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## UK Supreme Court Upholds Full Judicial Review of Arbitrators' Jurisdictional Rulings

### Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 UK

The UK Supreme Court yesterday unanimously held that an arbitral award made by an ICC tribunal was unenforceable in England and Wales, on the basis that there was no valid underlying arbitration agreement between the parties. This decision is of great interest, as it gives guidance as to when, and on what basis, the English courts will consider the validity of an underlying arbitration agreement in proceedings to enforce arbitral awards in England and Wales.

In finding the arbitration agreement to be invalid as between the parties, the Supreme Court disagreed with the contrary decision of the arbitral tribunal itself when it had determined its own jurisdiction. While the Supreme Court recognized the competence of a tribunal to determine its own jurisdiction as a preliminary issue under the so-called *Kompetenz-Kompetenz* principle, it ruled that under both the New York Convention and English law this determination did not bind a subsequent court, either at the seat of the arbitration or in another jurisdiction where enforcement was sought, and that indeed no special legal deference need be paid to the arbitral tribunal's jurisdictional decision when it concerns the existence of a valid and enforceable agreement to arbitrate at all.

#### Factual Background

The relevant agreement was entered into on 10 September 1996 between Dallah Real Estate and Tourism Holding Company (**Dallah**) and the Awami Hajj Trust (the **Trust**), and was signed on behalf of those parties. The Government of Pakistan (**Pakistan**) did not sign the arbitration agreement, although it had been closely involved in the negotiation of the agreement and the establishment of the Trust, and had guaranteed the Trust's borrowings. After the agreement was executed, the Trust lapsed, and in 1998 Dallah invoked ICC arbitration against Pakistan, on the alleged basis that the Trust was the alter ego of Pakistan, or that Pakistan was the successor to the Trust or to the rights and obligations of the Trust under the agreement. In a first partial award on its own jurisdiction in June 2001, the arbitrators found that Pakistan was a party to the Agreement. The tribunal proceeded to hear the case on the merits, and on 23 June 2006 made a final award of \$20,588,040 in favour of Dallah, which Dallah then sought

leave to enforce in England in October 2006. Throughout the arbitration Pakistan denied being party to any arbitration agreement, took no part in the arbitral proceedings, maintained a jurisdictional reservation and did not waive its sovereign immunity.

### The Decision of the Supreme Court

The question before the Supreme Court was whether any relevant arbitration agreement existed between the parties. This was determined by reference to the Arbitration Act 1996 (the **Act**) and the New York Convention. Section 103(2) of the Act provides *inter alia* that enforcement of arbitral awards may be refused if "*the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.*" This reflects Article V(1)(a) of the New York Convention which safeguards the fundamental rights of a party to object to the jurisdiction of the tribunal as a means to resist enforcement.

In this case, it was common ground that the relevant law under which the validity of the agreement stood to be assessed was that of France, where the award was made. Applying French law, and with Dallah having abandoned alter ego and successor liability theories, the Court found that the course of events did not justify a conclusion that it was the parties' common intention that Pakistan should be or was a party to the agreement, when the agreement was deliberately structured to be, and was agreed, between Dallah and the Trust. Accordingly, notwithstanding the arbitral tribunal's decision to the contrary, the Supreme Court held that Pakistan was not bound by the tribunal's award on the merits, and that the award could not be enforced against it.

Of particular interest in the Supreme Court's decision is its explicit statement that it was not required to defer to the arbitral tribunal's views on jurisdiction. In the words of the Supreme Court (Mance, J) "the Court may have regard to the reasonings and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them", when the issue is one of the validity of the arbitration agreement as between the parties, and hence the arbitral tribunal's jurisdiction to make an award binding on them. The Supreme Court also noted that in such circumstances the party resisting jurisdiction could challenge the enforcement of the tribunal's award in a state where enforcement was sought without having first attempted either to block the arbitration or to set aside the award in the country in which it was made, and that, as long as it had not submitted the question of arbitrability to the tribunal (which the Court noted was rarely the case), it could challenge the award notwithstanding that its challenge had also first been raised and argued before, and decided by, the arbitral tribunal.<sup>1</sup>

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<sup>1</sup> The Court followed in this respect the U.S. Supreme Court's decision in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), and the U.S. Third Circuit Court of Appeals' decision in China Minmetals Materials Import & Export Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003). It rejected the notion that the application of the ICC arbitration rules, which allow the arbitrators to consider their own jurisdiction under the *Kompetenz-Kompetenz* principle, displaces the court's independent role in determining whether there was an agreement to arbitrate.

In short, Dallah represents a strong affirmation of the independent role under the New York Convention of national courts, both at the seat and in enforcement proceedings elsewhere, in determining fundamental questions of jurisdiction in international arbitration. It makes it clear that, without both parties' consent, neither can be required to accept an arbitral award on jurisdiction without full judicial review.

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