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The Jnah vs. Marriott Case: The Never-Ending Story? Latest Episode with the 18 March 2015 Decision Of The French Cour de Cassation

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The so-called *Jnah v. Marriott* saga belongs to the category of cases that are seemingly never-ending. It is telling that the contracts which gave rise to the various disputes between the Lebanese company Jnah Development SAL ("Jnah") and the US company Marriott International Hotels Inc. ("Marriott") were concluded in 1994.

On 18 March 2015, the French *Cour de Cassation* added a new chapter to this epic story by quashing the 17 December 2013 Paris Court of Appeal decision. The Court of Appeal had previously set aside an arbitral award rendered on 3 February 2012 that denied jurisdiction over claims brought on behalf of Jnah relating to the termination of a hotel management contract.

The facts of the case are long and complex. Reference is therefore made to an earlier post relating to the 17 December 2013 Paris Court of Appeal decision in which these facts are discussed in more detail.

For the purpose of the present post which will mainly focus on the legal issue addressed by the French Supreme Court, we need simply recall that Jnah and Marriott entered into several agreements relating to the construction and the management of a hotel in Lebanon, all of which contained an ICC arbitration clause. The first dispute goes back to 2001, when Marriott initiated a first arbitration against the owner, Jnah, claiming wrongful interference in the hotel's management. An award called "Jnah I" was rendered in 2003 in favor of Jnah and, in 2005, Jnah commenced a second arbitration against Marriott, alleging different violations of the agreements. A second award called "Jnah II" was rendered in 2009, also in favor of Jnah. Marriott subsequently filed a claim to set aside the Jnah II award. The Paris Court of Appeal dismissed the request to set aside on 9 September 2010. A few years earlier (in 2007), while the second arbitral procedure was heading towards an end, Marriot decided to terminate the agreements. In 2009, Jnah's main shareholder sold approximately 80% of Jnah's shares to another Lebanese company. The new main shareholder then assigned to Mr. F. (principal of the former majority shareholder) all the rights and liabilities relating to the ongoing Jnah II arbitration. At the same time, a power of attorney was also granted to Mr. F., which gave him the power to represent and defend Jnah *"in all that is related to the existing dispute with* [Marriott and Jnah] *and arising out of the relationship that existed with"* Jnah before the transfer of the shares to the new shareholder.

Things did not end there. Mr F. initiated a third arbitration against Marriott on the basis of the same

ICC arbitration clause, seeking damages for Marriott's termination of the hotel management contract. In a "Jnah III" award dated 3 February 2012, the arbitral tribunal declined jurisdiction, holding that the scope of Mr. F.'s power of attorney and assignment of rights was limited to the then ongoing Jnah II proceedings and could not possibly be interpreted as including other claims and disputes between Jnah and Marriott that were not settled by the Jnah II proceedings.

Jnah filed a claim before the Paris Court of Appeal to set aside the award on the grounds that the Jnah III arbitration proceedings were validly brought in its name. Jnah contended that the power of attorney given to Mr. F. concerned the "dispute" in general with Marriott arising out of the agreements prior to the transfer of ownership, and was not limited to the then ongoing Jnah II arbitral proceedings. Marriott argued that the arbitral tribunal's interpretation of the scope of the power of attorney was not a decision on its jurisdiction, but related to the admissibility of claims brought before it by an alleged representative of Jnah. As a consequence, it could not be subject to an in-depth review by the Court of Appeal.

The question to be ruled upon by the Court of Appeal was twofold: first, whether the scope of Mr. F.'s power of attorney was an issue of jurisdiction or admissibility, and second, whether the Jnah III award was open to criticism pursuant to the grounds of annulment provided for by the French Code of Civil Procedure, and if so, what level of review would be conducted by the Court of Appeal. The Paris Court of Appeal decided 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 Jnah's claim. As a consequence, and following a solution firmly established by the *Abela* case (*Cour de cassation*, 6 October 2010, Rev. Arb. 2010, p. 815), the Paris Court of Appeal held that it was entitled to exercise full review of the arbitral tribunal's decision.

Marriott then filed a *pourvoi* (appeal) before the French *Cour de Cassation*. Marriott claimed, most notably, that when the Court of Appeal rules on a request for annulment of an arbitration award, it must analyze the nature of the decision rendered by the arbitral tribunal in order to give, where appropriate, its exact qualification- without being influenced by the terms chosen by the arbitrators and the parties. According to Marriott, the arbitral tribunal interpreted the power of attorney given by Jnah to Mr. F. in a manner that limited its scope to the Jnah II arbitration. As a result, the tribunal deduced that the clause could not be further extended to allow the initiation of new proceedings. In reaching this decision, it was clear that the arbitral tribunal did not rule on its jurisdiction but on the admissibility of Jnah's claim.

In a concise decision of 18 March 2015 the *Cour de Cassation* overturned the Paris Court of Appeal's findings. The *Cour de Cassation* stated that when the Court of Appeal reviewed the arbitral tribunal's interpretation of Mr.F's power of attorney, the Court in fact ruled on a question of admissibility, not jurisdiction. In doing so, the Court of Appeal violated Article 1520 of the French Code of Civil Procedure which provides for five limited grounds for annulment. Jurisdiction is among such grounds but admissibility is not.

This solution does not come as a complete surprise. Many commentators had already sharply criticized the Paris Court of Appeal's decision for having confused the issues of jurisdiction and admissibility.

French law draws a clear distinction between the notions of jurisdiction (in the present case the lack of jurisdiction) and admissibility (in the present case inadmissibility of a claim for lack of

standing), unlike what one can see in many investment arbitration cases: (i) an arbitral tribunal's jurisdiction must be assessed in the light of the scope of an arbitration agreement and the parties' claims (a claim for lack of jurisdiction is a procedural plea (*exception de procédure*)); (ii) the admissibility of a claim relates to whether the claim can be validly submitted to a tribunal having jurisdiction (a claim founded on lack of standing is a plea of non-admissibility (*fin de non-recevoir*)). Accordingly, a tribunal can only rule on the admissibility of a claim (for instance for lack of standing because of an issue affecting the power of attorney relied upon by the claimant), once the tribunal has ruled on its own jurisdiction.

There are good reasons to draw a firm distinction between these two concepts as it has repercussions on the standard of review of the state court: under French law, the question of the jurisdiction of the arbitral tribunal is fully reviewed by the State judge (Article 1520 mentioned above). Conversely, the decision of an arbitral tribunal regarding a plea of inadmissibility is in principle final, as it forms part of the merits of the case. Any attempt to review such a finding would contradict the principle that prohibits the judicial review on the merits of an arbitral award.

The case has been referred back to the Versailles Court of Appeal which is set to review the question once again. One could expect that it will follow the direction set forth by the *Cour de Cassation* and, as a consequence, exercise a very narrow review of the arbitral tribunal's findings. If the Jnah III award was to be upheld, and if Jnah decided to halt the legal battle, this epic, and, to date, never-ending saga would finally be over. All this is possible, but perhaps there remain far too many "ifs" in the equation for this wishful thinking to finally see the light of day.

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