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A New Episode In The Jnah vs. Marriott Saga : The 17 December 2013 Decision Of The Paris Court Of Appeal

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On 17 December 2013, the Paris Court of Appeal added a new chapter to the Jnah vs. Marriott saga, when it ruled on an action to set aside an arbitral award issued on 3 February 2012 by which an arbitral tribunal denied jurisdiction over claims brought on behalf of Jnah relating to the termination of a hotel management contract.

This decision, which applies the new regime of French arbitration law, confirms that, as had been held by the French Cour de cassation in the Abela case (Cour de cassation, 6 October 2010, Rev. Arb. 2010, p. 815) under the previous arbitration law, the French juge de l'annulation conducts a full review of an arbitral tribunal's decision that it lacks jurisdiction. Just as it does if a positive finding of arbitral jurisdiction is the subject of a setting aside action, the juge de l'annulation examines all legal and factual elements that allow it to assess and determine the existence and scope of the arbitration agreement.

By way of background, the underlying dispute stems from five agreements relating to the construction and the management of a hotel concluded between the Lebanese company Jnah Development SAL ("Jnah") and the US company Marriott International Hotels Inc. ("Marriott"), all of which contained an ICC arbitration clause.

A dispute arose between the parties and Marriott commenced a first arbitration procedure against Jnah ("Jnah I"), seeking a declaration that it had complied with the contracts but that Jnah had committed various breaches thereof. In 2003, an arbitral tribunal rejected Marriott's claims and granted certain counterclaims of Jnah.

A few years later, Jnah commenced a separate arbitration against Marriott ("Jnah II"), alleging different violations of the parties' agreements, invoking the same ICC arbitration clause. While that arbitration was underway, Marriott terminated the agreements with Jnah, leading the parties to raise claims regarding the termination before the arbitral tribunal. In 2009, that arbitral tribunal issued an award granting damages in favour of Jnah concerning Marriott's management of the hotel, but denying jurisdiction over any claims concerning termination of the parties' agreements. Marriott's subsequent action to set aside the award in favour of Jnah was denied by the Paris Court of Appeal.

As the Jnah II arbitration was nearing its end, the majority shareholder in Jnah (a family group) transferred its shareholding to another Lebanese group, which assigned to the principal of the former majority shareholder ("Mr F.") all rights and liabilities relating to the ongoing Jnah II arbitration. A series of acts and agreements were concluded: (i) an agreement between the parties to the transfer of the majority stake, assigning the outcome of the arbitral proceedings to Mr F.,

regardless of the final outcome; (ii) a resolution approving the assignment of the outcome of the dispute between Jnah and Marriott, by the new shareholders; (iii) a power of attorney granting Mr F. the power to represent and defend Jnah "in all that is related to the existing dispute with the company Marriott International Inc. and [Jnah] and arising out of the relationship that existed with [Jnah] before 4 May 2009 [date of the transfer of the majority stake] including the arbitration case that is pending between [Jnah] on one side and the company Marriott International Inc. before the ICC and before courts of all type, level, functions and features…", and (iv) an undertaking by the holder of the power of attorney to bear the financial consequences in the event of an adverse award.

After the transfer of the majority share and the conclusion of these acts and agreements, Mr F., holder of the aforementioned power of attorney, commenced a third arbitration against Marriott in the name of Jnah ("Jnah III"), on the basis of the same arbitration clause, seeking damages for Marriott's termination of the hotel management contract.

In its Jnah III award dated 3 February 2012, the majority of the arbitral tribunal declined jurisdiction, holding that the scope of the power of attorney and assignment of rights to Mr F. was limited to the then ongoing Jnah II proceedings and could not be interpreted as including other claims and disputes between Jnah and Marriott not settled by the Jnah II proceedings.

Jnah sought the annulment of the award before the Paris Court of Appeal on the basis of Article 1520-1° of the French Code of Civil Procedure, pursuant to which the award may be set aside if the arbitral tribunal either wrongly upholds or declines jurisdiction. Jnah claimed, notably, that the Jnah III arbitration proceedings were validly brought in its name, since the power of attorney given to Mr F. concerned the "dispute" in general with Marriott arising out of the contractual relations prior to the date when the majority shareholding in Jnah was transferred, and was not limited only to the then ongoing Jnah II arbitral proceedings.

Marriott argued that the arbitral tribunal's interpretation of the scope of the power of attorney given to Mr F. was not really a decision on its jurisdiction, but rather constituted a question of admissibility of the claims brought before it by an alleged representative of Jnah. According to Marriott, such a question of admissibility does not trigger a full review by the juge de l'annulation.

The Paris Court of Appeal held first that the arbitral tribunal's determination on the scope of the power of attorney was, in fact, a decision on the arbitral tribunal's jurisdiction and not a decision regarding the admissibility of the claims. The Paris Court of Appeal therefore held that it was entitled to exercise a full review of the decision of the arbitral tribunal.

The Court then confirmed that the juge de l'annulation reviews a decision of an arbitral tribunal on its jurisdiction by examining all legal and factual elements that allow it to determine the existence and scope of an arbitration agreement. After performing its own assessment of the applicable elements of law and fact (in particular, the series of acts and agreements entered into between the new majority shareholder of Jnah and Mr F.), the Court of Appeal held that the power of attorney was intended to cover any disputes between Jnah and Marriott arising from their contractual relations prior to the sale of the majority shareholding in Jnah and was not limited just to the Jnah I and Jnah II proceedings. The Court of Appeal thus concluded that the arbitral tribunal had wrongly declined jurisdiction and set aside the award pursuant to Article 1520-1° of the French Code of Civil Procedure.

It is worth noting that the Court of Appeal did not reproduce in extenso the terms of the power of attorney. In fact, the decision only quoted some of the language of the power of attorney, omitting the very language that the majority of the arbitral tribunal had interpreted as limiting the scope of the power of attorney to the then pending Jnah II proceedings (namely, a second sentence containing the wording "this being a general power of attorney in relation to this arbitration case"). In this respect, the decision of the Court of Appeal may be questioned, since it does not address

(and seems to ignore) an important part the arbitral tribunal's reasoning.

This case is a confirmation of the Abela approach of applying the same extent of review to arbitral decisions denying jurisdiction as is applied to arbitral decisions upholding jurisdiction. However, the Abela decision had been rendered under the former regime of French arbitration law, pursuant to which the juge de l'annulation had two different grounds for the annulment of an award on jurisdiction, depending on whether jurisdiction was upheld or denied. Under that regime, if the arbitral tribunal upheld its own jurisdiction, Article 1502-1° allowed the judge to review whether the arbitrator had ruled upon the matter in the absence of an arbitration agreement or on the basis of an agreement that was null and void or expired, but the ambit of Article 1502-1° was expressly limited to cases where a tribunal had upheld its jurisdiction. If the arbitral tribunal declined jurisdiction, Article 1502-3° allowed the judge to review whether the arbitrator had failed to comply with its mission. The Abela decision had confirmed that the full extent of review that had traditionally been applied by a juge d'annulation under Article 1502-1° to an arbitral decision upholding jurisdiction was also applied under Article 1502-3° to an arbitral decision declining jurisdiction.

In its 17 December 2013 decision, the Paris Court of Appeal applied the new Article 1520-1°, which specifically covers both positive and negative jurisdiction decisions by the arbitral tribunal. Notwithstanding this formal change in the provisions of the French Code of Civil Procedure, the Court reiterated the very same attendu de principe of Abela, showing its desire to maintain a continuity of case law relating to the review of decisions on jurisdiction.

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