

The arbitral tribunal decided that it could exercise jurisdiction over the State. According to the tribunal:

> [D]isputes between the foreign investor and EGOTH would have to go to an ICC arbitration tribunal. It does not seem in any way unlikely or improbable that the government would have wished that all disputes concerning the same project would go to the same tribunal . . . In this connection one should remember that . . . the transaction as a whole is to be viewed as a unified contractual scheme . . . the three parties were to be involved throughout the venture . . . the Claimant in future disputes might well have been either the Egyptian government or EGOTH or both.

The tribunal ultimately decided that by signing the December agreement and thereby contractually assuming a number of obligations under this agreement, the Government became a party to it and engaged its responsibility with respect to the performance of the said obligations, and moreover agreed to the arbitration clause contained therein.[8]

An action to set aside was initiated by the State of Egypt against the award. The Paris Court of Appeal set aside the award on July 12, 1984,[9] considering that the State had signed the December contract as supervisory authority; that its signature did not express any intention to become party to the contract or its arbitration clause, or to waive its sovereign immunity; and that the tribunal's statement that the two contracts formed a unified contractual scheme and that the State would have admitted that all the contracts concerning the same project should be submitted to the same tribunal, was purely hypothetical and unsupported by evidence. The decision was confirmed by the French *Cour de Cassation* on January 6, 1987.[10]

B. *ICC Case No. 8035*

In ICC case No. 8035 of 1995,[11] the arbitral tribunal reached a similar decision to the one rendered by the Paris Court of Appeal in the *Pyramids* case. The claimant company had concluded a concession agreement for a duration of fifty years with the Libyan state, the second respondent. The first respondent was the Libyan State Oil Company ("LSOC"). Several years later, the State and claimant concluded a participation agreement for exploitation of the concession. Subsequently, as a consequence of the sanctions taken against Libya by the Government of the United States, the claimant and LSOC concluded an agreement suspending the performance by claimant of its contractual obligations while preserving its interests (the "Suspension Agreement"). The Suspension Agreement contained an arbitration clause providing for ICC arbitration in Paris and the application of Libyan law. It was signed twice by Mr. A, the first time in his capacity as representative of LSOC and the second time under "approved and endorsed" in his capacity as representative of the State.

---

8 IX Y.B. COM. ARB. at 115. Compare with ICC case No. 4727, where claimant started an arbitration against the state, a signatory of their agreement, and against a state company, non-signatory, but whose director had signed the agreement in his capacity as Deputy General Manager of the state entity "on behalf of the State." The extension was refused by the arbitral tribunal. It decided that the contract had been concluded by the state. It also rejected the argument that the mere fact that the contract contained a stipulation in favor of the state entity was sufficient to make the latter a party to the arbitration agreement. The Paris Court of Appeal dismissed an action to set aside the award. April 3, 1987 award, unpublished, commented by GAILLARD FOUCHARD, GOLDMAN, *supra* note 3, at 296.

9 114 J. DROIT INT'L (CLUNET) 638 (1987), note Berthold Goldman; 1987 REV. ARB. 469, note Philippe Leboulanger; X Y.B. COM. ARB. 113 (1985).

10 *Id.*

11 124 J. DROIT INT'L (CLUNET) 1040 (1997) and note Dominique Hascher.

During the subsequent period of suspension, LSOC signed a contract with a third party for the exploitation of an oil field located on the perimeter of the concession. Considering that its interests had been affected by LSOC's conduct, the claimant decided to start arbitration not only against LSOC but also against the Libyan state.

The arbitral tribunal decided that it did not have jurisdiction over the State. It accepted that the Suspension Agreement, by referring to the concession agreement and the participation agreement, had created a unified contractual scheme imposing the same contractual obligations on LSOC and the State. It noted, however, that several of these agreements contained a specific arbitration clause. According to the tribunal, its jurisdiction was based exclusively on the arbitration clause included in the Suspension Agreement. The tribunal further pointed out that LSOC had been set up as an independent entity, endowed with broad powers and functions for the management of the State's oil resources. By signing the first two agreements and validating the third one, the State had not agreed to be bound by the arbitration clause in the Suspension Agreement (in which it was only involved in its capacity as regulatory authority). The purpose of its approval was to establish that LSOC had acted within the limits of its powers and that the State confirmed and accepted what LSOC would undertake vis-à-vis the claimant in the context of the Suspension Agreement, including any liability potentially incurred and the final character of any arbitral award. The tribunal further considered that, taking into consideration the very broad responsibilities of LSOC recognized under Libyan law, there was nothing fraudulent in the interposition of that company in the Suspension Agreement between the State and the owners or operators of the concession. The State could not therefore be considered a party to the Suspension Agreement.

C. *ICC Case No. 15113*

In ICC case No. 15113 of 2007,[12] the arbitral tribunal reached the opposite conclusion. The dispute concerned termination of a contract for the exploitation of iron ore concluded between Company A and a "*société anonyme*" of State Z, of which the State owned more than three quarters of the shares. As the contract was subsequently terminated before its term, an ICC arbitration was started by Company A against Company X and State Z. The disputed agreement was governed by the law of State Z which was inherited from French law. The arbitration took place in Paris. State Z objected to the jurisdiction of the arbitral tribunal.

The State was not mentioned as a party to the agreement. However, the agreement had been signed and approved by His Excellency, the Minister of Energy and Mines in the name and on account of the State. After a careful analysis of all the facts, the arbitrators decided that the State had behaved as if it were party to the agreement and should therefore be bound by the arbitration clause.

[12] Unpublished.

Indeed, for the following reasons the arbitral tribunal reached the conclusion that throughout the project, the State had exceeded the role of regulatory authority and had behaved as if it were a true party to the agreement:

– it was present at all times throughout the contractual relationship, during the negotiation of the agreement and in the course of its performance.

– it played a decisive role in the context of the termination. The record clearly established that the decision to terminate had been taken by the Minister of Mines and not by Company X itself. Moreover, in a letter to Company X the day before termination, the Minister proposed an indemnity payment to Company A. The tribunal noted that according to the relevant articles of the Code of Obligations of the Administration, an indemnity was due when the contracting administration decided to unilaterally terminate an agreement to which it was a party. Therefore, by its recognition of A's right to indemnification, the State implicitly recognized that it was a party to the agreement.

– moreover, Company X had accepted in the agreement to assume important obligations which could not be performed without the participation of the State and the State has accepted these in approving the agreement.

– Company X had not acted in an autonomous manner in its relationship with claimant but rather had acted most of the time as a subordinate upon the instructions of the Minister. The State was present during Company X's decision-making process throughout the contractual relationship.

The tribunal therefore concluded that State Z had to be considered party to the underlying agreement and its arbitration clause.

D. *The Westland case*

As already observed in ICC Case No. 15113, the existence between the parties of common obligations and interests is one of the elements that may lead an arbitral tribunal to decide that an arbitration clause to which a company is a party also binds other non-signatory entities.

In the *Westland* case,[13] the four Arab states that were members of the Arab Organization for Industrialization ("AOI") had entered into a shareholders' agreement with Westland Helicopters by which they created a joint stock company, the Arab British Helicopters Company ("ABH"). The agreement contained an ICC arbitration clause. Westland also signed a series of contracts with ABH that provided for ICC arbitration. A dispute arose and Westland

[13] ICC interim award of March 5, 1984 in case No. 3879, XI Y.B. COM. ARB. 127 (1986).

initiated ICC arbitration against the four Arab states, AOI and ABH. Egypt and ABH objected to the competence of the arbitral tribunal. The other respondents did not appear.

The arbitrators considered that the four states were bound by the arbitration clause, although they had not signed the clause themselves. According to the arbitral tribunal:

> The question whether the four States are bound by the arbitration clause concluded by the AOI in its own name (Shareholders Agreement contracted with Westland, clause 12.1) is exactly the same as the substantive law question whether the four States are bound in general by the obligations contracted by the AOI. If the obligations under substantive law flowing from the Shareholders Agreement are obligations not only of the AOI but also of the four States, if the locus standi to conduct the defense in relation to those obligations can be attributed not only to the AOI, but also to the four States, then the latter are therefore bound by the arbitration clause, just as they might, had they been summoned before an ordinary Court, have availed themselves of this clause as a ground in their defense. The mandatory force of the arbitration clause cannot be dissociated from that of the substantial contractual commitments; the reply to the question as to whether the four States are bound by the acts of the AOI must always be the same, whether the procedural aspect of the arbitration clause is involved or that of the substantive law concerning the financial obligations of the four States.[14]

On this basis, the arbitrators also held that the attribution of legal personality to the AOI would not affect the liability of the four founding states. Indeed, the AOI was akin to a general partnership. In this respect, the tribunal further noted: "A partner is bound by the arbitration clause entered into by a general partnership (*société en nom collectif*) of which he is a partner, and the co-contracting party may rely upon the arbitration clause if he brings his action against the partner instead of bringing it against the partnership."[15]

It must of course be pointed out that the award was subsequently challenged by the State of Egypt and annulled in relation to that state (the award remaining valid vis-à-vis the other, defaulting, states: U.A.E., Saudi Arabia and Qatar) by the Swiss Federal Court in a decision of July 19, 1988,[16] on the following grounds:

> An arbitration clause cannot be opposed to a party which did not sign it unless this party is nevertheless bound [by the clause] by the signature of an entity or a third party empowered to act on behalf of the first party, on the basis of an act granting to that entity or third party the power to refer a dispute to arbitration . . . The Shareholders Agreement is a private law contract, explicitly regulated by Swiss law. [AOI] is a public international law legal entity . . . AOI's legal personality, together with its juridical, financial and procedural autonomy –

---

[14] *Id.* at 130.
[15] *Id.* at 129.
[16] 1989 REV. ARB. 525; 7 ASA BULL. 63 (1989); XVI Y.B. COM. ARB. 180 (1991).

> including a specific power to conclude arbitration clauses or agreements – . . . are the evident and unequivocal indications that AOI was totally independent from the founding States. AOI's autonomy rules out the possibility that its contracts with third parties, and more particularly the arbitration clauses signed by it, may be considered as contracts concluded by a representative or an agency, i.e., binding on the founding States. The predominant role played by these States in AOI . . . cannot affect AOI's independence and legal personality, nor can it lead to the conclusion that AOI bound the founding states when dealing with the third parties.[17]

E. *ICC Case No. 9762*

The existence of joint obligations of a state also played a role in the decision of the tribunal in ICC case No. 9762 of 2001,[18] although the arbitrators also seem to have drawn on the concept of agency/representation and on theories of attribution under public international law.

In this case, two companies in the A Group, Ax and Ay, had contracted to carry out several civil and industrial projects in the republic of Z at the request of the Ministry of Agriculture and Food of Z. The debit and credit situation resulting from the carrying out of the above transactions was checked by the parties in 1996 and a document, later referred to as the "Verification Act," was signed by Ax and the Ministry of Agriculture and Food of Z on July 1. Shortly after the issuance of the Verification Act, Ax transferred all the credits of the A Group mentioned in the Verification Act to A. Meanwhile, in Z, the Ministry of Agriculture and Food was liquidated and a new Ministry of Agriculture was created. The following day, a new body, the State Fund for Development of Agriculture of Z, was established to pay the debts of the liquidated Ministry. Two years later, the Ministry of Agriculture along with the Ministry for Amelioration and Water Management were abolished and merged into a new Ministry of Agriculture and Water Management. Difficulties ensued regarding the completion of the contracting projects and the payment of the amounts mentioned in the Verification Act, and A initiated ICC arbitration on the basis of the arbitration clauses contained in contracts concluded between Ax and Ay and the Ministry of Agriculture and Food of Z from which the asserted credits originated.

In the arbitration, A claimed against the Ministry of Agriculture and Water Management of Z, as the successor of the former Ministry of Agriculture and Food of Z (first respondent), the State Fund for Development of Agriculture of Z (second respondent) and the Government of Z (third respondent). The second and third respondents did not participate in the proceedings. A based its claim for payment on the Verification Act. The first respondent declared not to have any objection to the jurisdiction of the ICC International Court of Arbitration and submitted a counterclaim for damages caused by breach of contract by Ax and Ay. In its award, the arbitral tribunal first held that A was a legitimate assignee of the

---

[17] XVI Y.B. COM. ARB. at 180-81.
[18] XXIX Y.B. COM. ARB. 26 (2004).

alleged credits transferred to it. On the other hand, it held that A was not a proper counter-respondent to the counterclaim, as that claim was based on the contracts, not on the alleged credit that had been transferred. Concerning the second respondent, the tribunal held that the Fund had not fully inherited the obligations of the former Ministry of Agriculture and Food of Z and was not to be considered as its legitimate successor. The arbitral tribunal had therefore no jurisdiction over the second respondent. Finally, as far as state Z was concerned, the arbitral tribunal decided that the Ministry represented the State and the State was bound by its acts, even if the Ministry was a legal person, as it certainly was. The first respondent had accepted the jurisdiction of the arbitral tribunal and in doing so, implicitly and necessarily also appeared as the representative of the State of Z in a matter pertaining to its department. Consequently, the arbitral tribunal held that it had jurisdiction over the State of Z as third respondent, because it was validly represented by first respondent, the Ministry, and no distinction was to be made between their liabilities. The arbitral tribunal referred in its decision to the theory that if a party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it.

F. *The Svenska Petroleum Exploration case*

In *Svenska Petroleum Exploration AB* v. *Lithuania,* the decision of the arbitral tribunal was based both on the existence of a commonality of obligations and on the state's approval of the agreement containing the arbitration clause.

On April 28, 1993, Svenska Petroleum Exploration AB ("Svenska") entered into a joint venture agreement ("JVA") with AB Geonafta ("Geonafta") and allegedly with the Government of the Republic of Lithuania (the State) for the purpose of exploiting certain oil fields in Lithuania. In June 2000, a dispute arose between the parties and was referred to ICC arbitration in Copenhagen pursuant to the clause in the JVA. The State objected to the jurisdiction of the arbitral tribunal, alleging that it was not a party to the JVA or to the arbitration clause therein. On December 21, 2001, the arbitral tribunal issued an interim award on jurisdiction holding that the State was a party to the JVA and was bound by the arbitration clause.[19] The State did not challenge the interim award before the Danish courts and continued to participate in the arbitration. On October 30, 2003, the arbitral tribunal issued a final award on the merits directing the State and Geonafta to pay Svenska US $12,579,000 plus interests and costs. The State did not challenge the final award.

On April 2, 2004, Svenska sought enforcement of the final award against the State and Geonafta in the Commercial Court at the Queen's Bench Division of the High Court in London. On April 7, 2004, the High Court granted enforcement. On January 11, 2005, the High Court denied Svenska's application to have the State's

[19] Unpublished.

application to set aside the enforcement order on grounds of sovereign immunity dismissed.[20] On November 4, 2005, the Court rejected Svenska's argument that the State had waived immunity under the State Immunity Act 1978.[21]

Svenska submitted that the immunity defense must fail since under Section 9 of the 1978 Act, a state waives immunity by entering into a written arbitration agreement. The Court was therefore confronted with the question of whether the State was party to the arbitration clause in the JVA. It determined that it had to reach an independent conclusion on this issue and further considered that the question was governed by Lithuanian law, the law governing the underlying agreement. One problem in this respect was that the arbitration clause provided for arbitration of disputes between the "founders," being the collective definition of Geonafta and Svenska set out in the preamble to the JVA. This notwithstanding, the Court concluded from an analysis of the facts of the case, including pre-contractual negotiations, that there was a common intention of the State, Geonafta and Svenska that their disputes (including those involving the State) should be settled by arbitration and that the dispute resolution provisions of Article 9 of the JVA should apply to disputes between the State and Svenska, notwithstanding the inappropriate use of the words "founders" and other words in that article.

The decision was confirmed by the Court of Appeal on November 13, 2006.[22] Two important factors led the Court to conclude that Lithuania was to be regarded as being a party to the contract with Svenska. First, the contract specifically dealt with the rights and obligations of the State (in addition to those of Geonafta); and second, it explicitly provided that "[t]he Government of the Republic of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the agreement."[23] This led the Court of Appeal to decide that in signing the agreement it was Lithuania's clear intention not only to approve it but also to acknowledge itself as legally and contractually bound as if it were a signatory. The Court found it irrelevant that the Government was not itself explicitly named as a "Party" and that this term was reserved for Geonafta and Svenska.[24]

G. *The Zeevi Holdings case*

In *Zeevi Holdings* v. *The Republic of Bulgaria and The Privatization Agency of The Republic of Bulgaria,*[25] the arbitral tribunal based its decision on the agency theory. The dispute stemmed from the purchase of 55% of the share

---

[20] High Court of Justice, Queen's Bench Division, Commercial Court, Jan. 11, 2005, XXX Y.B. COM. ARB. 701 (2005).

[21] High Court of Justice, Queen's Bench Division, Commercial Court, Nov. 4 2005, case No. 2004: folio 272, XXXI Y.B. COM. ARB. 906 (2006).

[22] Svenska Petroleum Exploration AB v. Lithuania, [2006] EWCA Civ 1529.

[23] *Id*. at ¶ 4.

[24] *Id.* at ¶ 27.

[25] UNCITRAL Arbitration, Final award of Oct. 25, 2006, *available at* http:\\www.investmentclaims.com.

capital of Bulgaria's national airline, Balkan Bulgarian Airlines (the "Company"), by Zeevi Holdings together with Nafaim-Arkia Holdings Ltd. from the Republic of Bulgaria. Zeevi Holdings invested substantial amounts in the Company. On the other hand, the Government of Bulgaria did not fulfill its obligations pursuant to a privatization agreement, with the consequence that the Company was forced to declare bankruptcy. The tribunal decided that both the Republic of Bulgaria and the Privatization Agency were proper respondents to the claim. As far as the Republic was concerned, the tribunal's reasoning was that it was bound by the arbitration agreement which had been signed by the Privatization Agency as a "mere agent" of the Republic.[26] According to ordinary principles of contract law, this would have meant that the tribunal had jurisdiction over the Republic only. The tribunal nevertheless decided otherwise. With respect to the merits, after concluding that the actions of both respondents had to be taken into consideration in evaluating the conclusion and performance of the contract, the tribunal decided that if it were to make a finding of liability, only Bulgaria would be liable since the Privatization Agency had acted on behalf of and with the authorization of the State.[27]

H. *The Papillon cases*

The *Papillon*, *Bridas* and *Dallah* cases demonstrate that where two arbitral tribunals or two courts have to decide the same issues on the basis of the same or connected agreements, they may reach opposite conclusions based on varying interpretations of the law or the facts of the case.

In the *Papillon* cases, several contracts – some of which were not relevant for the disputes submitted to arbitration and are therefore not mentioned in this summary – had been concluded by Papillon Group Corporation ("PGC"), a Panamanian company, during the organization by the Republic of Syria of the 10th Mediterranean Games in Lataquié in September 1987. They gave rise to two successive ICC arbitrations.

By a Decree dated May 3, 1984, the President of the Syrian Republic had created a committee ("*Comité d'Organisation*") that would be responsible for the organization of the Games. As permitted by the Decree, this committee had set up a "*Comité de Publicité*" presided over by the President of the Arab Advertizing Organization Golan ("Golan"), who was instructed to proceed to the signature of a contract concerning the advertising that would be done during the Games.

It is in this context that a contract ("the Initial Contract") was concluded between Golan and PGC according to which PGC became Golan's exclusive agent for the sale of advertising space and the sale of merchandise relating to the Games. The revenue generated by the sales would be shared between the parties: 62% for Golan, 38% for PGC. The Initial Contract contained an ICC arbitration clause.

---

[26] *Id*. at ¶ 169.
[27] *Id*. at ¶ 172.

The Initial Contract was subsequently amended by two documents: an "Addendum" providing among other things that in case of arbitration, the arbitrators would have to decide the dispute according to general principles of law, justice and equity; and an "Annex" stipulating that Golan had signed the Initial Contract in the name of the *Comité d'Organisation* that was "excluded from all applicable laws and regulations and [was] responsible before the President of the State and the Prime Minister, consequently the Prime Minister [bore] full and direct responsibility in relation of the signed agreements."

A final contract (the "Final Agreement") was signed after the Games. It stipulated that all previous agreements had to be amended according to its terms. It provided *inter alia* that the name of the Syrian party had to be amended and replaced by "the *Comité d'Organisation* of the Mediterranean Games represented by the President of the *Comité de Publicité*, Mr. X – authorized to sign pursuant to the letter of the *Comité d'Organisation* No. . . . and the decision of the *Comité d'Organisation* No. . . . – and the Arab Advertizing Organization represented by its General Manager Mr. X." More importantly, Article 12 provided that the Syrian Republic, represented by the *Comité d'Organisation*, and the Syrian Government, represented by the Minister of Economic Affairs and the Minister of Interior, were fully responsible vis-à-vis PGC for the performance of all agreements signed by the two parties. Article 18 of the Final Agreement confirmed the previous arbitration agreement.

A dispute arose concerning amounts to be paid to PGC. It gave rise to a first arbitration[28] brought by PGC against the Syrian Republic and Golan, relating exclusively to the advertisements to be placed within the buildings where the Games took place. Three arbitrators were appointed. The proceedings took place in Paris, in accordance with the arbitration clause.

The Syrian Republic signed the terms of reference but disputed the jurisdiction of the arbitral tribunal. In deciding the issue of jurisdiction according to general principles of law, the tribunal referred to the principles of *pacta sunt servanda*, good faith performance, and the rule according to which contracts can only be amended by mutual consent.

The tribunal decided that it had jurisdiction over the State. It reached the conclusion that the *Comité d'Organisation* was an organ of the State. It was set up by a presidential decree, had no legal personality, status or budget, was exempted from all laws and regulations and received its instructions from the Vice Prime Minister and the Minister of Economic Affairs. The Ministers of Education and Information were members of its board. Its constitutive decree provided that it was accountable to the Prime Minister for all its decisions and activities. This was confirmed in "Annexe A" to the Initial Contract, Article 5 of which stipulated that "the Prime Minister has the full and total responsibility for the signed agreements." The tribunal also referred to both Article 12 of the Final Agreement, which specifically provided that the Syrian Republic and the Syrian Government were fully responsible vis-à-vis PGC for all agreements

[28] ICC case No. 10729, unpublished.

signed between the two parties, and Article 18 of the Final Agreement, which confirmed the arbitration clause. The tribunal concluded that the Republic was bound by the latter.

In its decision on the merits, the tribunal found both respondents jointly and severally liable. An action to set aside was filed by the respondents before the Paris Court of Appeal, but was dismissed. The award was subsequently performed in totality by the respondents.

A second arbitration[29] was subsequently started by PGC against the Syrian Republic, Golan and a third party, "L'Etablissement Général de Commerce et de Distribution," referred to as GOTA. GOTA was signatory to one agreement only, a "consensual agreement" concluded with PGC. The amount claimed in the second arbitration was different from that claimed in the first.

The Syrian Republic refused to sign the terms of reference and objected again to the jurisdiction of the arbitral tribunal. The tribunal in these proceedings comprised three new arbitrators and by majority decision declined jurisdiction over the Syrian state.

The tribunal based its decision on the following principles:

– A state becomes party to an international commercial arbitration only if it has expressed a clear and explicit consent to this effect. This consent must be expressed according to the domestic rules of public law of that state.

– The Syrian state has not made any contractual undertaking vis-à-vis PGC and has not signed any arbitration agreement.

– It has not signed the terms of reference as in the first arbitration.

– The *Comité d'Organisation*, although a state organ, had not been authorized to represent the State in an arbitration proceeding. The close control of the State over the *Comité* was insufficient to rebut the presumption resulting from the absence of signature of the arbitration clause by the State according to which only the company that has signed the clause is party to the arbitration agreement.

– Considering that the claimant was not able to produce the original copy of the Final Agreement, and that the photocopy that was produced could not be considered a reliable and legally valid document, the tribunal decided not to take it into consideration. Consequently, Article 12 thereof, under which the State was responsible for the performance of all the agreements, was also not taken into consideration.

– The decision of the tribunal in the first arbitration could not have *res judicata* effect, since there was no identity of parties, object or cause.

---

[29] ICC case No. 12923, unpublished.

The tribunal, having jurisdiction over the other two respondents, dismissed the claims on the merits. The claimant's action to set aside the award before the Paris Court of Appeal was dismissed.[30]

I. *The Bridas cases*

Bridas v. *Turkmenistan* also gave rise to two ICC arbitral awards (No. 9058 and No. 9151) and numerous court decisions.[31]

ICC case No. 9058 gave rise to three ICC arbitration awards, two decisions of the District Court for the Southern District of Texas dated September 30, 2001 and September 30, 2004 and two decisions of the United States Court of Appeals for the Fifth Circuit dated September 9, 2003 and April 21, 2006.[32]

The facts of the case are quite simple. Turkmenistan has the fourth largest natural gas reserves in the world. It began securing bids for oil and gas exploration and production rights in 1992. In February 1993, Turkmenneft, a Turkmen government-owned entity, signed a joint venture agreement ("JVA") with Bridas, an Argentinean corporation. The JVA contained an ICC arbitration agreement. Significant problems developed in the performance of the JVA. Bridas alleged that the Turkmen Government ordered it to suspend work in the Keimer region in 1995, leading Bridas to pursue ICC arbitration proceedings in 1996. Bridas named the government-owned entity and the Turkmen Government as respondents. From the outset of the arbitration, Turkmenistan contended that it was not a party to the JVA. The arbitral tribunal rendered three partial awards in 1999 and 2000 and its final award in 2001. In particular, the tribunal decided that it had jurisdiction to determine its own jurisdiction over the Government and whether the Government was a proper party to the arbitration.

In deciding whether Turkmenistan was a party to the agreement, the tribunal undertook a complex and detailed analysis of the letter and spirit of the JVA.

---

[30] Cour d'Appel de Paris, 1ère Chambre, Section C, 26 mars 2009, Rep. 08/01578 and commentary by Jennifer Kirby & Denis Bensaude in 24(5) INT'L ARB. REP. 3 (May 2009).

[31] Beyond the articles quoted at notes 5 and 6 *supra*, the awards and decisions have been commented in particular by George Rosenberg, *State as Party to Arbitration*, 20 ARB. INT'L 387 (2004); Timothy G. Nelson, Bridas v. Turkmenistan, 24 ASA BULL. 584 (2006); Ali Malek & Christopher Harris, *A Pilgrimage to Paris:* Dallah v. Pakistan, 2(4) INT'L J. ARAB ARB. 23 (2010); Devika Khanna, Dallah: *The Supreme Court's Positively Pro-Arbitration "No" to Enforcement*, 28 J. INT'L ARB. 127 (2011).

[32] Most of these decisions have been published in 21(4) INT'L ARB. REP. (2006): Partial Award (ICC case No. 9058), Document 05-011026-012 A; Second Partial Award, Document 05-011026-013 A; Third Partial Award, Document 05-011026-014 A, Final Award, Document 05-011026-015 A; District Court Decision, Document 05-011026-023 X; first Court of Appeals Decision, 345 F.3d 347 (5th Cir. 2003), *cert. den.*, 541 U.S. 937 (2004); second Court of Appeals Decision, 447 F.3d 411 (5th Cir. 2006), *cert. den*., 549 U.S. 1051 (2006).

After detailing the representations embodied in the JVA that could only be fulfilled by the Government, it concluded:

> The Claimants were entitled to have a legitimate expectation that what was represented and guaranteed to them in the JV Agreement would be fulfilled. Only the Government could perform these requirements. It saw fit to have them included in the JV Agreement, by Presidential Decree. It confirmed that the requisite approvals and consents were in place to conduct operations ". . . based on the conditions established in the [JV Agreement]" and it saw fit to have the most important of them guaranteed with its consent. It cannot now resile from these facts or from the conclusion to which they lead: the Government is bound by the contractual commitments that only it could perform.[33]

On September 30, 2001, the District Court for the Southern District of Texas confirmed the awards. In relation to jurisdiction, the district court applied the famous decision *First Options of Chicago* v. *Kaplan*,[34] in which the Supreme Court of the United States held that "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." Applying that test, the district court found no clear and unmistakable evidence that the parties agreed that the tribunal would determine its own jurisdiction, and therefore undertook an independent review of whether the Government was bound to arbitrate with Bridas. It found that the Government of Turkmenistan, although non-signatory to the arbitration agreement, was bound under traditional principles of agency law, under estoppel theory and under the *alter ego* and third-party beneficiary theories.

In a decision dated September 9, 2003, the Court of Appeals for the Fifth Circuit partially invalidated the district court decision, having concluded that the Government of Turkmenistan was not subject to the jurisdiction of an ICC tribunal. Like the district court, the Fifth Circuit came to the conclusion that there was no clear and unmistakable evidence that the parties agreed that the tribunal would determine its own jurisdiction. Consequently, it undertook an independent review of whether the government was bound to arbitrate with Bridas. This decision is obviously wrong since the ICC Rules, incorporated by reference in the JVA, stipulate that the arbitral tribunal shall have the express authority to determine its own jurisdiction. In its analysis, the Fifth Circuit held that the district court erred in binding Turkmenistan under the various prevailing theories for binding non-signatories. Specifically, the Court held that:

1) with respect to agency, the district court committed clear error in concluding that the government entity was an agent of the Turkmen Government;

---

33 First Partial Award at 19.

34 514 U.S. 938, 944 (1995).

2) with respect to *alter ego*, the district court erred in failing to take into account all aspects of the relationship between Turkmenistan and the government entities;
3) with respect to estoppel, the district court erred in binding Turkmenistan when the Government neither relied on the arbitration agreement nor otherwise exploited the JVA; and
4) with respect to third-party beneficiary, the district court erred in binding Turkmenistan as a beneficiary of the JVA, where the Government never filed a claim against Bridas or otherwise sought to enforce its terms.[35]

However, The Fifth Circuit refused to exclude the possibility that the state of Turkmenistan might be found liable on a veil-piercing theory. Finding that the evidence on this issue was incomplete, it remanded the case to the district court for further hearing and reconsideration of whether Turkmenneft was the *alter ego* of the State. On remand, the district court held that there was insufficient evidence to support an *alter ego* theory and vacated the award.

---

[35] The reasoning of the Court of Appeals was severely criticized by Professor Roger Alford in the following terms:

> Thus, the goal of such government instrumentalities is to create within the government structure a special enterprise that resembles a private corporate entity in form and purpose. Such entities often are created devoid of any traditional regulatory function, and specially established for the purpose of engaging in commercial activities. Thus, while the entity itself may resemble a private corporation, the motivation of the government in establishing the entity, and the relationship of that entity vis-à-vis its "parent" are quite distinct.
>
> Bridas virtually ignored these distinctions, assuming that principles derived in the private sphere could be brought and applied in the government context. For example, in holding that the district court erred in its alter-ego determination, the Court imposed a test for parent-subsidiary alter ego status that is far removed from the context of government instrumentalities. One cannot address, as the Court requires, whether the government of Turkmenistan is the alter ego of Turkmeneft based on the fact that the parent and subsidiary have "common business departments" or "consolidated financial statements" or "common directors and officers" or "common stock ownership." In addition, the Court utilized traditional third-party beneficiary cases without addressing the special rules applicable to government contracts that may reflect public policies that afford rights to third parties to enforce the agreement. Likewise, in its analysis of agency, the Court utilized traditional notions of private agency to determine whether an "agency relationship" existed between Turkmeneft and Turkmenistan. Yet government agencies and instrumentalities do not easily lend themselves to such private comparisons . . . As difficult as it may be to develop a more accurate analysis of the circumstances under which a sovereign non-signatory should be bound by the signature of its instrumentality, Bridas certainly underscores the hazards of freely transposing criteria established in the private sector to government contracts.

Alford, *supra* note 5, at 14.

The decision of the district court was once again appealed before the circuit court. The Fifth Circuit again considered the question of whether the Government was liable to Bridas, focusing this time exclusively on the theory that the Government was the *alter ego* of Turkmenneft. In a decision of April 21, 2006, the Fifth Circuit reversed the district court ruling exonerating the State of Turkmenistan from *alter ego* liability, holding instead that Turkmenneft's corporate veil should be pierced so as to make Turkmenistan directly liable under the ICC award. It applied the federal common-law test agreed to by the parties, namely that *alter ego* liability requires a showing of: (1) control by the owner over the subject corporation; and (2) a finding that such control was misused to commit fraud or injustice. Although noting that corporate separateness was a "bedrock" principle of U.S. jurisprudence and that veil-piercing was only warranted in exceptional cases, the court held that on the facts of the case, Turkmenneft was the *alter ego* of the state of Turkmenistan and that the State was consequently liable for each of Turkmenneft's wrongful actions.

The Court found that the State of Turkmenistan had misused Turkmenneft's corporate form to commit a fraud:

> [T]here is ample evidence that after the 1995 export ban the Government misused Turkmenneft to harm Bridas by destroying the value of the JVA. In 1996, when the Government dissolved [Turkmenneft's predecessor] and replaced it with Turkmenneft, Turkmenneft was initially capitalized with the equivalent of only $17,000 U.S., and was funded by a State Oil and Gas Development Fund expressly rendered immune from seizure under newly enacted Turkmenistan law. Yet Turkmenneft became the party bound to arbitrate under the JVA and liable for any adverse award. At the same time, the Government issued a number of decrees distancing itself from the joint venture and attempting to limit its potential exposure to liability. The Government's manipulation of Turkmenneft to prevent any substantial damage award satisfied the "fraud or injustice" prong [of alter ego liability].[36]

Concerning the question of whether the state of Turkmenistan exercised the level of domination and "control necessary to pierce the corporate veil," the Fifth Circuit concluded that the facts of the case satisfied this threshold.[37] It noted that there were twenty-one factors which could be taken into consideration in deciding whether control of a subsidiary is so pervasive as to warrant veil-piercing. Applying these principles to the facts, the Fifth Circuit concluded that Turkmenneft's lack of financial independence, standing alone, was sufficient to establish the required level of domination and control by the state of Turkmenistan to pierce the corporate veil:

> The fact that Turkmenneft owned producing rights and equipment that it contributed to the joint venture does not in this case support a claim of financial separateness, because such resources could only carry value if the venture were

[36] *Bridas*, 447 F.3d at 417.
[37] *Id*. at 417, 419 and 420.

> allowed to keep its own revenues, which it was not. Further, the Government changed the law to prevent Turkmeneft's assets from being seized by a creditor such as Bridas, after the initiation of arbitration proceedings. The fact that a subsidiary maintains what amounts to a "zero balance," and relies exclusively upon another entity to service its debts, is strong evidence that the subsidiary lacks an independent identity.[38]

In conclusion, the Fifth Circuit found that Turkmenneft's gross undercapitalization, combined with the State's abuse of corporate form to commit a fraud, presented a clear case for piercing the corporate veil:

> Despite some indicia of separateness, the reality was that when the Government's export ban forced Bridas out of the joint venture, the Government then exercised its power as a parent company to deprive Bridas of contractual remedy. Intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil. It is true that the standard for this equitable remedy should be more stringent in breach of contract cases, because the creditor has willingly transacted business with a subsidiary and, as here, forewent the opportunity to obtain a warranty of Turkmeneft's debts by the Government. The standard is met in this case, however, because Turkmeneft assumed full responsibility for its obligations under the joint venture. The Government, as Turkmenneft's owner, made it impossible for the objectives of the joint venture to be carried out.[39]

Consequently, the Fifth Circuit ordered that final judgment on the full ICC award sum be entered for Bridas against the state of Turkmenistan. This decision has been strongly criticized by Professor Smit.[40] In particular, he emphasizes that it was on the basis of a doctrine (*alter ego*/piercing the corporate veil) foreign to Turkmenistan's own legal tradition that the Fifth Circuit not only held the Government bound by contractual obligations it had not assumed, but also exercised its jurisdiction over the Government on the basis of an arbitration clause it did not agree to. Professor Smit not only criticized the fact that the Fifth Circuit failed to consider whether it could properly apply its own law to determine the issue, but he also criticized the Fifth Circuit's misplaced reliance on the *alter ego* doctrine which is usually applied to attribute the subsidiary's conduct to a parent, rather than to justify the condemnation of the parent's own conduct.[41]

By contrast, a different decision was reached by an arbitral tribunal sitting in Stockholm in a second dispute between Bridas and Turkmenistan.[42] The dispute arose out of a joint venture agreement between Bridas SAPIC and Production

---

[38] *Id*. at 420.

[39] *Id.*

[40] *See supra* note 4.

[41] *Id*. at 334-35 and 337.

[42] Joint Venture Yashlar and Bridas SAPIC v. Government of Turkmenistan, ICC case No. 9151, Mealey's International Arbitration Report, Document 05-011026-020A, 16(10) INT'L ARB. REP. 6 (2001).

Association Turkmengeologia, a state-owned body nominated by the Government of Turkmenistan to establish a joint venture to carry out oil exploration and production operations in the Yashlar region. The agreement provided for ICC arbitration in Sweden, with the application of English law, but the Government was not designated as a party and did not sign the agreement. Nonetheless, Bridas contended that the Government was a party to the agreement and to its arbitration clause.

Arbitration proceedings were commenced in June 1996 by Joint Venture Yashlar and Bridas SAPIC seeking a ruling as to whether the Joint Venture Agreement was still extant or whether it was void, and also seeking damages. One of the respondents, the Ministry of Oil and Gas of Turkmenistan, had been substituted by Presidential Resolution for the Production Association Turkmengeologia. This ministry itself was later abolished and another ministry created in its place. This second ministry was also later abolished and replaced by the Turkmengeologia State Corporation, which eventually became the Turkmen party to the Joint Venture Agreement.

The factual background was that the relationship between the Joint Venture Yashlar and the Turkmen party had encountered serious problems. Joint Venture Yashlar claimed that its real counterparty under the Joint Venture Agreement was the State of Turkmenistan and not the Turkmengeologia State Corporation.

In the award, the tribunal first noted that the respondent Ministry was a separate legal entity under Turkmenistan law and that the Turkmen Civil Code explicitly provided that the state was not liable for obligations of state organizations which were legal entities and *vice versa*. However, the award went on to note that this was the beginning rather than the end of the enquiry and that: "[w]hile Governmental control of the trading entity does not justify one in identifying it with its Government, its separate legal existence under its own law does not mean that it cannot in any circumstances be identified as acting in a particular transaction as the organ, arm or alter ego of the State or Government."

The tribunal concluded that it was not bound to find that the Turkmen party was the organ, arm or *alter ego* of the State. This was despite there being many indications that the State was heavily involved in the negotiations, that there were many commitments in the Joint Venture Agreement which arguably could only have been made by the State and that the behavior of the State showed that it had a continuing interest even after the Joint Venture Agreement was signed.

According to the tribunal, the question that it faced was not whether the state-owned organization which signed the agreement was an arm or organ of the State, but whether the parties to the agreement intended that the State should be a party. In this respect, the tribunal decided:

> The Government of Turkmenistan obviously chose not to become a party to the JV Agreement but rather to authorize an agreement to be entered into by a body which was a legal entity in its own right having its own separate funds. Nor can it have escaped the notice of Bridas that the Government itself did not appear in the JV Agreement as their contracting partner. Whatever was said at the bidding

> round about the role of the Government, the Government did not become a signatory to the agreement and obviously must have made a deliberate decision not to do so. Nor is this surprising. The activities of the Turkmenian Party in the Joint Venture are commercial rather than sovereign activities. It need hardly be added that the Government's acts of authorization and approval and its acts of control, however far reaching, do not of themselves make it a party to the JV Agreement.

As is clear from the above, this decision stands in stark contrast to the finding of the majority of the arbitral tribunal in the first *Bridas* case.

J. *The Dallah case*

The *Dallah* case also gave rise to conflicting decisions, but this time from the English Supreme Court and the Paris Court of Appeal.[43]

The case concerned a dispute that was submitted to arbitration by Dallah Real Estate and Tourism Holding Company, a Saudi Arabian company and subsidiary of the Albaraka group, a major Islamic financial institution. Dallah provides services for pilgrims travelling to Saudi Arabia.

On February 16, 1995, Dallah contacted the Ministry of Religious Affairs of the Government of Pakistan to propose a long-term lease of buildings intended as accommodation for Pakistani pilgrims to Mecca. On July 24, 1995, the President of the Islamic Republic of Pakistan and Dallah signed a Memorandum of Understanding whereby Dallah undertook to acquire lands in Mecca and construct housing there for the Pakistani pilgrims.

Following an Ordinance of January 31, 1996, the President of Pakistan established a Trust, the main purpose of which was to collect savings from pilgrims, invest them and take measures designed to facilitate their going on the pilgrimage. In accordance with Article 89 of the Constitution of Pakistan, such an ordinance expires at the end of four months if it is not put before Parliament, unless it is re-promulgated. It was re-promulgated on May 2, 1996 and August 12, 1996, but not on December 12, 1996, the date on which the Trust ceased to have legal identity.

Prior to that, on September 10, 1996, Dallah entered into a contract with the Trust for the projected construction of accommodations in Mecca. It contained an ICC arbitration clause providing for arbitration in Paris.

---

[43] The two cases have been commented by Jacob Grierson & Mireille Taok, *Comment on Dallah v. Pakistan*, 26 J. INT'L ARB. 467 (2009); *Comment on Dallah v. Pakistan: Refusal of Enforcement of an ICC Arbitration Award against a Non-Signatory*, *id*. at 903; *Dallah: Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d'Appel*, 28 J. INT'L ARB. 407 (2011); by Gilles Cuniberti, *Divergence d'appréciation entre juges français et anglais du contrôle sur l'existence d'une convention d'arbitrage*, 2 PARIS J. INT'L ARB. 435 (2011); by Julian Lew, *The Implications of the Dallah Case for International Commercial Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION, THE FORDHAM PAPERS 2011 at 129 (2012); and by George Bermann, *The UK Supreme Court Speaks to International Arbitration: Learning from the* Dallah *Case*, 22 AM. REV. INT'L ARB. 1 (2011).

The contract made reference to a guarantee to be provided to the Government although it was not a signatory to the contract. The housing project never came to fruition and, as already mentioned, following a change of Government in Pakistan, the Trust ceased to exist in December 1996. In May 1998, Dallah commenced ICC arbitration against the Government. The tribunal issued three awards, successively on jurisdiction, applicable law and the merits and awarded Dallah approximately U.S. $20 million in damages and legal costs. Dallah endeavoured to enforce the final award in the United Kingdom. The Government opposed enforcement and commenced annulment proceedings against all three awards before the Paris Court of Appeal.

Enforcement was denied by the English courts, successively the High Court,[44] the Court of Appeal[45] and finally the Supreme Court in a decision of November 3, 2010[46] on the basis of Article 103(2) of the 1996 Arbitration Act (incorporating Article V(1)(a) of the New York Convention). On the other hand, the Government's request for annulment was denied on February 17, 2011 by the Paris Court of Appeal.

The English courts decided that the law by which they had to decide whether Pakistan was a party to the arbitration clause was the law of France. They further noted that the consistent practice of the English courts was to re-examine for themselves the jurisdiction of the arbitral tribunal and that the scope of this enquiry was a full re-hearing and not a review.

With respect to the French rules that were applicable to the issue of validity of the arbitration agreement, the courts noted that the experts on both sides were in agreement on the following:

– That the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law and can be determined according to rules of transnational law;

– that under French law, in order to determine whether an arbitration clause extends to a person who is neither a main party nor a signatory of the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings had the common intention to be bound by the said agreement and the arbitration clause; and that the existence of a common intention of the parties has to be determined in the light of the facts of the case. To this effect, the courts would consider the involvement and behavior of all the parties during the

---

[44] [2008] EWHC 1901 (Comm); [2009] 1 All E.R. (Comm) 505; [2008] 2 Lloyd's Rep. 535; 121 Con. L.R. 138; (2008) 105(33) L.S.G. 21.

[45] [2009] EWCA Civ 755; [2010] 2 W.L.R. 805; [2010] Bus. L.R. 384; [2010] 1 All E.R. 592; [2010] 1 All E.R. (Comm) 917; [2010] 1 Lloyd's Rep. 119; [2009] 2 C.L.C. 84; [2010] B.L.R. 1; 125 Con. L.R. 37; [2009] 30 E.G. 67 (C.S.); TIMES, Aug. 24, 2009.

[46] [2010] UKSC 46; [2011] 1 A.C. 763; [2010] 3 W.L.R. 1472; [2011] Bus. L.R. 158; [2011] 1 All E.R. 485; [2011] 1 All E.R. (Comm) 383; [2010] 2 Lloyd's Rep. 691; [2010] 2 C.L.C. 793; 133 Con. L.R. 1; (2010) 160 N.L.J. 1569; TIMES, Nov. 5, 2010.

negotiation, performance and, if applicable, termination of the underlying agreement;

– finally, that what was to be found was the subjective intent of the parties on the basis of their objective conduct.

The English courts then considered the factual analysis made by the three arbitrators in connection with the facts relating to the negotiation, signature and performance of the agreement and the events following the repeal of the Ordinance. They reached the conclusion that on the evidence before them, it was not the subjective intention of all the parties that the Government should be bound by the agreement or the arbitration clause.

In the setting aside procedure, the Paris Court of Appeal, in its decision of February 17, 2011,[47] reached the opposite conclusion. After a review of the facts in the record in relation to the negotiation, signature, performance and termination of the agreement, it reached the conclusion that "the argument to the effect that the Arbitral Tribunal was wrong to extend the arbitration clause to the Government of Pakistan, Ministry of Religious Affairs and find that it had jurisdiction is unfounded." It therefore dismissed the request to set aside.

The English courts proceeded obviously on an objective approach, which is not the one dictated by French law. They seem to have been convinced in particular by the change in the proposed transaction from an agreement with the Government, the Memorandum of Understanding, to – finally – a contract with the Trust; as well as by the deliberate structuring of the contract to be between Dallah and the Trust and the fact that the only role of the Government was to guarantee the Trust's loan obligations and to receive a counter-guarantee from the Trust; also by the fact that Dallah had been advised throughout the transaction by lawyers who must have understood the difference between a contract with a state entity and a contract with the state itself; and finally by the fact that the Trust was established as a corporate body with an independent legal personality.

On the other hand, the Paris Court of Appeal, in accordance with the French approach, noted the continuous involvement of the Government during the whole process from the beginning of the negotiations to the termination of the contract. It noted in particular that:

– during the entire period prior to the conclusion of the contract, the Government was Dallah's sole counterpart and negotiating partner; that the Government directly negotiated the contract, although the signatory, from a legal standpoint, was the Trust;

– it emphasized that the Government was also involved during the performance of the contract, as evidenced, in particular, by the direct

---

[47] 2011 REV. ARB. 286.

involvement of two employees of the Government in the organization of savings plans and advertising campaigns related to the project;

– it stressed that the Government directly handled the termination of the contract;

– it therefore concluded that the Government behaved as if the contract were its own; this involvement, in the absence of evidence that the Trust took any actions, as well as the Government's behavior during the pre-contractual negotiations, confirmed that the creation of the Trust was purely formal and that the Government was in fact a true Pakistani party in the course of the economic transaction.

III. THE NON-SIGNATORY STATE AS ADDITIONAL CLAIMANT

Cases where the state wants to intervene in the arbitration procedure as additional claimant are rare. One is a case that resulted in an UNCITRAL interim award on jurisdiction of August 31, 2004.[48] Subsequently, an action to set aside the award was initiated by the first respondent against claimants before the Swiss Federal Court.

The issue of extension, however, was not dealt with by the Federal Court since it dismissed the action in a decision of February 4, 2005,[49] having reached the conclusion that the parties had opted out of the action to set aside, as is permitted by Swiss law.[50]

In its recourse, the first respondent in the arbitration complained that the arbitral tribunal had accepted the extension of an arbitration clause to State X as an additional claimant and had refused the extension to Company Z as an additional defendant. The facts were the following: In the early 1990s, State X started privatization of its banking system. In 1998, the National Property Fund ("NPF") of that state and Company Y entered into an agreement for the sale and purchase of shares in Bank B (the "Agreement"), according to which Company Y agreed to purchase the NPF's shares in Bank B. The agreement provided that any and all disputes or differences arising out of or in connection with the agreement would be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The seat of the arbitration would be Zurich. The language of the arbitration would be English. Subsequently, as foreseen by the Agreement, Company Y transferred its holding in Bank B to Company Z. Later, Bank B was

48 Unpublished.

49 ATF 131 III 173 and 23 ASA BULL. 496 (2005) and note by François Perret.

50 According to Article 192 of the Swiss Private International Law Act: "provided that neither of the parties has its domicile, habitual residence or place of business in Switzerland, they can agree, in express terms either in the arbitration agreement or in a subsequent agreement, to waive the right to file an appeal; they can also exclude some of the grounds set out in Article 190 para. 2."

put into forced administration. In December 2002, the NPF and State X filed a Notice of Arbitration under the UNCITRAL Arbitration Rules against Company Y and Company Z. They requested a declaration that Company Y and Company Z had breached the agreement and that consequently they be ordered to pay the NPF and State X compensation for the damages suffered as a result of the breaches.

Company Y and Company Z objected to the jurisdiction of the arbitral tribunal over State X and Company Z. With respect to the former, the claimants invoked in the first place the existence of a normative consensus that State X could assert breach of contract and other claims under the Share Purchase Agreement. The concept of normative consensus is a recent development in Swiss law. As explained by Professor Bucher:

> Modern academic writing therefore distinguishes between "natural" consensus (in other words one based on the actual will of the parties) and "normative consensus" which is simply deemed to exist by operation of law and brings about contractual effects when one party was reasonably permitted to take the declaration of will of the other as being coincident with their own intention.[51]

Reference is made to normative consensus when there is disagreement between the internal wills of the parties but where, on the other hand, the agreement is created by law as an application of the principle of reliance. The law does not give effect to the real will of a party, but to what the other party could reasonably believe as being the real will of its counterpart. In this respect, claimants alleged that the role of the NPF in executing the government's privatization decision, the decisive role of the government of State X in negotiating and executing the sale of the Bank B shares to Company Y, the direct appeal by Company Y to State X's Government's interests in benefiting the economy of that state as a whole, and State X's express acknowledgement in the Share Purchase Agreement that its contracting party was part of the state machinery, made it clear that respondent should have always understood that the Share Purchase Agreement and the arbitration clause contained therein would bind State X, and, conversely, that State X could assume that respondents had always had that understanding. This was also the conclusion of the arbitral tribunal.

Indeed, according to the tribunal, it was clear from the Act that created the NPF that NPF was an instrument of State X. It provided that the activity of the NPF was to be directed by the Ministry for Administration of National Property. Among its prerogatives, the Ministry could issue privatization decisions. It is pursuant to these decisions that assets of state enterprises were transferred to the NPF. The lack of independence of the NPF from the state was confirmed by the effective control of the state authorities over the management of the NPF: The presidium was composed of members elected by the parliament and had no actual

---

[51] Eugen Bucher, *Commentary on Article 1 of the Swiss Code of Obligations, in* KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, OBLIGATIONENRECHT 1 at ¶ 6 (Heinrich Honsell, Nedim Peter Vogt & Wolfgang Wiegand eds., 1996).

autonomy when major policy decisions were to be made. The activities and the management of the Fund and its presidium were supervised by the Supervisory Board consisting of five members elected by the House of Deputies of the parliament. On the basis of the above, the arbitral tribunal reached the conclusion that the NPF was a functional part of State X and that when dealing with the NPF, the respondents were necessarily aware that they were dealing with an organ of State X or its Government. According to the arbitrators, the negotiation process showed that the NPF, an organ of State X, a body controlled by its highest authorities, implemented the will of the Government of State X, as expressed by the Ministry of Finance. Company Y negotiated primarily with the Minister of Finance and with the NPF as the instruments of State X. The final text of the Agreement was adopted by the Government of State X and offered to Company Y on a take-it-or-leave-it basis. Thus, although the Agreement was signed by the NPF and Company Y, Y's main counterpart under the Agreement was State X. The will of the parties, as understood by each of them, was undoubtedly that State X was a party to the Agreement. The fact that under the Act the NPF is a legal entity, and it has the power to sue and the capacity to be sued was deemed irrelevant. The arbitral tribunal considered that as any legal body, it could in some cases act independently and in others as an instrument of State X.

IV. THE RELEVANCE OF THE STATE ENTITY'S SEPARATE PERSONALITY

As we have noted in some of the above decisions, the fact that the state entity had a separate legal personality was considered a decisive element in the arbitral tribunal's award or in the court's decision. In many others, it was not. This latter approach is contrary to the position of the English Court of Appeal and of the Privy Council, as evidenced by recent decisions.

In the *Svenska Petroleum* case,[52] the English Court of Appeal has indeed expressed the view that

> [a] Government is not to be taken to be a party to an agreement or to have submitted to arbitration simply as a result of the fact that it has put forward a State organization to contract with a foreign investor. In a case where the State organization enjoys separate legal personality and the Government is not named as a party to the agreement and has not signed it in the capacity of a party, we think it would be difficult to reach any other conclusion.

In the same way, in its recent landmark decision in *La Générale des Carrières et des Mines ("Gecamines")* v. *F.G. Hemisphere LLC ("Hemisphere")*, rendered on July 17, 2012,[53] the Privy Council, overturning the Jersey Court of Appeal, held that an arbitral award against the Democratic Republic of Congo could not be enforced against Gecamines, an entity owned by the state with Jersey-based

[52] Svenska Petroleum Exploration AB v. Lithuania, [2006] EWCA Civ. 1529, ¶ 81.
[53] Privy Council Appeal No. 0061 of 2011, [2012] UKPC 27.

assets. Lord Mance of the Privy Council, looking to the UK State Immunity Act 1978 and the State Immunity (Jersey) Order 1985 – whereby the UK Statute applies to Jersey – reaffirmed the importance of the sovereign status of the state in the following terms:

> Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.[54]

The Privy Council also recognized that "[t]here may also be particular circumstances in which the State has so interfered with or behaved towards a State-owned entity that it would be appropriate to look through or past the entity to the State, lifting the veil of incorporation. But any remedy should in that event be tailored to meet the particular circumstances and need."[55]

V. CONCLUSION

As the above case law demonstrates, the answer to the question of whether the scope of an arbitration clause extends not only to signatories of the arbitration agreement or underlying contract, but also to non-signatory states, depends very much on the specific factual circumstances of the case.

The case law confirms that consent to arbitration may not only be expressed by words or by signature but also by conduct – although to a variable extent, depending upon the applicable law. From this perspective, an arbitration agreement can be interpreted as covering a non-signatory state on the basis of an explicit (by a specific wording) or an implicit intent to be bound. More particularly, the role played by the state at the time of the conclusion, during the performance or in relation to the termination of the agreement is a determinative factor. It is also clear that the factual indicia retained by the arbitral tribunal must demonstrate a contractual intent and not simply an intervention of a state in the context of its regulatory or supervisory authority.

Another element which leads arbitral tribunals and national courts to include a non-signatory state within the scope *rationae personae* of an arbitration agreement

---

[54] *Id.* at ¶ 29.
[55] *Id.* at ¶ 30.

is the fact that the state company or entity has assumed in the relevant agreement obligations, some of which can only be performed by the state or with the intervention of the state, beyond its role of regulatory authority; or, in other words, the fact that the substantive-law rights and obligations in the disputed contract also extend to the non-signatory state.

Theories of agency/representation, estoppel, *alter ego* and third-party beneficiary are also sometimes applied, although less frequently.

Finally, with respect to states, the doctrine of piercing the corporate veil will find application only in extreme circumstances when the state has abused its control of the state company or entity to commit fraud or injustice.

It remains that whether the circumstances of the case will be interpreted as implying consent to arbitration or, generally speaking, as implying the "extension" of the arbitration clause to the non-signatory state, is to a large extent a matter of personal judgment. This explains why, confronted with relatively similar factual and legal contexts, different arbitral tribunals or courts may sometimes reach – and have sometimes reached – opposite conclusions.