

United Kingdom Supreme Court Rules That Courts Always Retain Final Decision To Determine Arbitrator's Jurisdictional Authority

Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, 2010 UKSC 46 (3 November 2010), involved an attempt by a company (Dallah) operating in Saudi Arabia to enforce in England a \$20 million arbitration award in its favor against the Government of Pakistan (Pakistan). The International Chamber of Commerce ("ICC") arbitral tribunal sitting in Paris, France, had ruled that while Pakistan was not a signatory to the agreement containing the arbitration clause, Pakistan was nevertheless bound by it and properly a party to the arbitration. Accordingly, Dallah sought to enforce the award against Pakistan in England. Pakistan challenged enforcement under section 103(2)(b) of the English Arbitration Act of 1996 ("1996 Act") on the ground that "the arbitration agreement was not valid... under the law of the country where the award was made" because under that law Pakistan was not a party to it. The United Kingdom Supreme Court ("Court") affirmed the decisions of the lower courts to refuse to recognize and enforce the award.

The Courts, Not Arbitrators Themselves, Ultimately Decide the Jurisdiction of Arbitral Tribunals.

Dallah argued that, where the arbitral tribunal ruled on its own jurisdiction and the tribunal's conclusions are plausible or "reasonably supportable," a court should only engage in a limited review of the arbitral tribunal's jurisdiction. The Court rejected this argument. Instead the Court ruled that the doctrine of Kompetenz-Kompetenz does not empower the tribunal to determine its own jurisdiction and thus bind a party who refuses to appear or participate in the arbitration on the basis that it is not a signatory to the arbitration agreement. Instead, the Court held, the issue of jurisdiction ultimately is for a court to decide anew. The Court noted that while it may look at the reasoning and findings of the arbitral tribunal, the Court is neither bound nor restricted by them as the arbitral tribunal's own view of its jurisdiction has no legal or evidential value. The Court also rejected Dallah's argument that Pakistan should have moved to set aside the award in France, and held that Pakistan was free to wait and instead ask the Court to refuse enforcement once Dallah sought to enforce the award in England.

Pakistan Did Not Intend To Be and Thus Was Not A Party To The Arbitration Agreement.

Because the arbitration agreement did not designate a governing law, the Court under section 103(2) of the 1996 Act applied the law of the country where the award was made (French law) to determine whether Pakistan was bound by the arbitration clause even though it was not a signatory to the agreement. Accordingly, the Court evaluated whether Pakistan had a subjective "common intention" with the signatories to the agreement so as to be bound by the arbitration clause. In doing so the Court evaluated Pakistan's objective conduct (e.g., Pakistan's involvement with the project, the negotiation and signature of a MOU preceding the agreement, the creation by Pakistan of one of the signatories to that agreement, and Pakistan's involvement in the negotiation of that agreement). The Court concluded that they did not justify a conclusion that it was Dallah's and the Pakistan'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 another party.

The Court Lacks Discretion To Enforce An Award Where There Is No Valid Arbitration Agreement.

Dallah further argued that the Court should have discretion to enforce the award, regardless of whether a party against whom the award is to be enforced was a party to the arbitration agreement because section 103(2) of the 1996 Act states "Recognition and enforcement of the award may be refused," thus implying that it need not be. The Supreme Court rejected this argument because other sections of the 1996 Act 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." In particular the Court noted that "[a]bsent 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".

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