ARTICLES

THE UK SUPREME COURT SPEAKS TO INTERNATIONAL ARBITRATION: LEARNING FROM THE *DALLAH* CASE

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I. INTRODUCTION

Rarely, over the decades following its entry into force, was the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Convention,[1] the subject of a judgment of the UK House of Lords.[2] Yet, within barely over a year after its succession to the House of Lords in October 2009, the United Kingdom Supreme Court delivered a judgment that may not make up for all that lost time, but is deeply instructive nonetheless. The decision in *Dallah Real Estate and Tourism Holding Company* v. *Ministry of Religious Affairs, Government of Pakistan*[3] became the vehicle for the Court to lay down important markers not only for arbitration with sovereign entities, but for the judicial role in the enforcement of foreign awards generally.

On the facts, *Dallah* looks very much like just another entry in a long series of arbitral awards tackling the issue of the separateness of States from their agencies and instrumentalities. The issue has been a recurrent one because, by the time a dispute arises and an arbitration ensues, the instrumentality that is the signatory party is often no longer an attractive respondent. It may lack assets to pay an award, and it may not even any longer exist. After briefly setting out the facts of the case and its procedural history in Part II of this article, I explore in Part III *Dallah*'s significance in this first respect.

As will be seen, the UK Supreme Court in *Dallah* denied enforcement against the Government of Pakistan of an arbitral award rendered in France, on the ground that the Government – a non-signatory to the underlying arbitration agreement signed by one of its instrumentalities – was never bound by that agreement and therefore not liable for the award. The UK decision is all the more revealing in this respect since, only a few months later and in full awareness of the UK

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959), *reprinted at* 9 U.S.C. § 201. The Convention is implemented in the UK by the Arbitration Act (England and Wales), Part III, and by the Arbitration (Scotland) Act 2010, Secs. 18-22.

[2] For the rare example, see Government of Kuwait v. Sir Frederick Snow & Partners, [1984] AC 426; Hiscox v. Outhwaite, [1992] 1 AC 562.

[3] [2010] UKSC 46 (Nov. 3, 2010). The principal opinions were authored by Lords Mance and Collins, and essentially endorsed by the other members of the Court, Lords Hope, Saville, and Clarke.

judgment, the Cour d'appel of Paris rejected the Government of Pakistan's attempt to have the award annulled in France on that very ground.[4] The UK Court's apparent misapprehension of French law – the law that according to all parties governed the arbitral tribunal's jurisdiction over the Government – in itself raises intriguing questions.

Although the French Cour d'appel's rejection of the UK Supreme Court's reasoning and result lends the *Dallah* case its special resonance in international arbitration circles, the UK ruling is also of interest insofar as it addresses issues of broader significance to the recognition and enforcement of foreign arbitral awards. One of these issues is the difference, if any, between the standard of review over the existence and validity of an arbitration agreement exercised by the courts of the place of arbitration, on the one hand, and a foreign court at the time of enforcement, on the other. A second and closely related issue is the weight, if any, that the enforcing court should give to the findings of the tribunal on those questions. These are the subjects of Part IV.

II. THE FACTS

The dispute in *Dallah* had its origins in a 1996 contract between Dallah and an entity ("the Trust") created for purposes of the contract by the Government of Pakistan. The agreement provided for the construction of lodgings for pilgrims visiting holy places in Saudi Arabia. The arrangement was negotiated between Dallah and the Government, and memorialized in a 1995 Memorandum of Understanding between them. Following certain preparations by Dallah, largely in the form of land acquisition, the President of Pakistan promulgated an Ordinance, effective in February 1996, establishing the Trust as the vehicle for the contract with Dallah. (Under the Constitution of Pakistan, such an Ordinance would automatically expire four months after its promulgation unless expressly renewed. In fact the ordinance was renewed twice, in May and in August 1996.)

Further negotiations between Dallah and the Government ensued, and agreement on the contract was reached. In April 1996, Dallah instructed its lawyers to draft an agreement between Dallah and the Trust on the agreed upon terms. The contract, entered into in September 1996 by Dallah and the Trust, provided for the arbitration of disputes between the parties in France under the rules of the International Chamber of Commerce. It also entitled the Trust to assign or transfer its rights and obligations under the contract to the Government of Pakistan without Dallah's prior consent. But in November 1996, the government of Benazir Bhutto fell from power, and the new Pakistani government did not renew the Ordinance that had established the Trust. As a result the Trust ceased to exist as a legal entity on December 11, 1996. A series of suits was brought in the courts of Pakistan either in the name of the Trust or of the

[4] Gouvernement de Pakistan, Ministère des Affaires Religieuses v. Société Dallah Real Estate and Tourism Holding Co., joined cases 09/28533, 09/28541 (Ct. App. Paris, Feb. 17, 2011).

Government, both before and after the Trust's passage out of legal existence. The first two actions sought a declaration that Dallah had itself committed a fundamental breach of contract, thus repudiating the contract, while the third sought a declaration that the Government was and is not bound by the contract between Dallah and the Trust. In fact, none of the three actions produced a judgment on the merits.

In May 1998, Dallah initiated arbitration in France against the Government for breach of contract. The Government did not nominate an arbitrator, and the ICC Court of Arbitration did so in its place. It also did not sign the Terms of Reference or participate in any way in the proceedings. In a first partial award on jurisdiction dated June 26, 2001, the arbitral tribunal found the Government to be a party to the contract and its arbitration agreement, thus affirming its own jurisdiction. It issued a second partial award, on liability, on January 19, 2004. A final award followed on June 23, 2006. The tribunal awarded the claimant U.S. $20,588,040.

Dallah then sought enforcement of the award in the UK. Provisional permission to enforce the award was granted in October 2006, but the Government objected, claiming that it was not a party to the underlying contract between Dallah and the Trust, and therefore neither under an obligation to submit to arbitration of disputes arising out of that contract nor bound by the resulting award. Following a three-day hearing, the court of first instance in July 2008 set aside the preliminary enforcement order, relying on Article V(1)(a) of the New York Convention and the corresponding UK statutory provision.[5] The English Court of Appeal, upon hearing, dismissed Dallah's appeal in July 2009. This appeal to the UK Supreme Court followed.

III. THE STATE AS NON-SIGNATORY OF THE ARBITRATION AGREEMENT

The single overriding issue of substance in *Dallah* was whether the Government of Pakistan was bound by an arbitration agreement entered into between one of its instrumentalities and a private party. The question is anything but new,[6] and it will not fade any time soon, if only because the analysis required to answer the question is ordinarily highly fact-intensive and circumstance-specific. Neither before tribunals nor courts does any single factor seem to dominate the analysis. Results have tended to turn on what may be called the "totality of the circumstances," an approach that entails identifying and weighing what can be a long list of indicators of the separateness, or lack thereof, of the two entities in question. The exercise is burdened not only with sprawling sets of

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[5] Arbitration Act 1996, Sec. 103(2)(b).

[6] *See*, *e.g.*, Bernard Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, ICCA CONGRESS SERIES NO. 13 at 341 (Albert Jan van den Berg ed., 2007); William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1 (Belinda Macmahon ed., 2009).

disparate facts, but also with an abundance of legal theories through the lens of which those facts are commonly viewed: estoppel, agency, alter ego, assignment, third-party beneficiary, and still others.

Cases of this sort predictably abound. But *Dallah* will assume a leading place among them, and this for several reasons, quite apart from the sheer fact that it finds the UK Supreme Court denying enforcement of a French award under French law, and the French Cour d'appel subsequently rejecting that analysis. First, by its decision, the Court has lent currency to the French law notion that the recognition and enforcement of international arbitral awards, and international arbitration law generally, is governed by "transnational" principles, rather than the law of any particular jurisdiction. Second, the Court found in that body of transnational law a guiding principle that, if followed, stands to alter considerably the outcome of cases that, like *Dallah*, turn on whether agreements to arbitrate entered into by an instrumentality of the State bind the State itself.

The arbitral tribunal in *Dallah* had itself applied transnational principles to the jurisdictional question, on the ground that French law – the law of the arbitral situs – so required. Citing the international character of the arbitration agreement, the parties' selection of the ICC as arbitral institution, and the absence of any reference in the agreement to the arbitration law of any particular country, the tribunal characterized the arbitration as truly international, and therefore subject through French law to "those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business."[7] Those principles, the arbitral tribunal found, permitted a non-signatory to 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."[8] To determine whether any of these theories would bind the Government of Pakistan to the arbitration agreement, the tribunal conducted what it termed "a close scrutiny of the conduct and of the actions of the parties before, during and after the implementation of the main Agreement,"[9] concluding on that basis that the Trust and the Government were essentially alter egos. The Government was accordingly bound by the contract between Dallah and the Trust, including its arbitration clause.

While an arbitral tribunal of course has a voice in the matter, so too do courts, both before the arbitration (in determining whether the State may be compelled to arbitrate) and afterwards (in entertaining either a challenge to the award or a defense against recognition or enforcement). As noted, the English courts, both at first instance and on appeal, denied Dallah's petition for enforcement of the award, invoking Article V(1)(a) of the New York Convention and the UK implementing legislation, which permits a court to deny enforcement if the

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[7] *Dallah*, *supra* note 3, at ¶ 33.

[8] *Id*. at ¶ 34.

[9] *Id*. at ¶ 36. The tribunal thus drew upon the factual circumstances surrounding the arbitration agreement's "negotiation, performance and termination." *Id*.

resisting party proves that the agreement to arbitrate "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."

On further appeal, the UK Supreme Court conducted a conventional choice-of-law analysis, taking as its point of departure Article V(1)(a)'s reference to "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, . . . the law of the country where the award was made." The applicable law was, uncontroversially, French law. Like the arbitral tribunal itself, the Court concluded that the French law of international arbitration incorporated transnational principles.[10] It explained at some length that, in applying those principles, it was applying nothing other than French law.[11]

However, Lord Mance found fault with the tribunal's understanding of the relevant transnational principles under French case law. In his understanding, those principles permitted a non-signatory to be bound by an arbitration agreement only if it was the "common intention" of the parties that it be bound.[12] Although the tribunal, like the French law experts on both sides, had alluded to the common intention of the parties, its analysis, in Lord Mance's opinion, appeared largely to be driven by factors more closely relevant to alter ego doctrine. Lord Mance discerned a substantial divide between alter ego analysis and the search for the parties' common intention:

> There is a considerable difference between 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 . . .[13]

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[10] Lord Collins cited, among others, the following French judgments for this proposition: Municipalité de Khoms El Mergeb v. Dalico, 1994 REV. ARB. 116 (Cour de Cassation, Dec. 20, 1993); Hecht v. Buisman's, 1974 REV. CRIT. 82 (Cour de Cassation, July 4, 1972); Menicucci v. Mahieux, 1976 REV. CRIT. 507 (Ct. App., Dec. 13, 1975).

[11] According to Lord Collins, "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 . . ." *Dallah*, *supra* note 3, at ¶ 115.

[12] The Court cited both the doctrinal writings of scholars and French case law, including Municipalité de Khoms El Mergeb v. Dalico, *supra* note 10; Société Isover-Saint-Gobain v. Société Dow Chemical, 1984 REV. ARB. 98 (Ct. App., Oct. 21, 1983); Compagnie tunisienne de Navigation v. Société Comptoir commercial André, 1990 REV. ARB. 675 (Ct. App., Nov. 28, 1989); Orri v. Société des Lubrifiants Elf Aquitaine, 1992 JUR. FR. 95 (Ct. App., Jan. 11, 1990).

[13] *Dallah*, *supra* note 3, at ¶ 39.

In Lord Mance's view, the tribunal erred by focusing unduly on the Government's involvement in the negotiation and performance of the contract between Dallah and the Trust. That focus had led the tribunal to dwell on factual aspects of the relationship between the Government and the Trust, as if they were the only relevant parties, thereby leaving Dallah's intentions out of the equation. Lord Collins took a similar view, rejecting the notion that the Government's control over the Trust (even if considerable) and its direct involvement in the implementation of the contract (even if likewise considerable) evidenced the Government's intention to be bound by the arbitration agreement.[14]

The Court thus ended up purporting to assess the existence and validity of the arbitration agreement under the transnational principles that French courts had announced as being part of French law. Although those standards deviated from those found in English law,[15] the New York Convention and its UK implementing legislation mandated their application. The Court must itself have thought this an important statement to make, since it devoted pages to the issue of the applicable law, even though it does not seem to have been a point of major contention between the parties or between their French law experts, who agreed both that French law incorporated transnational principles and that the relevant test under those principles was the "common intention" of the parties.[16] The Court expressly rejected on this point the position taken by the UK judge at first instance that

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[14] *Id*. at ¶¶ 141-42.

[15] Lord Mance obviously considered the common intention test derived from transnational law to be extremely relaxed by UK standards. "This then," he said "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*" (emphasis added). *Dallah*, *supra* note 3, at ¶ 18.

[16] The experts' joint memorandum concluded, with regard to the transnational character of French law on the subject:

> 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.

Dallah, *supra* note 3, at ¶ 14.

Their joint memorandum showed further agreement on the content of the relevant transnational law principles:

> 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.

Dallah, *supra* note 3, at ¶ 17.

transnational law is not part of French law, but external to it, and that the New York Convention and its UK implementing legislation contemplate application of the internal law of the place where the award was made, not its conflict of laws rules.[17]

The Court's focus on the "common intention" of the parties as the operative principle of French law, rather than more objective-sounding tests like alter ego, is of course not without significance. An approach based on the parties' common intentions tends to shift attention away from factual aspects of the relationship between what may appear to be alter egos, including the State's sometimes very compromising conduct vis-à-vis the instrumentality over the life of the contract, and toward more direct evidence of party intention. In a more intention-driven inquiry of that kind, the structure and content of the underlying transaction necessarily loom large, as they tend to speak directly to what the parties intended to achieve. Lord Mance put the matter bluntly:

> 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.*[18]

Lord Mance then reviewed the record in some detail through the lens of common intention, as he understood that notion, and found the tribunal's conclusion that the Government was bound to be simply "unpersuasive."

> 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.[19]

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[17] *Dallah*, *supra* note 3, at ¶ 15. Lord Collins acknowledged that the New York Convention, in signaling the law applicable to a particular ground for denying enforcement, meant the internal law of that jurisdiction and not its conflict of laws rules. He considered it likely that the Convention thus meant to exclude *renvoi*. But he rightly insisted that, when French courts apply transnational principles to international arbitration cases, they directly apply substantive French law. *Id*. at ¶¶ 124-25.

[18] *Id*. at ¶ 40 (emphasis added).

[19] *Id*. at ¶ 66 (emphasis added). Counsel for Dallah also argued that the use of the word "may" in Article V of the Convention gave the UK courts discretion to enforce a foreign award even in the presence of a ground that would justify a refusal to enforce. Lord Mance acknowledged that the word "may" rendered denial of enforcement in general terms discretionary with the courts. However, he found it unthinkable that an award not based on any agreement to arbitrate at all could possibly warrant enforcement. "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 recognize an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognized and applied to determine that issue." *Dallah*, *supra* note 3, at ¶ 69. The case of *Dardana Ltd.* v. *Yukos Oil Co*., [2002] 2 Lloyd's Rep. 326 (¶ 8) is an example of a court finding a "fresh circumstance," in the form of an "estoppel," sufficient to justify

On the contrary, the parties' common intention was that the Government *not* be bound. The structure and content of the contract figure prominently in Lord Collins' opinion as well:

> [T]here 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 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.[20]

The factors to which Lord Collins attached the greatest weight were ones inscribed in the contract as such, either in its structure or its content.

Under the Court's understanding of common intention in French law, if a party is put clearly enough on notice from the start that a State wants to be regarded as *not* a party to a transaction, it will have difficulty establishing that either it or the State (or the instrumentality, for that matter) shared a common intention that the State be bound. Notwithstanding the Court's insistence that the subjective intention can only be gleaned from the objective conduct of the parties,[21] the inquiry remains a fundamentally subjective one, certainly by comparison with such highly objectivized tests as alter ego. There is of course a certain irony in all of this. The Court applied French transnational law principles, which are commonly thought of as relaxing the standards for binding non-signatories to a contract, but read them in a way that would actually impede finding the State bound.

In the wake of the UK Supreme Court's decision, it could reasonably be asked what influence that ruling should have on the then ongoing proceedings in France, home of the award. Lord Mance and Lord Collins properly observed that whether the award is valid and enforceable in France is a question that only a French court can answer. But, as Lord Mance noted, "an English judgment holding that the award is not valid could prove significant in relation to such proceedings."[22] Both judges raised the possibility that a French court might give issue preclusive effect to the UK judgment on the issue of the existence of a valid arbitration agreement

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enforcing an award that could have been denied enforcement under Article V(1)(a) of the Convention. Lord Collins agreed. *Dallah*, *supra* note 3, at ¶ 127.

[20] *Dallah*, *supra* note 3, at ¶ 145 (emphasis added).

[21] Lord Collins put it this way: "The common intention of the parties means their subjective intention derived from the objective evidence." *Id*. at ¶ 122.

[22] *Id*. at ¶ 29.

but, as Lord Mance rightly observed, whether a UK judgment on a French award is entitled to preclusive or even persuasive effect in a French court is likewise for the French court itself to determine.[23] Most likely, French courts, not generally embracing the practice of issue preclusion, would decide the matter de novo, or at least purport to do so.

The subsequent decision of the Cour d'appel of Paris in *Dallah* supports that assumption and also shows how outcome-determinative a court's approach to the jurisdictional issue can be. In that decision,[24] the Cour d'appel upheld the award against the very same challenge that had defeated enforcement in the UK Supreme Court. The Cour d'appel found that the Government of Pakistan had been Dallah's sole interlocutor in the negotiation of the contract, and that the decision to enter into the contract with Dallah was made by the Board of Trustrees of the Trust at a meeting presided over by the Minister of Religious Affairs, even though the latter was not a member of the Board. It further found that, following the contract, Ministry officials intervened directly in financial and public relations aspects of the project, and that the declaration that Dallah had committed a fundamental breach of the contract, justifying its rescission, was made on Ministry letterhead. On these bases, the French court found that the Government of Pakistan "acted as if the contract were its own" and "as … the veritable Pakistani party." In so doing, the court quite evidently relied in substantial measure on conduct following the entry into force of the contract, as is customary in the context of alter ego analyses. It said relatively little about what appeared to have mattered most to the UK Supreme Court, namely the common intention of the parties as manifested by the language and structure of the contract itself and the circumstances under which it was formed.

Judging by the decision of the Cour d'appel, the UK Supreme Court failed in its understanding of the French law governing an arbitral tribunal's jurisdiction over a non-signatory. Was the UK Supreme Court misled by the expert witnesses who appeared before it? Did the Court invoke the proper French law standard – namely, the common intention of the parties – but misapply it? Did the Court, while purporting to apply French law, actually come closer to applying English law principles or possibly, even unconsciously, effectuate its own policy preferences on the jurisdictional issue? Or did the Court possibly understand and apply French law more accurately than the Cour d'appel itself would later do? These questions cannot be answered with any confidence. But what can be said with confidence is that the divergence between the UK and French courts on the jurisdictional issue in *Dallah* could have been avoided if the UK court had availed itself of the discretion given it by Article VI of the New York Convention to stay the UK enforcement proceedings until such time as the annulment action in

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[23] The question whether award recognition encompasses issue preclusion as well as claim preclusion is a delicate one. *See* RESTATEMENT THIRD OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (Council Draft No. 2, Sept. 27, 2010, approved Oct. 21, 2010. § 5-3(e), comment *i*, and reporters' note *i*.

[24] *See* note 4 *supra*.

France had run its course. That would have permitted the jurisdictional issue to be decided by the court of the place of arbitration and of the State whose law by all accounts governed that issue.

The divergence will undoubtedly complicate further attempts, if any, at enforcement of the award outside of France. There is of course no possibility of the award coming again before the UK courts and of those courts, in reliance on the Cour d'appel ruling, reaching a different conclusion than the UK Supreme Court has now reached. In the UK at least, the matter is res judicata. But, suppose enforcement is subsequently sought elsewhere outside of France. The UK Supreme Court decision would ordinarily have considerable influence when the Government of Pakistan raises the jurisdictional issue to defeat enforcement in the third country's court, as surely it would. But assuming the Cour d'appel decision is not reversed by the Cour de Cassation, it would likely carry even greater weight in that third country, given that French law governs the jurisdictional issue, and that French courts may be deemed to know that law best. With international arbitral awards coming with greater frequency before the courts of different States in succession, the prospect grows that they will be accorded respect in some States but not others, thereby offering States before which the award is yet to come an embarrassment of choice.

IV. THE ROLE OF THE COURT OF ENFORCEMENT

While the UK Supreme Court ruling in *Dallah* principally addresses a matter of substance – the effectiveness of a State's efforts to distance itself from contracts of its instrumentalities and from the arbitrations to which they give rise – it also casts light more generally on the judicial role in assessing the existence and validity of an arbitration agreement in the context of actions to enforce a foreign award. That role is immensely complicated by the fact just alluded to that the same issues – some of them, like the existence and validity of the arbitration agreement, very fundamental – may in a single case be revisited successively by different actors in different jurisdictions.

Dallah illustrates well the number and range of decisional bodies that may find themselves facing the same basic questions of arbitral authority. At one point in the *Dallah* case, the Pakistani courts were asked to decide whether a valid agreement to arbitrate existed between Dallah and the Government; they rightly understood that their own jurisdiction to decide the underlying dispute on the merits would depend on that. When the case then went to arbitration, the same question was laid squarely before the arbitral tribunal. The question next came in for examination in the English courts at all levels in the enforcement context. As we know, the case came before the French courts as well in the form of both an action to enforce the award and an action to annul it. Theoretically, each of these judicial and arbitral bodies could examine the question of the existence and validity of the arbitration agreement de novo, but they could equally well decide to show deference to a prior determination of the issue. As noted, they could

conceivably, but improbably, even regard a certain prior determination as conclusive of that matter.

Despite the fact that this revisiting of issues is entirely endemic to arbitration, the problems it raises are still not well settled in either the law or the literature, as further evidenced by the attention they are receiving in the current *Restatement of the U.S. Law of International Commercial Arbitration*.[25] But the *Dallah* opinions contribute importantly to their better understanding.

Counsel for Dallah had formulated two propositions in this regard, both of which would tend to favor enforcement of the award: one, the claim that courts of enforcement have a lesser role to play than courts of the place of arbitration in determining the existence and validity of the agreement to arbitrate; the other, the claim that courts of enforcement in any event owe deference on those questions to the conclusions that the arbitral tribunal reached in establishing its own competence.

A. *Ancillary Issues*

Before turning to these core questions, I draw the reader's attention to three ancillary issues on which the UK Supreme Court in *Dallah* took positions worth mentioning. Though all three of these issues – (1) the status under the Convention of a partial award; (2) estoppel based on a failure to seek annulment of an award; and (3) the impact of a parallel annulment action in the arbitral situs – pertain to the recognition and enforcement of awards, they are incidental to the central jurisdictional question, and I discuss them only briefly.

1. *Partial Awards*

Counsel for Dallah made the assertion in oral argument that the first partial award, in which the tribunal found in favor of its jurisdiction, was itself an award entitled to recognition and enforcement.[26] Even if that were so, it would logically have no bearing on the analysis or the result, since the first partial award was no different from the final award insofar as it was based on the same agreement to arbitrate to which the Government claimed it was not a party. However, instead of dismissing Dallah's argument on that basis, Lord Mance took the position that partial awards are simply not awards within the meaning of the New York Convention and are not properly the subject of an action for enforcement.[27] That

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[25] RESTATEMENT THIRD OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-5 (Council Draft No. 2, Sept. 27, 2010, approved Oct. 21, 2010).

[26] The argument apparently was that the first partial award was made on proper jurisdiction because, under kompetenz-kompetenz, arbitral tribunals necessarily have the authority to rule on their own jurisdiction – even if they cannot validly rule on the merits once it is determined that they lack jurisdiction. And the first partial award is as such entitled to recognition and enforcement, thus disposing definitively of the jurisdictional question. *See Dallah*, *supra* note 3, at ¶ 99.

[27] "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

conclusion is not, however, self-evident. To begin with, neither the Convention nor its legislative history gives any indication one way or the other as to whether partial awards are to be treated any differently than final awards. Certainly, from a policy point of view, subjecting partial awards to the Convention produces advantages in terms of enforcement. In fact, denying Convention status to partial awards fits poorly with the notion that they dispose in a final and binding fashion of the matters resolved therein. The matter is one worthy of fuller consideration than Lord Mance, in passing, gave it.[28] If partial awards are ultimately found to constitute awards within the meaning of the New York Convention, further and more technical questions then arise, not least the time when the statute of limitations applicable to actions to set them aside starts to run.

2. *Estoppel for Failure to Seek Annulment*

The UK Court was on more solid footing in rejecting counsel's assertion that a party may not invoke a ground for denying enforcement of an award if it could have sought annulment of the award in a court of the arbitral situs on that basis, but failed to do so. Counsel for Dallah had in effect posited an exhaustion of remedies requirement that would make a party's failure to seek annulment of an award on a given ground a bar to its assertion as a defense to enforcement. Lord Mance correctly viewed the argument as logically flawed:

> 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.[29]

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awards on jurisdiction." *Dallah*, *supra* note 3, at ¶ 22, *citing* FOUCHARD, GAILLARD & GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION ¶ 654 (Emmanuel Gaillard & John Savage eds., 1999).

[28] The *Restatement Third of the U.S. Law of International Commercial Arbitration* opts for treating partial awards in the same fashion as any other award for recognition and enforcement purposes. Indeed it goes much further, defining awards within the meaning of the Convention to include even arbitral orders of provisional relief, though not purely procedural orders. RESTATEMENT THIRD OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, § 1-1(v) (Council Draft No. 2, Sept. 27, 2010, approved Oct. 21, 2010).

[29] *Dallah*, *supra* note 3, at ¶ 23. However, Lord Mance allowed for the possibility that the parties might agree in advance to submit the issue of arbitral jurisdiction itself to the arbitral tribunal, provided they do so clearly and unmistakably, citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). However, "[a]n 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." *Dallah*, *supra* note 3, at ¶ 26.

More important, the position urged by counsel would serve only to foment litigation, as parties would understandably feel it necessary to bring annulment actions if only to preserve all colorable objections for use in defeating a later enforcement action. The case did not require the Court to go any further in this path of reasoning. When the occasion arises, however, courts would do well to take the position that even though a party is not positively bound to bring an annulment action in the arbitral situs in order to defeat enforcement of an award elsewhere, it is required to advance all available arguments in any annulment action it chooses to bring, or be deemed to have waived them at the enforcement stage. Such a position would promote judicial economy without inciting parties to bring unnecessary litigation.[30]

3. *Parallel Annulment Proceedings*

The New York Convention permits a court in which enforcement of a foreign award is sought to suspend proceedings on the matter if an action to set aside the award is at that time pending in a competent court of the place of arbitration. Commonly, by the time enforcement has been sought in a foreign jurisdiction, the action to set aside the award will already have been brought. The stage is thus set for the foreign court to exercise its discretion to stay enforcement proceedings.

Dallah played out differently. The tribunal rendered its final award in June 2006, and the UK enforcement action was brought a few months later, in October 2006. Yet the Government did not seek set aside of the award in France until December 2009, doing so in apparent response to Dallah's having applied for enforcement of the award in France in August of that year. (Under French law, the annulment action was still timely.) Thus, even if the lower UK courts would have wanted to stay proceedings until a set aside action in France was decided, they could not do so. The Convention clearly requires that a set aside action have already been instituted; it is not enough that such an action would still be timely. Why the Government refrained so long from challenging the award in France is a matter of surmise.

By the time the French enforcement and set aside actions were initiated, the UK litigation had progressed rather far. The English Court of Appeal, following the court of first instance, had already refused enforcement of the award. Dallah's lack of success in the English courts doubtless led it to turn then to France for enforcement of the award. By this time, the prospects for enforcement of the award in the UK had dimmed to the point that Dallah petitioned the UK Supreme Court, unsuccessfully we know, to stay proceedings until such time as the French set aside action had been decided.

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[30] *See*, to this effect, RESTATEMENT THIRD OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-17(c)(Council Draft No. 2, Sept. 27, 2010, approved Oct. 21, 2010).

B. *Levels of Inquiry and Deference*

I turn now to the two principal systemic questions that confronted the UK Supreme Court in *Dallah*. First, how, if at all, does the nature of the review that an award receives in an annulment action in the arbitral situs differ from its review in an action for the award's enforcement abroad? Second, what weight, if any, should the court where enforcement is sought give to arbitral findings on issues, such as the existence and validity of the arbitration agreement, on which the grant or denial of enforcement may depend?

1. *Levels of Jurisdictional Review*

Counsel for Dallah urged the UK Supreme Court to distinguish between the courts of the place of arbitration, on the one hand, and the courts where an award is brought for enforcement, on the other, in terms of their level of scrutiny of the existence and validity of the arbitration agreement. According to the submission, while a French court would properly determine de novo whether an arbitration agreement existed between Dallah and the Government, the English courts properly exercise a more relaxed standard of review, i.e. one reflecting a measure of deference to the arbitral tribunal's findings on that matter.[31] Put differently, the enforcement jurisdiction owes the tribunal's determination a degree of respect; the courts of the place where the award was made do not.[32]

It is true that the arbitration literature draws a distinction between courts having primary and those having secondary jurisdiction over awards.[33] Primary jurisdiction – which belongs to the jurisdiction on whose territory or under whose

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[31] Lord Mance put the contention of Dallah's counsel as follows:

> In [her] submission, any enforcing court (other than the court of the seat of arbitration) . . . 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. . . . [She] argues . . . in favour of a limited review. . . . [A] court should refuse to become further involved, at least when the tribunal's conclusions could be regarded on their face as plausible or "reasonably supportable."

Dallah, *supra* note 3, at ¶ 21.

[32] It was apparently argued to the Court that the inclusion of Article V(1)(e) in the New York Convention permitting a court to deny enforcement of an award that has been set aside in a competent court of the place of arbitration implied that the latter court has greater responsibility for determining arbitral jurisdiction than courts to which the award may be brought for enforcement. That argument is wide of the mark. All that Article V(1)(e) does is reserve the right of annulment to courts of the place of arbitration. It does not address the proper level of review in a completely independent ground for denying enforcement, such as Article V(1)(a).

[33] *See*, *e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2403 ff. (2009).

law of arbitration an award was made – entails certain prerogatives. The State of primary jurisdiction is not only the one whose law of arbitration presumptively governs the arbitral proceedings; it is also the one whose courts intervene in the arbitration when necessary (as in hearing challenges to an arbitrator or issuing or enforcing an award of interim relief); and most importantly, it is the one, and only one, whose courts may set aside the award, doing so under their own annulment standards. Courts having secondary jurisdiction perform fewer functions. They are basically limited to enforcing or denying enforcement of the award, ordinarily under the standards set out in the New York Convention. On these propositions there is general agreement.

In fact, however, courts of both primary and secondary jurisdiction are often called upon to answer the same questions: was the agreement that formed the basis of the arbitration actually formed? was it valid? may it be considered as binding on the party challenging the award? The consequences of finding the arbitration agreement non-existent or invalid admittedly differ according to the court making that pronouncement: the court of primary jurisdiction may on that ground annul the award, while a court of secondary jurisdiction can do no more than decline to enforce it. But the question to be addressed is substantively the same.

The novel aspect of Dallah's argument in this regard was its suggestion that the level of judicial scrutiny applied to those questions should differ depending on whether the court in question has primary or secondary jurisdiction over the award. Under the thesis advanced by Dallah, the court of primary jurisdiction performs a more searching review than the court of secondary jurisdiction, presumably because it has greater responsibility for ensuring the legitimacy of the award and the party's consent to be bound by it. If that thesis were to be applied in *Dallah*, a French court could determine the jurisdictional matter de novo, while a UK court would need to show deference to the tribunal.

The UK Supreme Court rejected this thesis, and properly so. Neither Lord Mance nor Lord Collins could find any evidence in the Convention to support the notion that an enforcing court should exercise less than fully independent judgment on the existence or validity of the arbitration agreement. Neither could they find any support in the arbitration case law or literature; all authority pointed to the contrary. For Lord Mance, it was plain that arbitrators cannot by their own decision create arbitral authority.[34] For Lord Collins, the very point of Article

[34] *Dallah*, *supra* note 3, at ¶ 24. Lord Mance allowed that the parties could expressly grant the tribunal power to decide whether the arbitration agreement exists and is valid, though they would have to do so in a clear and unmistakable fashion. This does not seem correct. The parties could, and sometimes do, expressly give the tribunal the power to determine the scope of disputes subject to arbitration, but at least in that case they concede that an arbitration agreement exists and that it binds them. But if a party contends that there was no arbitration agreement at all, it is difficult to base jurisdiction on that agreement. He is correct on the main point, however. As he points out, "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." *Id*. at ¶ 30.

V(1)(a) is that it "safeguards . . . the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal."[35]

In further support of the Court's position, suppose the party prevailing in the arbitration does not seek enforcement in the place of arbitration. It certainly is not required to do so; on the contrary, one of the accomplishments of the New York Convention was precisely to eliminate the so-called requirement of "double exequatur."[36] Therefore, unless the losing party invokes that court's jurisdiction to have the award set aside, that court will make no exercise of primary jurisdiction over the award. But for its part, neither is the losing party obliged to seek annulment of the award in the court of primary jurisdiction as a precondition to resisting enforcement at a later date in a court of secondary jurisdiction.[37] Therefore, in the entirely plausible event that neither party invokes the jurisdiction of a court of the place where the award was made, judicial review of the award on issues as important as the existence and validity of the arbitration agreement may be had only in courts of secondary jurisdiction on the occasion of an application for the award's enforcement. No other court will conduct independent post-award review of those issues. And there may well have been no pre-award judicial determination of those issues either, certainly not in France. In France, and in jurisdictions following French law on the issue, a case goes to arbitration in the first place on a mere prima facie showing of jurisdiction. A party resisting arbitration at that stage must show that an agreement to arbitrate manifestly does not exist or is manifestly invalid.[38] Indeed, the very justification given in France for tolerating so relaxed a standard of inquiry at the threshold of the proceedings is that the courts where enforcement of the resulting award is sought can be counted on to make an independent judgment on the existence and validity of the arbitration agreement if the party resisting enforcement so requests.[39]

Moreover, had the Supreme Court accepted Dallah's thesis, it would soon enough be asked to define the parameters of the relaxed standard of review to which a court of secondary jurisdiction was to be confined. Courts do of course sometimes assume the task of delineating levels of scrutiny in judicial review, but

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[35] *Id*. at ¶ 102.

[36] As Lord Collins observed, "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." *Id*. at ¶ 103. *See also id.* at ¶ 131.

[37] *See* notes 29-30 *supra* and accompanying text.

[38] The new French decree on international arbitration codifies the prior case law to this effect. Decree No. 2011-48 of Jan. 13, 2011 (J.O. Jan. 14, 2011, p. 9). According to Article 1447 of the Code of Civil Procedure, introduced by the decree, "[t]he arbitral tribunal has exclusive authority to rule on objections to its authority." Article 1448 adds that "[w]hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction except if an arbitral tribunal has not yet been vested to hear the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."

[39] *See* FOUCHARD, GAILLARD & GOLDMAN, *supra* note 27, at ¶ 654.

they tend to do so when the substantive issues at stake – such as the protection of fundamental rights – justify the burden of doing so. But counsel was inviting the Court in *Dallah* to establish a two-tier regime across the international arbitration board. The Court did well to decline the invitation.[40]

2. *Deference to the Arbitrators*

Counsel for Dallah also took an alternate route to the same result by positing a general requirement of deference to the arbitral tribunal's determination of its own jurisdiction, invoking the notion of Kompetenz-Kompetenz. Counsel buttressed its argument with a claim that the tribunal in the *Dallah* case was an especially eminent one whose jurisdictional determination was therefore especially deserving of respect.

Both Lord Mance and Lord Collins decisively rejected this submission as well, and rightly so. There are numerous reasons for allowing courts to freely reexamine the tribunal's finding that a valid arbitration agreement existed. It is widely suspected, and most likely true, that arbitral tribunals have a built-in bias in favor of finding that they have, rather than lack, jurisdiction. But even putting aside that unproven assertion, the fact remains that a question as fundamental as jurisdiction should not be left primarily in the hands of the body whose authority to decide it rests on that very agreement. Or, as Lord Saville, concurring in *Dallah*, put it:

> [T]o 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 obligation; for without some such agreement such a ruling cannot have any status at all.[41]

In any event, the case for deferring to the arbitrators on the matter of arbitral jurisdiction would apply equally well to the court of the place of arbitration as to courts where enforcement is sought. Were it extended to those courts as well, we would arrive once again at the result that no court – neither the court of annulment nor the court of enforcement – is entitled on a post-award basis to pass independent judgment on the tribunal's assertion of authority if challenged. One should hesitate long before endorsing such a result.

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[40] Lord Mance looked unfavorably on the prospect that the same issue would be subject to levels of review that vary according to the court in which it raised. *Dallah*, *supra* note 3, at ¶ 27.

[41] *Id*. at ¶ 159. Lord Saville continued: "[A]n 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'" (quoting from the 1996 Report on the Arbitration Bill by the Departmental Advisory Committee).

Alternatively, one might say that arbitral findings on a question like the existence or validity of the arbitration agreement, while not presumed to be correct, are entitled to at least some weight. Lord Mance decisively rejected that position as well,[42] though he allowed that a court may "examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination."[43] Drawing the line between giving some weight to a finding, on the one hand, and examining it "with interest," on the other, is a delicate exercise indeed.[44]

Counsel for Dallah also invoked the doctrine of Kompetenz-Kompetenz to support its assertion that jurisdictional findings by arbitral tribunals deserve deference at the award enforcement stage. In fact, views differ considerably on exactly what the notion of Kompetenz-Kompetenz entails and how it is to be operationalized. Even its most ardent adherents present it as only guaranteeing to a tribunal the right to make an initial determination of its own jurisdiction, a determination that will be subject to de novo post-award judicial review.[45] In any event, views differ on whether a tribunal's Kompetenz-Kompetenz is exclusive. Thus, does Kompetenz-Kompetenz have not only a "positive" dimension (enabling the tribunal to determine initially its own jurisdiction), but also a "negative" one (barring courts from addressing the issue of arbitral jurisdiction issue before the tribunal has an opportunity to do so)? Though many in the arbitral community regard "positive" Kompetenz-Kompetenz as meaningless unless accompanied by "negative" Kompetenz-Kompetenz,[46] others disagree.[47]

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[42] "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." *Dallah*, *supra* note 3, at ¶ 30.

[43] *Id*. at ¶¶ 30-31. According to Lord Mance, "Courts welcome useful assistance."

[44] The *Restatement* strikes a similar note, while allowing for the rare possibility that jurisdiction might turn on conflicting testimony of live witnesses, whose credibility matters. RESTATEMENT THIRD OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (Council Draft No. 2, Sept. 27, 2010, approved Oct. 21, 2010).

[45] *See* China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 288 (3d Cir. 2003).

[46] FOUCHARD, GAILLARD & GOLDMAN, *supra* note 27, at ¶¶ 655, 672. Under this view, a court may not intervene on issues of arbitral jurisdiction prior to the tribunal's having the opportunity to rule on it, unless the tribunal is "manifestly" without jurisdiction.

[47] *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, forthcoming in 37 YALE J. INT'L L. __ (2011). This is the view suggested by Lord Collins in his opinion in *Dallah*:

> [T]he 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. . . 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*.

Dallah, *supra* note 3, at ¶ 84 (emphasis added). Lord Collins continued: "The constant practice of the courts in England has been that they will examine or re-examine for

This is not the place to reopen that debate. But the *Dallah* case itself has at least something to say about the wisdom of postponing to the post-award stage the first serious judicial inquiry into the binding effect of the arbitration agreement on the foreign State. It is true that a refusal by the UK courts to enforce an award, even on the basis of Article V(1)(a), does not affect the award's validity in France or elsewhere. If the award ends up being enforced in another jurisdiction, the resources invested in the arbitration will not have been wasted. But they could be wasted if a French court were to have come to the same conclusion that the UK courts did and if other enforcement fora were to accord the French court determination substantial weight, as well they might.

Finally, the Supreme Court knew well enough not to credit any argument that the degree of respect that a court shows to a tribunal's jurisdictional findings should vary according to the court's assessment of the eminence of its members. It is difficult to imagine a more mischievous path of analysis.

V. CONCLUSION

In *Dallah*, the UK Supreme Court rendered a decision that matters greatly to international commercial arbitration on several levels. From a conflict of laws point of view, the Court was drawn to applying to the jurisdictional question a "transnational" body of law the genesis of which lay in French law notions of the autonomy of the arbitration agreement – notions quite alien to the common-law tradition. To be sure, the Supreme Court did not itself discover the "common intention" test in the French "transnational" law relevant to determining the separateness of the State from its instrumentalities in the arbitration context; the French law experts had jointly directed the Court to it. Still, the Court had no hesitation in acknowledging that French law governed the jurisdictional issue and in those terms.

On the other hand, the Court, while by all appearances making a serious inquiry into the relevant French law, may well have deviated from it. It certainly accorded greater weight to the structure and content of the agreement itself than to patterns of control by the State over the instrumentality throughout the contract period. That makes sense if the goal of the inquiry is to ascertain what the parties subjectively intended. But while the UK court may well have captured the parties' common intentions, it also incentivizes States to interpose state instrumentalities

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themselves the jurisdiction of the 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*." *Dallah*, *supra* note 3, at ¶ 96 (emphasis added). Lord Collins cites Al-Naimi (t/a Buildmaster Construction Servs) v. Islamic Press Agency, [2000] 1 Lloyd's Rep. 522 (Ct. App.), and Albon (t/a NA Carriage Co.) v. Naza Motor Trading Sdn Bhd, [2008] 1 Lloyd's Rep. 1 (Ct. App.), for the proposition that "[w]here there is an application to stay proceedings under section 9 of the 1996 Act, . . . the court will determine the issue of whether there ever was an agreement to arbitrate." *Id*. at ¶ 97.

between themselves and private contracting parties. A State that is determined to distance itself from its instrumentality and its instrumentality's contracts will have no difficulty insisting that the contract is structured in such a way as to achieve that objective. The Cour d'appel was plainly uncomfortable interpreting and applying French law in that fashion.

The UK Supreme Court was manifestly also interested in making broader observations about the conduct of courts in the recognition and enforcement of foreign arbitral awards, and more particularly about the level of scrutiny they properly apply when reviewing findings of arbitral jurisdiction. The Court properly saw no reason why courts that are asked to enforce foreign awards should be more relaxed in their review than courts entertaining annulment actions at the arbitral situs. It likewise properly saw no reason why courts of enforcement should show deference to tribunals' findings on arbitral jurisdiction, though it understandably left open the elusive question of where permissible "examin[ation] . . . with interest" of a tribunal's findings on the jurisdictional issue ends and impermissible deference to them begins. The Court's conclusions on these two vital questions are not limited to arbitrations against sovereign States, such as in *Dallah*, but apply across the arbitration board.

Even with the benefit of the *Dallah* judgment, we are far from understanding perfectly what courts are to do when entertaining challenges to the enforcement of foreign awards based on claims, such as the nonexistence or invalidity of the arbitration agreement, on which other courts and the arbitral tribunal itself will already have opined. But, if the UK Supreme Court's understanding of French law was mistaken, as appears to be the case, the Court nevertheless contributed positively to sorting through these larger systemic issues. The Court may not have faced in *Dallah* the toughest of questions that may arise in relation to the level of judicial scrutiny of the arbitration agreement at the award enforcement stage, but it gave the questions that it did face sound and principled answers. The Court's answers to this series of questions will surely have far more lasting impact on international commercial arbitration than its dubious account of the French law on the binding effect of arbitration agreements on non-signatories.