

# Litigating a dispute with French connections – the rule of exorbitant jurisdiction applied by the French courts

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Continuing our discussion on issues to consider when litigating a dispute with French connections (see our last post, "A Growing Trend in French Construction Law? The Recognition of Mandatory Rules by the Court of Cassation"), the following contribution highlights a further issue to be considered by parties to a construction contract when litigating as, or with, a French party to the contract.

Article 14 and Article 15 of the French civil code give the French Courts jurisdiction on the basis of, respectively, the claimant's or the defendant's French nationality. Accordingly, a French party can sue at home on any cause of action, whether or not the events in issue relate to France, and regardless of the defendant's nationality, connections and interests. However, these articles are not mandatory and this jurisdictional privilege can easily be waived if one of the parties sues abroad and there is no challenge to the jurisdiction of the foreign Court, or if the relevant contract contains a jurisdiction clause. These rather controversial provisions are often criticized as being too nationalistic but the French legal system is by no means the only one with this rule of "privilège de juridiction" ("exorbitant jurisdiction").

Despite such criticism, the French Court of cassation has recently applied the rule of exorbitant jurisdiction based on the nationality of the claimant in a dispute between a Saudi employer and a French contractor.

In a judgment dated September 30, 2009 (No. 08-17587), the Court of cassation had to deal with the following situation: a Saudi company concluded a contract for the construction of its headquarter in Riyadh with a construction company incorporated in France. It is noteworthy that the construction company had a business establishment in Saudi Arabia. The contract, written in Arabic, included a clause conferring jurisdiction to a particular Saudi Court (the Grievance Bureau). Following difficulties with the performance of the contract, the French company issued proceedings before the Saudi Court designated by the jurisdiction clause. The Saudi Court rendered a judgment which was later annulled by the Saudi Court of appeal on the ground that the nature of the dispute was civil, not commercial, and the Saudi Court seized lacked jurisdiction over this type of dispute.

The French company later brought the same dispute before the French Commercial Tribunal of Paris on the basis of Article 14 of the French civil code which provides that:

*"An alien, even if not residing in France, may be cited before French Courts for the performance of obligations contracted by him in France with a French person; he may be called before the Courts of France for obligations contracted by him in a foreign country towards French persons."*

The dispute proceeded to the Paris Court of appeal and finally to the Court of cassation. The question addressed by the Court of cassation was whether French Courts have jurisdiction over a dispute despite a jurisdiction clause included in the contract designating a foreign court which, seized by one of the parties to the contract, holds that it lacks jurisdiction.

In each stage of the proceedings, the jurisdiction of the French Courts was challenged by the Saudi company based on three main arguments. First, as Article 14 of the French civil code is not mandatory, the French judges should decline jurisdiction because the connection with France was not strong enough to give jurisdiction to French Courts. Indeed, the contract was performed in Saudi Arabia, governed by Saudi laws and entered into by a Saudi company and a construction company with a business establishment in Saudi Arabia (which happened to be incorporated in France). Second, the incorporation in France of the construction company was a sham as no minutes of meetings of the board were produced and as this company had no actual business activity in France. Third, French judges could not have jurisdiction over the dispute because the jurisdiction clause designated a Saudi Court and thus excluded the possibility of bringing the dispute before French judges.

The Court of cassation, in its judgment, applied the rule of exorbitant jurisdiction contained in Article 14 of the French civil code. The Court found that it was sufficient to show that the construction company was formally incorporated in France to consider it as French for the purposes of Article 14. Moreover, the Court found that the French judges had jurisdiction over the dispute because, in spite of the jurisdiction clause, the Saudi judges had found that they lacked jurisdiction over the dispute in question, and the dispute had not been brought before another foreign judge, which would have had the effect of a waiver of Article 14.

Thus, parties contracting as, or with, a French party should be aware that if the Court designated by a jurisdiction clause decides that it does not have jurisdiction over a contract-related dispute, French Courts might have jurisdiction over it because of Article 14 (and Article 15) of the French civil code.

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