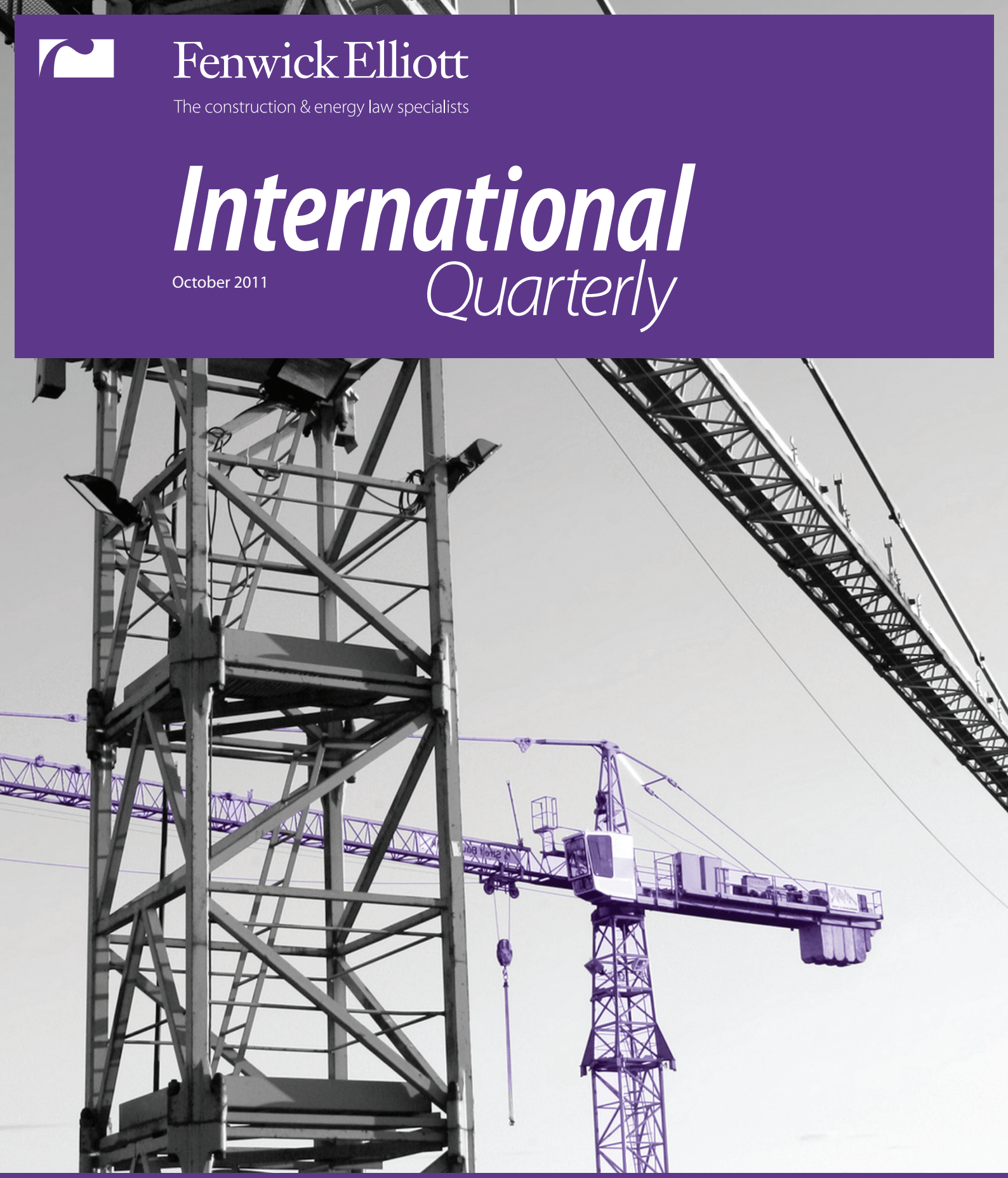
Fenwick Elliott

The construction & energy law specialists

International Quarterly

October 2011



We will be launching our new ***International Quarterly*** newsletter this Autumn which will provide informative and practical articles regarding legal and commercial developments in construction and energy sectors around the world.

In advance of the first issue we are pleased to provide you with an example of the type of articles ***International Quarterly*** will feature.

In this issue:

In his article "Dallah; the differing Policy for Enforcement of an Arbitration Award in England and France", Nicholas Gould comments on the reported judgements relating to the Dallah arbitration award.

Fenwick Elliott
The construction & energy law specialists

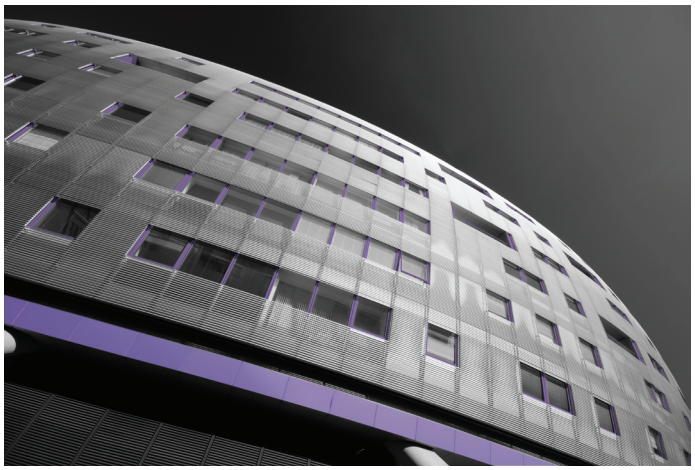
International Quarterly

Commentary:

International dispute resolution & arbitration

October 2011

Dallah; the differing Policy for Enforcement of an Arbitration Award in England and France



The reported judgments relating to the Dallah arbitration award has created international interest in the field of commercial arbitration. The judgments of the English and French Courts concern the enforcement of an arbitration award made by an ICC arbitral tribunal sitting in Paris. The award required the Government of Pakistan to pay Dallah US$20,588,040.

The arbitration

A Saudi construction company, Dallah, signed an agreement with a Pakistani trust for the financing and construction of a centre in Mecca for Pakistani pilgrims. The contract provided for ICC Arbitration in Paris. The trust ceased to exist shortly after the contract had been executed. A presidential order issued by the Pakistani Government had lapsed, which meant that the trust no longer had any powers. The minister of religious affairs then sent a letter to Dallah claiming contractual breaches and repudiation by Dallah. The minister was a Government official, but also before the demise of the trust he was the trust's secretary.

As the trust no longer existed, Dallah commenced arbitration against the Government of Pakistan. Dallah argued that the Government had been deeply involved in the negotiations and therefore had a sufficient interest in the contract to have standing in the arbitration as respondent. The arbitral tribunal decided that the Government of Pakistan was effectively the controlling party of the trust.

This was based on;

"trans-national general principals and usages reflecting the fundamental requirements of justice and international trade and the concept of good faith in business".

The arbitral tribunal found that the Government of Pakistan was liable and ordered it to pay damages of around US$18 million. The Government refused to honour the award and Dallah sought enforcement.

Enforcement in England

Initially, Dallah sought enforcement of the final award in England. In the High Court, at first instance, enforcement was denied. It was also denied by the Court of Appeal and the Supreme Court. This is a rare case of the English Courts refusing enforcement of an international arbitral award. The Supreme Court judgment of 3 November 2010 considered that the application of the New York Convention would require strict compliance with the law of the contract. Section 103(2)b of the Arbitration Act 1996 repeats Article V(l)(a) of the New York Convention, which sets out one of the circumstances when an arbitration agreement is not valid:

"the arbitration agreement was not valid … under the law of the country where the award was made"

The law of the contract was French law, which did not leave room for trans-national general principles to be applied. More importantly, the parties' experts on French law agreed that the test that a French Court would apply would be one of the common intention of the parties. The Supreme Court accepted that according to French law the test was whether there had been a common intent of the Government to be a party to the arbitration agreement. According to the facts available there was no evidence at all of any such common intention.

Kompetenz-kompetenze

A key question was the extent to which the tribunal had authority to rule on its own jurisdiction. They clearly do, but this

Fenwick Elliott
The construction & energy law specialists

International Quarterly

Commentary:

International dispute resolution & arbitration

October 2011

does not address the extent to which the tribunal's conclusion is subject to review or the extent of that review. A tribunal to an international commercial arbitration may have to consider its jurisdiction in order to take matters forward to a conclusion. For example, Article 16(1) of the UNCITRAL model law provides that an arbitral tribunal has the power to rule on its own jurisdiction. However, Article 34(2) provides that an award can be set aside by the court of the seat in the absence of a valid arbitration agreement. There are it appears, two bites at the cherry.

French law appears to follow this approach. In the Pyramides case (Republique Arabe d'Egypte v Southern Pacific Properties Ltd, Paris Cour d'appel, 12 July 1984) the tribunal decided that Egypt was a party to the agreement, rather than a Government owned organisation that dealt with tourism. The Cour d'appel decided that the arbitral tribunal could not finally decide if it had jurisdiction, even if the tribunal had to consider and decide the point as part of its mission.

In the United States, the Court of Appeal (3rd Circuit) considered this point in the case of China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation (2003) 334 F3d 274. They held that a court must come to an independent conclusion as to the question of whether there is an arbitration agreement between the parties, regardless of the tribunal's view.

The Supreme Court in England followed the approach of the French and US Courts. So, under English law a court is required to consider afresh the question as to whether there is an arbitration agreement. A court is not bound to enforce just because the tribunal has decided that it has jurisdiction.

Enforcement in Paris

During the English proceedings Dallah also sought enforcement in Paris. The Cour d'appel enforced the award by its judgment of 17 February 2011. Importantly, the Cour d'appel also applied French law but adopted a different test. The Cour d'appel did not look for any evidence in respect of common intent. Instead they asked whether the Government of Pakistan had objectively acted as if it were a party to the contract. The Court decided that the Government had acted as if it was a party to the contract, and was in fact the "altered ego" of the Trust.

Importantly, this was not based upon the application of existing French law, but a development. In the case of ELF Aquitain v Orri, The Cour de Cassation came to the conclusion that the application of the alter ego principle could only arise in cases of fraud. That case involved an agreement executed by a company, but the Court extended the reach of the arbitration agreement to the single shareholder of the company, quite simply because the Court came to the conclusion that there had been a fraudulent intent to use the company as a shield for all liability. In the Dallah case there was no allegation of fraud against the Government of Pakistan.

Declaration in Pakistan

The Government of Pakistan sought a declaration from the Pakistani Court. The Pakistani Court ruled that the Government was not a party to the agreement. The ramifications of that ruling is not only that Dallah will not be able to enforce the award in Pakistan, but that the Court may also hear the dispute between the Government and Dallah. The Government could commence proceedings in its local Courts against Dallah.

The only question now is whether the case finds its way to the Cour de Cassation in France. Will that Court allow the alter ego doctrine to be applied on the basis of good faith and fairness in business transactions, in the absence of any allegation of fraud?

One final point to consider is whether this issue concerns the conduct of the proceedings (and the powers of the Tribunal during the proceedings) or simply the identification of those who should be a party to the proceedings at the outset. Should a duty of good faith operate to force a party to respond in arbitration beyond the immediate parties identified expressly in the contract?

Conclusion

A tribunal has jurisdiction, indeed it has an obligation, to consider its jurisdiction if challenged at the outset of the arbitration. The court of the seat may reconsider the question on the application of a party. If a tribunal decides that it has jurisdiction and delivers a final award, the court of the place of enforcement may reconsider the question as to whether there is a valid arbitration agreement "under the law of the place where the award was made".

In this case the English Supreme Court refused to enforce the award on the basis that the application of the "common intention" test (agreed by the experts) under French law meant that the respondent was not a party to the arbitration agreement. The French court adopted a different approach and enforced the award. Further developments are awaited.

Nicholas Gould
Partner
Fenwick Elliott

Nicholas Gould BSc (Hons) LLM FRICS FCIArb MCIOB is a partner in the specialist construction, engineering and energy lawyers Fenwick Elliott LLP, where he conducts a mix of international dispute resolution and non-contentious work. He is a solicitor, chartered surveyor, accredited adjudicator and CEDR Solve lead mediator. He acts for contractors, employers and governments in the building, construction, engineering, infrastructure, transport, energy, oil and gas, and process engineering sectors.

ngould@fenwickelliott.com
Tel: +44 (0) 20 7421 1986
www.fenwickelliott.com

Contact the editor: Jeremy Glover, jglover@fenwickelliott.com