

Michaelmas Term
[2010] UKSC 46
On appeal from: [2009] EWCA Civ 755

JUDGMENT

Dallah Real Estate and Tourism Holding Company (Appellant) *v* The Ministry of Religious Affairs, Government of Pakistan (Respondent)

before

Lord Hope, Deputy President
Lord Saville
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT GIVEN ON

3 November 2010

Heard on 28, 29 and 30 June 2010

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Appellant	*Respondent*
Hilary Heilbron QC Klaus Reichert	Toby Landau QC
(Instructed by Kearns & Co)	(Instructed by Watson, Farley & Williams)

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LORD MANCE:

Introduction

1. This appeal arises from steps taken by the appellant, Dallah Real Estate and Tourism Holding Company ("Dallah"), to enforce in England a final award dated 23 June 2006 made in its favour in the sum of US$20,588,040 against the Government of Pakistan ("the Government") by an International Chamber of Commerce ("ICC") arbitral tribunal sitting in Paris. The Government has hitherto succeeded in resisting enforcement on the ground that "the arbitration agreement was not valid ….. under the law of the country where the award was made" (Arbitration Act 1996, s.103(2)(b), reflecting Article V(I)(a) of the New York Convention), that is under French law. Dallah now appeals.

2. The award was made against the Government on the basis that it was "a true party" to an Agreement dated 10 September 1996 expressed to be made between and signed on behalf of Dallah and Awami Hajj Trust ("the Trust"). The Agreement contains an arbitration clause referring disputes or differences between Dallah and the Trust to ICC arbitration. The tribunal in a first partial award dated 26 June 2001 concluded that the Government was a true party to the Agreement and as such bound by the arbitration clause, and so that the tribunal had jurisdiction to determine Dallah's claim against the Government. The central issue before the English courts is whether the Government can establish that, applying French law principles, there was no such "common intention" on the part of the Government and Dallah as would make the Government a party.

3. Dallah is a member of a group providing services for the Holy Places in Saudi Arabia. It had had long-standing commercial relations with the Government. By letter dated 15 February 1995, Mr Shezi Nackvi, a senior director in the Dallah group, made a proposal to the Government to provide housing for pilgrims on a 55-year lease with associated financing. The Government approved the proposal in principle, and a Memorandum of Understanding ("MOU") was concluded on 24 July 1995. Land was to be purchased and housing facilities were to be constructed at a total cost not exceeding US$242 million and the Government was to take a 99- year lease subject to Dallah arranging the necessary financing to be "secured by the Borrower designated by THE GOVERNMENT under the Sovereign Guarantee of THE GOVERNMENT". The lease and financing terms were to be communicated to the Government within 30 days for approval, and Dallah was to supply detailed specifications within 60 days of the date of such approval.

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4. In the event, Dallah in November 1995 acquired a larger and more expensive plot of land than the MOU contemplated, and the timetable was also not maintained. Further, on 21 January 1996 the President of Pakistan promulgated Ordinance No VII establishing the Trust with effect from 14 February 1996. Under article 89(2) of the Constitution of Pakistan, an Ordinance so promulgated "shall stand repealed at the expiration of four months from its promulgation", although, under the same article, it should before then have been laid before Parliament, upon which it would have taken effect as a bill. In the event, Parliament appears never to have been involved, but further Ordinances were promulgated to recreate and continue the Trust, viz Ordinance No XLIX of 1996 on a date unknown (presumably prior to 21 May 1996) and No LXXXI of 1996 on 12 August 1996.

5. Under each Ordinance the Trust was to maintain a fund with a trustee bank, to be financed from contributions and savings by pilgrims (Hujjaj) and philanthropists, as well as by any income from investments or property. The Ordinances also assigned functions within the Trust to various public officers. They prescribed, in particular, that the secretary of the Ministry of Religious Affairs ("MORA") should act as secretary of the Board of Trustees and (unless some other person of integrity was appointed) as Managing Trustee of the Trust.

6. On 29 February 1996 Dallah wrote to the secretary of MORA with a revised proposal, increasing the cost to US$345 million to take account of the larger plot purchased, setting out options for a new legal and financial structure and stating:

> "Legal issues
>
> In order to comply with the legal requirements of the various entities involved, the structure will be as follows:
>
> a) Government of Pakistan to set up AWAMI HAJJ TRUST
>
> b) Trust will borrow the US$100 Million from Dallah Albaraka
>
> c) Trust will make a down payment of US$100 million to Albaraka
>
> d) Trust will enter into a lease to use these buildings during the Hajj period"

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Annex A detailed the financial structure:

> "Loan terms for down payment of US $ 100 Million – Approx 30% of project cost
>
> Amount: US $ 100 Million
>
> Borrower: Awami Hajj Trust
>
> Guarantor: Government of Pakistan"

7. On 3 April 1996 Dallah instructed its lawyers, Orr, Dignam & Co. that "the current shape of the transaction" involved an agreement to be entered into between Dallah and the Trust on terms which it described. Further negotiations with the Government led to the signing of the Agreement between Dallah and the Trust on 10 September 1996. The Agreement reflected the increased cost of $345 million, out of which it provided that:

> "the Trust shall pay a lump sum of U.S. $ 100 [million] …. to Dallah by way of advance ….. subject to (i) Dallah arranging through one of its affiliates a U.S. Dollar 100 [million] Financing Facility for the Trust against a guarantee of the Government of Pakistan, ….. (iii) A counter guarantee issued by the Trust and Al-Baraka Islamic Investment Bank, E.C., Bahrain, …. appointed by the Board of Trustees pursuant to Section 8 of the Awami Hajj Trust Ordinance, 1996 in favour of the Government of Pakistan."

Clause 27 provided that:

> "The Trust may assign or transfer its rights and obligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah."

The Agreement made no other references to the Government and was in terms introducing and setting out mutual obligations on the part of Dallah and the Trust. These included the arbitration clause:

> "23. Any dispute or difference of any kind whatsoever between the Trust and Dallah arising out of or in connection with this

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> Agreement shall be settled by arbitration held under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, by three arbitrators appointed under such Rules."

8. On 6 November 1996 Ms Benazir Bhutto's government fell from power, and was replaced by that of Mr Nawaz Sharif. No further Ordinance was promulgated, and the Trust accordingly ceased to exist as a legal entity at midnight on 11 December 1996. It will be necessary to look in detail at correspondence as well as three sets of proceedings in Pakistan which took place during the following years.

9. Dallah invoked ICC arbitration against the Government on 19 May 1998, nominating Lord Mustill as its arbitrator. It is common ground that the Government has throughout the arbitration denied being party to any arbitration agreement, maintained a jurisdictional reservation and not done anything to submit to the jurisdiction of the tribunal or waive its sovereign immunity. The ICC under its Rules appointed Justice Dr Nassim Hasan Shah to act as the Government's arbitrator and Dr Ghaleb Mahmassani to chair the tribunal. Terms of Reference, in which the Government refused to join, were signed by the arbitrators and Dallah in March 1999 and approved by the ICC in April 1999. The tribunal issued its first partial award on its own jurisdiction on 26 June 2001. A second partial award on liability was issued on 19 January 2004 and the final award on 23 June 2006.

10. Leave to enforce the final award in England was given by Order of Christopher Clarke J dated 9 October 2006 on a without notice application by Dallah. The Government's application to set aside the leave led to a three day hearing with oral evidence before Aikens J in July 2008. His judgment setting aside the Order is dated 1 August 2008: [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505. A further three day hearing led to the Court of Appeal's dismissal of Dallah's appeal on 20 July 2009 ([2009] EWCA Civ 755; [2010] 1 AER 592), against which the present appeal lies. On 19 August 2009, Dallah filed an application in the French courts for enforcement of the final award, and, on 12 January 2010, it sought a stay of the present appeal pending the outcome of its French application. On 25 January 2010, the Supreme Court refused such a stay. On 21 December 2009, the Government applied in France to set aside all three awards. It was in time to do this, since, under French law, the limitation period for doing so only starts to run one month after "official notification of the award bearing an enforcement order".

The issue and the principles governing its resolution

11. The "validity" of the arbitration agreement depends in the present case upon whether there existed between Dallah and the Government any relevant arbitration agreement at all. Dallah's case is that the Government has at all times been an

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unnamed party to the Agreement containing the arbitration clause. Before the English courts, this case has been founded on a submission that it was the common intention of the parties that the Government should be such a party to the Agreement. Before the arbitral tribunal Dallah put the matter differently. It argued that either the Trust was the alter ego of the Government or the Government was the successor to the Trust or to the rights and obligations which the Trust had under the Agreement prior to its demise. Neither of these ways of putting the case is now pursued. Dallah did not argue before Aikens J that the Trust was the Government's alter ego (judgment, para 58, footnote 21), and it merely submitted that, if and so far as the Government behaved as if it were a successor to the Trust, this was relevant to the issue of common intention (judgment, paras 94-96).

12. The issue regarding the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a United Kingdom court under provisions of national law which are contained in the Arbitration Act 1996 and reflect Article V(1)(a) of the New York Convention. The parties' submissions before the Supreme Court proceeded on the basis that, under s.103(2)(b) of the 1996 Act and Article V(1)(a) of the Convention, the onus was and is on the Government to prove that it was not party to any such arbitration agreement. This was so, although the arbitration agreement upon which Dallah relies consists in an arbitration clause in the Agreement which on its face only applies as between Dallah and the Trust. There was no challenge to, and no attempt to distinguish, the reasoning on this point in *Dardana Limited v Yukos Oil Company* [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819, paras 10-12, and I therefore proceed on the same basis as the parties' submissions.

13. Section 103(2)(b) and article V(1)(a) raise a number of questions:

(a) what is meant by "the law of the country where the award was made"?

(b) what are the provisions of that law as regards the existence and validity of an arbitration agreement?

(c) what is the nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law?

and, in particular,

(d) what is the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction?

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(a) The law of the country where the award was made

14. It is common ground that the award was made in France and French law is relevant. But it is also common ground that this does not mean the French law that would be applied in relation to a purely domestic arbitration. In relation to an international arbitration, the experts on French law called before Aikens J by Dallah and the Government agreed in their Joint Memorandum (para 2.8) that:

> "Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration …. need not be assessed on the basis of a national law, be it the law applicable to the main contract or any other law, and can be determined according to rules of transnational law".

The approach taken in French law appears in decisions of the Court of Appeal of Paris, in particular *Menicucci v Mahieux* [1976] Rev Crit 507 (13 December 1975) and *Coumet et Ducler v Polar-Rakennusos a Keythio* [1990] Rev Arb 675 (8 March 1990), and later in the decision of the Cour de Cassation (1re Ch. Civ) (20 December 1993) in *Municipalité de Khoms El Mergeb v Dalico* [1994] 1 Rev Arb 116, where the court said that:

> "… en vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique …."

15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law. If so, that would not avoid the need to have regard to French law as "the law of the country where the award was made" under Article V(1)(a) of the Convention and s.103(2)(b) of the 1996 Act. The Cour de Cassation is, however, a national court, giving a French legal view of international arbitration; and Dallah and the Government agree that the true analysis is that French law recognises transnational principles as potentially applicable to determine the existence, validity and effectiveness of an international arbitration agreement, such principles being part of French law. As Miss Heilbron QC representing Dallah put it, "transnational law is part of French law". Mr Landau QC representing the Government now accepts this analysis (although in his written case, para 157, he appeared to take issue with it and Aikens J, para 93, in fact disregarded transnational law on the basis that it was not part

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of French law, but relevant only under French conflict of laws principles and so not within Article V(1)(a) and s.103(2)(b)).

16. Since the point is common ground, I merely record that Mr Landau referred the Court to Pierre Mayer's note on *Ducler* in KluwerArbitration, explaining the rationale of the Paris Court of Appeal decisions as being to confine the restrictive provisions of article 2061 of the French Civil Code to internal contracts. He also referred to Fouchard, Gaillard, Goldman's *International Commercial Arbitration* (1999) (Kluwer), para 440, describing as 'somewhat unfortunate' the terminology used in (French) decisions referring to an arbitration agreement as autonomous from 'any national law' and as having its 'own effectiveness', and observing that "a contract can only be valid by reference to a law that recognises such validity". Finally, in response to a 1977 commentary, suggesting that the validity of an arbitration clause in an international contract "resulted solely from the will of the parties, independently of any reference to the law of the main contract, and to any national law" and describing this as "the ultimate pinnacle of autonomy", Poudret and Besson's *Comparative Law of International Arbitration* 2nd ed (2007), para 180 also said that:

> "… it is only the first two aspects, i.e. indifference to the fate of the main contract and the possibility of being submitted to a separate law, that flow logically from the principle of separability. The latter by no means implies that the arbitration agreement is independent of any national law. The real justification of this regime lies elsewhere: as Philippe Fouchard emphasises in his note on the *Menicucci* judgment, the aim is to remove the obstacles which certain laws, including French law, bring to the development of international arbitration. Although the judgment does not say so, this new conception of separability implies abandoning the conflict of laws approach in favour of material rules, which are in reality part of French law and not of any international or transnational system. We shall see this point with the *Dalico* judgment."

In the light of the common ground between the parties, it is also unnecessary to engage with the competing representations of international arbitration lucidly discussed in Gaillard's *Legal Theory of International Arbitration* (2010) pp 13-66. Whatever the juridical underpinning or autonomy of their role from the viewpoint of international arbitrators, the present case involves an application to enforce in the forum of a national court, subject to principles defined by s.103 of the 1996 Act and Article V of the New York Convention, upon the effect of which there is substantial, though not complete, agreement between the parties now before the Supreme Court.

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(b) The provisions of that law as regards the existence and validity of an arbitration agreement

17. The parties' experts on French law were agreed that a French court would apply a test of common intention to an issue of jurisdiction. Dallah's expert, M. Derains, said this in his written report (p 14):

> "Thus, my Experts' opinion is that it is open to an arbitral tribunal seating in Paris in an international arbitration to find that the arbitration agreement is governed by transnational law. Yet, the arbitrators must also look for the common will of the parties, express or implied, since it is a substantive rule of French law that the Courts will apply when controlling the jurisdiction of the arbitrators."

In para 2.9 of a joint memorandum to which Aikens J referred in paras 85 et seq of his judgment, the experts agreed upon the following statement:

> "Under French law, in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the said agreement and, as a result, by the arbitration clause therein. The existence of a common intention of the parties is determined in the light of the facts of the case. To this effect, the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement".

18. The experts' agreement summarises a *jurisprudence constante* in the French courts. The Cour de Cassation endorsed a test of common intention in the case of *Dalico* (para 14 above). M. Derains endorsed its application to issues such as that in the present case. Aikens J had cited to him the leading decisions of the Paris Court of Appeal spelling out the principle in greater detail in a series of cases concerning international arbitrations: *Société Isover-Saint-Gobain v Société Dow Chemical* [1984] 1 Rev Arb 98 (21 October 1983), *Co. tunisienne de Navigation v Société Comptoir commercial André* [1990] 3 Rev Arb 675 (28 November 1989) and *Orri v Société des Lubrifiants Elf Aquitaine* [1992] Jur Fr 95 (11 January 1990). In the last case, the Court put the position as follows:

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> "Selon les usages du commerce international, la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application aux parties directement impliquées dans l'exécution du contrat et les litiges qui peuvent en résulter, dès lors qu'il est établi que leur situation contractuelle, leurs activités et les relations commerciales habituelles existent entre les parties font présumer qu'elles ont accepté la clause d'arbitrage dont elles connaissaient l'existence et la portée, bien qu'elles n'aient pas été signataires du contrat qui la stipulait".

In translation:

> "According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract and any disputes which may result therefrom, provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not signatories of the contract containing it".

This then is the test which must be satisfied before the French court will conclude that a third person is an unnamed party to an international arbitration agreement. It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.

19. Aikens J recorded that the experts were also agreed that: (i) "when the court is looking for the common intention of all the potential parties to the arbitration agreement, it is seeking to ascertain the subjective intention of each of the parties, through their objective conduct. The court will consider all the facts of the case, starting at the beginning of the chronology and going on to the end and looking at the facts in the round" (para 87); (ii) "when a French court is considering the question of the common intention of the parties, it will take into account 'good faith'" (para 90); and (iii) under French law a state entering into an arbitration agreement thereby waives its immunity, both from jurisdiction (as under English law: State Immunity Act 1978, s.9(1) and *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529; [2007] QB 886) and (unlike English law) also from execution (para 91). However the experts disagreed as to whether the last point had any relevance when considering whether a state had entered

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into such an agreement. In the light of their conflicting evidence on this point, Aikens J found that: (iv) "the correct analysis of French law is that when the court is ascertaining the subjective intention of the potential state party to the arbitration agreement, it will bear in mind the fact that the potential state party to the arbitration agreement would lose its state immunity if it were to become a party to the arbitration agreement" (para 91).

(c) The nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law, and

(d) the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction

20. These questions are here linked. Miss Heilbron's primary submission on question (c) is that the only court with any standing to undertake a full examination of the tribunal's jurisdiction would be a French court on an application to set aside the award for lack of jurisdiction. An example of the French courts' willingness to do this is provided by *République arabe d'Egypte v Southern Pacific Properties Ltd* [1986] Ju Fr 75; [1987] Ju Fr 469 (12 July 1984, Paris Court of Appeal and 6 January 1987, Cour de Cassation) (the *Pyramids* case). Article 1502 of the French Code of Civil Procedure entitles a French court to refuse to recognise or enforce an arbitral award made in the absence of any arbitration agreement, while article 1504 entitles the court to set aside an award made in France in an international arbitration on the grounds provided in article 1502. An ICC arbitral tribunal sitting in Paris had held the Arab Republic of Egypt liable as being party to a contract signed between companies in the Southern Pacific group and the Egyptian General Organisation for Tourism and Hotels ("EGOTH"). On an application by Egypt to set aside the award, the Court of Cassation held that the Court of Appeal had been entitled under articles 1502 and 1504 "de rechercher en droit et en fait tous les elements concernant les vices en question" (to examine in law and in fact all the elements relevant to the alleged defects: p 470), and that it had on that basis been up to the Court of Appeal to make up its own mind whether the arbitrators had exceeded their jurisdiction.

21. In Miss Heilbron's submission, any enforcing court (other than the court of the seat of the arbitration) should adopt a different approach. It should do no more than "review" the tribunal's jurisdiction and the precedent question whether there was ever any arbitration agreement binding on the Government. The nature of the suggested review should be "flexible and nuanced" according to the circumstances. Here, Miss Heilbron argues that the answer to question (d) militates in favour of a limited review. She submits that the tribunal had power to consider and rule on its own jurisdiction (*Kompetenz-Kompetenz* or *compétence-compétence*), that it did so after full and close examination, and that its first partial award on jurisdiction should be given strong "evidential" effect. In these circumstances, she submits, a court should refuse to

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become further involved, at least when the tribunal's conclusions could be regarded on their face as plausible or "reasonably supportable".

22. At times, Dallah has put its case regarding the first partial award even higher. In her oral submissions, Miss Heilbron went so far as to suggest that the first partial award was itself an award entitled to recognition and enforcement under the New York Convention. No application for its recognition or enforcement has in fact been made (the present proceedings concern only the final award), but, quite apart from that, the suggestion carries Dallah nowhere. First, (in the absence of any agreement to submit the question of arbitrability itself to arbitration) I do not regard the New York Convention as concerned with preliminary awards on jurisdiction. As Fouchard, Gaillard, Goldman's *International Commercial Arbitration*, para 654, observes the Convention "does not cover the competence-competence principle". Dallah could not satisfy even the conditions of Article IV(1) of the Convention and s.102(1)(b) of the 1996 Act requiring the production of an agreement under which the parties agreed to submit the question of arbitrability to the tribunal - let alone resist an application under Article V(1)(a) and s.103(2)(b) on the ground that the parties had never agreed to submit that question to the binding jurisdiction of the tribunal. Second, Dallah's case quotes extensively from Fouchard, Gaillard, Goldman, para 658, pointing out that arbitral tribunals are free to rule on their own jurisdiction, but ignores the ensuring para 659, which says, pertinently, that:

> "Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award."

23. In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the Government's deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the Government's recent application to set aside the tribunal's awards in France. But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

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24. Dallah's stance on question (d) cannot therefore be accepted. Arbitration of the kind with which this appeal is concerned is consensual – the manifestation of parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them. Of course, it is *possible* for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability - that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such an agreement is not simply rare, it involves specific agreement (indeed "clear and unmistakable evidence" in the view of the United States Supreme Court in *First Options of Chicago, Inc. v Kaplan* 514 US 938, 944 (1995) per Breyer J), and, absent any agreement to submit the question of arbitrability itself to arbitration, "the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently": ibid, per Breyer J, p 943.

25. Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration, the concept of competence-competence is "applied in slightly different ways around the world", but it "says nothing about judicial review" and "it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision …..": *China Minmetals Materials Import and Export Co., Ltd. v Chi Mei Corporation* 334 F 3d 274, 288 (2003), where some of the nuances (principally relating to the time at which courts review arbitrators' jurisdiction) were examined. In *China Minmetals* it was again held, following *First Options*, that under United States law the court "must make an independent determination of the agreement's validity and therefore of the arbitrability of the dispute, at least in the absence of a waiver precluding the defense": p 289. English law is well-established in the same sense, as Devlin J explained in *Christopher Brown Ltd v Genossenschaft Österreichischer* [1954] 1 QB 8, 12-13, in a passage quoted in the February 1994 Consultation Paper on Draft Clauses and Schedules of an Arbitration Bill of the DTI's Departmental Advisory Committee (then chaired by Lord Steyn):

> "It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those

LANBUK.COM LANBUK SIERRA LEONE

> courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties."

This coincides with the position in French law: paras 20 and 22 above.

26. An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68. The English and French legal positions thus coincide: see the *Pyramids* case (para 20 above).

27. The question is whether the position differs when an English court is asked to enforce a foreign award. There is an irony about Dallah's stance that any enforcing court, other than the court of the seat, has a restricted role in reviewing an arbitral tribunal's jurisdiction. The concept of transnational arbitration has been advocated in arbitral circles, and was no doubt recognised by French courts, in order so far as possible to underline the autonomy of international arbitration from the seat of arbitration or its national legal system. What matters in real terms is where an arbitration award can be enforced: see Gaillard's *Legal Theory of International Arbitration*, (op cit) Chapter I. Yet Miss Heilbron's submissions invoke in one and the same breath a transnational view *and* a view attaching a special and dominant significance to the law of the seat. They also invite the spectre of dual sets of proceedings, conducted in two different countries (that of the seat and that of enforcement) involving different levels of review in relation to essentially the same issue – whether the award should be enforced in the latter country.

LANBUK.COM LANBUK SIERRA LEONE

28. It is true that Article V(1)(e) of the Convention and s.103(2)(f) of the 1996 Act recognise the courts of "the country in which, or under the law of which" an award was made as the courts where an application to set aside or suspend an award may appropriately be made; and also that Article VI and s.103(5) permit a court in any other country where recognition or enforcement of the award is sought to adjourn, if it considers it proper, pending resolution of any such application. But Article V(1)(a) and s.103(2)(b) are framed as free-standing and categoric alternative grounds to Article V(1)(e) of the Convention and s.103(2)(f) for resisting recognition or enforcement. Neither Article V(1)(a) nor s.103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc. existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do Article VI and s.103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made.

29. None of this is in any way surprising. The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal's activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to *both* parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

30. The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in

LANBUK.COM LANBUK SIERRA LEONE

view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence", "high standing and great experience". The scheme of the New York Convention, reflected in ss.101-103 of the 1996 Act may give limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up.

31. This is not to say that a court seised of an issue under Article V(1)(a) and s.103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well-summarised by the following paragraph which I quote from the Government's written case:

> "233. Under s.103(2)(b) of the 1996 Act / Art V.1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."

The application of the above principles

32. The above principles have already been applied to the facts of this case at two previous instances. Not surprisingly, therefore, most of the emphasis of Dallah's written case and oral submissions before the Supreme Court was on the submissions of principle which have already been considered. In the circumstances and in the light of the careful examination of the whole history in the courts below, it is unnecessary to go once again into every detail. Each of the courts below has paid close attention to the arbitral tribunal's reasoning and conclusions, before concluding that the tribunal lacked jurisdiction to make the final award now sought to be enforced. Their examination of the case took place by reference to the same principles that a French court would, on the expert evidence, apply if and when called upon to examine the existence of an arbitration agreement between Dallah and the Government: see paras 17-20 above. It took account of the whole history, including the Government's close involvement with and interest in the project from the original proposal onwards, the negotiation and signature of the MOU with the Government, the creation by the Government of the Trust and the re-structuring of the project to introduce the Trust, the negotiation and signature of the Agreement between Dallah and the Trust, the

LANBUK.COM LANBUK SIERRA LEONE

subsequent correspondence, the three sets of proceedings in Pakistan and the arbitration proceedings.

The tribunal's approach

33. The arbitral tribunal set out its approach to the issue of jurisdiction in the opening paragraphs of its first partial award. Dallah and the Government had argued for a single law governing both arbitral jurisdiction and the substance of the issues: the law of Saudi Arabia in Dallah's submission and the law of Pakistan in the Government's. The tribunal distinguished between jurisdiction and substance, relying on the principle of autonomy of arbitral agreements, and rejected both the suggested national laws. It held (section III(I)) that:

> "3. Judicial as well as Arbitral case law now clearly recognise that, as a result of the principle of autonomy, the rules of law, applicable to an arbitration agreement, may differ from those governing the main contract, and that, in the absence of specific indication by the parties, such rules need not be linked to a particular national law (French Cour de Cassation, 1er civ., Dec. 20, 1993, Dalico), but may consist of those transnational general principles which the Arbitrators would consider to meet the fundamental requirements of justice in international trade.
>
> Dr Justice Shah and Lord Mustill would not endorse without reservation the concept of a transnational procedural law independent of all national laws. They need not however pursue this, since it makes no difference to the result.
>
> 4. ..... in view of the autonomy of the Arbitration Agreement, the Tribunal believes that such Agreement is not to be assessed, as to its existence, validity and scope, neither under the laws of Saudi Arabia nor under those of Pakistan, nor under the rules of any other specific local law connected or not, to the present dispute.
>
> By reason of the international character of the Arbitration Agreement coupled with the choice, under the main Agreement, of institutional arbitration under the ICC Rules without any reference in such Agreement to any national law, the Tribunal will decide on the matter of its jurisdiction and on all issues relating to the validity and scope of the Arbitration Agreement and therefore on whether the Defendant is a party to such Agreement and to this Arbitration, by reference to those transnational general principles and usages

LANBUK.COM LANBUK SIERRA LEONE

> reflecting the fundamental requirements of justice in international trade and the concept of good faith in business."

34. As to what this meant in practice, the tribunal noted (section III(III)(1)) that:

> "a non-signatory may be bound by an arbitration agreement, by virtue of any one of a number of legal theories such as representation, assignment, succession, alter ego or the theory of group of companies".

It recorded that Dallah's primary case was that the Trust was an alter ego of the Government, but went on immediately to say that:

> "To arbitrate this disputed issue, the Arbitral Tribunal believes that it is very difficult to reason exclusively on the basis of juristic and abstract legal principles and provisions and to decide such issue by merely relying on general considerations of legal theory."

35. The tribunal then described the setting up and organisation of the Trust. It concluded that the rules and regulations provided in the Ordinance did "not contain sufficient evidence that would permit it to disregard the Trust's legal entity and to consider that the Trust and the Government are one such entity", and were "fully consistent with the general features of the regulations of public entities", and that "Such control of the Trust by the Government is not, in itself, sufficiently pertinent to impair the distinct legal personality enjoyed by the Trust or to lead to the disregard of such personality, and therefore to the extension of the Arbitration Agreement from the Trust to the Government". The tribunal, or Dr Shah and Lord Mustill, added that "particular caution must be observed where the party sought to be joined as defendant is a state or state body".

36. The tribunal continued (section III(III)):

> "5. In fact, any reply to the present issue relating to whether or not the Present Defendant is a Party to the Arbitration Agreement depends on the factual circumstances of the case and requires a close scrutiny of the conduct and of the actions of the parties before, during and after the implementation of the main Agreement in order to determine whether the Defendant may be, through its role in the negotiation, performance and termination of such Agreement, considered as a party thereto, and hence to the Arbitration Agreement.

LANBUK.COM LANBUK SIERRA LEONE

> The control exercised by the State over the Trust becomes, within that framework, an element of evidence of the interest and the role that the party exercising such control has in the performance of the agreement concluded by the Trust, and provides the backdrop for understanding the true intentions of the parties.
>
> 6. Arbitral as well as judicial case-law has widely recognised that, in international arbitration, the effects of the arbitration clause may extend to parties that did not actually sign the main contract but that were directly involved in the negotiation and performance of such contract, such involvement raising the presumption that the common intention of all parties was that the non-signatory party would be a true party to such contract and would be bound by the arbitration agreement."

In the context of the award as a whole, the last paragraph must be a statement by the tribunal of one of the "transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business", to which the tribunal had earlier referred in section III(I)(4).

37. In this light, the tribunal examined in turn the position prior to, at signature of, and during performance of the Agreement, and during the period after the Trust lapsed. At each point, it focused on the Government's conduct. It considered that it was "clearly established" that the Trust was organically and operationally under the Government's strict control, that its financial and administrative independence was largely theoretical, and that everything concerning the Agreement was at all times "performed by the [Government] concurrently with the Trust" and that "the Trust functions …. reverted back logically to" the Government, after the Trust ceased to exist (section III(III)(12-1). The tribunal's examination led it to conclude (para 12-1) that:

> "The Trust, in spite of its distinct legal personality in theory, appears thus in fact and in conduct to have been considered – and to have acted – as a part and a division of the Defendant to which it is fully assimilated, a temporary instrument that has been created by a political decision of the Defendant for specific activities which the Defendant wanted to perform, and which was cancelled also by a political decision of the Defendant. Therefore, the Trust appears as having been no more than the alter ego of the Defendant which appears, in substance, as the real party in interest, and therefore as the proper party to the Agreement and to the Arbitration with the Claimant".

LANBUK.COM LANBUK SIERRA LEONE

38. The tribunal went on (para 12-2) to say that the Government's behaviour, as "in actual fact the party that was involved in the negotiation, implementation and termination of the Agreement …. before, during and after the existence of the Trust", "shows and proves that the [Government] has always been – and considered itself to be – a true party to the Agreement ….". The tribunal acknowledged (para 13) that "Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section", but it recorded that Dr Mahmassani believed that, when looked at "globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement", and that "While joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line". In paragraph 14, the tribunal recorded a further divergence of view, with Dr Mahmassani believing that "the general principle of good faith" "comforts the conclusion that the Trust is the alter ego of the Defendant", but Dr Shah and Lord Mustill "not convinced that in matters not concerning the conduct of proceedings but rather the identification of those who should be participants in them, a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such".

39. The tribunal's ultimate conclusion on jurisdiction was thus expressed as a finding (in which two of the arbitrators only narrowly concurred) that the Trust was the alter ego of the Government, making the Government a "true party" to the Agreement. That, as I have said (para 11 above), is not now Dallah's case. But Dallah points out that the tribunal's reasoning for its ultimate finding, and the lengthy analysis of conduct and events which the tribunal undertook, can be traced back to para 6 of section (III)(III) of its award, where the tribunal identified a test of common intention to be derived from judicial and arbitral case-law. How these strands of thought relate is not to my mind clear. There is a considerable difference between a finding (and between the evidence relevant to a finding) that one of two contracting parties is the alter ego of a third person and a finding that it was the common intention of the other party to the contract that the third person should be a party to the contract made with the first party. The former depends on the characteristics and relationship of the first contracting party and the third person. The latter depends on a common intention on the part of the second contracting party and the third person (and possibly also on the part of the first contracting party, although no-one has suggested that the Trust in the present case did not concur in any common intention that Dallah and the Government may be found to have had). Since the tribunal focused throughout on the Trust and Government and their relationship and conduct, and ended with a conclusion that the former was the alter ego of the latter, it is not clear how far the tribunal was in fact examining or making any finding about any *common* intention of Dallah and the Government. If it was, the weight attaching to the finding is diminished by the tribunal's failure to focus on Dallah's intention. The hesitation of two of the arbitrators about the conclusion they reached also suggests the possibility that even a

LANBUK.COM LANBUK SIERRA LEONE

slight difference in the correct analysis of the relevant conduct and events could have led the tribunal overall to a different conclusion.

40. More fundamentally, if and so far as the tribunal was applying a test of common intention, the test which it expressed in section III(III)(6) differs, potentially significantly, from the principle recognised by the relevant French case-law on international arbitration. Although the tribunal must have viewed its test as a transnational general principle and usage, it appears likely that it also had the French case-law in mind. This is suggested by its use of the words "directly involved in" and "presumption", by its earlier mention of the *Dalico* case (see para 18 above), and by its letter dated 29 November 2000 written (after the oral hearings before it on jurisdiction) raising the possibility that reasoning embodied in the French *Pyramids* case might be relevant on the issue of jurisdiction. In any event, in Dallah's submission, the tribunal applied principles which accord "broadly" with French law. But, the French legal test, set out in para 18 above, is that an international arbitration clause be may extended to non-signatories directly involved in the performance of a contract:

> "provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope".

In contrast, under the test stated by the tribunal (para 36 above), direct involvement in the negotiation and performance of the contract is *by itself* said to raise the presumption of a common intention that the non-signatory should be bound. The tribunal's test represents, on its face, a low threshold, which, if correct, would raise a presumption that many third persons were party to contracts deliberately structured so that they were not party. Asked about the tribunal's test, M. Vatier did not consider it accurate enough, adding that "the principles adopted were in general the principles that might be adopted in French law. But they are too general". I consider that Aikens J was therefore correct to doubt (in para 148) whether the tribunal had applied a test which accords with that recognised under French law.

Analysis of the history

41. I turn to the conduct of the Government and the events on which the tribunal relied. As to the Ordinance, the tribunal said that it regarded the Government's "organic control" of the Trust as "an element of evidence as to the true intention of the Defendant to run and control directly and indirectly the activities of the Trust, and to view such Trust as one of its instruments". Miss Heilbron accepts that Dallah cannot rely on the last ten words. Dallah is not advancing a case of agency, and the Ordinance

LANBUK.COM LANBUK SIERRA LEONE

does not support a case of agency. The tribunal's comment at this point is on its face also inconsistent with the tribunal's earlier references to the normality of the control established by the Ordinance (para 35 above).

42. As to the negotiations leading up the Agreement, the courts below were in my view correct to observe that the fact that the Government was itself involved in negotiations and in the MOU and remained interested throughout in the project does not itself mean that the Government (or Dallah) intended that the Government should be party to the Agreement deliberately structured so as to be made, after the Trust's creation, between Dallah and the Trust. It does not appear that a French court would adopt any different attitude to governmental interest and involvement in the affairs of a state entity. An illustration of the careful analysis required in this context is provided by the decision of the Court of Appeal of Paris in the *Pyramids* case (above). Under Heads of Agreement signed by the Egyptian government through its Minister of Tourism, the Egyptian General Organisation for Tourism and Hotels ("EGOTH") and the claimant, the government had committed itself to do the necessary work to acquire property near the Pyramids and EGOTH and the claimants undertook to form a company (to be owned 40/60 by EGOTH and the claimants) to develop a tourist centre on such property. A usufruct over the property was to be given to the company by the government and EGOTH, and the claimants were to be responsible for engineering, construction and architectural services, as well as financing. Subsequently, EGOTH and the claimants entered into a "Supplemental Agreement" which defined the project and their obligations and contained an ICC arbitration clause. Underneath their respective signatures on this agreement, the Minister of Tourism placed the words "approved, agreed and ratified by the Minister of Tourism" followed by his signature. A worldwide outcry led to the Egyptian authorities cancelling the project. The Paris Court of Appeal set aside an arbitral award against the state of Egypt, holding that the words and signature added by the Minister did not mean that the state was a party. They were added because the Ministry was responsible for supervising tourist sites and approving the creation of economic complexes and the creation, operation and management of hotels, and EGOTH and the claimants had specifically contemplated that their agreement would be subject to such approval. The added words and signature did not therefore indicate any intention to be bound and so to waive the state's immunity.

43. Here, the structure of the Agreement made clear that the Government was distancing itself from any direct contractual involvement: see per Aikens J, para 129 and Moore-Bick LJ, para 32. The Government's only role under the Agreement (in the absence of any assignment or transfer under clause 27) was to guarantee the Trust's loan obligations and to receive a counter-guarantee from the Trust and its trustee bank. Dallah was throughout this period advised by lawyers, Orr, Dignam & Co. The tribunal confined itself in relation to the Agreement to statements that (a) it was the Government which decided to "delegate" to the Trust the finalisation, signature and implementation of the Agreement, (b) the Government was "contractually involved in the Agreement", as the Government was "bound", under Article 2, to give its

LANBUK.COM LANBUK SIERRA LEONE

guarantee and (c) clause 27 authorised the Trust to assign its rights and obligations to the Government without Dallah's prior approval, such a clause being "normally used only when the assignee is very closely linked to the assignor or is under its total control …." (no doubt true, but on its face irrelevant to the issue). The "delegate" and "bound" tend to beg the issue, and nothing in these statements lends any support to Dallah's case that the Agreement evidences or is even consistent with an intention on the part of either Dallah or the Government that the Government should be party to the Agreement. Nowhere did the tribunal address the deliberate change in structure and in parties from the MOU to the Agreement, the potential significance of which must have been obvious to Dallah and its lawyers, but which they accepted without demur.

44. As to performance of the Agreement, between April 1996 and September 1996, exchanges between Dallah and the Ministry of Religious Affairs ("MORA") of the Government culminated in agreement that one of Dallah's associate companies, Al-Baraka Islamic Investment Bank Ltd., should be appointed trustee bank to manage the Trust's fund as set out in each Ordinance (para 5 above), and in notification by letters dated 30 July and 9 September 1996 of such appointment by the Board of Trustees of the Trust. In subsequent letters dated 26 September and 4 November 1996, the MORA urged Mr Nackvi of the Dallah/Al-Baraka group to give wide publicity to the appointment and to the savings schemes proposed to be floated for the benefit of intending Hujjaj. By letter dated 22 October 1996 Dallah submitted to the MORA a specimen financing agreement for the Trust (never in fact approved or agreed), under one term of which the Trust would have confirmed that it was "under the control of" the Government. The Government's position and involvement in all these respects is clear but understandable, and again adds little if any support to the case for saying that, despite the obvious inference to the contrary deriving from the Agreement itself, any party intended or believed that the Government should be or was party to the Agreement.

45. The fact that the Trust never itself acquired any assets is neutral, since its acquisition of any property always depended upon the arrangement of financing through Dallah, which never occurred, and its acquisition of other funds was to depend on the savings and philanthropic schemes to be arranged through its trustee bank under the Ordinances, the time for which never came. It is scarcely surprising that in these circumstances the Trust never itself acquired its own letter-paper, and letters recording its activity were, like those reporting decisions of its Board of Trustees, written on MORA letter-paper.

46. At the forefront of Dallah's factual case before the Supreme Court, as below, were exchanges and events subsequent to the Trust's demise. One letter in particular, dated 19 January 1997, was described in Dallah's written case as playing "a pivotal role" in, and in Miss Heilbron's oral submissions as "key" to the differing analyses of the tribunal and the courts below. The letter was written by Mr Lutfullah Mufti,

LANBUK.COM LANBUK SIERRA LEONE

signing himself simply as "Secretary", on MORA letter-paper, and faxed to Dallah on 20 January 1997. It read:

> "Pursuant to the above mentioned Agreement for the leasing of housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, you were required within ninety (90) days of the execution of the said Agreement to get the detailed specifications and drawings approved by the Trust. However, since you have failed to submit the specifications and drawings for the approval of the Trust to date you are in breach of a fundamental term of the Agreement which tantamounts to a repudiation of the whole Agreement which repudiation is hereby accepted.
>
> Moreover, the effectiveness of the Agreement was conditional upon your arranging the requisite financing facility amounting to U.S. $100,000,000.00 within thirty (30) days of the execution of the Agreement and your failure to do so has prevented the Agreement from becoming effective and as such there is no Agreement in law.
>
> This is without prejudice to the rights and remedies which may be available to us under the law."

47. Mr Lutfullah Mufti was secretary of MORA from 26 August 1993 to 19 December 1995 and from 23 December 1996 to 3 June 1998, and it will be recalled that, under each Ordinance, the secretary of MORA was at the same time secretary of the Trust. Also on 20 January 1997 Mr Mufti verified on oath the contents of a plaint issued in the name of the Trust as plaintiff to bring the first set of Pakistani proceedings against Dallah. The plaint set out the establishment of the Trust by Ordinance LXXXI of 1996 dated 12 August 1996 as a body having perpetual succession and asserted that Dallah had repudiated the Agreement by failing to submit detailed specifications and drawings within 90 days of the execution of the Agreement "which repudiation was accordingly accepted by the plaintiff vide its letter dated 19.01.1997". The Trust sought a declaration that, in consequence of the accepted repudiation, the Agreement was "not binding and is of no consequence upon the rights of the plaintiff" and a permanent injunction restraining Dallah "from claiming any right against the plaintiff". By an undated application, also verified by Mr Mufti, the Trust further sought an interlocutory injunction restraining Dallah "from representing or holding out itself to have any contractual relation with the applicant on the basis of the aforesaid repudiated Agreement".

48. Dallah made an application against the Trust for a stay of the Trust's proceedings in favour of arbitration under clause 23 of the Agreement. The

LANBUK.COM LANBUK SIERRA LEONE

application is missing from the bundle, but a written reply to it was put in on behalf of the Trust. This averred, in terms consistent with the stance taken in the plaint (though less obviously consistent with the principle of the separability of arbitration clauses), that since "the plaintiff has challenged the very validity and existence of the agreement dated 10.09.1996, the instant application is, therefore, not maintainable". Mr Mufti deposed on oath that allegations evidently made by Dallah against the Trust in its application for a stay were "false" and that "the facts stated in the plaint are true and correct to the best of my knowledge and belief and are reiterated". In early 1998, the first set of Pakistan proceedings were brought to an end by a judgment which commenced by recording that:

> "Counsel for the defendant had objected at the last date of hearing that Awami Haj Trust was established [under section] 3 of the Awami Haj Trust Ordinance, 1996 but at the time of institution of this suit Ordinance had elapsed, there was no more ordinance in the field and suit has been filed on behalf of same which was formed under the Ordinance after the lapse of Ordinance. Awami Haj Trust is plaintiff in this suit. After the lapse of Ordinance, the present plaintiff was no more a legal person in the eye of law."

The judge went on to record and reject the submission of counsel appearing for the Trust that the Trust continued to be able to file suit in respect of things done during the life of the Trust, adding:

> "Moreover the things done during the Ordinance can be sued and can sue by the parent department for which this Ordinance was issued by the government and that was ministry for religious affairs. Suit should have been filed by the Ministry of religious affairs. …… [B]efore parting with this Order, I observe that the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any. Since the suit has not been filed by the legal person. The present plaintiff is no more a plaintiff in the eye of the law. Suit is dismissed. …."

49. Dallah invoked ICC arbitration against the Government on 19 May 1998, on the basis that the Government was party to the Agreement. Notice of Dallah's request for arbitration was received by the Government on 29 May 1998, and on 2 June 1998 a second Pakistani suit was filed in the Government's name against Dallah, verified once again by Mr Mufti. Its terms were clearly drawn from those of the first suit, but it started by reciting that the Trust established under Ordinance No. LXXXI of 1996 "no longer remained in field" after the lapse of the Ordinance after four months, and that "The present suit is, therefore, being filed by Pakistan who issued the said Ordinance". The plaint went on to recite the Agreement, variously referring to "the parties" to it, to

LANBUK.COM LANBUK SIERRA LEONE

the Trust as a party, to "the plaintiff Trust", to "the plaintiff" and to Dallah's alleged repudiation "which repudiation was accordingly accepted by the plaintiff vide its letter dated 19.01.1997". It further asserted that, on account of such repudiation, the Agreement "is no longer binding on the plaintiff" and then:

> "14. That in January 1997, Awami Hajj Trust instituted a civil suit for declaration and permanent injunction against the defendant which suit was, however, dismissed vide order dated 21.02.1998 on the ground that after the lapse of the Ordinance, Awami Hajj Trust was no more a legal person and it could neither sue or be sued. The learned civil court, however observed that "liabilities and duties against the defendant can be agitated by the Government of Pakistan" [sic]."

50. The plaint concluded by praying for a declaratory decree in favour of the plaintiff that the Agreement "stands repudiated on account of default of the defendant ….. and the same, as such, is not binding and is of no consequence upon the rights of the plaintiff" and by seeking a permanent injunction restraining Dallah "from claiming any right against the plaintiff under the said Agreement or representing or holding out that it has any contractual relationship with the plaintiff". An interim injunction in the same terms was obtained on 2 June 1998. On 5 June 1998 the Government, through its advocates, wrote to the ICC informing it of the proceedings and the interim injunction as well as relying on s.35 of the Pakistan Arbitration Act 1940 in support of a contention that any further proceedings in the ICC arbitration would be "invalid" in the light of the Pakistan proceedings.

51. Dallah responded to the second set of Pakistan proceedings on 12 June 1998 with an application for a stay for arbitration, asserting that "the contract, admitted by the Plaintiff, which is complete, valid and fully effective between the parties, contains the following clause 23 ….", which was then set out. It pointed out, no doubt correctly, that the Government's plaint must be seen as a riposte to the recently notified request for ICC arbitration. The Government replied on 27 June 1998 to the effect that "there is no valid and effective Agreement between the parties. The application, as such, is incompetent and is liable to be dismissed". On 15 August 1998 the Government's advocates informed the ICC that the Government "has already declined to submit to the jurisdiction of the International Court of Arbitration" and spelled out that:

> "There is no contract or any arbitration agreement between our client and Dallah …. The contract and the arbitration agreement referred to by the Claimant were entered into between the Claimant and Awami Hajj Trust. The Trust has already ceased to exist after

LANBUK.COM LANBUK SIERRA LEONE

expiry of the period of the Ordinance under which it was established".

52. By a judgment dated 18 September 1998, the judge in the second set of Pakistan proceedings dismissed Dallah's application for a stay for arbitration on the ground that Dallah had "neither alleged nor placed on record any instrument of transfer of rights and obligations of the Trust in the name of the [Government]", which was not therefore prima facie bound by the Agreement dated 10 September 1996. Dallah appealed on the ground that the Government was "successor" to the Trust, but on 14 January 1999 the Government withdrew its suit, as it was apparently entitled to, in view of its commencement of the third set of Pakistani proceedings. Dallah has disclaimed, both before the tribunal and before the English courts, any suggestion that these short-lived and abortive proceedings could give rise to any estoppel on the issue of the tribunal's jurisdiction. But Dallah relies on them in support of its current case of common intention.

53. In the third set of proceedings the Government claimed against Dallah declarations to the effect, inter alia, that it was not successor to the Trust, had not taken over the Trust's responsibilities and was not a party to the Agreement or any arbitration agreement with Dallah. The claim was made under s.33 of the Arbitration Act 1940, which entitles a party to an arbitration agreement or any person claiming under such party to claim relief. Dallah's response was that, since the Government was denying that it was party to an arbitration agreement, it had no locus standi to make the claim. This response was upheld by judgment dated 19 June 1999, against the Government's argument that the purpose of s.33 was to enable a party alleged to be party to an arbitration agreement to seek the relief it claimed. An appeal by the Government to the Lahore High Court was dismissed, again on the basis that the Government was not a party to the Agreement or arbitration agreement. An appeal to the Pakistan Supreme Court has apparently remained unresolved.

54. No evidence was adduced from Mr Mufti before Aikens J. Aikens J said, in relation to the letter dated 19 January 1997 that, "logically" Mr Mufti "must, in fact, have been writing the letter in his capacity of Secretary to MORA, whatever he may have thought at the time", but Aikens J found it "possible to get a clearer indication of the state of mind of the [Government] at this stage" by reference to the proceedings begun by Mr Mufti on 20 January 1997 (paras 117, 119). These indicated, in Aikens J's view, that Mr Mufti thought that the Trust had rights it could enforce, and that there was no intention on the part of the Government to be bound by the Agreement or to step into the shoes of the Trust (para 119). The Court of Appeal took a slightly different view. It observed that the fact that, after the Trust ceased to exist, Mr Mufti could not have been writing (as opposed, I add, to purporting to write) as secretary to the Board of Trustees did not necessarily mean that he was writing on behalf of the Government or that the Government viewed itself as a party to the Agreement (Moore-Bick LJ, para 36). Moore-Bick LJ continued: "If, as I think likely, the letter

LANBUK.COM LANBUK SIERRA LEONE

was written in ignorance that the Trust had ceased to exist, it is almost certain that Dallah was equally unaware of the fact and that it was read and understood as written on behalf of the Trust".

55. Miss Heilbron challenges this reasoning as regards the Government, and invites attention to the letter on its face and to the Government's stance in the second set of Pakistan proceedings. But one obvious explanation of the letter, read with the first set of proceedings of which it was clearly the precursor, is that neither Mr Mufti nor indeed Dallah was at that stage conscious of the drastic effect under Pakistan law of the failure to repromulgate the Ordinance. Even if Mr Mufti was aware of the Trust's demise, he may well have believed (and one may understand why) that this could not affect the Trust's right to litigate matters arising during and out of the Trust's existence – which was the stance taken by counsel for the Trust when Dallah eventually realised and pointed out that the Trust had lapsed. However that may be, it seems clear that Mr Mufti was in January 1997 acting on the basis that and as if the Trust existed. Further, Dallah clearly cannot have appreciated that the Trust had ceased to exist until a late stage in the course of the first set of Pakistan proceedings.

56. The arbitral tribunal regarded the letter dated 19 January 1997 as "very significant because it confirmed in the clearest way possible that the Defendant [the Government], after the elapse of the Trust, regarded the Agreement with the Claimant as its own and considered itself as a party to such Agreement" (para 11-1). It went on to say that the Government's position in the arbitration:

> "did not deal with the substance and contents of such letter, but was rather limited to a formal and very general challenge of the validity of said letter, on the ground that such letter was absolutely unauthorised, illegal and of no legal effect because all office bearers of the Trust, including the Secretary, had ceased to have any authority to act for the defunct Trust. Such challenge is however completely unfounded as the signatory of the letter of 19.1.97, Mr Lutfallah Mufti, did not sign such letter in his capacity as official of the Trust, to which anyhow the letter makes no reference at all, but in his capacity as Secretary of the Defendant i.e. the Ministry of Religious Affairs which is an integral part of the Government of Pakistan. As such, the signatory of the letter engages and binds the Government, as he has continued to bind it during the whole previous period where the Trust was in existence."

57. Several features of the arbitral tribunal's reliance on the letter are notable. First, the tribunal did not put the letter in its context. It did not mention the first set of proceedings at all in addressing the letter's significance. In fact, it referred to those proceedings only once in its whole award. That was much earlier in para 5(c) where it

LANBUK.COM LANBUK SIERRA LEONE

recited three short submissions by the Government "With respect to the effect of the legal proceedings in Pakistan". The first such submission read:

> "The 1st [sic] January 1997 suit : Pakistan was not a party to such suit and as such it is not bound by any observation made by the Court in the said suit instituted by the defunct Trust".

(In making this submission, the Government was evidently seeking to rebut a possible argument that it might be bound by the (obiter) observations of the judge in his judgment at the end of the first set of proceedings to the effect that "the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any". It has not been, and could not have been suggested in the present proceedings that these observations in any way bind the Government.)

58. Secondly, the tribunal rejected any idea that Mr Mufti was, when writing the letter, acting in a manner which was "absolutely unauthorised, illegal and of no legal effect". But that, on any view, was precisely what Mr Mufti can be seen, with hindsight, to have been doing, on the same day as the letter was faxed, by commencing the first set of proceedings in the Trust's name.

59. Thirdly, the tribunal's comments on the letter assume that the Government or Mr Mufti on its behalf was aware of the "elapse of the Trust" and believed that this ended any possibility of the Trust taking any legal stance or proceedings. That, for reasons I have indicated, cannot have been the case. He must at least have believed that it was still possible for action to be taken in the Trust's name in respect of matters arising from the Agreement.

60. Fourth, the tribunal, in this context as in others, did not address Dallah's state of mind, or its objective manifestation - an important point when considering a test based on common intention.

61. The letter dated 19 January 1997 and faxed on 20 January 1997 cannot be read in a vacuum, particularly when the issue is whether the parties shared a common intention, manifested objectively, to treat the Government as a or the real party to the Agreement and arbitration clause. Read in the objectively established context which I have indicated, it is clear that it was written and intended as a letter setting out the Trust's position by someone who believed that the Trust continued either to exist or at least to have a sufficient existence in law to enable it to take a position on matters arising when the Ordinance was in force. This is precisely how the plaint of 20 January 1997 put the matter when it said that the "repudiation was accordingly accepted by the plaintiff [i.e. the Trust] vide its letter dated 19.01.1997". It makes no

LANBUK.COM LANBUK SIERRA LEONE

sense to suppose that Mr Mufti on one and the same day sent a letter intended to set out the Government's position and caused proceedings to be issued by the Trust on the basis that the letter was intended to set out the Trust's position. That Dallah also believed that the Trust continued to exist, certainly in a manner sufficient to enable it to pursue the proceedings, is confirmed by Dallah's application to stay the Trust's proceedings pending arbitration and is also (as I understood her) admitted by Miss Heilbron.

62. The arbitral tribunal also relied on the second set of Pakistan proceedings and on the Government's letter dated 5 June 1998 to the tribunal. It saw Mr Mufti's verification on oath of the plaint dated 2 June 1998 as an admission providing "another piece of evidence to be added to the other pieces, as to the fact that the [Government] has always been – and has considered itself – a party to the agreement", and the letter as an admission "that it was a party to such Agreement and that it could accept repudiation of the Agreement by [Dallah]" (para 11-2). Aikens J and the Court of Appeal did not accept this analysis. They considered that the second set of proceedings viewed overall was premised on the basis that the Government had succeeded to the Trust's rights and obligations upon the Trust's demise, not that the Government had been a party to it always or at any previous date. The Government was taking up the suggestion of the judge who, when determining the first set of proceedings, had remarked that "the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any". In my opinion this analysis is clearly correct. If the search is for confirmation of an intention to be or belief that the Government was party to the Agreement throughout, the second set of proceedings does not therefore advance the matter. Nor does the letter dated 5 June 1998. This was written to draw express attention to the second set of proceedings, and it recorded and attached a copy of the Pakistan judge's injunction in them restraining Dallah "from representing or holding out itself to have contractual relations with the applicant on the basis of the disputed contract".

63. Further, nothing affirmed by the Government during the second set of proceedings or in the letter throws any light on Dallah's intention at any prior date, or therefore assists the case that there was any "common" intention that the Government should "always" be party to the Agreement.

64. If the search is for an admission in or after June1998 that the Agreement or arbitration clause was binding on the Government, this is equally lacking. The Government's case in the second set of proceedings, and the gist of the injunction and the letter dated 5 June 1998 was that, although the Government could "agitate" the former Trust's rights and liabilities, the Government's acceptance of Dallah's alleged repudiation meant that the Agreement "as such, is not binding and is of no consequence upon the rights of the [Government]" (plaint of 20 January 1997). However questionable the proposition that an accepted repudiation renders the whole agreement (let alone an arbitration clause) "not binding", that was the Government's

LANBUK.COM LANBUK SIERRA LEONE

case, and such a case is inconsistent with an intention to be party to the Agreement or agreement clause in or after June 1998. Further and in any event, a very short time afterwards on 15 August 1998 the Government wrote to the tribunal making clear also its current position that it had never been party to any contract or arbitration agreement with Dallah. Even if the Government could be treated in June as having made any relevant, short-lived admission, it would in context and in the overall course of events be incapable of giving rise to any real inference that the Government had always intended or been intended to be a party to the Agreement.

65. Finally, the search for a subjective common intention under the principle recognised by the French courts must be undertaken by examining, and so through the prism of, the parties' conduct. Account will in that sense necessarily be taken of good faith. The tribunal also described the "transnational general principles and usages", which it decided to apply, as "reflecting the fundamental requirements of justice in international trade and the concept of good faith in business" (award, section III (I) (4)), and this must also be true of the principle recognised by the French courts. As both Aikens J (para 130) and Moore-Bick LJ (para 45) said, and in agreement on this point with Justice Dr Shah and Lord Mustill, if conduct interpreted as it would be understood in good faith does not indicate any such common intention, then it is impossible to see how "… a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such" (award, section (III)(III)(14)). This remains so, whatever comments might or might not be made about the Government's conduct in allowing the Trust to lapse without providing for the position following its lapse.

66. In my view, the third re-examination by this court, in the light of the whole history, of the issue whether the Government was party to the Agreement, and so to its arbitration clause, leads to no different answer to that reached in the courts below. The arbitral tribunal's contrary reasoning is neither conclusive nor on examination persuasive in a contrary sense. As to the law, it is far from clear that the tribunal was directing its mind to common intention and, if it was, it approached the issue of common intention in terms differing significantly from those which a French court would adopt. In any event, as to the facts, there are a number of important respects in which the tribunal's analysis of the Government's conduct and the course of events cannot be accepted, and this is most notably so in relation to the significance of the letter dated 19 January 1997 and the second set of proceedings in Pakistan. The upshot is that the course of events does not justify a conclusion that it was Dallah's and the Government's common intention or belief that the Government 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.

LANBUK.COM LANBUK SIERRA LEONE

Discretion

67. Dallah has a fall-back argument, which has also failed in both courts below. It is that s.103(2) of the 1996 Act and Article V(1) of the New York Convention state that "Recognition and enforcement of the award may be refused" if the person against whom such is sought proves (or furnishes proof of) one of the specified matters. So, Miss Heilbron submits, it is open to a court which finds that there was no agreement to arbitrate to hold that an award made in purported pursuance of the non-existent agreement should nonetheless be enforced. In *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 I suggested that the word "may" could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused (paras 8 and 18). I also suggested as possible examples of such circumstances another agreement or estoppel.

68. S.103(2) and Article V in fact cover a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word "may" contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award. Article II of the Convention and ss.100(2) and 102(1) of the 1996 Act serve to underline the (in any event obviously fundamental) requirement that there should be a valid and existing arbitration agreement behind an award sought to be enforced or recognised. Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word "may" enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue.

69. The factors relied upon by Dallah in support of its suggestion that a discretion should be exercised to enforce the present award amount for the most part to repetition of Dallah's arguments for saying that there was an arbitration agreement binding on the Government, or that an English court should do no more than consider whether there was a plausible or reasonably supportable basis for its case or for the tribunal's conclusion that it had jurisdiction. But Dallah has lost on such points, and it is impossible to re-deploy them here. The application of s.103(2) and Article V(1) must be approached on the basis that there was no arbitration agreement binding on the Government and that the tribunal acted without jurisdiction. General complaints that the Government did not behave well, unrelated to any known legal principle, are equally unavailing in a context where the Government has proved that it was not party to any arbitration agreement. There is here no scope for reliance upon any discretion to refuse enforcement which the word "may" may perhaps in some other contexts provide.

LANBUK.COM LANBUK SIERRA LEONE

Conclusion

70. It follows that Aikens J and the Court of Appeal were right in the conclusions they reached and that Dallah's appeal to this Court must be dismissed.

LORD COLLINS:

I Introduction

71. I agree that this appeal from the excellent judgments of Aikens J [2009] 1 All ER (Comm) 505 and the Court of Appeal [2010] 2 WLR 805 (with Moore-Bick and Rix LJJ giving the reasons) should be dismissed. Because of the international importance of the issues on the appeal, I set out the steps which have led me to that conclusion.

72. The final award is a Convention award which prima facie is entitled to enforcement in England under the Arbitration Act 1996, section 101(2). The principal issue is whether the courts below were right to find that the Government has proved that on the proper application of French law (as the law of the country where the award was made, since there is no indication in the Agreement as to the law governing the arbitration agreement), it is not bound by the arbitration agreement. To avoid any misunderstanding, it is important to dispel at once the mistaken notion (which has, it would appear, gained currency in the international arbitration world) that this is a case in which the courts below have recognised that the arbitral tribunal had correctly applied the correct legal test under French law. On the contrary, one of the principal questions before all courts in this jurisdiction has been whether the tribunal had applied French law principles correctly or at all.

73. The main issue involves consideration of these questions: (a) the role of the doctrine that the arbitral tribunal has power to determine its own jurisdiction, or Kompetenz-Kompetenz, or compétence-compétence; (b) the application of arbitration agreements to non-signatories (including States) in French law, and the role of transnational law or rules of law in French law; (c) whether renvoi is permitted under the New York Convention (and therefore the 1996 Act) and whether the application by an English court of a reference by French law to transnational law or rules of law is a case of renvoi.

LANBUK.COM LANBUK SIERRA LEONE

74. There is also a subsidiary issue as to whether, even if the Government has proved that it is not bound by the arbitration agreement, the court should exercise its discretion ("… enforcement *may* be refused …") to enforce the award.

75. By Article V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) … 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; …"

76. The New York Convention is given effect in the United Kingdom by Part III of the Arbitration Act 1996 (England and Wales and Northern Ireland) and by sections 18 to 22 of the Arbitration (Scotland) Act 2010. Article V(1)(a) of the New York Convention is transposed in England and Wales and Northern Ireland by section 103 of the 1996 Act, which provides:

> "(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
>
> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
>
> …
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> …"

LANBUK.COM LANBUK SIERRA LEONE

77. Although Article V(1)(a) (and section 103(2)(b)) deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement. Thus in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 it was accepted by the Court of Appeal that section 103(2)(b) applied in a case where the question was whether a Swedish award was enforceable in England against Yukos on the basis that, although it was not a signatory, it had by its conduct rendered itself an additional party to the contract containing the arbitration agreement. In *Sarhank Group v Oracle Corp*, 404 F 3d 657 (2d Cir 2005) the issue, on the enforcement of an Egyptian award, was whether a non-signatory parent company was bound by an arbitration agreement on the basis that its subsidiary, which had signed the agreement, was a mere shell; and in *China Minmetals Materials Import and Export Co Ltd v Chei Mei Corpn*, 334 F 3d 274 (3d Cir 2003) enforcement of a Chinese award was resisted on the ground that the agreement was a forgery. See also Born, *International Commercial Arbitration* (2009), pp 2778-2779.

78. In this case, because there was no "indication" by the parties of the law to which the arbitration agreement was subject, French law as the law of the country where the award was made, is the applicable law, subject to the relevance of transnational law or transnational rules under French law.

II The applicable principles

Kompetenz-Kompetenz or compétence-compétence as a general principle

79. A central part of this appeal concerns the authority to be given to the decision of the arbitral tribunal as to its own jurisdiction, and the relevance in this connection of the doctrine of Kompetenz-Kompetenz or compétence-compétence. These terms may be comparatively new but the essence of what they express is old.

80. The principle was well established in international arbitration under public international law by the 18th century. In the famous case of *The Betsy* (1797) the question was raised as to the power of the commissioners under the Mixed Commissions organised under the Jay Treaty between United States and Great Britain of 19 November 1794 to determine their own jurisdiction. On 26 December 1796 Lord Loughborough LC had a meeting at his house with the American Commissioners and the American Ambassador. The Lord Chancellor expressed the view "that the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd; and that they must necessarily decide upon cases being within, or without, their competency": Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Vol 1 (1898), p 327. While the point was under

LANBUK.COM LANBUK SIERRA LEONE

discussion, the American Commissioners filed opinions. Mr. Christopher Gore, the eminent American Commissioner, said: "A power to decide whether a Claim preferred to this Board is within its Jurisdiction, appears to me inherent in its very Constitution, and indispensably necessary to the discharge of any of its duties": Moore, op cit, Vol 3 (1898), p 2278.

81. The principle has been recognised by the Permanent Court of International Justice and the International Court of Justice: Rosenne, *The Law and Practice of the International Court 1920-1996* (3rd ed 1997), Vol II, pp 846 et seq. In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement* (1928) Series B No 16, 20, the Permanent Court of International Justice said: "as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction ... ". In the *Nottebohm* case (*Liechtenstein v Guatemala*), 1953 ICJ Rep 111, 119, the International Court of Justice, after referring to the *Alabama* case in 1872, and the views of the rapporteur of the Hague Convention of 1899 for the Pacific Settlement of International Disputes, said: "it has been generally recognised….that…an international tribunal has the right to decide as to its own jurisdiction".

82. The principle has been recognised also by the European Court of Justice. In *West Tankers Inc v Allianz SpA (formerly Ras Riunione Adriatica di Sicurta SpA)* (Case C-185/07) [2009] ECR I-663, [2009] AC 1138, para 57, it referred to "… the general principle that every court is entitled to examine its own jurisdiction (doctrine of 'Kompetenz-Kompetenz')."

83. The principle that a tribunal has jurisdiction to determine its own jurisdiction does not deal with, or still less answer, the question whether the tribunal's determination of its own jurisdiction is subject to review, or, if it is subject to review, what that level of review is or should be. Thus the International Court's decision on jurisdiction is not subject to recourse, although the State which denies its jurisdiction may decline to take any part at all in the proceedings (as in the *Fisheries Jurisdiction* cases (*Federal Republic of Germany v Iceland*; *United Kingdom v Iceland*), 1972-1974), or to take any further part after it has failed in its objections to the jurisdiction (as in *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua v United States*, 1986). By contrast, a decision of an ICSID tribunal (which "shall be the judge of its own competence": Article 41(1) of the ICSID Convention) is subject to annulment on the grounds (inter alia) that the tribunal manifestly exceeded its powers (article 52(1)(b)), which includes lack of jurisdiction: *Klöckner v Cameroon*, Decision on Annulment, 2 ICSID Rep 95; Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009), pp 943-947.

LANBUK.COM LANBUK SIERRA LEONE

The principle in international commercial arbitration

84. So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependant upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.

85. Thus Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. But by article 34(2) an arbitral award may be set aside by the court of the seat if an applicant furnishes proof that the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the seat (and see also article 36(1)(a)(i)). Articles V and VI of the European Convention on International Commercial Arbitration of 1961 also preserve the respective rights of the tribunal and of the court to consider the question of the jurisdiction of the arbitrator.

Comparative procedure

86. Consequently in most national systems, arbitral tribunals are entitled to consider their own jurisdiction, and to do so in the form of an award. But the last word as to whether or not an alleged arbitral tribunal actually has jurisdiction will lie with a court, either in a challenge brought before the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad. The degree of scrutiny, particularly as regards the factual enquiry, will depend on national law, subject to applicable international conventions.

87. There was sometimes said to be a rule in German law that an arbitral tribunal had the power to make a final ruling on its jurisdiction without any court control, but if it ever existed, there is no longer any such rule: Poudret and Besson, *Comparative Law of International Arbitration* (2nd ed 2007), para 457; Born, *International Commercial Arbitration*, vol I (2009), pp 907-910.

LANBUK.COM LANBUK SIERRA LEONE

88. In France the combined effect of articles 1458, 1466 and 1495 of the New Code of Civil Procedure ("NCPC") is that, in an international arbitration conducted in France, the tribunal has power to rule on its jurisdiction if it is challenged. If judicial proceedings are brought in alleged breach of an arbitration agreement the court must declare that it has no jurisdiction unless the jurisdiction agreement is manifestly a nullity: Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (ed Gaillard and Savage 1999), paras 655, 672; Delvolvé, Pointon and Rouche, *French Arbitration Law and Practice* (2nd ed. 2009), paras 139 et seq, 172 et seq; and eg *Soc Laviosa Chimica Mineraria v Soc Afitex*, Cour de cassation, 11 February 2009, 2009 Rev Arb 155 ("Vu le principe compétence-compétence selon lequel il appartient à l'arbitre de statuer par priorité sur sa propre compétence").

89. But the position is different once the arbitral tribunal has ruled on its jurisdiction. Its decision is not final and can be reviewed by the court hearing an action to set it aside. The French Cour d'appel seised of an action for annulment of an award made in France for lack of jurisdiction, or seised with an issue relating to the jurisdiction of a foreign tribunal or an appeal against an exequatur granted in respect of a foreign award, has the widest power to investigate the facts: Fouchard, Gaillard, Goldman, paras 1605 to 1614; Delvolvé, Pointon and Rouche, para 426. In the *Pyramids* case (*République Arabe d'Egypte v Southern Pacific Properties Ltd*, Paris Cour d'appel, 12 July 1984 (1985) 10 Yb Comm Arb 113; Cour de cassation, 6 January 1987 (1987) 26 ILM 1004) the question was whether a distinguished tribunal had been entitled to find that Egypt (as opposed to a State-owned entity responsible for tourism) was a party to an arbitration agreement. The Cour d'appel said that the arbitral tribunal had no power finally to decide the issue of its jurisdiction; if it decided the issue of the existence or of the validity of the arbitration agreement, nevertheless it only decided this question subject to the decision of the court on an application for the annulment of the award pursuant to article 1504, NCPC. The Cour de cassation confirmed that the Cour d'appel had been entitled "de rechercher en droit et en fait tous les elements concernant les vices en question … en particulier, il lui appartient d'interpréter le contrat pour apprécier elle-même si l'arbitre a statué sans convention d'arbitrage." ("to examine as a matter of law and as a matter of fact all circumstances relevant to the alleged defects … in particular, it is for the court to construe the contract in order to determine itself whether the arbitrator ruled in the absence of an arbitration agreement.")

90. *First Options of Chicago Inc v Kaplan*, 514 US 938 (1995) was not an international case. It concerned the application of the Federal Arbitration Act to an award of an arbitral panel of the Philadelphia Stock Exchange. The question was whether the federal District Court should independently decide whether the arbitral panel had jurisdiction. The United States Supreme Court drew a distinction between the case where the parties had agreed to submit the arbitrability question itself to arbitration, and the case where they had not. In the former case the court should give considerable leeway to the arbitrator, setting aside the award only in certain narrow circumstances, but (at 943, per Breyer J):

LANBUK.COM LANBUK SIERRA LEONE

> "If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently".

91. That flowed inexorably from the fact that arbitration was simply a matter of contract between the parties and was a way to resolve those disputes, but only those disputes, that the parties had agreed to submit to arbitration.

92. This decision was applied in the international context, in connection with the enforcement of a CIETAC award, in *China Minmetals Materials Import and Export Co Ltd v Chei Mei Corpn*, 334 F 3d 274 (3d Cir 2003) in which Minmetals, a Chinese corporation, sought to enforce a CIETAC award against Chei Mei, a New Jersey corporation. Chei Mei resisted enforcement on the ground that the contract containing the arbitration clause had been forged. The tribunal had held that Chei Mei failed to show that the contracts were forged, but that even if its signature and stamp had been forged, it had taken various steps which confirmed its adherence to the arbitration agreement. The Court of Appeals for the Third Circuit decided that the court asked to enforce an award may determine independently the arbitrability of the dispute. After an illuminating discussion of the doctrine of compétence-compétence and kompetenz-kompetenz, it concluded (at 288, citing Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators* (1997) 8 Am Rev Int Arb 133, 140-142) that "it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed." The court said (ibid): "After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it."

The position in England

93. Prior to the 1996 Act the leading authority in England was *Christopher Brown Ltd v Genossenschaft Osterreichischer* [1954] 1 QB 8, in which Devlin J said (at pp 12-13):

> "… It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to

LANBUK.COM LANBUK SIERRA LEONE

determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties."

94. The DTI Departmental Advisory Committee in its February 1994 Report on a draft Arbitration Bill said:

> "[The German] doctrine of Kompetenz-Kompetenz resolves logical difficulties in legal systems where the jurisdiction of state courts and the jurisdiction of arbitrators under a valid arbitration agreement are mutually exclusive in legal theory. In these legal systems, the state courts must 'dismiss' legal proceedings brought in violation of a valid arbitration agreement, thereby retaining no competence over the parties – but in the case of an invalid or non-existent arbitration agreement, the arbitrators can have no jurisdiction at all. Who then decides what and in what order – in the absence of a suitable doctrine of Kompetenz-Kompetenz? In contrast, the courts of most common law countries (including England) merely 'stay' legal proceedings because in legal theory an arbitration agreement can never oust the Court's jurisdiction over the parties; and this logical problem over jurisdiction has not arisen in the same form …
>
> For these reasons, the law and practice of English arbitration does not require an *express* doctrine of Kompetenz-Kompetenz. English law achieves the same result as the German doctrine by a different route. ... [T]he practice of arbitration tribunals determining their own jurisdiction, subject to the final decision of the English Court, has long been settled in England …" (Ch III, pp 4-5)

LANBUK.COM LANBUK SIERRA LEONE

95. The position in England under the Arbitration Act 1996 as regards arbitrations the seat of which is in England is as follows. By section 30(1) of the 1996 Act, which is headed "Competence of tribunal to rule on its own jurisdiction" the arbitral tribunal may rule on its own substantive jurisdiction, including the question whether there is a valid arbitration agreement. By section 30(2) any such ruling may be challenged (among other circumstances) in accordance with the provisions of the Act. Section 32 gives the court jurisdiction to determine any preliminary point on jurisdiction but only if made with the agreement of all parties or with the permission of the tribunal, and the court is satisfied (among other conditions) that there is good reason why the matter should be decided by the court. By section 67 a party to arbitral proceedings may challenge any award of the tribunal as to its substantive jurisdiction but the arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court is pending in relation to an award as to jurisdiction. The equivalent provisions in Scotland are in the Arbitration (Scotland) Act 2010, Sched 1, Rules 19, 42 (not limited to jurisdiction), and 67.

96. The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603) and is plainly right.

97. Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate: *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency* [2000] 1 Lloyd's Rep 522 (CA) (English arbitration); *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 4)* [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1 (Malaysian arbitration). So also where an injunction was refused restraining an arbitrator from ruling on his own jurisdiction in a Geneva arbitration, the Court of Appeal recognised that the arbitrator could consider the question of his own jurisdiction, but that would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or in England: *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd's Rep 716, para 32.

98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's

LANBUK.COM LANBUK SIERRA LEONE

jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court: see, e.g. *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886, para 104; *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 48, per Kaplan J.

The application of the principles in the present case

99. Dallah's argument is that the enforcing court, faced with a decision by the tribunal that it has jurisdiction, should only conduct a limited review. The argument is essentially this: (1) The arbitral tribunal remained a competent tribunal to determine its own jurisdiction, whether or not it determined it wrongly. (2) The first partial award was made with jurisdiction i.e. the Kompetenz-Kompetenz jurisdiction, even if (on the English court's view) the later awards relating to the merits were subsequently found to be made without substantive jurisdiction. (3) It is universally accepted that an enforcing court cannot review the merits of an award, and a *de novo* rehearing at the enforcement stage (by contrast with an application to set aside at the seat of the arbitration) adds a fact-finding layer to the process which was not envisaged by those drafting the New York Convention and which undermines the finality and efficiency of the system. (4) The review envisaged by the New York Convention is premised on the need to ensure that there is not a grave departure from the basic precepts of international arbitration and fairness and basic concepts of justice. (5) The award is itself an evidential element of the reviewing process, and deference must be given to such an award by the reviewing/enforcing court. (6) The degree of deference may vary according to many factors, for example, the experience of the tribunal or the nature of the underlying decision, such as whether it was one of fact or law or mixed fact and law, and enforcing courts must be particularly wary where, as here, the underlying decision is fact-based or a case of mixed fact and law. (7) Where, as here, there is no dispute as to the underlying facts or law such that the decision is one upon which different tribunals can legitimately come to different conclusions, enforcing national courts should be slow to substitute their own interpretation unless it can be shown that the tribunal's decision was unsustainable, and this is particularly so where, as in this case, the resisting party has offered no new evidence. (8) In essence the issue in this case is whether the English court should refuse to enforce the award on the basis that its views and interpretation of the same facts, applying the same principles of law, should be preferred to the decision of a former Law Lord and a doyen of international arbitration, a former Chief Justice of Pakistan and an eminent Lebanese lawyer.

100. Dallah relies in particular on international authorities relating to applications to annul awards on the basis that the matters decided by the arbitral tribunal exceeded the

LANBUK.COM LANBUK SIERRA LEONE

scope of the submission to arbitration: article V(1)(c) of the New York Convention; article 34 of the UNCITRAL Model Law. In *Parsons & Whittemore Overseas Co Inc v Soc Gén de l'Industrie du Papier*, 508 F 2d 969 (2d Cir 1974) the Court of Appeals for the Second Circuit, in dealing with an attack on a Convention award based on Article V(1)(c), said (at p 976) that the objecting party must "overcome a powerful presumption that the arbitral body acted within its powers." That statement was applied by the British Columbia Court of Appeal, in a case under article 34 of the Model Law as enacted by the International Commercial Arbitration Act, SBC 1986: *Quintette Coal Ltd v Nippon Steel Corpn* [1991] 1 WWR 219 (BCCA).

101. These cases are of no assistance in the context of a challenge based on the initial jurisdiction of the tribunal and in particular when it is said that a party did not agree to arbitration. Nor is any assistance to be derived from Dallah's concept of "deference" to the tribunal's decision. There is simply no basis for departing from the plain language of article V(1)(a) as incorporated by section 103(2)(b). It is true that the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law. It is also true that the Convention introduced a "pro-enforcement" policy for the recognition and enforcement of arbitral awards. The New York Convention took a number of significant steps to promote the enforceability of awards. The Geneva Convention placed upon the party seeking enforcement the burden of proving the conditions necessary for enforcement, one of which was that the award had to have become "final" in the country in which it was made. In practice in some countries it was thought that that could be done only by producing an order for leave to enforce (such as an exequatur) and then seeking a similar order in the country in which enforcement was sought, hence the notion of "double exequatur" (but in England it was decided, as late as 1959, that a foreign order was not required for the enforcement of a Geneva Convention award under the Arbitration Act 1950, section 37: *Union Nationale des Co-opératives Agricoles des Céréales v Robert Catterall & Co Ltd* [1959] 2 QB 44). The New York Convention does not require double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive.

102. But article V safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal. As van den Berg, *The New York Arbitration Convention of 1958* (1981) puts it, at p 265: "In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award *extra* or *ultra petita*, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the non-binding force of the award, the setting aside of the award in the country of origin, and the violation of public policy." In *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, 706, May LJ said that section 103(2) concerns matters that go to the "fundamental structural integrity of the arbitration proceedings."

LANBUK.COM LANBUK SIERRA LEONE

103. Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement; and that the exclusivity of the supervisory court in this regard ensures uniformity of application of the Convention. There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

104. It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.

Arbitration agreements and non-signatories: groups of companies/State-owned entities and States

105. One of the most controversial issues in international commercial arbitration is the effect of arbitration agreements on non-signatories: among many others see, eg, Hanotiau, *Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law*, in *International Arbitration 2006: Back to Basics?* (2007, ed van den Berg), p 341; Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Party Actions in International Arbitration* (ed Macmahon, Permanent Court of Arbitration, 2009), p 1.

106. The issue has arisen frequently in two contexts: the first is the context of groups of companies where non-signatories in the group may seek to take advantage of the arbitration agreement, or where the other party may seek to bind them to it. The second context is where a State-owned entity with separate legal personality is the signatory and it is sought to bind the State to the arbitration agreement. Arbitration is a consensual process, and in each type of case the result will depend on a combination of (a) the applicable law; (b) the legal principle which that law uses to supply the answer (which may include agency, alter ego, estoppel, third-party beneficiary); and (c) the facts of the individual case.

107. One of the decisions in the field of groups of companies best known internationally is the *Dow Chemical* case in France, which arose in the context of the setting aside of a French award. The arbitrators (Professors Sanders, Goldman and Vasseur: (1984) 9 Yb Comm Arb 131) decided that non-signatory companies in a group could rely on an arbitration clause in contracts between Isover St Gobain and two Dow Chemical group companies. The tribunal said that a group of companies constituted one and the same economic reality (*une realité économique unique*) of

LANBUK.COM LANBUK SIERRA LEONE

which the tribunal should take account when it ruled on its jurisdiction. It decided that it was the mutual intention of all parties that the group companies should have been real parties to the agreement. They relied in particular on the fact that group companies participated in the conclusion, performance and termination of the contract, and on the economic reality and needs of international commerce. The Paris Cour d'appel rejected an application to set aside the award: the effect of the ICC Rules was that the tribunal was bound to take account of the will of the parties and of trade usages; in the light of the agreements and of the documents exchanged in the course of their conclusion and termination, the tribunal had given relevant and consistent reasons for deciding that it was the joint intention of the parties that Dow Chemicals France and Dow Chemical Company had been parties to the agreements (and therefore to the arbitration agreements) although they had not physically signed them. The court also mentioned that as a subsidiary reason the tribunal had invoked the notion of the "group of companies," which had not been seriously disputed by Isover St-Gobain: *Soc. Isover Saint-Gobain v Soc. Dow Chemical France*, 21 October 1983, 1984 Rev Arb 98. For other cases see, eg, Redfern and Hunter, *International Arbitration* (5th ed 2009, ed Blackaby and Partasides), paras 2.44-2.45; Wilske, Shore and Ahrens, *The "Group of Companies Doctrine" – Where is it heading?* (2006) 17 Am Rev Int Arb 73.

108. As regards States, the *Pyramids* case (*République Arabe d'Egypte v Southern Pacific Properties Ltd*, above, para 89) was also a case of setting aside rather than enforcement of a foreign award. A company incorporated in Hong Kong ("SPP") signed an agreement with an Egyptian state owned entity responsible for tourism ("EGOTH"). The contract referred to a pre-existing framework contract between the same parties and the Egyptian Government concerning the construction of two tourist centres, one of which was located near the Pyramids. The contract contained an ICC arbitration clause with Paris as the seat. The last page of the agreement contained the words "approved, agreed and ratified" followed by the signature of the Egyptian Minister for Tourism. After political opposition to the project, the Egyptian authorities cancelled it, and SPP initiated arbitration proceedings against both EGOTH and Egypt. The arbitral tribunal, with Professor Giorgio Bernini as Chairman, ruled that it had jurisdiction, because, although acceptance of an arbitration clause had to be clear and unequivocal, there was no ambiguity since the Government, in becoming a party to the agreement, could not reasonably have doubted that it would be bound by the arbitration clause contained in it. The Egyptian Government brought proceedings in France to set aside the award. The combined effect of articles 1502 and 1504, NCPC, is that the French court may set aside an award made in France in an international arbitration on the ground that there is no arbitration agreement. The Paris Cour d'appel held that the Government was not a party to the arbitration agreement because the words under the Minister's signature were to be read in the light of Egyptian legislation which simply gave the Minister the power to approve construction and in the light of a declaration by the signatories that the obligations assumed by EGOTH would be subject to approval by the relevant government authorities. Subsequently an ICSID Tribunal found that it had jurisdiction and awarded the claimants $27m: 3

LANBUK.COM LANBUK SIERRA LEONE

ICSID Rep 131 and 189. See also the *Westland* case in the Swiss courts, involving the application of an arbitration agreement in a contract between Westland Helicopters and the Arab Organisation for Industrialisation to the organisation's member States: (1991) 16 Yb Comm Arb 174; and Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003), paras 27-26 et seq; *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282.

109. An example in England of a foreign award prior to the present case is *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886, where the Court of Appeal, after a review of the principal arbitral decisions, confirmed (at para 81 et seq) that a government is not to be taken to be a party to an agreement or to have submitted to arbitration simply because it has put forward a state organisation to contract with a foreign investor. But on the facts the Government had agreed to ICC arbitration in Denmark.

French law and transnational law

110. The Joint Memorandum of the experts stated (para 2.8):

> "Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law."

111. The notion in French law that an arbitration clause may be valid independently of a reference to national law goes back to the decisions of the Cour de cassation in *Hecht v Buisman's*, 4 July 1972, 1974 Rev Crit 82 and of the Paris Cour d'appel in *Menicucci v Mahieux*, 13 December 1975, 1976 Rev Crit 507: see Fouchard, Gaillard, Goldman, para 418; Poudret and Besson, para 180. In the *Dow Chemical* case the Paris Cour d'appel (21 October 1983, 1984 Rev Arb 98) said that the arbitral tribunal could decide on its competence without reference to French law, and could rely on the notion of the "group of companies" as a customary practice in international trade.

112. In the *Dalico* case (*Municipalité de Khoms El Mergeb v Soc Dalico*, 20 December 1993, 1994 Rev Arb 116) the Cour de cassation was concerned with an application to set aside an award in which an arbitral tribunal had upheld the existence and validity of an arbitration clause in a document annexed to a works contract between a Libyan municipal authority and a Danish company ("Dalico"). The main contract was subject to Libyan law and stipulated standard terms and conditions,

LANBUK.COM LANBUK SIERRA LEONE

amplified or amended by an annex, which formed part of the contract. The standard terms and conditions conferred jurisdiction on the Libyan courts, but the annex amended them by providing for international arbitration. Dalico referred the dispute to arbitration and obtained an award against the Libyan municipal authority.

113. An action to set aside the award was brought before the Paris Cour d'appel. The court dismissed the application to set aside, relying in particular on the fact that the principle of the autonomy of the arbitration agreement "confirms the independence of the arbitration clause, not only from the substantive provisions of the contract to which it relates, but also from a domestic law applicable to that contract". The court held that the wording of the documents revealed the parties' intention to submit their dispute to arbitration.

114. The Cour de cassation dismissed an appeal, emphasising that the Cour d'appel justified its decision in law by establishing the existence of the arbitration agreement without reference to Libyan law, which governed the contract. The Cour de cassation said, at p 117: "… en vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles imperatives de droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique …." ("by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law."). On this case see Fouchard, Gaillard, Goldman, paras 388, 452.

115. The fact that the experts were agreed that an arbitral tribunal with a French seat may apply transnational law or transnational rules to the validity of an arbitration agreement does not mean that a French court would not be applying French law or that it is no longer a French arbitration. It simply means that the arbitration agreement is no longer affected by the idiosyncrasies of local law, and its validity is examined solely by reference to the French conception of international public policy: Fouchard, Gaillard, Goldman, paras 420, 441. As Poudret and Besson put it (at para 181):

> "The result of this case law is that the arbitration agreement is subjected to a material rule which recognises its validity provided it does not violate international public policy. Although this has been the subject of controversy, the rule is an international rule of French law and not a transnational rule."

LANBUK.COM LANBUK SIERRA LEONE

116. Nor could there be any suggestion that the application of transnational law or transnational rules could displace the applicability in England, under article V(1)(a) of the New York Convention as enacted by section 103(2)(b) of the 1996 Act, of the law of the place where the award is made.

117. This case does not therefore raise the controversial question of delocalisation of the arbitral process which has been current since the 1950s. It started with the pioneering work of Professor Berthold Goldman, Professor Pierre Lalive and Professor Clive Schmitthoff, which was mainly devoted to the question of disconnecting the substantive governing law in international commercial arbitration from national substantive law. It expanded to promotion of the notion that international arbitration is, or should be, free from the controls of national law, or as Lord Mustill put it in *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52, "a self-contained juridical system, by its very nature separate from national systems of law": see, among many others, Lew, *Achieving the Dream: Autonomous Arbitration* (2006) 22 Arb Int 179; Gaillard, *Legal Theory of International Arbitration* (2010); Paulsson, *Arbitration in Three Dimensions* (LSE Law, Society and Economy Working Papers 2/2010); the older material cited in Dicey, Morris and Collins, *The Conflict of Laws* (14th ed 2006), para 16-032; and the cases on the enforcement in France of awards which have been annulled in the country where they were rendered on the basis that they were international awards which were not integrated in the legal system of that country, e.g. *Soc PT Putrabali Adyamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299, and below at para 129.

Non-signatories: the principle in French law

118. One of the odd features of this case is that there is nothing in the experts' reports which suggests that there is any relevant difference between French arbitration law in non-international cases and the principle in such cases as *Dalico*. When counsel was asked at the hearing of this appeal what difference it made, there was no satisfactory answer. No doubt that is because common intention would serve equally to answer the question in a non-international case: *cf* Loquin, *Arbitrage*, para 18, in *Juris-Classeur Procédure Civile*, Fasc 1032. As M Yves Derains (Dallah's expert) put it in his report, the arbitrators may find that the arbitration agreement is governed by transnational law, but the arbitrators must also look for the common will of the parties, express or implied, since it is a substantive rule of French law that the courts will apply when examining the jurisdiction of the arbitrators.

119. There was, in the event, a large measure of agreement between the experts on French law who appeared before Aikens J, M le Bâtonnier Vatier for the Government and M Yves Derains for Dallah. In their Joint Memorandum they agreed that in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral

LANBUK.COM LANBUK SIERRA LEONE

tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the agreement and, as a result, by the arbitration clause; the existence of a common intention of the parties is determined in the light of the facts of the case; the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement. When a French court has to determine the existence and effectiveness of an arbitration agreement, and when for these purposes it must decide whether the agreement extends to a party who was neither a signatory nor a named party, it examines all the factual elements necessary to decide whether that agreement is binding upon that person. The fact that an arbitration agreement is entered into by a State-owned entity does not mean that it binds the State, and whether the State is bound depends on the facts in the light of the principles.

120. The principle as expressed in the jurisprudence of the Paris Cour d'appel is as follows: "Selon les usages du commerce international, la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application aux parties directement impliquées dans l'exécution du contrat et les litiges qui peuvent en résulter, dès lors qu'il est établi que leur situation contractuelle, leurs activités et les relations commerciales habituelles existant entre les parties font présumer qu'elles ont accepté la clause d'arbitrage dont elles connaissaient l'existence et la portée, bien qu'elles n'aient pas été signatoires du contrat qui la stipulait". ("According to international usage, an arbitration clause inserted in an international contract has a validity and an effectiveness of its own, such that the clause must be extended to parties directly implicated in the performance of the contract and in any disputes arising out of the contract, provided that it has been established that their respective contractual situations and existing usual commercial relations raise the presumption that they accepted the arbitration clause of whose existence and scope they were aware, irrespective of the fact that they did not sign the contract containing the arbitration agreement." See *Orri v Soc. des Lubrifiants Elf Acquitaine*, 11 January 1990, 1991 Rev Arb 95 (affd Cour de cassation, 11 June 1991, 1992 Rev Arb 73, on different grounds); also *Société Korsnas Marma v Soc Durand–Auzias*, 30 November 1988, 1989 Rev Arb 691; *Compagnie tunisienne de navigation (Cotunav) v Soc Comptoir commercial André*, 28 November 1989, 1990 Rev Arb 675.

121. The principle applies equally where a non-signatory seeks the benefit of an arbitration agreement, as in *Dalico* itself and in *Dow Chemicals*.

122. The common intention of the parties means their subjective intention derived from the objective evidence. M le Bâtonnier Vatier, the Government's expert, confirmed in his oral evidence that under French law the court must ascertain the "genuine," subjective, intention of each party, but through its objective conduct, and

LANBUK.COM LANBUK SIERRA LEONE

M Yves Derains, Dallah's expert, agreed. M Derains confirmed that in order for an act (such as the letter of termination) of the Government to have the effect of establishing the subjective intention on the Government's part to be bound by the arbitration agreement, it would have to be a "conscious, deliberate act by the government"; that "anything less than a conscious and deliberate act of the government might make the letter less relevant"; and that the letter would not be relevant if it was written by mistake.

Renvoi

123. The parties were agreed before Aikens J that article V(1)(a) of the New York Convention established two conflict of laws rules. The first was the primary rule of party autonomy: the parties could choose the law which governed the validity of the arbitration agreement. In default of that agreement, the law by which to test validity was that of the country where the award to be enforced was made. Because they were to be treated as "uniform" conflict of laws rules, the reference to "the law of the country where the award was made" in article V(1)(a) of the New York Convention and the same words in section 103(2)(b) of the 1996 Act must be directed at that country's substantive law rules, rather than its conflicts of law rules. Aikens J also drew support from section 46(2) in Part I of the 1996 Act, which defines "the law chosen by the parties" as "the substantive laws of that country and not its conflict of laws rules," and which was specifically inserted to avoid the problems of *renvoi*: Mustill & Boyd, *Commercial Arbitration, 2001 Companion* (2001), p 328. Aikens J considered that the same approach was intended for section 103(2)(b) in Part III of the 1996 Act, and that he should have regard to French substantive law and not its conflict of laws rules (at para 78) and that the principle of French law that the existence of an arbitration agreement in an international context may be determined by transnational law was a French conflict of laws rule (at para 93).

124. It is likely that renvoi is excluded from the New York Convention: see van den Berg, *The New York Convention of 1958* (1981), p 291. But it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country's conflict of laws rules the issue is referred to another country's law. That is not the case here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.

125. As mentioned above, the applicability of transnational rules or law (and there was no evidence on their content) would not make a difference in this case. But even

LANBUK.COM LANBUK SIERRA LEONE

if there were a difference, there is not, according to English notions, any reference on to another system of law. All that French law is doing is distinguishing between purely domestic cases and international cases and applying different rules to the latter. If a French court would apply different principles in an international case, for an English court to do what a French court would do in these circumstances is not the application of renvoi.

Discretion

126. The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement. This is apparent from the difference in wording between the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention. The Geneva Convention provided (article 1) that, to obtain recognition or enforcement, it was necessary that the award had been made in pursuance of a submission to arbitration which was valid under the law applicable thereto, and contained (article 2) mandatory grounds ("shall be refused") for refusal of recognition and enforcement, including the ground that it contained decisions on matters beyond the scope of the submission to arbitration. Article V(1)(a) of the New York Convention (and section 103(2)(b) of the 1996 Act) provides: "Recognition and enforcement of the award *may* be refused …" See also van den Berg, p 265; Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics* (1998) 14 Arb Int 227.

127. Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by van den Berg, op cit, p 265, is where the party resisting enforcement is estopped from challenge, which was adopted by Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326, para 8. But, as Mance LJ emphasised at para 18, there is no arbitrary discretion: the use of the word "may" was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). See also *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, para 25 per Lord Phillips CJ. Another possible example would be where there has been no prejudice to the party resisting enforcement: *China Agribusiness Development Corpn v Balli Trading* [1998] 2 Lloyd's Rep 76. But it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement.

128. There may, of course, in theory be cases where the English court would refuse to apply a foreign law which makes the arbitration agreement invalid where the foreign law outrages its sense of justice or decency (Scarman J's phrase in *In the Estate of Fuld, decd (No 3)* [1968] P 675, 698), for example where it is discriminatory

LANBUK.COM LANBUK SIERRA LEONE

or arbitrary. The application of public policy in the New York Convention (article V(2)(b)) and the 1996 Act (section 103(3)) is limited to the non-recognition or enforcement of foreign awards. But the combination of (a) the use of public policy to refuse to recognise the application of the foreign law and (b) the discretion to recognise or enforce an award even if the arbitration agreement is invalid under the applicable law could be used to avoid the application of a foreign law which is contrary to the court's sense of justice.

129. Only limited assistance can be obtained from those cases in which awards have been enforced abroad (in particular in France and the United States) notwithstanding that they have been set aside (or supended) in the courts of the seat of arbitration. In France the leading decisions are *Pabalk Ticaret Sirketi v Norsolor*, Cour de cassation, 9 October 1984, 1985 Rev Crit 431; *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663, in which a Swiss award was enforced in France even though it had been set aside in Switzerland: "… the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside …" (at p 665); *République arabe d'Egypte v Chromalloy Aero Services*, Paris Cour d'appel, 14 January 1997 (1997) 22 Yb Comm Arb 691. Thus in *Soc PT Putrabali Adyamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299, an award in an arbitration in England which had been set aside by the English court (see *PT Putrabali Adyamulia v Soc Est Epices* [2003] 2 Lloyd's Rep 700) was enforced in France, on the basis that the award was an international award which did not form part of any national legal order. Those decisions do not rest on the discretion to allow recognition or enforcement notwithstanding that "the award … has been set aside … by a competent authority of the country in which … that award was made" (New York Convention, article V(1)(e)). They rest rather on the power of the enforcing court under the New York Convention, article VII(1), to apply laws which are more generous to enforcement than the rules in the New York Convention: see Born, *International Commercial Arbitration* (2009), pp 2677-2680; Gaillard, "Enforcement of Awards Set Aside in the Country of Origin" (1999) 14 ICSID Rev 16; and *Yukos Capital SARL v OAO Rosneft*, 28 April 2009, Case No 200.005.269/01 Amsterdam Gerechtshof.

130. In the United States the courts have refused to enforce awards which have been set aside in the State in which the award was made, on the basis that the award does not exist to be enforced if it has been lawfully set aside by a competent authority in that State: *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2d Cir 1999); *TermoRio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007). But an Egyptian award which had been set aside by the Egyptian court was enforced because the parties had agreed that the award would not be the subject of recourse to the local courts: *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996). That decision was based both on the discretion in the New York Convention, article V(1) and on the power under article VII(1) (see *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 367 (5th

LANBUK.COM LANBUK SIERRA LEONE

Cir 2003)) and whether it was correctly decided was left open in *TermoRio SA ESP v Electranta SP*, ante, at p 937.

131. The power to enforce notwithstanding that the award has been set aside in the country of origin does not, of course, arise in this case. The only basis which Dallah puts forward for the exercise of discretion in its favour is the Government's failure to resort to the French court to set aside the award. But Moore-Bick LJ was plainly right in the present case (at para 61) to say that the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction. There is certainly no basis for exercising the discretion in this case.

III The application of the principles to the appeal

132. The crucial facts have been set out fully by Lord Mance. The essential question is whether the Government has proved that there was no common intention (applying the French law principles) that it should be bound by the arbitration agreement. The essential points which lead to the inevitable conclusion that there was no such common intention are these.

133. First, throughout the transaction Dallah was advised by a leading firm of lawyers in Pakistan, Orr, Dignam & Co, which was responsible for the drafts of both the Memorandum of Understanding ("MoU") which was concluded on 24 July 1995 between Dallah and the Government, and the Agreement of 10 September 1996 ("the Agreement") between Dallah and the Trust. It must go without saying that the firm well understood the difference between an agreement with a State entity, on the one hand, and the State itself, on the other.

134. Second, there was a clear change in the proposed transaction from an agreement with the State to an agreement with the Trust. The MoU was expressed to be made between Dallah and "the President of the Islamic Republic of Pakistan through the Ministry of Religious Affairs," and it was signed "For and on behalf of The President of the Islamic Republic of Pakistan". It was governed by Saudi Arabian law (clause 23). It provided for ad hoc arbitration with a Jeddah seat (clause 24), and contained an express waiver of sovereign immunity, including immunity from execution (clause 25).

135. Third, the Trust was established as "a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may by its name, sue and be sued."

LANBUK.COM LANBUK SIERRA LEONE

136. Fourth, the Agreement (including the arbitration agreement) was plainly an agreement between Dallah and the Trust, and the Government was referred to in the Agreement only in its capacity of guarantor of loans to the Trust. It described the parties as "Dallah Real Estate and Tourism Holding Company" and "Awami Hajj Trust..." (which is referred to as having been: "… established under Section 3 of the Awami Hajj Trust Ordinance, 1996 (Ordinance No VII of 1996)…" On the signature page, there are two signatories: Dallah and the "Awami Hajj Trust". Shezi Nackvi signed on behalf of Dallah, and "Managing Trustee" (Zubair Kidwai) signed on behalf of the Trust. Clause 2 provided for the Trust to pay $100m to Dallah by way of advance, subject to (inter alia) Dallah providing a Financing Facility "against a guarantee of the Government of Pakistan" and the Trust and the Trustee Bank providing a counter guarantee "in favour of the Government of Pakistan." By clause 27 it was provided: "The Trust may assign or transfer its rights and obligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah." The arbitration clause (article 23) related to "Any dispute or difference of any kind whatsoever between the Trust and Dallah ….." The parties amended the ICC model clause (which reads: "All disputes arising out of or in connection with the present contract shall be finally settled…"), in order to specify "the Trust" and "Dallah".

137. Fifth, it was the Trust which immediately following the termination letter of 19 January 1997, commenced proceedings against Dallah in Islamabad (the "1997 Pakistan Proceedings"). The proceedings were for a declaration that the Trust had validly accepted Dallah's repudiation of the Agreement between the Trust and Dallah on 19 January 1997. The contents of the pleading were verified on oath by Mr Muhammad Lutfullah Mufti. On the same day Mr Lutfullah Mufti made an application in the name of the Trust for an interim injunction restraining Dallah from holding itself out to have any contractual relationship with the Trust. On 6 March 1997 Dallah filed an application to stay the action, given the existence of an arbitration agreement with the Trust. The Trust took preliminary objections against this application, among which was that the Trust had challenged the validity and existence of the Agreement. Mr Lutfullah Mufti, describing himself as "Secretary Board of Trustees Awami Hajj Trust/Secretary, Religious Affairs Division, Government of Pakistan" swore an affidavit verifying the objections by the Trust to the application.

138. There are only two serious contra-indications. The first is the fact that the termination latter was written, after the Trust had ceased to exist, by Mr. Lutfullah Mufti (who had been Secretary of the Board of Trustees of the Trust and its Managing Trustee, and who was also from time to time Secretary of the Ministry of Religious Affairs) under the letterhead of the Ministry of Religious Affairs, and signed as "Secretary." There is nothing in the text of the letter to suggest that it was written on behalf of the Government. On the contrary, as Moore-Bick LJ said [2010] 2 WLR 805, para 36 (differing on this point from Aikens J, at para 117) all the internal

LANBUK.COM LANBUK SIERRA LEONE

indications are that it was written on behalf of the Trust. Thus the opening paragraph reads as follows:

> "Pursuant to the above mentioned Agreement for the leasing of housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, you were required within ninety (90) days of the execution of the said Agreement to get the detailed specifications and drawings approved by the Trust. However, since you have failed to submit the specifications and drawings for the approval of the Trust to date you are in breach of a fundamental term of the Agreement which tantamounts to a repudiation of the whole Agreement which repudiation is hereby accepted."

139. The second contra-indication is contained in the fact that the 1998 Pakistan Proceedings were commenced in the name of the Government. That was because, when the 1997 Pakistan Proceedings were dismissed by the Pakistan court on the ground that the Trust had ceased to exist as of 11 December 1996, the judge said that, on dissolution of the Trust suit should have been filed by the Ministry for Religious Affairs, apparently on the basis that the Government had succeeded to the rights and obligations of the Trust. On 18 September 1998, the Islamabad judge ruled that the Government was not the legal successor of the Trust, and so not bound by the Agreement or the arbitration agreement. On 14 January 1999, the Government applied voluntarily to withdraw the suit, which was granted on the same day.

140. Neither of these two matters, nor the other matters relied on, was sufficient to justify a finding of a common intention that the Government should be bound by the arbitration agreement. It is true that the principle of common intention in French law was similar to that articulated by the tribunal, but M Le Bâtonnier Vatier's evidence made clear that there were significant differences. He accepted that the principles adopted by the tribunal were in general the principles that might be adopted in French law, but they were too general.

141. That is undoubtedly a valid criticism of the way in which the Tribunal sought to use material from the period prior to termination to justify its conclusion. The Tribunal first considered the conduct of the Government prior to the execution of the Agreement. It drew the conclusion that the organic control of the Government over the Trust, although insufficient to lead to the disregard of the separate legal entity of the Trust, constituted nevertheless an element of evidence as to the true intention of the Government to run and control directly and indirectly the activities of the Trust, and to view the Trust as one of its instruments. The Tribunal next considered the conduct of the Government at the time of execution of the Agreement. From that it drew the conclusion that the Government was "contractually involved in the Agreement, as the Government was bound, under article 2 thereof, to give its guarantee for the financial

LANBUK.COM LANBUK SIERRA LEONE

facility to be raised by [Dallah]" and that the Trust's right to assign its rights and obligations to the Government was a provision which was normally used only where the assignee is closely linked to the assignor or is under its total control through ownership, management or otherwise. The Tribunal considered that during the lifetime of the Agreement the Government continued itself to handle matters relating to the Agreement and to act and conduct itself in a way which confirmed that it regarded the Agreement as its own. Government officials were actively involved in the implementation of the Agreement. The Government decided not to re-promulgate the Ordinance and therefore put an end to the Trust, and so the very existence of the Trust appeared to have been completely dependent on the Government.

142. None of these matters could possibly justify a finding that there was a common intention that the Government should be bound by the arbitration agreement.

143. The crucial finding was that after the dissolution of the Trust, the termination letter of 19 January 1997 was written on Ministry of Religious Affairs letterhead and signed by the Secretary of the Ministry, and confirmed in the clearest way possible that the Government regarded the Agreement with Dallah as its own and considered itself as a party to the Agreement and was entitled to exercise all rights and assume all responsibilities provided for under the Agreement. The signature of the letter could only be explained as evidence that the Government considered itself a party to the Agreement. But the Trust had no separate letterhead and it is plain from the surrounding circumstances, and particularly the way in which the 1997 Pakistan proceedings were commenced on behalf of the Trust, and verified by Mr Lutfullah Mufti, that the letter was written on behalf of the Trust and in ignorance of its dissolution.

144. The tribunal ignored the 1997 Pakistan proceedings, and relied on the 1998 Pakistan proceedings to find that they showed that the Government considered itself as a party to the Agreement. But it is clear that those proceedings were commenced at the erroneous suggestion of the Pakistan judge and shed no light on whether the parties intended that the Government should be bound by the Agreement or the arbitration agreement.

145. Consequently on a proper application of French law as mandated by the New York Convention and the 1996 Act there was no material sufficient to justify the tribunal's conclusion that the Government's behaviour showed and proved that the Government had always been, and considered itself to be, a true party to the Agreement and therefore to the arbitration agreement. On the contrary, all of the material up to and including the termination letter shows that the common intention was that the parties were to be Dallah and the Trust. On the face of the Agreement the parties and the signatories were Dallah and the Trust. The Government's role was as guarantor, and beneficiary of a counter-guarantee. The assignment clause showed that

LANBUK.COM LANBUK SIERRA LEONE

the Government was not a party. It permitted the Trust to assign or transfer its rights and obligations under the Agreement to the Government without the prior consent in writing of Dallah. The arbitration clause related to any dispute between the Trust and Dallah.

146. The weakness of the conclusion of the tribunal is underlined by this passage in the Award:

> "Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section. However, Dr Mahmassani believes that when all the relevant factual elements are looked into globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement with the Claimant and therefore a proper party to the dispute that has arisen with the Claimant under the present arbitration proceedings.
>
> Whilst joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line."

147. Aikens J rejected the argument that the discretion should be exercised in favour of enforcement because of the Government's failure to challenge the award in the French courts: Dallah had not submitted that the Government was estopped from challenging the jurisdiction of the tribunal; and the discretion would not be exercised where, as in this case, there was something unsound in the fundamental structural integrity of the ICC arbitration proceedings, namely that the Government did not agree to be bound by the arbitration agreement in clause 23 of the Agreement. There was no error of principle and the Court of Appeal was right not to interfere with the judge's exercise of discretion.

LORD HOPE:

148. The essential question in this case, as Lord Mance and Lord Collins explain in paras 2 and 132 of their judgments, is whether the Government of Pakistan has proved that there was no common intention (applying French law principles) between it and Dallah that it should be bound by the arbitration agreement. This is a matter which goes to the root of the question whether there was jurisdiction to make the award. As

LANBUK.COM LANBUK SIERRA LEONE

such, it must be for the court to determine. It cannot be left to the determination of the arbitrators.

149. For the reasons set out in the opinions of Lord Mance and Lord Collins, I agree that the facts point inevitably to the conclusion that there was no such common intention. As Lord Mance says in para 66, the agreement was deliberately structured to be, and was agreed, between Dallah and the Trust. I also agree that the Court of Appeal was right not to interfere with the judge's exercise of his discretion to refuse enforcement of the award. I too would dismiss the appeal.

LORD SAVILLE:

150. In his judgment Lord Mance has set out in detail the facts of this case and no purpose would be served by repeating them in this judgment.

151. The case concerns an application by Dallah Real Estate and Tourism Holding Company to enforce in this country an ICC arbitration award dated 23rd June 2006 against the Ministry of Religious Affairs of the Government of Pakistan. The amount of the award was US$20,588,040. The application was opposed by the Ministry of Religious Affairs on the grounds that there was no arbitration agreement between the parties, so that the award was unenforceable.

152. The award was a New York Convention Award within the meaning of Section 100 of the Arbitration Act 1996 and was made in Paris.

153. Section 103(1) of the Arbitration Act 1996 provides that recognition and enforcement of a New York Convention Award "*shall not be refused except in the following cases*." The following sub-sections set out the cases in question. Section 103(2) contains a number of these cases and provides that recognition or enforcement of the award may be refused if the person against whom it is invoked proves (so far as the case relevant to these proceedings is concerned) "*that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*." (Section 103(2)(b)) (emphases added).

154. The arbitrators considered the question of their jurisdiction before dealing with the merits of the claim and concluded that the Ministry of Religious Affairs of the Government of Pakistan was party to an arbitration agreement with Dallah Real Estate

LANBUK.COM LANBUK SIERRA LEONE

and Tourism Holding Company, for the reasons contained in what they described as a Partial Award dated 26th June 2001.

155. It was common ground that the question whether or not the Ministry of Religious Affairs was a party to the arbitration agreement relied upon by Dallah Real Estate and Tourism Holding Company, under which the ICC award was made, was to be determined under section 103(2)(b) of the Arbitration Act 1996, and that the law to be applied was French law, being the law of the place where the award was made.

156. After a trial, during which both parties tendered expert evidence on French law, Aikens J (as he then was) held that the Ministry of Religious Affairs was not party to the arbitration agreement and refused to enforce the award. The Court of Appeal upheld his decision. Dallah Real Estate and Tourism Holding Company now appeal to the Supreme Court.

157. In their written case Dallah Real Estate and Tourism Holding Company submitted that the first issue for resolution by the Supreme Court concerned the nature and standard of review to be undertaken by an enforcing court when considering recognition and enforcement of a New York Convention award; and further submitted that the court should accord a high degree of deference and weight to the award of the arbitrators that there was an arbitration agreement between the parties.

158. In the present case the arbitrators have made a ruling, as they were doubtless entitled to do under the doctrine of kompetenz-kompetenz, that there was an arbitration agreement between the parties, so that they were able to hear and decide the merits of the case, which they then proceeded to do. However, under Section 103 of the Arbitration Act 1996 (as under the New York Convention itself) the person against whom the award was invoked has the right to seek to prove that there was no arbitration agreement between the parties, so that in fact the arbitrators had no power to make an award. The question at issue before the court, therefore, was whether the person challenging the enforcement of the award could prove there was no such agreement.

159. In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all. As the Departmental Advisory Committee on Arbitration Law put it in paragraph 1.38 of its 1996 Report on the Arbitration Bill, an arbitral tribunal may rule on its own jurisdiction but cannot be the final arbiter of jurisdiction, “for this would provide a classic case of pulling oneself up by one’s own bootstraps.”

LANBUK.COM LANBUK SIERRA LEONE

160. In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself. I accept, as an accurate summary of the legal position, the way it was put in the written case of the Ministry of Religious Affairs:

> "Under s103(2)(b) of the 1996 Act / Art V.1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."

161. In short, as was held in *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation* (2003) 334 F3d 274, a decision of the United States Court of Appeals (3rd Circuit), the court must make an independent determination of the question whether there was an arbitration agreement between the parties.

162. In the present case, for the reasons given by Lord Mance and Lord Collins (and the courts below), the Ministry of Religious Affairs has succeeded in showing that no arbitration agreement existed to which it was party and that there were no other grounds for enforcing the award. I would accordingly dismiss this appeal.

LORD CLARKE:

163. I agree that this appeal should be dismissed for the reasons given by the other members of the court. Both Lord Mance and Lord Collins have analysed the relevant principles so fully and so expertly that it would be inappropriate self-indulgence for me to attempt a detailed analysis of my own.

LANBUK.COM LANBUK SIERRA LEONE