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# Dallah: Agreement Or Disagreement Between The English And French Courts?

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# Commentary

## Dallah: Agreement Or Disagreement Between The English And French Courts?

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### I. Summary

Last November's ruling by the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*[1] provided a timely reminder that, under Article V of the New York Convention, arbitral awards are subject to scrutiny (on certain limited grounds) by the Court in the jurisdiction where enforcement is sought. In particular, the last word as to whether or not an arbitral tribunal has jurisdiction will lie with the Courts, either of the arbitral seat or of the country where enforcement is sought.

In the context of an application by Dallah Real Estate and Tourism Holding Company ("Dallah") for the enforcement of an arbitral award in its favour, the English Courts were faced with the question of whether the Government of Pakistan ("Government"), which was not a signatory to the arbitration agreement, should be considered a party to the arbitration agreement (as an ICC tribunal sitting in Paris had found), or whether enforcement could be refused under Article V(1)(a) of the New York Convention because a proper application of French law led to the conclusion that the Government was not a party to the arbitration agreement.

The Supreme Court held that, on a proper interpretation of the New York Convention, whenever a party resists enforcement under Article V(1)(a) (i.e., by claiming that the arbitration agreement was invalid), the Court is bound to "revisit the tribunal's decision on jurisdiction".[2] The Supreme Court also endorsed the position of the Government that the reviewing 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".[3] On the facts, the Court concluded that "there was no material sufficient to justify the tribunal's conclusion" that the Government was a party to the arbitration agreement.[4]

When the Government's action for annulment of the award came before the Paris Court of Appeal in February 2011, the Court applied similar principles to those applied by the UK Supreme Court. On the facts, however, the Court found that a proper application of French law led to the conclusion that the Government was a party to the arbitration agreement.[5] It remains to be seen whether the Government will appeal this decision to the Cour de Cassation.

### II. The Facts Of The Case

Dallah is a Saudi Arabian company which provides services for pilgrims travelling to the Holy Places in Saudi Arabia. In July 1995, Dallah signed a Memorandum of Understanding with the Government in relation to the construction of certain housing for pilgrims. In September 1996, Dallah entered into a contract ("Contract") with the Awami Hajj Trust ("Trust"), a body which had been established by an Ordinance promulgated by the President of Pakistan. The Contract contained an arbitration agreement, under which all disputes were to be referred to ICC Arbitration in Paris.

The Government was not a signatory to the Contract (though the Contract made reference to a guarantee to be provided by the Government (subject to a counter-guarantee by the Trust and its Trustee Bank) and included a provision by which the Trust could assign its rights and obligations to the Government without the permission of Dallah). These were the only references to the Government in the Contract although, as a matter of fact, the Government exerted control over the Trust and Government officials were involved in the implementation of the Contract.

The housing project never came to fruition and, following a change of government in Pakistan, the Trust ceased to exist as a legal entity. In May 1998, Dallah commenced ICC arbitration proceedings against the Government.

The Government denied that it was a party to the arbitration agreement and maintained a jurisdictional objection throughout the arbitration. Nevertheless, the tribunal ruled that it had jurisdiction over the Government, and eventually issued a final award in June 2006.

In October 2006, Dallah applied to enforce the award in England. The Government resisted enforcement on the ground that it was not party to the arbitration agreement as a matter of French law. Under French law (the *Dalico*[6] test), the relevant question was whether, as a matter of fact, the parties had a common intention that the Government would be bound by the arbitration agreement. The High Court, Court of Appeal and Supreme Court all found in favour of the Government under Article V.1(a) of the New York Convention[7] on the basis that there was insufficient evidence of such common intention.

In the meantime, the Government commenced proceedings seeking an annulment of the award in the French Courts. In February 2011, the Paris Court of Appeal disagreed with the UK Supreme Court and found that a proper application of French law led to the conclusion that the Government was a party to the arbitration agreement.

## III. The Kompetenz-Kompetenz Principle And The New York Convention

Before the UK Supreme Court, Dallah argued that the Kompetenz-Kompetenz principle (i.e., the principle that an arbitral tribunal has power to rule on its own jurisdiction) in combination with the "pro-enforcement" regime of the New York Convention, meant that the enforcing Court should give deference to the decision of the tribunal that the arbitration agreement was valid "when the tribunal's conclusions could be regarded on their face as plausible or 'reasonably supportable'."[8]

The Supreme Court disagreed that any such limitation on the scope of the Court's review could be derived from the Kompetenz-Kompetenz principle. Lord Collins concluded that "[t]he 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 should be."[9]

The Court's conclusion was bolstered by a comparative analysis, which found similar application of the Kompetenz-Kompetenz principle in the United States, France and Germany.

The Supreme Court also concluded that there was no basis to imply a concept of "deference" to the tribunal's decision on jurisdiction into Article V of the New York Convention. The plain language of Article V required the enforcing Court to safeguard "fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal."[10]

## IV. Similarities And Differences Between The English And French Courts

When the Government's application for annulment of the award came before the French Courts, the Paris Court of Appeal applied a similar standard of review to that adopted by the UK Supreme Court. The relevant principles had recently been re-affirmed by a decision of the Cour de Cassation (*Fondation Albert*

*Abela Family Foundation et. al. v. Fondation Joseph Abela Family Foundation*[11]) in which it was held that, in the context of either enforcement or annulment proceedings, French Courts are entitled to perform a review of "all legal and factual elements that are relevant to determine the reach of the arbitration agreement and draw the corresponding conclusions regarding the arbitrators' compliance with their mission."

The principal difference between the Supreme Court and the Paris Court of Appeal was on the application of French law to determine whether the Government was bound by the arbitration agreement. The Supreme Court construed the *Dalico* "common intention" test narrowly in requiring proof of an actual common intention that the Government be bound by the arbitration agreement. In so-doing, the Court was likely influenced by what it perceived as 'red flags' in the tribunal's reasoning and may also have been influenced by the traditional English views on privity of contract and separate legal personality.

By contrast, the Paris Court of Appeal applied the "common intention" test in a more liberal fashion and was prepared to give weight to the same contextual factors that had influenced the tribunal's decision. The Court held that "[The Government] behaved as if the Contract was its own; [. . .] this involvement of [the Government], in the absence of evidence that the Trust took any actions, as well as [the Government's] behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and that [the Government] was in fact the true Pakistani party in the course of the economic transaction" (informal translation).

It therefore seems that, while the two Courts applied the *Dalico* test differently, there is no significant difference of principle between the English and French Courts when it comes to the question of reviewing an arbitral tribunal's decision on jurisdiction.

Lord Mance in the Supreme Court noted that "what matters, self evidently, to *both* parties is the enforceability of the award in the country where enforcement is sought . . . [w]hether it is binding in France could only be decided in French court proceedings to recognize or enforce".[12] The Supreme Court thus effectively embraced the so-called Westphalian representation of International Arbitration that "each State has a title to impose its conception of what constitutes an arbitration worthy of legal protection only within the confines of its own legal order."[13] Subject to any appeal by the Government to the Cour de Cassation and unless the award can be enforced in France, it will now be for Dallah to persuade Courts in other potential enforcement jurisdictions that the French Courts' view should be preferred over the English.

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## Endnotes

1. [2010] 3 W.L.R. 1472 (3 November 2010).
2. Per Lord Collins at paragraph 104.
3. Per Lord Saville at paragraph 160.
4. Per Lord Collins at paragraph 145.
5. *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533).
6. *Municipalite de Khoms El Mergeb v Société Dalico* [1994] 1 Rev Arb 116, Cour de Cassation.
7. As incorporated into English law by s.103(2)(b) of the Arbitration Act 1996.
8. Per Lord Mance at paragraph 21.
9. Per Lord Collins at paragraph 83.
10. Per Lord Collins at paragraph 102.
11. Revue de l'Arbitrage (2010), p. 813 et seq.
12. Per Lord Mance at paragraph 29.
13. E. Gaillard, Legal Theory of International Arbitration (2010) Martinus Nijhoff, at p.35. ■

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